

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

VERISIGN, INC. and NU DOTCO, LLC.

Amicus Curiae.

ICDR CASE NO: 01-18-0004-2702

**APPENDIX OF LEGAL AUTHORITY OF AMICUS CURIAE
NU DOTCO, LLC AND VERISIGN, INC.**

6 August 2021

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Chapter 24: Correction, Interpretation and Supplementation of International Arbitral Awards

After an arbitral award has been made, one or more parties may identify (or purport to identify) errors, ambiguities, or omissions in the tribunal's decision. These may range from essentially clerical or typographical mistakes, which nonetheless have financial or other consequences, to basic defects in the tribunal's conclusions or reasoning.

This Chapter first addresses the principle that an arbitral tribunal becomes "*functus officio*" after making its final award. The Chapter then considers the avenues that are available, notwithstanding the *functus officio* doctrine, to a party who wishes to seek correction, interpretation, or supplementation of an award. Finally, the Chapter also considers the possibilities of revoking arbitral awards obtained by fraud and "internal" appeals of awards to an administering institution which are possible under some institutional rules.

§24.01 INTRODUCTION

Human fallibility guarantees that all arbitral awards, like all national court judgments and academic treatises, will have mistakes, omissions, or ambiguities. These will range from typographical errors, to inaccurate references to evidence or legal authorities, to *non sequiturs* or unpersuasive analysis, to confusions of parties or outright mathematical miscalculations of amounts; they also may involve failures by the arbitrators to address particular arguments, claims, or evidence. These errors usually concern minor or incidental issues and have little or no relevance to the tribunal's ultimate awards of damages or other relief.

After an award has been published by the arbitral tribunal to the parties, (1) they will review it and, in most cases, choose to ignore any errors or ambiguities that they identify. In the overwhelming majority of cases, errors are inconsequential or only marginally relevant to the tribunal's ultimate decision. Complaining about those errors often appears to be – and is – a costly and pointless display of sour grapes.

Nevertheless, there are cases where an award contains very serious, but manifest, errors or ambiguities that directly affect one party's rights. (2) Most obviously, an award's damages calculation may contain arithmetic mistakes, or an undisputed fact relevant to a damages award may be erroneously recorded (e.g., the number of lost sales in a particular year, the cost of purchasing replacement goods) or may have ordered relief that is hopelessly ambiguous or unintelligible; alternatively, the tribunal may simply have failed to address one of the claims presented by the parties.

In these instances, a party may wish to seek correction, interpretation, or supplementation of the arbitral award in order to change the quantum of monetary damages that were awarded, clarify ambiguities, or to address the neglected issue(s). P 3370 Alternatively, the arbitrators ● themselves may discover a mistake in their award after notification to the parties and wish to make a correction upon their own initiative (*sua sponte*).

There are strong policies counseling against alteration of an award after it has been made. One of the most fundamental purposes of the arbitral process is to obtain a speedy, final resolution of the parties' disputes, without the costs and delays of litigation. (3) Further, as discussed below, most national legal systems provide that an arbitral tribunal is "*functus officio*" once it has made its award. This again reflects the powerful interest in the finality of awards, free from continuing dispute about their correctness, completeness, or meaning. A liberal approach to "corrections" or "interpretations" is in obvious tension with these policies.

Despite this, most legal systems recognize the reality that awards may contain errors, omissions, or ambiguities and that at least some of those defects can be addressed without seriously jeopardizing the arbitral process. Moreover, most legal systems also recognize that awards containing serious errors or omissions may be subject to annulment or non-recognition, which can result in even greater delays and costs than a process of correction, interpretation, or supplementation.

Accordingly, many modern arbitration statutes provide mechanisms that allow parties to request (and arbitrators to make) "corrections" to, (4) "interpretations" of, (5) or "supplementations" to (6) an award; even in the absence of statutory authorization, most national courts have devised comparable mechanisms to allow such corrections and interpretations. In almost all jurisdictions, the circumstances in which these types of changes can be made are very narrowly circumscribed. Nonetheless, the existence of these powers provides grounds for addressing obvious slips or miscalculations, omissions, or uncertainties which could otherwise cause injustice or lead to annulment of the award.

§24.02 FUNCTUS OFFICIO DOCTRINE (7)

It was historically the case, under many national legal systems, that an arbitral tribunal lost its capacity to act – including its power to reconsider, correct, interpret, or supplement an award it had made – after the arbitrators had rendered their final award. In the phrase used in many jurisdictions, the tribunal became “*functus officio*.” (8)

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A U.S. court explained the *functus officio* doctrine in traditional terms as follows: “[t]he term is Latin for ‘office performed’ and in the law of arbitration means that once an arbitrator has issued his final award he may not revise it.” (9) Similarly, another U.S. court held:

“The *functus officio* doctrine dictates that, once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, their authority over those questions is ended, and the arbitrators have no further authority, absent agreement by the parties, to redetermine those issues.” (10)

To the same effect, an English decision declared:

“Once his final award is made ... the arbitrator himself becomes *functus officio* as respects all issues between the parties unless his jurisdiction is revived by the courts’ exercise of its power to remit the award to him for his reconsideration.” (11)

Likewise, a Canadian court explained:

“The doctrine of *functus officio* states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission. ... ‘To allow the adjudicator to again deal with the matter of its own volition without hearing the entire matter “afresh” is contrary to this doctrine.’” (12)

The *functus officio* doctrine is distinguished from an arbitrator’s premature resignation or removal, thereby terminating his or her mandate before it is completed. (13) The term *functus officio* refers instead to a tribunal’s completion of its mandate at the end of an arbitral proceeding, ● by making an award with *res judicata* effect. (14) In contrast, the resignation or removal of an arbitrator refers to the withdrawal of an individual from the tribunal, before he or she has completed his mandate, with both the tribunal and the arbitral proceedings continuing. (15)

[A] International Arbitration Conventions

There is no express provision for the *functus officio* doctrine in the New York Convention or other leading international arbitration conventions. The closest that the Convention comes to acknowledging the doctrine is its provision that awards may be recognized when they are “binding,” (16) which suggests a status that prevents subsequent alteration of the award. This provision does not, however, address the question of a tribunal’s power following the rendering of a final award, including the arbitrators’ power to correct, interpret, or supplement its own award; instead, these issues are left almost entirely to national law. (17)

Other international arbitration conventions are similar in omitting provisions dealing with correction or modification of awards. That includes the Geneva Protocol and Convention, as well as the Inter-American and European Conventions. (18)

[B] National Arbitration Legislation

Most contemporary arbitration legislation expressly addresses the termination of the arbitrator’s mandate and the *functus officio* doctrine, typically adopting the same basic approach to the topic. These statutes generally provide that arbitrators complete their mandate after making a final award, and thereby lose the authority to take further actions in the arbitration, save for specific, narrowly-prescribed authority with regard to correcting or interpreting the award. (19) This statutory approach confirms the essence of the historic *functus officio* rule, while ameliorating its potential harshness and regulating the exceptional circumstances in which a tribunal may exercise arbitral authority after making a final award.

[1] UNCITRAL Model Law

The UNCITRAL Model Law sets forth a comprehensive and well-structured set of rules regarding termination of the arbitrators’ mandate. The Model Law provides in Article 32 that “the arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal [to that effect],” and that “the mandate of the arbitral tribunal terminates with the ● termination of the arbitral proceedings.” (20) This general provision is subject to specific, carefully-defined exceptions for corrections and interpretation. (21)

That is, save for the particular statutory authorizations contained in the Model Law for corrections or interpretations of the award, (22) a tribunal loses its capacity to act in an arbitration after the final award has been made. Thus, under the Model Law, the rule that an arbitral tribunal becomes “*functus officio*” is expressly mandated, but with specified

and carefully delineated residual statutory authority. (23)

A number of states, including most UNCITRAL Model Law jurisdictions, have adopted the same basic approach to the termination of the arbitral tribunal's mandate. Thus, arbitration legislation in France, (24) Germany, (25) Belgium, (26) the Netherlands, (27) Sweden, (28) Hong Kong, (29) Japan (30) and elsewhere (31) provides that an arbitral tribunal's mandate concludes when it has made its final award, subject only to specified power to correct, interpret, or supplement its award. These statutory provisions expressly define, and limit, the termination of the arbitrators' powers, while also allowing a narrow category of residual arbitral authority to address errors or omissions in the final award.

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[2] U.S. Federal Arbitration Act

In the United States, the FAA does not expressly provide for either the *functus officio* doctrine or the termination of the arbitrators' mandate. It instead provides only for the confirmation of arbitral awards, subject to limited grounds for vacatur, judicial correction or judicial modification of the award. (32) This statutory regime leaves the fulfillment of the arbitrators' mandate, after the making of an award, entirely to judicial, rather than arbitral, decisions. (33)

U.S. courts have repeatedly affirmed the *functus officio* doctrine, as a matter of common law, (34) holding that it is a "shorthand term for the common-law doctrine barring an arbitrator from revisiting the merits of an award once it has issued." (35) U.S. courts have reasoned that the doctrine is closely related to principles of *res judicata* and that it rests on the "unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion." (36) U.S. decisions have also reasoned that:

"The doctrine is based on the analogy of a judge who resigns his office and, having done so, naturally cannot rule on a request to reconsider or amend his decision. Arbitrators are *ad hoc* judges – judges for a case; and when the case is over they cease to be judges and go back to being law professors or businessmen or whatever else they are in private life, like Cincinnatus returning to his plow." (37)

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U.S. courts have held that, as a consequence of the *functus officio* doctrine, an arbitral tribunal loses the authority to grant further requests for relief, of any sort, after its final award. (38) As one court put it, "[a]s a general rule, once an arbitration panel renders a decision regarding the issues submitted, it becomes *functus officio* and lacks any power to reexamine that decision." (39) The *functus officio* doctrine extends to any arbitral award that is final, including partial awards; most U.S. courts have concluded that, once an award that is final is issued, a tribunal is incapacitated from altering or reversing that award, even if the arbitral proceedings continue on other issues or claims. (40)

At the same time, as discussed below and notwithstanding the provisions of the FAA (authorizing judicial corrections and modifications), contemporary U.S. courts have also held that the *functus officio* doctrine is subject to common law exceptions for the arbitrators to: (a) correct obvious mistakes; (b) decide issues deliberately left open by an interim or partial final award; and (c) clarify ambiguities. (41) Other U.S. decisions have

identified a variety of ● other exceptions to the *functus officio* doctrine, including additional awards to address issues mistakenly not dealt with by the initial award, (42) to provide relief contemplated by a long-term contract, (43) to oversee implementation of the final award (44) and to address post-award developments. (45) As already discussed, U.S. courts have adopted these exceptions to the *functus officio* doctrine without clear statutory guidance with an aim of ensuring that the arbitral process works properly.

More generally, despite general judicial acceptance of the *functus officio* principle, some U.S. lower courts have questioned the doctrine's continued relevance. (46) One court remarked, with considerable force:

"the doctrine of *functus officio* has been substantially diminished by the federal courts over the years, so much so that today it is arguably hanging on by its fingernails and whether it can even be said to exist in labor arbitration is uncertain." (47)

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Another decision questioned the wisdom of the *functus officio* doctrine and suggested that "perhaps the time has come to discard the rule." (48)

For the time being, however, judicially-created exceptions have prevented the unintended and arbitrary results that the *functus officio* doctrine might otherwise require. In those circumstances, abandoning the doctrine itself would appear to serve little purpose and might cause unnecessary mischief.

Finally, the *functus officio* doctrine is a default rule under the FAA. The doctrine is applicable "absent an agreement by the parties to the contrary," and "parties are certainly free to empower their arbitrators to reconsider an award." (49) As discussed

below, most institutional arbitration rules do alter the default rule of the *functus officio* doctrine and it is clear that these institutional regimes for corrections and interpretations are valid under the FAA. (50)

[3] Swiss Law on Private International Law

Like the FAA, the Swiss Law on Private International Law contains no statutory provisions addressing termination of the arbitration or the tribunal's mandate. Instead, Article 190 of the Swiss Law on Private International Law provides only that "[t]he award is final from the time when it is communicated." (51)

Despite the lack of statutory guidance, Swiss courts have adopted an approach towards the arbitrators' mandate that resembles that of the UNCITRAL Model Law (and common law decisions in the United States). Upon notification of the award to the parties, the arbitrators in a Swiss-seated arbitration are bound by the award and unable to alter its terms. (52) Swiss commentary concludes that "[b]y notifying their award the arbitrators perform their primary duty under the *receptum arbitri*," but that "this duty is only fully discharged once the award has become absolutely final." (53)

P 3378 Despite this, and notwithstanding the absence of statutory direction, Swiss courts have held that arbitrators have limited powers to correct, interpret and supplement their awards. (54) ● This authority has been implied, notwithstanding a "gap in the [Swiss] statute" (55) in order to facilitate the arbitral process.

In the words of the Swiss Federal Tribunal, "when the arbitration agreement (in this case, the rules adopted by the parties) does not clearly rule out such an eventuality, there is no reason to rule out the idea that the contractual clauses can be supplemented by the provisions that govern international arbitration at the seat of the tribunal," and that it would "fall into excess formalism if [the law] prevented an arbitral tribunal from correcting a blatant inadvertent error, which would be tantamount to preventing it from deriving the meaning of what it was competent to decide." (56) Based on that rationale, the Federal Tribunal has upheld arbitral awards that fairly clearly either corrected or interpreted the arbitrators' initial awards. (57)

[4] English Arbitration Act

As with the FAA and the Swiss Law on Private International Law, the English Arbitration Act does not expressly provide for termination of an arbitral tribunal's mandate upon the issuance of a final award. Section 58(1) of the Arbitration Act provides that, unless otherwise agreed by the parties, an award made by an arbitral tribunal is "final and binding," but does not expressly address the tribunal's mandate. Despite the Act's silence, the *functus officio* doctrine is well-settled in England as a common law rule.

Early English decisions held that arbitrators cannot alter their "arbitraments" after they had been made. (58) In one court's words, once an arbitrator has "declared his final mind," his task is complete and he becomes *functus officio*. (59) Similarly, in 1965, the Court of Appeal explained that, "[o]nce his final award is made ... the arbitrator himself becomes *functus officio* as respects all the issues between the parties unless his jurisdiction is revived by the courts' exercise of its power to remit the award to him for his reconsideration." (60) More recently, the High Court described the effect of the *functus officio* doctrine in the following terms:

P 3379 "Absent agreement of the parties, the tribunal may only reconsider or review its decision if the matter is remitted following a successful challenge to the award in court, ● or pursuant to the express powers of correction or reconsideration conferred by §57 of the Act or by the arbitral rules which the parties have agreed to govern the reference. Otherwise the tribunal has no authority or power to do so." (61)

Some English authorities have considered whether an arbitral tribunal may reserve to itself, in a partial or final award, the power to vary or amend the award once it has been made, delaying the operation of the *functus officio* doctrine. (62) Historically, English courts held that arbitral tribunals could not unilaterally reserve jurisdiction to oversee implementation of their awards. (63) Nothing in the Arbitration Act suggests a contrary conclusion, while the limited statutory power of courts to remit matters to a tribunal for reconsideration (64) suggests that arbitral tribunals lack such unilateral authority.

As discussed above, an arbitral tribunal is ordinarily *functus officio* once it has delivered its final award. (65) Thus, unless the applicable institutional rules (or other agreements between the parties) grant a tribunal the right to reserve to itself the power to reopen or vary its decision on issues resolved in an award, a tribunal doing so will likely be exceeding its authority. In those circumstances, such a reservation would likely be regarded as invalid, and any purported award that the tribunal issued pursuant to such a reservation would similarly be subject to annulment or non-recognition.

[5] Future Directions: *Functus Officio* Doctrine

P 3380 The uniformity of results under differing national arbitration regimes evidences the presumptive expectations of parties regarding the mandate of an international arbitral tribunal. Those expectations are that the arbitral tribunal's mandate will be completed, and the tribunal's powers will terminate, with the delivery of a final award, subject only to limited exceptions ● concerning the correction, interpretation and supplementation

of that award. This result has been uniformly arrived at both in contemporary legislative instruments (notably the UNCITRAL Model Law (66)) and in judicial decisions in the absence of legislative direction (in particular, U.S. and Swiss decisions (67)).

This result is confirmed by the character of the parties' agreement to arbitrate and the objectives of the arbitral process. As discussed above, a defining characteristic of the arbitral process is the selection of arbitrators to resolve a particular dispute (or category of disputes), rather than reliance on a standing tribunal to resolve all disputes between the parties: (68) parties select an arbitral tribunal for a particular dispute, not as long-term mentors of their contractual relations. This implies that the arbitrators' mandate concludes upon their resolution of the disputes submitted to them and that the tribunal does not remain in office with standing authority over the parties or their dispute(s).

The same conclusion follows from the parties' objective of obtaining an expeditious, final resolution of their disputes. (69) This objective argues for the finality of the arbitral award and against the possibility of continuing consideration by the arbitrators of the parties' claims. The award is *res judicata*, resolving the parties' dispute, including in continued proceedings before the previously-appointed arbitrators.

This view of the tribunal's authority is also rooted in important public policies. Arbitrators are private persons, not subject to the discipline and training of a national judiciary, (70) which raises particular concerns about a continuing power to make largely unreviewable decisions affecting private parties' rights. Permitting a tribunal to remain in power, over a lengthy period of time, would deprive arbitration of many of the benefits of flexibility that the process is intended to achieve, while creating at least the potential for an abuse of authority.

These various considerations give rise to a presumption that parties intend the arbitrators to become *functus officio* following the making of an award, subject to only limited exceptions which are essential to the fairness of the arbitral process. This presumption generally applies even in the absence of legislative provisions in the arbitral seat or elsewhere, and is instead an implied element of the parties' agreement to arbitrate. This presumption is also subject to contrary agreement by the parties and, where the parties' arbitration agreement includes provisions permitting (or precluding) corrections, interpretations, or supplementations, or granting arbitrators a quasi-permanent mandate over a defined relationship, those provisions will be given effect.

Finally, it is important to note that formulations such as "*functus officio*" and "the tribunal's mandate terminates" are over-simplifications. Under virtually all arbitration regimes, an arbitral tribunal retains limited powers and obligations even following the making of a final award. These powers (and obligations) include the authority to correct, interpret, or supplement the tribunal's award.

Given this, it is not so much that the arbitrators become "*functus officio*," or lose their mandate, upon making an award, as that their mandate is in these circumstances radically transformed and limited and that their decisions enjoy a high degree of finality after they are made. Only after all possibilities to correct, interpret, or supplement an award have been foreclosed, ● by the passage of time or otherwise, is it accurate to say that the tribunal's mandate is fulfilled or that the arbitrators have become *functus officio*.

Thus, prior to making an award, an arbitral tribunal's powers are very expansive, limited for the most part only by the parties' arbitration agreement, with the tribunal having broad, often essentially unreviewable, authority within this field to control the arbitration and decide the parties' claims. After making its final award, however, the tribunal's powers are restricted to a very limited range of actions, defined principally by reference to corrections and interpretations of its award, and which are ultimately extinguished entirely.

§24.03 CORRECTION OF INTERNATIONAL ARBITRAL AWARDS (71)

As discussed above, there will inevitably be cases where an award has an obvious mistake or omission. Most modern national arbitration legislation and institutional arbitration rules therefore provide mechanisms for correcting arbitral awards. Even where legislative mechanisms do not exist, national courts have fashioned limited means of correcting mistaken awards. These various legislative and judicial actions are necessary in order to avoid the ● unacceptable possibility that a party find itself bound by an award mistakenly ordering relief that the arbitrators did not intend to grant.

[A] Correction of Awards Under International Arbitration Conventions

There are no provisions in the New York Convention or other arbitration conventions concerning the correction or supplementation of arbitral awards. As discussed above, the Convention addresses the question of when an award is "binding," which may be affected by the filing of an application with the arbitral tribunal (or a court) to correct the award. The Convention does not, however, either require or forbid corrections to awards, leaving this to national law and the parties' agreement. (72)

[B] Correction of Awards Under National Arbitration Legislation

The subject of corrections of international arbitral awards is dealt with principally by national arbitration legislation (and, as discussed below, institutional rules). There is

little question but that, absent contrary agreement, it is the law of the arbitral seat that governs the tribunal's power to correct an award. That is the approach taken by modern arbitration legislation (which provides mechanisms for the correction of awards made in locally-seated arbitrations, and not foreign-seated arbitrations). (73) It is also the conclusion reached by arbitral awards on the issue. (74)

Most modern arbitration statutes permit the correction of awards, typically by the arbitrators (rather than by a national court), even where the parties have not expressly agreed to confer such authority. (75) These statutory provisions for corrections overcome possible limitations on a tribunal's powers after its final award has been rendered and provide a framework (including procedures and timetables) for seeking and making corrections. As discussed below, and consistent with the purposes of the *functus officio* doctrine, (76) most national arbitration statutes also narrowly limit the circumstances in which corrections may be sought from, or granted by, the arbitral tribunal. In rare cases (e.g., the FAA in the United States), national courts are permitted to entertain applications to correct an award, but this is unusual.

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[1] UNCITRAL Model Law

Article 33 of the UNCITRAL Model Law provides that "within thirty days of receipt of the award," a party may "request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature." (77) The tribunal is required, if it considers that the request is well-founded, to "make the correction ... within thirty days of receipt of the request." (78) The tribunal is also authorized to make corrections to its award "on its own initiative," within the same time limit (i.e., 30 days of receipt of the award by the parties). (79) Article 33 provides for correction of any award, not just the final award in an arbitration. (80)

The Model Law's provisions regarding corrections reflect the prevailing approach towards corrections in most developed jurisdictions – essentially, as a necessary evil that is tolerated, but not encouraged, and narrowly regulated. Notably, corrections are only available within a very limited time period (for both requesting and making a correction) following notification of the award and for only very limited reasons. These restrictions are imposed in order to safeguard the finality of awards, to limit uncertainty and to prevent ongoing disputes after an award has been made. (81)

It is clear that only very narrow categories of "errors" may be corrected under the Model Law. In particular, only "*errors in computation, ... clerical or typographical errors or ... errors of similar nature*" (82) may be corrected. Article 33(1) is directed towards simple arithmetic mistakes in calculation or typographical errors (e.g., failure to include one of a number of categories of damages which have been found payable in the dispositive section of the award, when this was clearly intended).

In contrast, errors in the tribunal's reasoning in the body of its award are not subject to correction. (83) As courts in some Model Law jurisdictions have reasoned, an arbitral tribunal is not authorized by Article 33 to correct errors of judgment, whether of law or fact. ● (84)

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Even if a tribunal demonstrably misunderstands or overlooks some critical provision of the parties' agreement or some essential piece of evidence, the remedy is not generally correction of the award under Article 33, but rather an application to annul. Courts in Model Law jurisdictions have interpreted the scope of a tribunal's authority to correct awards narrowly, refusing to permit corrections based upon a reassessment of the evidence or parties' arguments. (85)

It is sometimes suggested that a correction may not alter the meaning of an award. (86) This is difficult to accept.

A correction is made precisely in order to alter the effect – and, on most views of the term, the meaning – of an award. Absent the correction (e.g., of a computational error), one party would be faced with enforcement of an award that was manifestly in error, and the correction serves to change the terms of the award and prevent that result. It is correct to say that a correction ensures that the arbitrators' true intentions are fully effectuated (and not to alter those intentions), but it is difficult to conclude that a correction does not change the (mistaken) meaning of their original award.

The Model Law (and most other national laws) does not provide a clear remedy if the tribunal refuses to correct, modify, or supplement its award. The most realistic possibility for relief, in those circumstances, is an action to annul the award on the grounds that the tribunal did not comply with the terms of the parties' agreement to arbitrate (or, failing agreement, the law of the arbitral seat) or acted *ultra petita* or *infra petita*. (87)

It has been suggested that the parties may not, by agreement, exclude the possibility of a correction under Article 33 of the Model Law. (88) In particular, some authorities note that P 3385 ● Articles 33(1) and 33(2) of the Model Law, dealing with corrections and interpretations, do not expressly allow for an agreement by the parties to alter the statutory formula, in contrast to Article 33(3), dealing with additional awards, which does. It is very difficult, however, to square this position with principles of party autonomy and the requirements of Article II of the New York Convention; absent clear language in the Model Law, this conclusion should be rejected. (89)

Generally-applicable procedural protections apply to a tribunal's treatment of requests

for a correction. (90) In particular, the parties must be treated with equality and given an opportunity to present their respective cases with regard to the issue of a correction.

Although there is no express provision in Article 33 requiring that the tribunal hear objections to a request for a correction (or interpretation), there is virtually no justification for failing to do so. (91) Nonetheless, given the short time-frame and limited scope of issues it is doubtful that an in-person hearing is required, even if requested, on the issue of a correction. (92) Under the Model Law, a correction must satisfy the formal requirements specified in Article 31 (with regard to written form, signature, date and place and delivery to the parties). (93)

[2] English Arbitration Act

At English common law, and consistent with the *functus officio* doctrine, arbitrators lacked the authority to correct their awards. (94) In the late 19th century, recognizing that arbitrators' inability to correct manifest errors was anomalous, legislation was enacted granting arbitrators power to correct their awards, introducing what came to be known in England as the "slip ● rule." (95) Subsequent English legislation, including the English Arbitration Act, 1996, retained that authority. (96)

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Section 57 of the 1996 Arbitration Act is very similar to Article 33 of the UNCITRAL Model Law. It provides that a tribunal may, on its own initiative or on the application of a party, correct an award to "remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award." (97) Where there is no possibility of further recourse to the tribunal because the time to seek a correction of the award has expired, an English court may grant an extension of time to correct the award under Section 79 of the Arbitration Act, provided that there was no undue delay in making the application and to avoid substantial injustice to the party seeking the extension. (98)

This formulation is arguably somewhat broader than that of the Model Law, (99) but is nonetheless limited to accidental slips or omissions, (100) and clearly does not extend to reappraisal of the evidence or argument. (101) As one commentary puts it, "[n]either of these powers is intended to enable the arbitrator to change his mind on any matter which has been decided by ● the award, and attempts to use the section for this purpose should be firmly resisted." (102) Under the Arbitration Act, the parties are permitted to agree to alternative powers for the tribunal to correct errors in its award. (103)

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[3] Swiss Law on Private International Law

As noted above, the Swiss Law on Private International Law does not include a statutory provision on correction of awards. (104) It is well-settled, however, that this does not prevent an arbitral tribunal in an international arbitration seated in Switzerland from correcting its award. (105) As in other jurisdictions, the scope of permissible corrections is very narrow. (106)

In the absence of contrary agreement, some Swiss commentators suggest that a 30-day time limit is applicable to requests for corrections. (107) Although this time period is broadly reasonable, the better view adopts a more flexible approach towards the arbitrators' discretion, particularly in the absence of legislative deadlines. (108)

[4] Other National Arbitration Legislation

Most other national arbitration regimes are broadly similar to the Model Law approach. As with Article 33 of the Model Law, many jurisdictions permit only very limited correction of mistakes in the dispositive sections of the award. (109) In the words of one authority, "[t]he ● condition for interpreting the award is clearly more restrictive than the situation where material errors may be corrected. ... And under the pretext of interpreting an arbitral award one may not affect the irrevocable award." (110)

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Similarly, most jurisdictions impose very short time limits for requests by the parties for correction (typically 28 or 30 days), (111) although some jurisdictions provide for shorter time periods (from five to fifteen days). (112) A few jurisdictions set longer time limits (as in France, under the revised Code of Civil Procedure, providing a default three-month time limit (113)) but these are exceptions. Alternatively, these statutes generally provide that the tribunal itself may correct an award on its own initiative within the same time limits.

In most cases, parties are free to agree upon alternative approaches to the subject of corrections. (114) Arbitration legislation in a few jurisdictions permits a national court to correct an award if the tribunal that made the original award cannot be reconstituted. (115)

[5] U.S. Federal Arbitration Act

One significant legislative departure from the foregoing approach to the subject of corrections to arbitral awards is the FAA in the United States. In the United States, the common law ● historically gave robust effect to the *functus officio* doctrine and provided little or no opportunity to correct a mistaken award. (116) The FAA was one of the earliest legislative efforts to reform this common law approach.

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Section 11 of the FAA provides that a U.S. court – rather than the arbitral tribunal – may "make an order modifying or correcting the award" if "there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award," or if the award "is imperfect in matter of form

not affecting the merits of the controversy.” (117) There is no counterpart to §11 in either Chapter 2 or 3 of the FAA, although §11 would likely be applicable in cases under the New York and Inter-American Conventions pursuant to §208 and §307. (118) (Unusually, a few U.S. courts have (wrongly) asserted the power to judicially correct awards in recognition proceedings under the New York Convention, but these are anomalies. (119)) As in other jurisdictions, the authority to correct an award under the FAA is narrowly limited to errors in calculation, typographical mistakes and similar ministerial errors. (120)

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As noted above, the language of §11 does not address the parties’ ability to agree upon alternative modes of correction. Nonetheless, consistent with more general principles of party autonomy, U.S. courts have consistently upheld the validity of agreements granting arbitrators authority to correct their awards. (121) As one U.S. court held, “[f]unctus officio is merely a default rule, operative if the parties fail to provide otherwise.” (122)

As discussed below, most institutional arbitration rules used in the United States (and elsewhere) grant arbitrators the power to correct their awards, with the result that, in many cases, §11 is of no real importance in regulating corrections to awards made in the United States. Rather, institutional rules typically provide the arbitral tribunal, rather than U.S. courts under the FAA, with the authority to correct its own award.

Indeed, one U.S. appellate court has held that institutional rules granting the power to make corrections grant the arbitral tribunal the competence to determine the scope of its own jurisdiction to make corrections (relying on the *First Options* analysis used in U.S. competence-competence analysis). (123) This interpretation appears to be unduly expansive, converting a very limited grant of remedial authority into an effectively unreviewable authority to fix the tribunal’s competence. (124)

Finally, as discussed above, U.S. courts have recognized an inherent authority on the part of arbitrators, even in the absence of institutional rules, to correct their awards. One court explained this common law development as follows:

“An arbitrator is not rendered powerless by the completion of his duties, however. ... [E]ven after becoming *functus officio*, an arbitrator retains limited authority to correct a mistake which is apparent on the face of the award. This inherent authority applies narrowly to clerical mistakes or obvious errors in arithmetic computation.” (125)

Numerous lower courts have reached the same conclusion, notwithstanding the arguably inconsistent text of the FAA. (126) As noted above, this inherent authority is narrow, permitting ● only corrections of clerical, computation and similar errors. (127)

Putting aside these common law developments, in those cases where it does apply, §11 of the FAA is deficient in multiple respects and should be amended. The provision was a legislative advance when it was enacted, in 1925, but developments in other jurisdictions, and the U.S. common law, have moved well along in the intervening decades and the FAA’s solution is now archaic and unhelpful.

First, §11 does not provide for correction of an award by the *arbitral tribunal*, but rather by a *national court*. This is unsatisfactory both because it would arguably deprive the arbitrators of the opportunity to correct their own award (with the arbitrators manifestly being in the best position to do so, having drafted the original award) and because it would inject a national court into the arbitral process prematurely. Recognizing this, and as discussed above, some U.S. courts have departed from the common law and (wisely) held that arbitral tribunals have an inherent power to correct their awards. (128) In the words of one decision:

“the arbitrators at bar had the inherent power to deal with their error once it was pointed out to them, notwithstanding [respondent’s] recitation of that dread common law Latinism *functus officio*.” (129)

Second, §11 contains an ill-defined definition of those types of errors that may be corrected, (130) inviting needless applications to correct and consequent delays. This is reflected in U.S. judicial decisions on the topic. Although it is said that §11 “does not license the district court to substitute its judgment for that of the arbitrators,” (131) some courts have “corrected” awards on matters of substance. (132)

Third, the FAA permits applications for corrections up to three months after the award is made (without specifying the time in which a correction must be made). (133) Given the ● interests in finality of an award, this time period is unacceptably long; indeed, it is nearly as long as some fast-track arbitrations and imposes disproportionate and unnecessary delays on the arbitral process.

Finally, as noted above, a number of U.S. state laws provide arbitral tribunals with authority to correct awards. (134) There is little authority on the interplay between these state statutes and the FAA. (135) The better view is that these state statutes effectuate the parties’ implied agreement and are therefore not preempted by the FAA (although a contrary result would apply if state statutory provisions purported to override the terms of the parties’ arbitration agreement).

[6] Future Directions: Corrections of International Arbitral Awards Under National Law

The legislative approach of the UNCITRAL Model Law and most other modern arbitration statutes and judicial decisions is well-conceived. The Model Law's provisions eliminate uncertainties about a tribunal's authority to correct its award, while ensuring that this authority does not frustrate the objectives of the arbitral process (by limiting the scope of corrections and prescribing a precise timetable for any corrections).

Even in the absence of a statutory regime authorizing correction of an award, parties should be free in principle to provide in their arbitration agreement that a tribunal has such power. (136) Doing so is consistent with notions of party autonomy, and has been acknowledged by the consistent approach of judicial decisions in legal systems that do not make statutory provision for corrections by the arbitrators. (137) Indeed, a failure to give effect to the parties' agreement regarding corrections would likely be a violation of the New York Convention. (138)

In practice, contractual provisions concerning corrections to an award are rare, except in institutional rules that are incorporated into the arbitration agreement (and discussed below). (139) Where such agreements exist, however, both national law and the New York Convention should be interpreted to give effect to them.

P 3393 Even without express agreement by the parties that the arbitrators may correct their awards, arbitral tribunals should nonetheless possess this authority (again, even absent statutory authorization). (140) The power to correct an award, for a reasonable period after it has been ● made, should be implied into an agreement to arbitrate (subject to any express provisions to the contrary). The authority to correct obvious errors is consistent with the expectations of rational commercial parties acting in good faith, and can properly be seen as inherent in the arbitrators' adjudicative mandate: it is contrary to basic conceptions of procedural fairness for an obviously mistaken award to be given binding effect, notwithstanding the arbitrators' desire to correct it. (141)

It is important, however, that the authority to correct an award be narrowly circumscribed. A correction involves only ministerial, mathematical and similar errors. A request for a correction may not properly involve challenges to the tribunal's legal reasoning or assessment of the evidence or interpretation of the parties' submissions. (142) The tribunal may have grossly misapplied the law or misunderstood the evidence or parties' submissions, but these are not mistakes that may be corrected; they may provide the basis for an annulment application or objection to recognition, but they are not grounds for correcting the award.

[C] Correction of Awards Under Institutional Arbitration Rules

All leading institutional rules address the subject of corrections of arbitral awards, adopting mechanisms that are broadly similar to those of the Model Law. (143) In most jurisdictions, these institutional regimes for seeking corrections will supersede otherwise available statutory mechanisms (which operate only as default rules). (144) In some instances, internal institutional mechanisms (usefully) also seek to minimize the risks of errors occurring in the final award.

P 3394 The ICC Rules adopt a well-considered approach to corrections of awards. (145) The process begins before an award is finalized and provided to the parties, when the ICC Court (assisted by the Secretariat) subjects the award to scrutiny, pursuant to Article 34 of the 2017 ICC Rules. (146) This scrutiny is often constructive, provided that it is conducted in a timely manner: ● experience teaches even the most self-confident arbitral tribunal that another set (or sets) of eyes can be helpful in catching mistakes and omissions. (147)

Once an ICC award has been made (and notified to the parties), Article 36 of the 2017 ICC Rules (previously Art 35 of the 2012 ICC Rules) provides that the arbitral tribunal may, on its own initiative or upon application by a party, "correct a clerical, computational or typographical error, or any errors of similar nature." (148) An application for a correction (or the tribunal's *sua sponte* correction) must be submitted within 30 days of the receipt of the award by the party. (149) The ICC Rules provide for expedited submissions by the parties on the question of a correction, and an expedited decision by the tribunal. (150)

The scope and application of Article 35 of the earlier 2012 ICC Rules has been elaborated upon in a "Note on Correction and Interpretation of Arbitral Awards," issued on 31 March 2014. (151) This Note provides that, "[i]n all cases, the arbitral tribunal must first ensure that mandatory rules of law at the place of arbitration do not exclude the correction or interpretation of an award by the tribunal" and "[w]here the relevant national law or court practice provide specific circumstances in which an arbitral tribunal may render certain decisions other than corrections or interpretation regarding an award which had been approved and notified, such situations shall be treated in the spirit of this Note." (152)

P 3395 As under most arbitration legislation, (153) the scope of corrections permitted by Article 36 of the 2017 ICC Rules is intended to be narrow (and closely tracks that of the UNCITRAL Model Law). Its purpose consists in correcting unintended errors in the tribunal's expression of the relief it has granted in the award, as opposed to modifying the tribunal's reasoning or altering its findings. (154) As one commentary on Article 35 of the earlier 2012 ICC Rules explains: ●

"It would seem that [Article 35] includes errors of the following types: the failure to insert the word 'not'; the use of a period instead of a comma in order to separate hundreds and thousands (*i.e.*, in order to avoid confusion with a

decimal point); and the decision to order each party to bear 50% of the costs of arbitration while ordering the respondent to pay an amount that was equal to 100% of such costs (i.e., a computational error).” (155)

Application of this formulation is in the hands of the arbitral tribunal, and has in most instances resulted in narrow interpretations of the sorts of corrections that are permissible under Article 35 of the 2012 ICC Rules and Article 36 of the 2017 ICC Rules. (156) Most corrections have, in practice, involved mathematical or computational errors. In one case, for example, a period had to be replaced with a comma in order to avoid any confusion with decimal point notation, the latter being a distinctive feature of the English numerical system. (157)

Other institutional rules are similar, both in providing the arbitrators with the power to make corrections and in narrowly limiting that authority. In almost all cases, institutional rules provide for the tribunal to correct “computational,” “clerical” and “similar” errors, either on its own initiative or a party’s application, within a limited period from the original award. (158) It is clear under most such rules that only miscalculations and comparable slips – rather than faulty legal analysis or factual findings – can be the subject of a correction. (159) Equally, short time limits are prescribed for seeking (and, often, making) any correction. (160)

Likewise, the 2013 UNCITRAL Rules provide a similarly limited scope for corrections, both in substance and duration. Article 38 provides that either party, having given notice to the opposing party, has 30 days in which to request the arbitral tribunal to correct “any error in computation, any clerical or typographical error or any error or omission of a similar nature [in the award].” (161) Article 38 also allows arbitral tribunals to make such corrections *sua sponte*, providing that “[t]he arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.” (162)

[D] Arbitral Tribunal’s Corrections

As a practical matter, arbitral tribunals carefully scrutinize requests for corrections and typically resist attempts to challenge the substance of the award. (163) In virtually all instances, arbitral tribunals correct only accidental miscalculations or misstatements. (164) Tribunals frequently decline requests for corrections, on the grounds that they are in fact requests to reverse or alter the award’s conclusions. A correction will also only be made if requested in a timely manner. (165) In the words of one ICSID tribunal:

“The purpose of the correction exception to the *functus officio* principle is to correct obvious omissions or mistakes and avoid consequence where a party finds itself bound by an award that orders relief the tribunal did not intend to grant. The purposes is therefore to ensure that the true intensions of the tribunal are given effect in the award, but not to alter those intentions, amend the legal analysis, modify reasoning or alter findings... Any purported correcting that goes beyond the scope of the Tribunal’s limited mandate in this regard is likely to be subject to challenge.” (166)

P 3397

Or, as another tribunal held, in refusing a correction, “Article 36 of the [Iran–U.S. Claims] Tribunal Rules allows a party to request the Tribunal to ‘correct in the award any errors in computation, and any clerical or typographical errors, or any errors of similar nature.’ The Respondents’ Requests identify no such errors in the Award.” (167)

The decision of a tribunal to correct its award should be considered an integral part of the initial award under most national laws. Section 57(7) of the English Arbitration Act, 1996, provides so explicitly: “Any correction of an award shall form part of the award.” (168) Other arbitration legislation is generally silent on this point. The dominant view, nevertheless, is that the decision correcting the initial award cannot be recognized or enforced separately, but instead forms part of the original award. (169)

Conversely, a decision rejecting the application to correct an award does not constitute part of the award. (170) If the addendum correcting the initial award is unclear, an interpretation or another correction may be sought. (171) It may also be subject to separate challenge if the correction itself gives rise to grounds for a challenge, for example, if the tribunal acts *ultra vires*. (172) On the other hand, a challenge limited to the original award will also affect the correction to the award, which thus shares the fate of the former. (173)

A tribunal arguably may not claim additional remuneration for its work leading to a correction of its own award, particularly where the application results from its own lack of care. (174) ● The 2013 UNCITRAL Rules provide, in Article 40(3), that: “In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2(b) to (f), but no additional fees.” (175) A somewhat different view has been adopted by other authorities:

“Subject to the provisions of the arbitration agreement between the parties, since consideration of Article 33 applications are within the powers conferred upon the tribunal by the Model Law, the tribunal should be able to recover the costs incurred in relation to an Article 33 application from the parties. However, it would seem proper that if the request for correction, interpretation or an additional award was due to the tribunal’s failure to

exercise proper skill or care in making its initial award, the tribunal may find it appropriate not to seek to recover its costs from the parties.” (176)

It has also been held that a party that unsuccessfully opposes a correction will not be subject to an additional costs award for having opposed the correction, (177) although the wisdom of such an absolute rule is doubtful.

Finally, some authorities have raised the possibility that an arbitral tribunal would be liable to the parties for the additional costs arising from a successful application to correct an award. (178) This view is ill-conceived, both because it contradicts almost universally-accepted principles of arbitral immunity (179) and because it constructs perverse incentives for the arbitrators in resolving applications for corrections.

§24.04 INTERPRETATION OF INTERNATIONAL ARBITRAL AWARDS (180)

Related to the correction of arbitral awards is the interpretation of awards. In contrast to a correction, an interpretation or clarification of an award does not alter the previous award’s statements or calculations, but instead more clearly explains what such statements were intended ● to mean, without altering them. (181) In practice, it is very rare for interpretations to be either sought or granted. (182)

[A] Interpretation of Awards Under International Arbitration Conventions

As with corrections, the New York Convention and other international arbitration conventions are generally silent regarding an arbitral tribunal’s power to interpret its awards. The authority of a tribunal to interpret or clarify its awards is recognized in other international contexts, (183) but is not expressly reflected in international arbitration conventions. As with the analysis applicable to corrections, Article II of the Convention would likely be violated by a national law that refused to give effect to agreements regarding a tribunal’s power to interpret its awards. (184)

[B] Interpretation of Awards Under National Arbitration Legislation

As with corrections, the law applicable to a tribunal’s power to clarify or interpret an award is that of the arbitral seat (or, in rare cases, a foreign procedural law selected by the parties). (185) Not all national arbitration statutes authorize arbitral tribunals to make interpretations of their awards; nonetheless, judicial decisions generally recognize such authority even in the absence ● of statutory direction (on the basis, applicable also to corrections, that this is the parties’ implied intention and is important to ensuring that the arbitral process is fair and efficient).

Article 33 of the UNCITRAL Model Law is representative, providing that, “if so agreed by the parties,” a party may “request the arbitral tribunal to give an interpretation of a specific point or part of the award.” (186) This provision is subject to the same time limits that apply to corrections of an award. (187) It also applies to all awards, including partial and interim awards, as well as final awards. (188)

Article 33(1)(b) is more limited in its treatment of interpretations than Article 33’s provisions regarding corrections. Unlike a correction, a tribunal’s interpretation of its award is only permitted where the parties have previously so agreed (for example, by incorporating institutional rules providing for interpretations (189)) or reach such an agreement following publication of the award. (190) This is to avoid abuse resulting from requests made for delaying purposes, or requests aimed at obtaining a revision of the entire award. (191)

A substantial argument can be made that the parties’ agreement to arbitrate impliedly authorizes the arbitrators to clarify ambiguities (within the meaning of Article 33(1)(b)). This result is justified by the fact that rational commercial parties can be presumed to want to avoid ambiguous or uncertain awards and to want ambiguities clarified by the arbitrators (rather than a national court). (192) A tribunal that has rendered an ambiguous, and thus arguably not fully enforceable, award has not completely performed its mandate, and hence should not be regarded as *functus officio*. On this rationale, (193) even absent express authorization in institutional rules or national law, an arbitral tribunal should have an exceptional power to clarify or interpret an ambiguity in its award. (194)

P 3401 ●

Article 33(1)(b) also limits the provision of an interpretation to “a specific point or part of the award,” rather than a review of the tribunal’s overall rationale or relief. (195) As one commentator explains, “[i]n the early drafting stages it was agreed that art. 33(1)(b) – unlike its counterpart, art. 37 of the UNCITRAL Arbitration Rules – should be limited to specific points of the award in order to avoid possible abuses and delay.” (196)

Although not expressly stated, it has been suggested that an interpretation may be made only as to the dispositive portions of an award, and not the tribunal’s reasoning. (197) Notably, however, the drafters of the Model Law originally considered limiting interpretation to the reasons of the award, rather than to its operative part. It was finally agreed to leave the scope of interpretation to the parties’ agreement. (198)

An “interpretation” is generally limited to cases where the requesting party “points to a portion of the award that is ambiguous, in need, that is, of ‘clarification.’” (199) Thus, it is sometimes said that the term “interpretation” should be construed as meaning

“clarification” of an ambiguous award. (200) A request for interpretation should therefore be available only if a party demonstrates that the award is ambiguous and requires clarification for its effective execution. (201)

P 3402 ●

Some arbitration statutes parallel the Model Law in providing expressly for interpretations of arbitral awards (in limited circumstances). (202) On the other hand, a number of states have not included any provision in their arbitration legislation for interpretation of awards, including England, Switzerland and the United States. (203) Even absent express statutory authority, however, most national legal systems provide some mechanism for either “correcting” ambiguities (204) or referring the award back to the arbitral tribunal for clarification. This is consistent with the parties’ likely expectations (absent contrary express agreement) and with sensible policy. (205)

For example, Article 190 of the Swiss Law on Private International Law does not provide for interpretation of awards, but Swiss courts and commentators have held that interpretation is possible even in the absence of a statutory basis or a specific agreement by the parties to that effect. (206) Similarly, Section 57 of the English Arbitration Act, 1996, provides for corrections to “clarify or remove any ambiguity,” but does not provide for an interpretation of the award; nonetheless, it appears settled as a matter of English law that arbitrators in England-seated arbitrations may issue decisions clarifying ambiguities and, in effect, interpreting their awards. (207)

P 3403 ●

To the same effect, the FAA is silent regarding interpretations, but a number of U.S. courts have held that an ambiguous award can be referred back to the arbitrators for clarification. (208) These U.S. courts have reasoned that the *functus officio* doctrine does not prevent an arbitral tribunal from clarifying ambiguities in its award: “Without question, a reviewing court may ask the arbitrator to clarify an award.” (209) As one court reasoned:

“Given the evident incoherence of the explanation that was volunteered by the arbitration panel in this instance, we do not fault the district court in its commendable efforts to seek guidance through a remand.” (210)

P 3404 ●

In contrast, some U.S. courts have concluded that trial judges can resolve straightforward issues themselves. (211) Of course, where the award-debtor (or award-creditor) does not demonstrate that an ambiguity exists in the award, then no remand for interpretation is available. (212) Remand is limited solely to that aspect of an award that is unclear or ambiguous. (213)

[C] Interpretation of Awards Under Institutional Arbitration Rules

Institutional arbitration rules are broadly similar in their treatment of the possibility of interpretations of awards. Article 37 of the 2013 UNCITRAL Rules provides that, within 30 days of the receipt of the award, either party, with notice to the other parties, may “request that the arbitral tribunal give an interpretation of the award.” (214) Unlike the Model Law, the Rules impose no limitation on the type or nature of the interpretation which may be sought, although there is authority that interpretations may not be given of only part of an award. (215)

A number of other institutional rules also provide for interpretations of arbitral awards. (216) These agreements should be given effect, even where applicable law in the arbitral seat is silent ● regarding the subject of interpretations. (217)

P 3405

A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions. (218) As one decision by an ICC tribunal reasoned:

“As to the scope of ‘interpretation’, which might be regarded as broader than the ‘correction’ feature, there is virtual unanimity that an application of that sort cannot be used to seek revision, reformulation or additional explanations of a given decision.” (219)

Similarly, other institutional rules, including the Swiss Rules and VIAC Rules, limit the scope of requests for interpretation. (220) The 2013 UNCITRAL Rules are to the same effect:

“Interpretation is not a mechanism for revisiting an issue or claim that the arbitral tribunal should have addressed in the award but did not. ... Nor does the interpretation process provide grounds for review when a party seeks to reargue the case or disagrees with the conclusions reached by the Tribunal. Likewise, it does not allow a party to raise new arguments or introduce new evidence in the case. Numerous tribunals have confirmed this limited purpose of interpretation.” (221)

In practice, requests for interpretation will ordinarily only be successful if directed to specific portions of the dispositive part of the award. (222) For example, interpretations have been issued with regard to the geographic/temporal scope of royalty obligations and to what claims have and have not been resolved. (223)

A few institutional rules, including the LCIA Rules and WIPO Rules, do not expressly provide for interpretations of awards. (224) If both institutional rules and national law are silent concerning the possibility of obtaining an interpretation of an award, then, as discussed above, the better view is that this power is inherent (for a reasonable period of time after the making of the award) in the arbitrators' mandate. (225)

§24.05 SUPPLEMENTATION OF INTERNATIONAL ARBITRAL AWARDS (226)

Another category of post-award relief involves the supplementation of an award, by addressing matters omitted from the tribunal's initial decision. Again, this category of post-award relief is addressed in a number of arbitration statutes and institutional rules, as well as in judicial authority.

[A] Supplementation of Arbitral Awards Under National Arbitration Legislation

Many modern arbitration statutes provide for the making of supplementary awards (in limited circumstances) by the arbitral tribunal. Article 33(3) of the UNCITRAL Model Law is representative, providing that, unless otherwise agreed by the parties, the arbitral tribunal may "make an additional award as to claims presented in the arbitral proceedings but omitted from the award." (227) Applications seeking an additional award must be made within the same 30-day time limit as applies to corrections and interpretations of awards under the Model Law; (228) the arbitral tribunal is empowered to make an additional award "within sixty days." (229) In contrast to corrections, the power to make additional awards under Article 33(3) is expressly subject to contrary agreement by the parties. (230)

Article 33(3) provides a mechanism for a tribunal to resolve claims that might otherwise lead to an *infra petita* (or, less clearly, an "excess of authority") challenge to an award in annulment proceedings or under Article V(1)(c) of the New York Convention. (231) The mere fact that an arbitral tribunal has not expressly addressed a particular claim does not automatically require issuance of an additional award: a tribunal may be taken to have impliedly rejected claims as to which it does not grant relief (although the better practice is clearly to address issues explicitly and although the failure to do so may give rise to claims that the award is, in some respects, unreasoned). (232)

The English Arbitration Act, 1996, contains a similar provision, permitting the tribunal to "make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award." (233) As with the treatment of corrections under the Act, this authority is subject to contrary agreement by the parties. (234) Other arbitration legislation also includes provision for additional awards, to address matters omitted from what was intended as the arbitrators' final award. (235)

One court held that, even where an annulment application is pending under Article 34 of the Model Law, the arbitral tribunal was competent (and also required) to decide on the allocation of the arbitration costs in an additional award. The existence of annulment proceedings did not affect the validity or enforceability of the additional award made before the annulment proceedings were concluded. (236)

Some legislation (particularly older enactments) omits express power on the part of an arbitral tribunal to make additional awards. (237) As with corrections and interpretations, most national courts have permitted arbitral tribunals to cure omissions from their awards, even absent express statutory authorization. (238) This accords with the parties' presumptive intentions (which would be to authorize the arbitral tribunal to complete the mandate assigned to it). (239)

In the United States, some courts have nonetheless followed the common law rule, unaltered by the FAA, that the tribunal is *functus officio* upon rendering its final award and unable to make further awards. (240) As one decision put it: ●

"[T]he submission by the parties determines the scope of the arbitrators' authority. Thus, if the parties agree that the panel is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so. ... [O]nce the arbitrators have finally decided the submitted issues, they are, in common-law parlance, '*functus officio*,' meaning that their authority over those questions is ended." (241)

Most U.S. courts recognize, however, that when a tribunal does not address all issues submitted to its jurisdiction, or does not address contingencies that may arise after issuance of the award, the tribunal may issue a supplemental award or the court may remand to the tribunal to do so. (242)

[B] Supplementation of Arbitral Awards Under Institutional Arbitration Rules

Many institutional rules also provide for the making of additional awards by the tribunal, following its "final" award. For example, Article 39 of the 2013 UNCITRAL Rules provides that, within 30 days of receipt of the final award or termination order, either party may request the arbitral tribunal "to make an award or an additional award as to claims

presented in the arbitral proceedings but not decided by the arbitral tribunal.” (243)
Many other institutional rules are similar. (244)

P 3409 ●

In contrast, the 1998 and 2012 ICC Rules omitted any provision permitting supplemental awards (after lengthy debate) (245) and the 2017 ICC Rules continued to omit such a provision. It nonetheless appears that a tribunal in an ICC arbitration would be permitted to make an additional award if authorized to do so by the law of the arbitral seat. (246)

Where national arbitration legislation does not provide for supplemental awards, but institutional rules do, there is no reason not to give effect to the latter. Indeed, a failure to do so would disregard the parties’ agreement to arbitrate, in violation of both the New York Convention and most arbitration legislation. (247)

The making of an additional award is confined to claims that were advanced during the arbitral proceedings, but which have not been decided in the tribunal’s award. After making its final award, the tribunal has no power to entertain a new claim, which was not previously advanced during the arbitration. If a tribunal fails to, or is unable to, make an additional award addressing a claim that was presented during the arbitral proceedings, then its award will be subject to challenge in an action to annul or subject to non-recognition (on grounds of *infra petita*). (248)

Unless the parties agree otherwise, an application to supplement the award will often require further written submissions and, in some cases, another hearing. (249) The tribunal may nonetheless direct parties to file submissions on supplemental matters within very short time limits in the interests of finality and efficiency. (250)

The tribunal’s decision supplementing its initial award is generally held to be subject to separate annulment and/or enforcement proceedings. (251) In contrast, some authorities hold that a positive decision on correction forms part and parcel of the initial award and is thus not challengeable or enforceable in separate proceedings. (252)

P 3410 ●

§24.06 REMISSION OF INTERNATIONAL ARBITRAL AWARD TO ARBITRAL TRIBUNAL (253)

Some national arbitration legislation provides for the possibility of remitting an arbitral award to the tribunal, after an application to annul the award has been filed. In effect, this permits a court, presented with an annulment application, to allow the arbitrators an opportunity to take further steps or decisions, which might render the annulment application unnecessary or inappropriate.

Article 34(4) of the UNCITRAL Model Law is representative, providing that:

“The court when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take some other action as in the arbitral tribunal’s opinion will eliminate the ground for setting aside.” (254)

The drafting history of the Model Law explains this provision as confirming the arbitral tribunal’s “continuing mandate” and permitting it to eliminate a “remediable defect which constitutes a ground for setting aside.” (255) The powers under Article 34(4) are rarely invoked (with there being only limited reported decisions applying the provision). (256)

Importantly, Article 34(4) is available only in conjunction with an annulment application (and subject to the time limits for such applications) and is not a stand-alone remedy. (257) Courts have also declined to remit awards to the arbitral tribunal for the purpose of revising its decision on the merits of the dispute or taking additional evidence on the dispute. (258)

P 3411 ●

A few other national arbitration statutes in non-Model Law jurisdictions contain comparable provisions for remission of an award to the arbitral tribunal. (259) In contrast, a number of states which have adopted the Model Law have omitted Article 34(4). (260) Although the provision is unusual, and likely to receive limited usage, there is no good reason for deleting it and the remediable powers it affords. As the drafting history of the Model Law explains:

“The prevailing view, however, was that the provision should be retained. The mere fact that the procedure of remitting the award to the arbitral tribunal was not known in all legal systems was no compelling reason for excluding it from the realm of international commercial arbitration where it should prove useful and beneficial.” (261)

Even absent express statutory authority like that in Article 34(4) of the Model Law, the authority to remit an award to the tribunal, and for the tribunal to reconsider obvious errors, ambiguities, or omissions, is arguably implicit in national law and the parties’ arbitration agreement. (262)

Most institutional rules are silent on the subject of remission of awards to the tribunal. The 2017 ICC Rules include a provision addressing the remission of an award by a national court. Article 36(4) provides:

“Where a court remits an award to the arbitral tribunal, the provisions of Articles 32, 34, 35 and this Article 36 shall apply *mutatis mutandis* to any addendum or award made pursuant to the terms of such remission. The Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses.” (263)

Although unlikely to be used frequently, this provision underscores the practical utility, in rare cases, of a provision for remission.

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§24.07 REVOCATION OR REVISION OF FRAUDULENTLY OBTAINED ARBITRAL AWARDS

It is possible in some jurisdictions for parties to request an arbitral tribunal to revoke an award that has been obtained by fraud or comparable actions. This form of relief is distinct from provisions for judicial annulment or revocation of an award by the courts in the arbitral seat, and instead involves revocation or revision of an award by the arbitrators themselves. Revocation of an award by the arbitral tribunal is an exceptional and unusual authority, which apparently exists in only a few jurisdictions and which is exercised only very rarely.

A very limited number of jurisdictions provide a statutory mechanism for remitting an award to the arbitrators in the case of fraud on an arbitral tribunal. Under the English Arbitration Act, 1996, an award can be challenged on the ground of serious irregularity if it has been obtained by fraud (and the court may then remit the award to the arbitral tribunal for reconsideration). (264) In most jurisdictions, however, arbitration legislation is silent on the possibility of remitting an award to the arbitral tribunal in cases of fraud or newly-discovered evidence (or otherwise). (265) In particular, the UNCITRAL Model Law, contains no express authority for a tribunal to reconsider its award based on allegations that it was obtained by fraud.

Moreover, although the issue is infrequently considered, a number of national courts appear to reject the possibility of arbitral review or revocation of a previously-issued award based on fraud or similar circumstances. (266) Similarly, in contrast to their treatment of corrections, interpretations and supplementations, most institutional arbitration rules are silent on the question of the arbitrators' authority to consider claims that an award must be revised or revoked on the basis of fraud or similar circumstances. (267)

Despite this, courts in a few jurisdictions have held that arbitral tribunals have the authority, either at the request of a party or following a judicial order remitting an award to the tribunal, to revoke or revise an award that was based upon fraudulent acts. Thus, French judicial authority provides that a party may seek redress from an arbitral tribunal (if it is still functioning or “can be reconvened”), in the form of a decision by the arbitrators revoking a previous award, on the grounds that it was fraudulently obtained. Notwithstanding the absence of statutory authority, a 1992 French Cour de Cassation decision held a party that discovers that material evidence has been fraudulently concealed during an arbitration seated in France can apply to the members of the former tribunal to reconsider its prior decision:

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“as a consequence of the general principles of law relating to fraud – notwithstanding the exclusion of review by Article 1507 of the New Code of Civil Procedure – the rescinding of an award made in France concerning international arbitration is, by way of exception, to be admitted in the case of fraud, as long as the arbitral tribunal remains constituted after the making of the award (or can be reconstituted).” (268)

Applying the Cour de Cassation's analysis, arbitral tribunals seated in France have (very rarely) considered claims that their prior awards should be revised based on alleged fraud on the tribunal. (269)

The Cour de Cassation's decision has been criticized on the grounds that it allows an open-ended opportunity for disappointed parties to request arbitral tribunals to reconsider their awards, and that it leaves the possibility of a challenge dependent on whether the tribunal may be reconstituted. (270) In the words of one commentator, however, the requirement that the tribunal can be reconstituted should be interpreted expansively to include submission of the challenge to “both the tribunal which had previously ruled or a newly constituted tribunal, in case the arbitrators who are reconvened cannot or do not wish to sit to review their award.” (271) Carefully applied, the decision properly permits arbitrators to correct the effects of egregious wrongdoing and should be seen as an essential element of the arbitrators' mandate. Reflecting that assessment, the 2011 Decree reforming French arbitration law codified the authority of French courts to remit awards to the arbitral tribunal, or if the arbitral tribunal cannot be reconstituted, to the Court of Appeal, in cases of fraud. (272)

A few other jurisdictions also permit fraud (or, in some cases, other grounds) to be raised before the members of an arbitral tribunal as a ground for relief from an award. Even in the absence of statutory authority to do so, the Swiss Federal Tribunal has held that Swiss courts may order the return of an award to the arbitral tribunal for reconsideration where an award was influenced by criminal acts. (273)

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Indeed, there is authority that a Swiss court can (and should) return an award to the original (or newly constituted) arbitral tribunal if new material evidence is discovered, even in the absence of fraud. (274) According to a leading decision by the Swiss Federal Tribunal:

“[R]evision may be sought when the petitioner subsequently discovers significant facts or decisive evidence which he could not adduce in the previous proceedings to the exclusion of facts and evidence which emerged only after the award. The new facts must be significant, *i.e.* they must be suitable to change the factual basis of the award so that an accurate legal evaluation could lead to another decision.” (275)

It is clear that only new facts, which were not and could not have been discovered during the arbitral proceedings, can provide grounds for revision under Swiss law. (276)

The Swiss court’s analysis, including its extension of the tribunal’s powers of revocation to cases involving newly-discovered evidence, has been approved by some commentators. (277) Arbitral tribunals have held that only Swiss courts have authority to remit an award to the arbitral tribunal (and that an arbitral tribunal cannot directly consider a request to revoke an award). (278)

Moreover, a number of awards have also discussed the possibility that arbitrators have “inherent powers,” under exceptional circumstances involving corruption, fraud, forgery, or false testimony, to revise their awards. In most cases, these awards have ultimately concluded that there was insufficient evidence of fraud or comparable irregularities to justify revising or revoking an award. Nonetheless, arbitral tribunals have generally recognized an inherent arbitral authority in appropriate cases to revise or revoke awards because of fraud. (279) As one award reasoned: ●

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“[A] court or Tribunal, including this international arbitral Tribunal, has an inherent power to take cognizance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents or other egregious ‘fraud on the Tribunal.’ Certainly, if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, this Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action.” (280)

Even more expansively, one ICC tribunal held that it had the authority to reconsider a previous award (albeit, a partial award in an arbitration that was still pending) based on considerations of fairness and equity, even in the absence of fraud or similar circumstances. The tribunal held that it could revise its award “where common sense, fairness or arbitral due process require it if circumstances have changed.” (281) The tribunal derived this implied authority from the parties’ arbitration agreement and authority under the ICC Rules to conduct the arbitral proceedings.

On balance, the existence of arbitral authority to revise or revoke awards, including final awards, on the basis of fraud and similar conduct is appropriate and desirable. Even in the absence of express authority in either national arbitration legislation or institutional rules, the courts and arbitral tribunals that have carefully considered the issue have concluded that arbitrators possess inherent authority to revise or revoke an award that was based on fraudulent or similarly-tainted evidence.

This is a basic and desirable aspect of any adjudicatory body’s authority to render a just and lawful decision and it is undesirable that a tribunal be denied the possibility of correcting the consequences of egregiously wrongful conduct. Equally, it is the arbitrators before and upon whom fraud was committed that will almost always be in the best position to identify and correct such abuses. (282) Moreover, submitting a request for revision to the arbitrators who rendered the initial award is both more efficient and more consistent with the parties’ agreement to submit their disputes to arbitration than is channeling such requests through national courts. (283) Given this, the better view is that both national arbitration legislation and agreements to arbitrate should be interpreted to impliedly authorize arbitrators to revoke or revise awards made on the basis of fraud or comparable abuses (and to authorize national courts to remit awards to arbitrators in such circumstances).

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It is true that revoking or revising a final award is an exceptional action, which should be exercised with particular care and reserve. (284) It is also true that this action by a tribunal is an exception to the usual rule that arbitrators are *functus officio* after making their final award, which should be construed narrowly.

Nonetheless, as discussed above, the *functus officio* doctrine is subject to important exceptions, (285) and it is appropriate to permit a further limited exception in cases of

fraud and similar circumstances. It is doubtful, however, that extension of revocation of an award to cases merely involving after-discovered evidence would be appropriate; that authority runs counter to the limited mandate of arbitrators and would invite continued efforts to relitigate disputes based on additional evidence. On balance, it is difficult to conclude that this would be consistent with the parties' agreement to arbitrate.

Finally, the arbitrators' authority to revise or revoke an award raises choice-of-law questions. In principle, it is the law of the arbitral seat that governs the arbitrator's authority to revoke or revise an award and defines the scope of that authority. That is the approach taken in practice by arbitrators (286) and that is consistent with choice of law analysis of other issues relating to a tribunal's authority. (287) Criticism of this approach, on the basis that it gives undue weight to the law of the arbitral seat, ignores the fundamental importance of the arbitral seat's legislation in defining the arbitral tribunal's authority. (288)

As discussed below, applications to annul an award or to deny recognition of an award may also be made in national courts on the basis of fraud. (289) Most international arbitration conventions (including the New York Convention) and most arbitration legislation (including the Model Law) omit specific reference to fraud as a grounds for annulment or non-recognition. (290) Nonetheless, fraud is an accepted basis for annulling or denying recognition of an award under either the rubric of public policy or otherwise. (291)

P 3417 Notably, an action to annul or deny recognition of an award does not necessarily provide the same relief as a request to revise an award. Where a court annuls an award, it does not have the power to rule on the merits of the parties' dispute or issue affirmative relief (beyond annulling the award). (292) In contrast, the revision of an award contemplates the possible alteration ● of the substantive terms of the original award, to impose a new and different resolution of the parties' dispute.

§24.08 INSTITUTIONAL APPEALS FROM INTERNATIONAL ARBITRAL AWARDS

Most institutional rules provide no basis for a dissatisfied party to challenge an award either within the arbitral procedure or before the relevant administering authority. (293) Instead, in most cases, institutional rules leave a dissatisfied party to pursue whatever judicial avenues may be available for setting aside an award. (294)

A few institutional arbitration regimes take a different approach and provide for the possibility of "internal" appellate review of an award. The leading example of such a structure is ICSID, where the ICSID Convention provides for the selection of a review tribunal to consider applications to nullify awards made by ICSID tribunals. (295)

A request to nullify an ICSID award must be based on a limited number of grounds laid down in Article 52(1) of the ICSID Convention. These include claims that the tribunal was not properly constituted, that the tribunal manifestly exceeded its power, that there was corruption on the part of a member of the tribunal, that there has been some serious departure from a fundamental rule of procedure, or that the award failed to state the reasons on which it is based. (296) The parties can make an annulment application within 120 days. (297)

P 3418 An *Ad Hoc* Committee is selected to decide the request for annulment (with no member of the original tribunal and no person who has been involved in the original procedure being permitted to sit on the *Ad Hoc* Committee). (298) The Committee can either confirm or annul the award in whole or in part, but has no power to modify its content. (299) In case of annulment, the ● matter will be brought before a new tribunal at the request of either of the parties. (300)

An ICSID *Ad Hoc* Committee is not a court of appeal. (301) It is strictly limited to the grounds of annulment set forth in Article 52(1) of the ICSID Convention, and the Committee cannot revise the decision of the tribunal even if it believes the merits have been wrongly decided in the award. (302) Between 2001 and 2019, 293 ICSID awards were made, and 100 annulment applications were filed; of these applications for annulment, 60 applications were rejected, 26 annulment proceedings were discontinued and 14 applications were successful in annulling the award in part or in full. (303)

P 3419 ICSID was recently requested to reaffirm the limited nature of the annulment process (following several controversial annulment decisions, where annulment panels arguably adopted unduly expansive conceptions of their annulment authority). (304) In response, ICSID issued a discussion paper in August 2012 which affirmed the limited nature of annulment proceedings under Article 52 of the Convention. (305) Despite this, many practitioners have increasing doubts ● as to the scope and predictability of ICSID annulment decisions, raising broader questions about the wisdom of internal institutional review processes generally. (306)

A limited number of other institutional arbitration regimes also provide for internal appellate review of arbitral awards. A leading example is the Grain and Feed Trade Association ("GAFTA"). The GAFTA Arbitration Rules provide that a party may appeal to a standing Board of Appeal within 30 days of a GAFTA award. (307) In contrast to the ICSID *Ad Hoc* Committee, the Board of Appeal can rehear the entire case (and is empowered to admit new evidence). (308) The GAFTA Board of Appeal has power to vary or amend the original award, to award the payment of interest and to award the payment of costs of such appeal. (309)

In sport-related matters, the Appellate Division of the Court of Arbitration for Sport (“CAS”) serves as an appeals body. Pursuant to Rule 47 of the 2019 Code of Sport-Related Arbitration, the CAS Appellate Division hears appeals from the decisions of sports federations, associations, or sports-related bodies, (310) and awards rendered by the CAS while acting as a tribunal of first instance. (311)

Provisions for internal institutional appeals are a departure from the general principles of finality and *res judicata*, (312) and arguably compromise objectives of speed and efficiency. (313) Nonetheless, part of the attraction of the arbitral process is the parties’ autonomy to adopt procedures tailored to their particular needs. (314) Where parties agree to internal appellate review, there is no reason not to give full effect to this mechanism. Indeed, this result is required by both the New York Convention and modern arbitration legislation. (315) Nonetheless, the general absence of institutional review mechanisms, and the mixed experiences under ICSID’s annulment procedures, counsel strongly against adopting such approaches. ●

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References

- 1) Prior to its delivery to the parties, the arbitrators are in principle free to revise or make corrections or modifications to the award. See §23.06[A].
- 2) For examples, see *Hylev. Doctor’s Assocs., Inc.*, 198 F.3d 368, 371 (2d Cir. 1999) (award was ambiguous as to identity of party or parties which arbitral tribunal intended to subject to award’s remedy); *Judgment of 12 January 2005*, DFT 131 III 164 (Swiss Fed. Trib.) (rejecting application to set aside award rectifying amount to be paid from \$71,100,000 (as provided in initial award) to \$107,500,000).
- 3) See §§1.02[B][5] & [7]; §15.01[A].
- 4) See §24.03.
- 5) See §24.04.
- 6) See §24.05.
- 7) See, e.g., Clay, *The Role of the Arbitrator in the Execution of the Award*, 20(1) ICC Ct. Bull. 43, ¶15 (2009); Gaitis, *International and Domestic Arbitration Procedure: The Need for A Rule Providing A Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 Am. Rev. Int’l Arb. 9, 78-79 (2004); Giovanni, *When Do Arbitrators Become Functus Officio?*, in L. Lévy & Y. Derains (eds.), *Liber Amicorum Serge Lazareff* 305 (2011); Hascher, *La Révision en Arbitrage International*, in *Liber Amicorum Claude Reymond* 111 (2004); Hascher, *L’Autorité de la Chose Jugée des Sentences Arbitrales*, *Travaux du Comité Français du Droit International Privé 2000-2002* 17, 31-32 (2004); Isaacs, *Life After Death: The Arbitral Tribunal’s Role Following Its Final Award*, in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* 358 (2018); Knutson, *The Interpretation of Final Awards: When Is A Final Award Not Final?*, 11(2) J. Int’l Arb. 99, 108 (1994); Schwartz, *Thoughts on the Finality of Arbitral Awards*, in L. Lévy & Y. Derains (eds.), *Liber Amicorum Serge Lazareff* 569 (2011); Webster, *Functus Officio and Remand in International Arbitration*, 27 ASA Bull. 441 (2009).
- 8) See, e.g., *U.S. Life Ins. Co. v. Super. Nat’l Ins. Co.*, 591 F.3d 1167, 1177 n.11 (9th Cir. 2010); *TranstechIndus., Inc. v. A&ZSeptic Clean*, 270 F.App’x 200, 210 n.7 (3d Cir. 2008); *Sterling China Co. v. GlassMolders, Pottery, Plastics & Allied Workers Local 24*, 357 F.3d 546, 553-54 (6th Cir. 2004); *GlassMolders, Pottery, Plastics & Allied Workers Int’l Union, AFL-CIO, CLC, Local 182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 845 (7th Cir. 1995); *Local P-9, United Food & Commercial Workers Int’l Union v. George A. Hormel & Co.*, 776 F.2d 1393, 1394 (8th Cir. 1985); *Mercury Oil Refining Co. v. Oil Workers Int’l Union*, 187 F.2d 980, 983 (10th Cir. 1951) (*functus officio* is “a general rule in common law arbitration that when arbitrators have executed their awards and declared their decision they are *functus officio* and have no power to proceed further”); *Judgment of 2 May 2012*, DFT 4A_14/2012 (Swiss Fed. Trib.) (“once the final award is issued, the arbitral tribunal sees its jurisdiction disappear and becomes *functus officio*, with some exceptions”). See also Isaacs, *Life After Death: The Arbitral Tribunal’s Role Following Its Final Award*, in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* 357, 358 (2018) (“the parties cannot prolong the arbitration proceedings by repeated applications to the tribunal which would result in the tribunal having to revisit matters which it has already decided”); Webster, *Functus Officio and Remand in International Arbitration*, 27 ASA Bull. 441, 441 (2009) (“The principle that an arbitral tribunal is *functus officio* when it renders its final award is sacrosanct, subject to limited exceptions for correction and interpretation of awards and in some cases to remedial action with respect to awards”).
- 9) *GlassMolders, Pottery, Plastics & Allied Workers Int’l Union, AFL-CIO, CLC, Local 182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 845 (7th Cir. 1995).
- 10) *T.CoMetals, LLC v. Dempsey Pipe & Supply*, 592 F.3d 329, 342 (2d Cir. 2010). See also *Am. Intl. Specialty Lines Ins. Co. v. Allied Capital Corp.*, 167 A.D.3d 142, 149 (N.Y. App. Div. 2018), *rev’d*, 149 N.E.3d 33 (N.Y. 2020) (“when parties request that an arbitrator finally determine an issue and the arbitrator has done so, the parties must be confident that the determination cannot and will not be revisited by the arbitrator and that the award determining such issue is final”); *KXReins. Co. v. Gen. Reins. Corp.*, 2008 WL 4904882, at *4 (S.D.N.Y.).

- 11) *FidelitasShipping Co. v. VOExportchleb* [1965] 1 Lloyd's Rep. 223, 231 (English Ct. App.). See also *Emirates Trading Agency LLC v. Sociedad de Fomento Industrial Pvt Ltd* [2015] EWHC 1452, ¶26 (Comm) (English High Ct.) ("Absent agreement of the parties, the tribunal may only reconsider or renew its decision if the matter is remitted following a successful challenge to the award in court"); *Dawes v. Treasure & Son Ltd* [2010] EWHC 3218 (TCC) (English High Ct.); *Gannet Shipping v. Easttrade Commodities* [2001] EWHC 483, ¶13 (QB) (English High Ct.) (arbitrator becomes *functus officio* when award is made and published).
- 12) *Chandler v. Ass'nof Architects (Alberta)*, [1989] 2 SCR 848, 867 (Canadian S.Ct.).
- 13) See §13.03_[C]; §13.04[E].
- 14) See §23.01_[A]; §27.01_[B]; §§27.02[A]-[B].
- 15) See §12.06_[A][8]; §§12.06[H]-[I]; §13.03[C].
- 16) New York Convention, Art. III ("Each Contracting State shall recognize arbitral awards as binding ...").
- 17) A few national arbitration statutes are silent with regard to the termination of the arbitrator's mandate and the *functus officio* doctrine. Although the issue does not arise frequently in practice, Article II of the New York Convention requires Contracting States to recognize and give effect to the material terms of parties' arbitration agreements, which include provisions regarding corrections, interpretations, or supplementations. See §2.03_[C]; §11.04_[A][3]; §§15.04[A]-[B]; §§17.02[A][1]-[3]; §17.03_[B]; §18.02[B]. In principle, if a Contracting State refused to give effect to agreements on such issues, it would presumptively violate the Convention.
- 18) Inter-American Convention, Art. 3; European Convention, Arts. VIII-IX. The one exception in this regard is the ICSID Convention, which provides for correction, interpretation and supplementation of ICSID awards, as well as an internal annulment procedure. See ICSID Convention, Arts. 49-52; C. Schreuer *et al.*, *The ICSID Convention: A Commentary* 840-1095 (2d ed. 2009).
- 19) Webster, *Functus Officio and Remand in International Arbitration*, 27 ASA Bull. 441, 442 (2009) ("the principle of *functus officio* is not absolute").
- 20) UNCITRAL Model Law, Arts. 32(1), (3). The Model Law's drafting history suggests that the termination of proceedings was treated as being relevant for determining when a limitation period begins to run again, or when a party may pursue its claim in another forum. See H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 866-69 (1989).
- 21) UNCITRAL Model Law, Arts. 33, 34(4). See §24.02_[B][1]; §24.03_[B][1]; §24.04[B]. See Bantekas & I. Ullah, *Article 33: Correction and Interpretation of Award; Additional Award*, in Bantekas *et al.* (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 850 (2020) ("Once a tribunal has issued a final award and becomes *functus officio*, it cannot generally re-open the case. However, this presumption is subject to exceptions for the purposes of correction, interpretation of the award and the making of an additional award.").
- 22) UNCITRAL Model Law, Arts. 33, 34(4).
- 23) Courts in Model Law jurisdictions have held that, upon the termination of the arbitral tribunal's mandate, the tribunal ceases to possess jurisdiction or have power to reopen the case or make any other award. *Judgment of 20 December 2001*, 1 Sch 13/01 (Oberlandesgericht Stuttgart) (setting aside award which revised earlier final award); *Judgment of 11 December 2000*, 11 SchH 01/00 (Oberlandesgericht Dresden).
- 24) French Code of Civil Procedure, Art. 1485(1) ("The award discharges the arbitral tribunal from the dispute the award decides"), Art. 1485(2) ("However, at a party's request, the arbitral tribunal may interpret the award, rectify clerical errors and omissions affecting the award, or supplement the award if the tribunal has failed to decide a claim. The arbitral tribunal shall decide after having heard the parties or having called upon them [to be heard].").
- 25) German ZPO, §§1056, 1058-1059.
- 26) Belgium Judicial Code, Art. 1714(3) ("The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings and the notification of the award ...").
- 27) Netherlands Code of Civil Procedure, Art. 1058(2) ("Without prejudice to the provisions of Articles 1060 and 1061, the mandate of the arbitral tribunal shall terminate upon the deposit of the last final award with the Registry"), Arts. 1061-62.
- 28) Swedish Arbitration Act, §27 ("The assignment of the arbitrators shall be deemed complete when they have delivered a final award, unless otherwise provided in §§32 or 35").
- 29) Hong Kong Arbitration Ordinance, §68.
- 30) Japanese Arbitration Law, Art. 40(3) ("The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. Provided, the acts prescribed in the provisions of articles 41 through 43 may be made.").
- 31) See, e.g., Austrian ZPO, §608(3); Spanish Arbitration Act, Art. 38(1); Singapore International Arbitration Act, Art. 32(3); Indian Arbitration and Conciliation Act, §33; Russian International Arbitration Law, Art. 32(3); Ukrainian Arbitration Law, Art. 32(3); Costa Rican Arbitration Law, Art. 32(1).
- 32) U.S. FAA, 9 U.S.C. §§9-11; §§24.03[B][5]-[6]; §24.04[B]. As discussed below, the FAA's provision for judicial (rather than arbitral) modifications and corrections is unusual. See §24.03_[B][5]; §24.04_[B]; §24.05[A].

- 33) In contrast, the U.S. Revised Uniform Arbitration Act addresses the topic, confirming the arbitrators' authority with regard to corrections under state law. U.S. Revised Uniform Arbitration Act, §20 (2000) (arbitrator may "modify or correct an award"). Although generally preempted by the FAA in international matters, this grant of authority arguably is effective to supplement a tribunal's powers to resolve the parties' dispute. Cf. *Spector v. Torenberg*, 852 F.Supp. 201, 206-07 (S.D.N.Y. 1994) ("Since the arbitration took place in New York, the authority of the arbitrators to modify their award is governed by [New York law]").
- 34) See, e.g., *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544, 548 (2d Cir. 2018); *SBC Advanced Solutions, Inc. v. Commc'nsWorkers of Am., Dist. 6*, 794 F.3d 1020, 1031 (8th Cir. 2015); *T.CoMetals, LLC v. Dempsey Pipe & Supply*, 592 F.3d 329, 342 (2d Cir. 2010) ("[The *functus officio* doctrine] applies absent an agreement by the parties to the contrary"); *U.S. Life Ins. Co. v. Super. Nat'l Ins. Co.*, 591 F.3d 1167, 1177 (9th Cir. 2010); *E. Seaboard Constr. Co. v. GrayConstr., Inc.*, 553 F.3d 1, 4-5 (1st Cir. 2008); *TranstechIndus., Inc. v. A&ZSeptic Clean*, 270 F.App'x 200, 209-10 (3d Cir. 2008); *Local 2322, Int'lBhdof Elec. Workers v. Verizon New England, Inc.*, 464 F.3d 93, 97 (1st Cir. 2006); *Sterling China Co. v. GlassMolders, Pottery, Plastics & Allied Workers Local 24*, 357 F.3d 546, 553-54 (6th Cir. 2004); *Brown v. Witco Corp.*, 340 F.3d 209, 218-19 (5th Cir. 2003); *GlassMolders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 846-48 (7th Cir. 1995); *Domino Group, Inc. v. Charlie Parker Memorial Found.*, 985 F.2d 417, 420-21 (8th Cir. 1993); *Verizon Pa. LLC v. Commc'nsWorkers of Am., AFL-CIO, Local 1300*, 2020 WL 1508463, at *8 (E.D. Pa.); *Wakemanv.Aqua2Acquisitions, Inc.*, 2011 WL 666028, at *4 (D. Minn.); *La. Health Serv.Indem. Co. v. Gambro AM*, 756 F.Supp.2d 760, 767 (W.D. La. 2011); *Unite Here Local 26 v. Taj Hotel Boston*, 731 F.Supp.2d 95, 102 (D. Mass. 2010); *Cat Charter LLC v. Schurtenberger*, 691 F.Supp.2d 1339, 1345 (S.D. Fla. 2010); *Global Reins. Corp. v. Argonaut Ins. Co.*, 548 F.Supp.2d 104, 110 n.41 (S.D.N.Y. 2008); *Longo de Puerto Rico, Inc. v. United Steelworkers of Am.*, 463 F.Supp.2d 159, 162 (D.P.R. 2006); *Fred Meyer, Inc. v. Teamsters Local 206*, 463 F.Supp.2d 1186, 1192 (D. Or. 2006); *Collins v.D.R. Horton, Inc.*, 361 F.Supp.2d 1085, 1109-10 n.4 (D. Ariz. 2005); *Am. Centennial Ins. Co. v. Arion Ins. Co.*, 1990 WL 52295, at *4 (S.D.N.Y.).
- 35) *Office & Prof'l Employees Int'l Union v. Brownsville Gen. Hosp.*, 186 F.3d 326, 331 (3d Cir. 1999).
- 36) *La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967).
- 37) *GlassMolders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 846 (7th Cir. 1995). The court went on to observe that "[t]he flaw in the analogy is that the judge's resignation does not deprive litigants of an opportunity to seek reconsideration of his decisions," which assists in explaining both statutory regimes and institutional rules allowing for corrections, interpretations and supplementations and common law decisions relaxing the historic *functus officio* rule.
- 38) See, e.g., *Bosackv.Soward*, 586 F.3d 1096, 1102 (9th Cir. 2009); *Office & Prof'l Employees Int'l Union v. Brownsville Gen. Hosp.*, 186 F.3d 326, 331 (3d Cir. 1999); *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 991 (3d Cir. 1997); *Ottleyv. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987); *Local P-9, United Food & Commercial Workers Int'l Union v. George A. Hormel & Co.*, 776 F.2d 1393, 1394 (8th Cir. 1985); *Anderson v. Norfolk & W. Railway Co.*, 773 F.2d 880, 883 (7th Cir. 1985); *Lovelace v. Showroom Auto, LLC*, 2019 WL 3254949, at *6 (E.D.N.Y.); *Ray v. Chafetz*, 236 F.Supp.3d 66, 80-81 (D.D.C. 2017) ("once an arbitrator has made and published a final award, his authority is exhausted and he ... can do nothing more in regard to the subject matter of the arbitration") (quoting *Hill v. Wackenhut Servs. Int'l*, 971 F.Supp.2d 5, 12 (D.D.C. 2013)); *Unite Here Local 26 v. Taj Hotel Boston*, 731 F.Supp.2d 95, 102 (D. Mass. 2010); *Halliburton EnergyServs., Inc. v. NL Indus.*, 553 F.Supp.2d 733, 772 (S.D. Tex. 2008); *Am. Centennial Ins. Co. v. Arion Ins. Co.*, 1990 WL 52295, at *4 (S.D.N.Y.); *United Mine Workers of Am., Dist. 28 v. Island Creek Coal Co.*, 630 F.Supp. 1278, 1279 (W.D. Va. 1986) ("Once an arbitrator has issued his final ... award, then he becomes *functus officio* and lacks power to reconsider or amend"); *Salt Lake Pressmen v. Newspaper Agency Corp.*, 485 F.Supp. 511, 515 (D. Utah 1980).
- 39) *Colonial Penn Ins. Co. v. OmahaIndem. Co.*, 943 F.2d 327, 331 (3d Cir. 1991).

- 40) See, e.g., *UnitedBhdof Carpenters & Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 277 (2d Cir. 2015); *La. Health Serv.Indem. Co. v. Gambro AB*, 422 F.App'x 313, 314 (5th Cir. 2011) (dismissing appeal from district court decision applying *functus officio* doctrine to partial final arbitral award); *Bosackv.Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009) (*functus officio* doctrine applies to interim awards but only if they are deemed final); *Trade & Transp., Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191, 195 (2d Cir. 1991) (“[I]f the parties agree that the panel is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so. Second, once arbitrators have finally decided the submitted issues, they are, in common-law parlance, ‘*functus officio*,’ meaning that their authority over those questions is ended.”); *Swenson v. Bushman Inv. Props., Ltd*, 870 F.Supp.2d 1049, 1054 (D. Idaho 2012) (“interim award may be deemed final for *functus officio* purposes if the award states it is final, and if the arbitrator intended the award to be final”); *Halliburton EnergyServs., Inc. v. NL Indus.*, 553 F.Supp.2d 733, 772-73 (S.D. Tex. 2008); *New United MotorMfg, Inc. v. United Auto Workers Local 2244*, 617 F.Supp.2d 948, 956-57 (N.D. Cal. 2008); *Blake v.Transcommc’ns, Inc.*, 2004 WL 955893, at *6-7 (D. Kan.); *Andrea Doreen, Ltd v.BldgMaterial Local Union 282*, 250 F.Supp.2d 107, 112 (E.D.N.Y. 2003); *Am. Int’l Specialty Lines Ins. Co. v. Allied Capital Corp.*, 149 N.E.3d 33, 37 (N.Y. 2020). See also Gaitis, *International and Domestic Arbitration Procedure: The Need for A Rule Providing A Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 Am. Rev. Int’l Arb. 9, 78-84 (2004).
- 41) See §24.03_[B][5]; §24.05_[A]; *Gen. Re Life Corp. v. Lincoln Nat’l Life Ins. Co.*, 909 F.3d 544, 548-49 (2d Cir. 2018) (recognizing exception to *functus officio* where award fails to address contingency that later arises or is susceptible to more than one interpretation); *Barrancov. 3D Sys. Corp.*, 734 F.App’x 885, 888-89 (4th Cir. 2018) (“award did not violate *functus officio* ... because it contained only minor changes for purposes of clarification”); *Local 1982, Int’l Longshoremen’sAss’nv. Midwest Terminals of Toledo Int’l, Inc.*, 694 F.App’x 985, 988 (6th Cir. 2017) (“[arbitral tribunal’s] failure to specify the remedy in definite terms therefore makes this arbitration award ripe for clarification”); *E. Seaboard Constr. Co. v.GrayConstr., Inc.*, 553 F.3d 1, 4 (1st Cir. 2008); *TranstechIndus., Inc., v.A&ZSeptic Clean*, 270 F.App’x 200, 210 (3d Cir. 2008); *U.S. Energy Corp. v.Nukem, Inc.*, 400 F.3d 822, 836 (10th Cir. 2005) (“It is not the role of the courts to interpret vague arbitration awards. ... Therefore, a remand to the arbitral panel for clarification is necessary.”); *Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000); *Teamsters Local 312 v.Matlack, Inc.*, 118 F.3d 985, 991-92 (3d Cir. 1997); *GlassMolders, Pottery, Plastics & Allied Workers Int’l Union, AFL-CIO,CLC, Local182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 846 (7th Cir. 1995); *Colonial Penn Ins. Co. v. OmahaIndem. Co.*, 943 F.2d 327, 332 (3d Cir. 1991); *McClatchy Newspapers v. Cent. Valley Typographical Union No. 46*, 686 F.2d 731, 734 n.1 (9th Cir. 1982); *United Elec., Radio & Mach. Workers of Am. v. Gen. Elec. Co.*, 2020 WL 1542375, at *3 (W.D. Pa.) (“when the remedy awarded by the arbitrator[] is ambiguous, a remand for clarification of the intended meaning of an arbitration award is appropriate”) (quoting *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 334 (3d Cir. 1991)); *Verizon Pa. LLC v.Commc’nsWorkers of Am., AFL-CIO, Local 1300*, 2020 WL 1508463, at *8 (E.D. Pa.); *Int’lAss’nof Machinists & Aerospace Workers v. Hawaiian Airlines*, 2010 WL 4688809, at *5 (D. Haw.); *Int’lBhdof Teamsters Local 177 v. United Parcel Serv. of Am., Inc.*, 2009 WL 3234541, at *4 (D.N.J.); *Pittsburgh Metro Area Postal Workers’ Union, AFL-CIO v. U.S. Postal Serv.*, 2008 WL 1775502, at *10 (W.D. Pa.); *Employers’ Surplus Lines Ins. Co. v. Global Reins. Corp.*, 2008 WL 337317, at *4 (S.D.N.Y.). See also L. Edmonson (ed.), *Domke on Commercial Arbitration* §26.1 (3d ed. & Update 2013).

As noted above, U.S. courts will also permit an arbitral tribunal to retain jurisdiction over a dispute where ongoing issues relating to relief that it has granted may arise. See §24.05[A].

- 42) See, e.g., *Apex Towing Co. v. Trading Corp. of Pakistan*, 1986 WL 10713, at *1 (S.D.N.Y.); *Siljestadv.HidecaTrading, Inc.*, 541 F.Supp. 58, 61 (S.D.N.Y. 1981).
- 43) See, e.g., *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1220 (5th Cir. 1990); *ProodosMarine Carriers Co. v. Overseas Shipping & Logistics Co.*, 578 F.Supp. 207, 212 (S.D.N.Y. 1984).
- 44) See, e.g., *Unite Here! Local 19 v. Sutter’s Place, Inc.*, 2011 WL 3795070, at *2 (N.D. Cal.) (questions regarding scope of arbitrator’s jurisdiction to oversee implementation of award were for arbitrator to determine, where parties agreed that arbitrator would retain jurisdiction for purpose of resolving disputes about implementation of award).
- 45) *Int’lBhdof Teamsters v.Silverstate*, 109 F.3d 1409, 1411 (9th Cir. 1997); *CLC, Local182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995).
- 46) See, e.g., *Int’lBhdof Elec. Workers, Local Union 824 v. Verizon Florida, LLC*, 803 F.3d 1241, 1247-48 (11th Cir. 2015) (“some courts have been critical of the doctrines and have opined that an arbitrator *should* have the inherent power to reconsider his award within a reasonable period of time”); *E. Seaboard Constr. Co. v.GrayConstr., Inc.*, 553 F.3d 1, 4 (1st Cir. 2008) (noting “how limited the doctrine of *functus officio* has become”); *GlassMolders, Pottery, Plastics & Allied Workers Int’l Union, AFL-CIO,CLC, Local182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995); *Reg’lLocal Union No. 846 v. Gulf Coast Rebar, Inc.*, 194 F.Supp.3d 1096, 1100 (D. Ore. 2016).

- 47) *Halliburton Energy Servs., Inc. v. NL Indus.*, 553 F.Supp.2d 733, 772 (S.D. Tex. 2008). See also *Reg'l Local Union No. 846 v. Gulf Coast Rebar, Inc.*, 194 F.Supp.3d 1096, 1100 (D. Ore. 2016) (“the doctrine of *functus officio* is so ‘riddled with exceptions’ that ‘whether it can even be said to exist in labor arbitration is uncertain’”) (quoting *Glass Molders, Pottery, Plastics & Allied Workers Int’l Union*, 56 F.3d at 846).
- 48) *Glass Molders, Pottery, Plastics & Allied Workers Int’l Union, AFL-CIO, CLC, Local 182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 847.
- 49) *T.CoMetals, LLC v. Dempsey Pipe & Supply*, 592 F.3d 329, 342-46 (2d Cir. 2010). See also *Glass Molders, Pottery, Plastics & Allied Workers Int’l Union, AFL-CIO, CLC, Local 182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 847 (“*Functus officio* is merely a default rule, operative if the parties fail to provide otherwise. There is no legal bar to authorizing arbitrators to reconsider their decisions, and some rules for arbitrators ... do authorize reconsideration.”); *Carlson v. Norwegian Cruise Line Holdings, Ltd.*, 2018 WL 3824355, at *7 (D.V.I.) (“*Functus officio* is merely a default rule, operative if the parties fail to provide otherwise”) (quoting *Glass, Molders, Pottery, Plastics & Allied Workers Int’l Union*, 56 F.3d at 848).
- 50) See §24.03[B][5].
- 51) Swiss Law on Private International Law, Art. 190(1).
- 52) B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶1637 (3d ed. 2015); Berti & Schnyder, in S. Berti (ed.), *International Arbitration in Switzerland* Art. 190, ¶14 (2000) (“Upon notification of the award the arbitrators themselves are bound thereby. ... In the absence of a request by the parties to rectify or clarify the award, and unless they are ordered to do so by a state court upholding a motion to set aside, the arbitrators have no power to make any changes to the award.”). See §11.04[C][2][j]; §23.01[H]; §24.02[B][3]; §24.03[B][3].
- 53) Berti & Schnyder, in S. Berti (ed.), *International Arbitration in Switzerland* Art. 190, ¶13 (2000).
- 54) B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶1521 (3d ed. 2015); Berti & Schnyder, in S. Berti (ed.), *International Arbitration in Switzerland* Art. 190, ¶97 (2000).
- 55) Berti & Schnyder, in S. Berti (ed.), *International Arbitration in Switzerland* Art. 190, ¶97 (2000). See also P. Lalive, J.-F. Poudret & C. Reymond, *Le Droit de l'Arbitrage Interne et International en Suisse* Art. 191, ¶6 (1989).
- The 2011 Swiss Code of Civil Procedure, which applies to domestic arbitration, filled this gap by granting either party the right to seek correction, interpretation, or supplementation of the award. See Swiss Code of Civil Procedure, Art. 388.
- 56) *Judgment of 2 November 2000*, DFT 126 III 524, 527 (Swiss Fed. Trib.).
- 57) The Swiss Federal Tribunal was presented with an award in which the arbitrators found each party liable for a specified sum “with interest,” and a subsequent award holding that the interest referred to in the initial award was compound interest. *Id.* It is unclear whether the arbitrators or the Swiss Federal Tribunal considered the arbitrators’ second award to be a correction or an interpretation of their original award, but whatever its precise denomination, the Federal Tribunal upheld it. The latter conclusion appears more consistent with the terms of the arbitrators’ second award. See Kaufmann-Kohler & Rigozzi, *Correction and Interpretation of Awards in International Arbitrations Held in Switzerland*, 16(4) *Mealey’s Int’l Arb. Rep.* 25, ¶¶6-8, 17-19 (2001). The arbitral tribunal referred to its second decision as an “additional award,” although this is difficult to accept: the award was clearly directed towards interpreting its initial award (by stating that “interest” meant “compound interest”) or correcting its initial award (by stating that “interest” should have said “compound interest”); in contrast, the tribunal’s second award did not hold that the arbitrators had failed initially to decide a claim for compound interest.
- 58) *Anon.* (1468) YB, 8 Edw 4, fo 1, pl 1.
- 59) *Brooke v. Mitchell* [1840] 6 M&W 473 (English Ct. Exch. Cham.).
- 60) *Fidelitas Shipping Co. v. VO Exportchleb* [1965] 1 Lloyd’s Rep. 223, 231 (English Ct. App.).
- 61) *Emirates Trading Agency LLC v. Sociedad de Fomento Industrial Pvt Ltd* [2015] EWHC 1452, ¶26 (Comm) (English High Ct.).
- 62) See §24.02[B][4]. A tribunal may wish to do this in order to be able to either supervise implementation of its award or address post-award developments. This situation should be distinguished from cases where a tribunal may wish to reserve deciding an issue that has been referred to it for determination at a later stage of the arbitral proceedings (which may be done by issuing a partial award) and cases where a tribunal may wish to retain jurisdiction to oversee compliance or implementation of an award (for instance, directing parties to take certain actions in order to give effect to the award, without varying or amending the issues that have been decided). See, e.g., *Konkola Copper Mines plc v. U&M Mining Zambia Ltd* [2014] EWHC 2374, ¶¶96-97 (Comm) (English High Ct.). But see D. Sutton, J. Gill & M. Gearing, *Russell on Arbitration*, ¶6-078 n.313 (24th ed. 2015) (questioning whether such award could be considered final or complete).

- 63) See *Re Tandy & Tandy* (1841) 9 Dowl 1044, 1047-48 (English QB Prac. Ct.) (“if an arbitrator does not decide the matter referred to him, at the time he makes his award, but reserves to himself a future power to act when his power is gone, that is an excess of authority, as he cannot, in that way, keep alive his authority”); W. H. Watson, *A Treatise on the Law of Arbitration and Awards* 65-66 (1825) (“Any reservation of future power by the arbitrators in their award ... would render the award totally void. As, if the arbitrators reserve to themselves the power of settling a security, or the power of explaining any doubt that may arise on the meaning of any part of the award, or the power of altering any part or the whole of the award, these are such reservations of the arbitrator’s power, as would render an award void.”).
- 64) See, e.g., English Arbitration Act, 1996, §71(3). See *Sans Souci Ltd v. VRL Serv. Ltd* [2012] UKPC 6, ¶¶10, 17 (“The reopening by the arbitrators of findings which there were no grounds for remitting and which they had already conclusively decided would therefore have been contrary to the scheme of the Arbitration Act”).
- 65) See e.g. *Anon.* (1468) YB, 8 Edw 4, fo 1, pl 1; *Brooke v. Mitchell* [1840] 6 M&W 473 (English Ct. Exch. Cham.); *Fidelitas Shipping Co. v. VO Exportchleb* [1965] 1 Lloyd’s Rep. 223, 231 (English Ct. App.); *Emirates Trading Agency LLC v. Sociedad de Fomento Industrial Pvt Ltd* [2015] EWHC 1452, ¶26 (Comm) (English High Ct.).
- 66) See §24.02[B][1].
- 67) See §§24.02[B][2]-[3].
- 68) See §12.01[A]; §12.01[C][1].
- 69) See §§1.02[B][5]-[7].
- 70) Some authorities have emphasized that arbitrators do not share the “tradition which surrounds judicial conduct.” *La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967).
- 71) For commentary, see Bantekas & Ullah, *Article 33: Correction and Interpretation of Award; Additional Award*, in I. Bantekas et al. (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 846-57 (2020); Berti & Schnyder, in S. Berti (ed.), *International Arbitration in Switzerland* Art. 190, ¶97 (2000); P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 435-42 (4th ed. 2019); M. de Boissésou, *Le Droit Français de l’Arbitrage Interne et International* ¶397 (2d ed. 1990); Bühler, *Correction and Interpretation of Awards and Advances on Costs*, in ICC, *The New 1998 ICC Rules of Arbitration: Proceedings of the ICC Conference Presenting the Rules* 53 (1997); Bühler & Jarvin, *The Arbitration Rules of the International Chamber of Commerce (ICC)*, in F.-B. Weigand (ed.), *Practitioner’s Handbook on International Arbitration* 276-78 (2002); Bühler & Jarvin, *The Arbitration Rules of the International Chamber of Commerce (ICC)*, in F.-B. Weigand (ed.), *Practitioner’s Handbook on International Commercial Arbitration* 1133, ¶¶2.234-36, 5.245-47, 6.188, 7.222-24, 13.230-32 (2d ed. 2009); Daly, *Correction and Interpretation of Arbitral Awards Under the ICC Rules of Arbitration*, 13(1) ICC Ct. Bull. 61 (2002); de C. Frôes, *Correction and Interpretation of Arbitral Awards*, in *Liber Amicorum in Honour of Robert Briner* 285 (2005); Do, *Plaidoyer pour la Reconnaissance Effective du Renvoi de la Sentence à l’Arbitre pour Éviter l’Annulation dans les Pays de Civil Law*, 2018 Rev. Arb. 337; J. Fry, S. Greenberg & F. Mazza, *The Secretariat’s Guide to ICC Arbitration* ¶¶3-1256 to 1303 (2012); Gaitis, *International and Domestic Arbitration Procedure: The Need for A Rule Providing A Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 Am. Rev. Int’l Arb. 9 (2004); Garnier, *Interpréter, Rectifier et Compléter les Sentences Arbitrales Internationales*, 1995 Rev. Arb. 565; Giovanni, *When Do Arbitrators Become Functus Officio?*, in L. Lévy & Y. Derains (eds.), *Liber Amicorum Serge Lazareff* 305 (2011); Hascher, *La Révision en Arbitrage International*, in *Liber Amicorum Claude Reymond* 111 (2004); Hascher, *L’Autorité de la Chose Jugée des Sentences Arbitrales*, *Travaux du Comité Français du Droit International Privé 2000-2002* 17 (2004); Isaacs, *Life After Death: The Arbitral Tribunal’s Role Following Its Final Award*, in N. Kaplan & M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* 357 (2018); Kaufmann-Kohler & Rigozzi, *Correction and Interpretation of Awards in International Arbitrations Held in Switzerland*, 16(4) Mealey’s Int’l Arb. Rep. 25 (2001); Kirby, *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.: Are There Really No Limits on What An Arbitrator Can Do in Correcting An Award?*, 27 J. Int’l Arb. 519 (2010); Kühn, *Rectification and Interpretation of Arbitral Awards*, 7(2) ICC Ct. Bull. 78 (1996); Smit, *Correcting Arbitral Mistakes*, 10 Am. Rev. Int’l Arb. 225 (1999); H. Verbist, E. Schäfer & C. Imhoos, *ICC Arbitration in Practice* 193-94 (2d ed. 2015); ICC, *Extracts from ICC Addenda and Decisions Rendered Under Article 29 of the ICC Rules of Arbitration*, 13(1) ICC Ct. Bull. 72 (2002); Vollmer & Bedford, *Post-Award Arbitral Proceedings*, 15(1) J. Int’l Arb. 37 (1998); Webster, *Functus Officio and Remand in International Arbitration*, 27 ASA Bull. 441 (2009); T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶38-01 to 26 (3d ed. 2019); T. Webster & M. Bühler, *Handbook of ICC Arbitration* ¶¶36-1 to 29 (4th ed. 2018); Williams & Buchanan, *Corrections and Interpretations of Awards Under Article 33 of the Model Law*, 4 Int’l Arb. L. Rev. 119 (2001).
- 72) See §5.01[B][2]. As discussed above, Article II of the Convention requires Contracting States to give effect to arbitration agreements, an obligation which would extend to provisions regarding corrections. See §5.01[B][2]. The same is true of the Inter-American Convention, the European Convention and the ICSID Convention. See C. Schreuer et al., *The ICSID Convention: A Commentary* Art. 49, ¶¶28-77 (2d ed. 2009).
- 73) See §24.03[B]; UNCITRAL Model Law, Arts. 1(2), 33.

- 74) See *Partial Award in ICC Case No. 5835*, discussed in H. Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 *Recueil des Cours* 9, 166-67 (2001) (law of arbitral seat determines tribunal's power to make corrections to award); *Novenergia I – Energy & Environment (SCA), SICAR v. Spain, Procedural Order No. 17 in SCC Case No. V2015/063 of 9 April 2018*, ¶12 (law of arbitral seat and applicable institutional rules determine tribunal's power to make corrections to award).
- 75) As discussed above, the arbitration agreement should be interpreted to impliedly permit an arbitral tribunal to correct its award. See §24.02[B][4]. The parties could agree to deny an arbitral tribunal the authority to correct an award. Although such an agreement would be unusual (and ill-advised), there is no reason it should not be given effect.
- 76) See §24.02[B] (especially §24.02[B][4]).
- 77) UNCITRAL Model Law, Art. 33(1)(a).
- 78) *Id.* at Art. 33(1). The Tribunal is authorized to extend this time period “if necessary.” *Id.* at Art. 33(4).
- 79) *Id.* at Art. 33(2).
- 80) See *Award in SIAC Case No. 6 of 6 February 1998*, cited in P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 441 (4th ed. 2019).
- 81) The purpose of the short time period is to “help limit delays in the disposition of a party's request and thereby to limit the period of uncertainty about the content of an award.” H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 889 (1989). See also P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 437 (4th ed. 2019) (“[Certain members of the Working Group] saw the necessity of employing time limits in order to ensure the timely disposal of a party's request and to shorten the phase of uncertainty about the definitive content of the award”).
- 82) UNCITRAL Model Law, Art. 33(1) (emphasis added). It has been suggested that a correction under Article 33 should extend to omissions to state in the award the date when, or the place where the award has been made, or to sign the award. See Sanders, *UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future*, 21 *Arb. Int'l* 443, 464 (2005) (omissions can be corrected easily and may avoid setting aside of award). This appears correct.
- 83) *But see* K. H. Schwab & G. Walter, *Schiedsgerichtsbarkeit* ¶121-14 (7th ed. 2005) (corrections may extend to award's justification).
- 84) *VanolFar E.MktgPte Ltd v. HinLeong Trading Pte Ltd*, [1996] SGHC 108 (Singapore High Ct.). See also S. Kurochikin, O. Skvortsov & A. Kontelnikov, *Arbitration in Russia* 173 (2019) (“The procedure of correction and interpretation of the award cannot be deployed to change the mistaken pronouncements of the tribunal regarding the facts, and its conclusions on the merits of the claim”).
- 85) See, e.g., *Judgment of 17 May 2004*, 2005 *SchiedsVZ* 311 (Oberlandesgericht Frankfurt); *Judgment of 20 December 2001*, 1 *Sch* 13/01 (Oberlandesgericht Stuttgart); *Judgment of 11 December 2000*, 11 *SchH* 01/00 (Oberlandesgericht Dresden); *RelaisNordik Inc. v. Secunda Marine Servs. Ltd*, XIX *Y.B. Comm. Arb* 256 (Canadian Fed. Ct. 1988) (1994) (term “clerical or typographical” error includes mistakes made in typing or drafting award); *Tan Eng Chuan v. United Overseas Ins. Ltd*, [2009] SGHC 193 (Singapore High Ct.) (only technical and non-substantive errors are open to correction); *Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey*, [2000] SGHC 260 (Singapore High Ct.), *rev'd on other grounds*, [2001] 3 *SLR* 237 (Singapore Ct. App.); *VanolFar E.MktgPte Ltd v. HinLeong Trading Pte Ltd*, [1996] SGHC 108 (Singapore High Ct.). See also Bantekas & Ullah, *Article 33: Correction and Interpretation of Award; Additional Award*, in I. Bantekas et al. (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 850-51 (2020) (“this provision cannot be used to correct the mistakes in the arbitral reasoning: correction is no substitute for setting aside”); T. Baskaran, *Arbitration in Malaysia: A Commentary on the Malaysian Arbitration Act* 232 (2019) (“The section only allows for the correction of errors, which include computational and clerical errors”); Brekoulakis, Ribeiro & Shore, *UNCITRAL Model Law, Chapter VI, Article 33*, in L. Mistelis (ed.), *Concise International Arbitration* 898 (2d ed. 2015) (“Correction of the error must not result in amendment of the content of the award. ... [I]nterpretation must be allowed only in relation to a specific point or part of the award. Interpretation cannot amount to a rewriting of the award.”); UNCITRAL, *Digest of Case Law on the Model Law on International Commercial Arbitration* 131 (2012) (“The expression ‘errors in computation’ includes, *inter alia*, miscalculations, the use of incorrect data in calculations, and the omission of data in calculations”).
- A Singapore court held that errors of “similar nature” under Article 33 could also include mistakes made by the parties and reflected in the award. Thus, Article 33 was held applicable where one of the parties neglected to include certain expenses in an application for costs and which were later omitted from the award on costs. See *VanolFar E.MktgPte Ltd v. HinLeong Trading Pte Ltd*, [1996] SGHC 108 (Singapore High Ct.).
- 86) E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1416 (1999); Williams & Buchanan, *Corrections and Interpretations of Awards Under Article 33 of the Model Law*, 4 *Int'l Arb. L. Rev.* 119, 121 (2001) (“Correction cannot be used to alter the meaning of an arbitral award”).

- 87) See §25.04[F][4][c].
- 88) P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 437 (4th ed. 2019) (“The Working Group stressed the mandatory character of art. 33(1)(a), which prevents the parties from contracting out of this provision”); Williams & Buchanan, *Corrections and Interpretations of Awards Under Article 33 of the Model Law*, 4 Int’l Arb. L. Rev. 119, 121 (2001).
- 89) See §2.01_[A][1]; §11.04[A][3][e]; §15.04_[B][1]; §17.02[A] (especially §17.02[A][3][b][i]); §17.02[G][3][a]; §24.02_[A]; §24.03[B][1].
- 90) These procedural requirements are discussed above. See §15.04_[A]; §15.04[B][1].
- 91) Bantekas & Ullah, *Article 33: Correction and Interpretation of Award; Additional Award*, in I. Bantekas et al. (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 852 (2020) (“Article 33 requires that, when a party applies for a correction, interpretation or for an additional award, it must give the other party notice, so as to afford an opportunity to contradict”); P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 436 (4th ed. 2019) (“One point that is not immediately evident from the wording of arts 33(1) and (3) is that the requesting party’s ‘opponent,’ namely the other party, who according to the provision is entitled to be notified, also has a certain time period in which it could express its views concerning the request. The Commission thought it ‘not necessary to indicate any procedural details for the interpretation procedure other than that the other party must be notified of the request’ and it was noted that the principle of equality, as set out in art. 18, would assure procedural regularity and fairness.”); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 889-90 (1989) (according to Working Party responsible for text of Article 33, “the arbitral tribunal should allow sufficient time for a reply”; general provisions of Article 18 applicable throughout arbitration, including under Article 33).
- 92) See *Judgment of 17 May 2004*, 2005 SchiedsVZ 311 (Oberlandesgericht Frankfurt) (no violation of right to fair hearing if parties are not heard before decision on correction is taken).
- 93) UNCITRAL Model Law, Art. 33(5). See Bantekas & Ullah, *Article 33: Correction and Interpretation of Award; Additional Award*, in I. Bantekas et al. (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 856 (2020) (“Corrections and interpretation of awards, as well as additional awards, should thus in principle comply with the same requirements as the original award”).
- 94) See, e.g., *Brooke v. Mitchell* [1840] 6 M&W 473 (English Ct. Exch. Cham.); *Irvine v. Elnon* [1806] 8 East 54 (English K.B.) (award may not be altered by tribunal, even if time limit for making award has not expired); *Ward v. Dean* [1832] 3 B & Ad 234 (English K.B.).
- 95) English Arbitration Act, 1889, §7(c).
- 96) English Arbitration Act, 1950, §17; English Arbitration Act, 1996, §57.
- 97) English Arbitration Act, 1996, §57(3)(a). An application for a correction must be submitted to the tribunal within 28 days following the date of the award, and the tribunal must render its correction within 28 days thereof. English Arbitration Act, 1996, §§57(4)-(5). For the relationship between the English Arbitration Act, 1996, §57, and Article 27 of both the 1998 and 2014 LCIA Rules, see *MobileTelecommc’nCo.KSCv. HRH PrinceHussamBin Saud BinAbdulazizAl Saud* [2019] EWHC 3109 (Comm) (English High Ct.); *X v. Y* [2018] EWHC 741, ¶¶20-22 (Comm) (English High Ct.).

Some English authority suggests a limited judicial power to remit awards to the arbitral tribunal. *Husmann (Euro.) Ltd v. AhmedPharaon* [2003] EWCA Civ 266, ¶183 (English Ct. App.) (English court has power under §57 to remit award to arbitrators when it was made in favor of wrong party: “A valid final award on the merits will of course exhaust the arbitrators’ jurisdiction, subject to any remission from the courts; but we can see no good reason in principle why an invalid final award, in excess of jurisdiction, should lead to the same result, when once that award has been declared to be of no effect by the courts”).

- 98) See *MobileTelecommc’nCo.KSCv. HRH PrinceHussamBin Saud BinAbdulazizAl Saud* [2019] EWHC 3109 (Comm) (English High Ct.) (granting extension of time where, after expiry of time to seek correction, award had been refused enforcement in Saudi Arabia for stating that winning party was “entitled to payment” instead of imposing “explicit obligation” to pay awarded sum); *Xstrata Coal Queensland Pty Ltd v. Benxi Iron & Steel (Group) Int’l Econ. & Trading Co. Ltd* [2016] EWHC 2022 (Comm) (granting extension of time where, after expiry of time to seek correction, enforcement had been refused in China with respect to company which had not been clearly identified as party in award). See also English Arbitration Act, 1996, §79(3).
- 99) The English Arbitration Act, 1996, appears to permit correction of any accidental error, while the Model Law is arguably directed only towards computational, clerical, typographical, or similarly ministerial mistakes. In particular, English law permits correction of awards where the language used did not reflect the arbitrator’s original intentions. Compare R. Merkin, *Arbitration Law* ¶18.118 (2014 & Update July 2019).

- 100)** *See* *Sea Trade Maritime Corp. v. Hellenic Mut. War Risks Ass'n (Bermuda) Ltd, The Athena* [2006] EWHC 578, ¶20 (Comm) (English High Ct.) (“The purpose of [§57 of the Arbitration Act, 1996] is to avoid the situation that used to arise where an arbitrator could not, in respect of his final award, ... correct an obvious mistake, nor deal with something which he had left out, because he was *functus officio*, so that the affected party was compelled to go to the court in order to obtain relief.”). *See also* *Mut. Shipping Corp. v. Bayshore Shipping Co.* [1985] 1 Lloyd’s Rep. 189 (English Ct. App.); *No Curfew Ltd v. Feiges Props. Ltd* [2018] EWHC 744 (Ch) (English High Ct.); *Gannet Shipping v. Eastrade Commodities* [2001] EWHC 483 (QB) (English High Ct.); *Fuga AG v. Bunge AG* [1975] 2 Lloyd’s Rep. 192 (QB) (English High Ct.); *Sutherland & Co. v. Hannevig Bros. Ltd* [1921] 1 KB 336 (KB) (English High Ct.).
- 101)** *See* *Torch Offshore LLC v. Cable Shipping Inc.* [2004] EWHC 787 (Comm) (English High Ct.); *Al Hadha Trading Co. v. Tradigrain SA* [2002] 2 Lloyd’s Rep. 512 (QB) (English High Ct.). *See also* *Union Marine Classification Servs. v. Comoros* [2015] EWHC 508 (Comm) (English High Ct.).
- 102)** M. Mustill & S. Boyd, *Commercial Arbitration* 341 (2d ed. 1989 & Companion 2001).
- 103)** English Arbitration Act, 1996, §57(1).
- 104)** In contrast, the 2011 Swiss Code of Civil Procedure, which applies to arbitrations between parties resident or domiciled in Switzerland, provides both parties with the right to apply to the arbitral tribunal to correct typographical and arithmetical errors in the award. *See* Swiss Code of Civil Procedure, Art. 388. *See also* B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶¶1521-34 (3d ed. 2015); §24.03[B][3].
- 105)** *See* *Judgment of 6 October 2015*, DFT 4A_34/215 (Swiss Fed. Trib.) (allowing correction of a *lapsus calami* in the award’s reasoning); *Judgment of 12 January 2005*, DFT 131 III 164, 167 (Swiss Fed. Trib.) (allowing correction of computational mistake of \$30 million); *Judgment of 9 December 2003*, DFT 130 III 125, 127 (Swiss Fed. Trib.) (arbitrator correcting award where he granted \$45,000 and £15,000 to “German family” instead of referring to members of the family who had appeared as claimants by name); *Judgment of 2 November 2000*, DFT 126 III 524, 527 (Swiss Fed. Trib.); B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶¶1520-21 (3d ed. 2015); Berti & Schnyder, in S. Berti (ed.), *International Arbitration in Switzerland* Art. 190, ¶97 (2000); Kaufmann-Kohler & Rigozzi, *Correction and Interpretation of Awards in International Arbitrations Held in Switzerland*, 16(4) *Mealey’s Int’l Arb. Rep.* 25, ¶¶6-8, 17-19 (2001). *See* §24.03[B][3].
- 106)** *See* *Judgment of 12 January 2005*, DFT 131 III 164, 168 (Swiss Fed. Trib.) (application for correction may not serve as pretext for challenging award); *Judgment of 2 November 2000*, DFT 126 III 524, 526-29 (Swiss Fed. Trib.).
- 107)** *See, e.g.,* Heini, in D. Girsberger *et al.* (eds.), *Zürcher Kommentar zum IPRG* Art. 190, ¶63 (2d ed. 2004); Wirth, in S. Berti (ed.), *International Arbitration in Switzerland* Art. 189, ¶65 (2000). *See also* E. Geisinger & N. Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners* 231 (2d ed. 2013) (“[P]rocedures for the correction or interpretation of awards ... have no impact on and do not suspend time limits relating to the challenge of awards before the Federal Tribunal. Therefore, a party seeking both the correction (or interpretation) of an award by the arbitral tribunal and the setting aside of the award by the Federal Tribunal cannot wait for the ruling on the correction or interpretation of the award before filing its challenge.”).
- 108)** B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶1525 (3d ed. 2015).
- 109)** *See, e.g.,* French Code of Civil Procedure, Art. 1485; German ZPO, §1058; Belgium Judicial Code, Art. 1715; Netherlands Code of Civil Procedure, Art. 1060.
- Prior to the 2011 revision of the French Code of Civil Procedure, French courts had recognized an inherent authority of arbitrators to correct awards, albeit subject to narrow limits. *See* *Judgment of 8 July 2009*, Case No. 08-17.984 (French Cour de Cassation Civ. 1) (corrective or interpretative award may not substantially modify parties’ rights and obligations under original award); *Judgment of 16 June 1976, Krebs v. Stern*, 1977 Rev. Arb. 269 (French Cour de Cassation Civ. 1), Note, Mezger (while arbitrators may correct material errors, they cannot modify meaning of their decision).
- 110)** Demeyere, *1998 Amendments to Belgian Arbitration Law: An Overview*, 15 *Arb. Int’l* 295, 312 (1999) (“According to the new Article 1702 ... material errors may be corrected at the initiative of one of the parties or of the arbitral tribunal. The arbitral tribunal may be asked to interpret an award on the condition that the parties agreed to ask the tribunal for an interpretation. The condition for interpreting the award is clearly more restrictive than the situation where material errors may be corrected. And under the pretext of interpreting an arbitral award one may not affect the irrevocable award.”).

- 111) See, e.g., English Arbitration Act, 1996, §57(5); German ZPO, §1058(2); Belgium Judicial Code, Art. 1715(1)(a) (one-month limit from receipt of award for requesting correction of award, unless parties have agreed otherwise), Art. 1715(1)(b) (one-month limit from receipt of request for tribunal to give an interpretation of specific point or part of award); Austrian ZPO, §610(1); Netherlands Code of Civil Procedure, Art. 1060; Swedish Arbitration Act, §32; Spanish Arbitration Act, Art. 39(5) (save where otherwise agreed by parties, one-month time limit from award notification applicable to international arbitration only); Singapore International Arbitration Act, Schedule 1, Art. 33; Chinese Arbitration Law, Art. 56; Japanese Arbitration Law, Arts. 41(2), (4); Indian Arbitration and Conciliation Act, Art. 33(1); Malaysian Arbitration Act, §35(2); Russian International Arbitration Law, Art. 33(1); South Korean Arbitration Act, Art. 34(3). See also *Judgment of 4 July 2016*, 2016 NJOZ 1483, 1486 (Oberlandesgericht München) (arbitral tribunal not complying with one-month statutory limit for correction does not provide ground for annulment).
- 112) Some jurisdictions provide for shorter time limits. See, e.g., Brazilian Arbitration Act, Art. 30 (five days); Dominican Arbitration Law, Art. 38(3) (ten days); Bangladesh Arbitration Act, §40 (fourteen days); Sri Lankan Arbitration Act, §27 (fourteen days); Ugandan Arbitration and Conciliation Act, §33(1) (fourteen days); Peruvian Arbitration Law, 2008, Art. 58 (fifteen days); Venezuelan Commercial Arbitration Law, Art. 32 (fifteen days); Tunisian Arbitration Code, Art. 34 (twenty days).
- 113) French Code of Civil Procedure, Arts. 1485-86.
- 114) See, e.g., German ZPO, §1058; Belgian Judicial Code, Art. 1715; Norwegian Arbitration Act, §38; Singapore International Arbitration Act, Schedule 1, Art. 33. See also Smit, *Correcting Arbitral Mistakes*, 10 Am. Rev. Int'l Arb. 225 (1999).
- 115) See, e.g., French Code of Civil Procedure, Art. 1485(3); Belgian Judicial Code, Art. 1715(6). It has also been suggested that arbitrators who are incapable of reconvening an arbitration should be replaced in accordance with the parties' original agreement. See B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶1524 (3d ed. 2015).
- 116) See, e.g., *Leslie v. Leslie*, 24 A. 319, 320 (N.J. Ch. 1892) ("if an arbitrator makes a mistake either as to law or to fact, it is the misfortune of the party, and there is no help for it").
- 117) U.S. FAA, 9 U.S.C. §11. Under the FAA, an application to correct or modify an award may be made within three months of the making of the award. *Id.* at §12. See *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* §4-33 (2019) (corrections and modifications by court); L. Edmonson (ed.), *Domke on Commercial Arbitration* §40.4 (3d ed. & Update 2013).
- 118) Sections 208 and 307 provide for application of the domestic FAA's residual provisions under Chapters 2 and 3 of the FAA. This extends to the authority to make corrections under §11. See also *Productos Mercantiles Industriales, SA v. Faberge USA, Inc.*, 23 F.3d 41, 44 (2d Cir. 1994) (Inter-American Convention does not preempt U.S. courts' power to modify award made in United States pursuant to 9 U.S.C. §11).
- 119) See, e.g., *AdmartAG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 309 (3d Cir. 2006) ("[The recognition court has the] right to interpret or clarify the terms of the arbitral award [in a recognition action, and use] some flexibility to modify execution of an award without altering its substance. The leeway, however, is very small and is available only in limited circumstances so as not to interfere with the Convention's clear preference for confirmation of awards."); *Ministry of Def. Iran v. Gould, Inc.*, 969 F.2d 764, 773 (9th Cir. 1992) (approving modification of relief ordered in award, which was recognized generally, in order to comply with U.S. export control regulations).

These decisions are contrary to the Convention, which does not permit corrections in a recognition action. See also §26.05 [C][15]; *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* §4-33 comment a (2019) (U.S. court "may not correct or modify a foreign award, unless the parties unambiguously designated U.S. arbitration law to govern the proceeding from which that foreign award originates").

- 120) *Barrancov. 3D Sys. Corp.*, 734 F.App'x 885, 887-89 (4th Cir. 2018) (refusing to modify award; failure to follow parties' agreed-upon methodology for calculating attorney's fees is contract interpretation error rather than mathematical error); *UBS Fin.Servs., Inc. v. Padussis*, 842 F.3d 336, 341-42 (4th Cir. 2016) (refusing to modify award to allow for set-off because it would change "practical effect of the award"); *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1000 (11th Cir. 2007) (challenge based on new evidence is not request for correction); *Voltage Pictures, LLC v. Gulf Film LLC*, 2018 WL 2110937, at *8-9 (C.D. Cal.); *Gold v. Opera Solutions, LLC*, 2017 WL 3267770, at *3 (S.D.N.Y.) (refusing to modify award where award-debtor identified no clear mathematical or clerical error "but rather seeks modification on substantive grounds"); *Millmakerv.Bruso*, 2008 U.S. Dist. LEXIS 79480 (S.D. Tex.) (double-counting of fees and costs warrants correction); *NetknowledgeTechs, LLC v. Rapid Transmit Techs.*, 2007 U.S. Dist. LEXIS 11550 (N.D. Tex.) (double-counting in calculating damages warrants correction); *Thomason v. Citigroup GlobalMkts, Inc.*, 2006 U.S. Dist. LEXIS 3168 (D. Utah) (incorrectly including non-party in award warrants correction); *Pro-Fit Worldwide Fitness Inc. v. Flanders Corp.*, 2006 U.S. Dist. LEXIS 26011 (D. Utah) (no basis to correct tribunal's calculation of interest); *HesfibelFiberOptik&ElektronikSanVeTic AS v. Four S Group*, 315 F.Supp.2d 1365 (S.D. Fla. 2004) (arbitrators' prorating was not miscalculation but factual finding); *Cambridge Int'l Trading, Inc. v. Tigris Int'l Corp.*, 2000 U.S. Dist. LEXIS 3193, at *4 (S.D.N.Y.) (challenge to tribunal's fact-finding was not request for correction).
- 121) *See, e.g., T.CoMetals, LLC v. Dempsey Pipe & Supply*, 592 F.3d 329, 352 (2d Cir. 2010) (parties are free to agree on grounds and modes for correction to be used by arbitrators); *Smith v. Transp. Workers Union of Am., AFL-CIO Air Transp. Local 556*, 374 F.3d 372, 374 (5th Cir. 2004) (giving effect to arbitration agreement that provided: "The arbitrators *sua sponte* may amend or correct their award within three business days after the award, but the parties shall not have a right to seek correction of the award").
- 122) *GlassMolders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 848 (7th Cir. 1995). *See also Carlson v. Norwegian Cruise Line Holdings, Ltd.*, 2018 WL 3824355, at *7 (D.V.I.) ("*Functus officio* is merely a default rule, operative if the parties fail to provide otherwise") (quoting *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union*, 56 F.3d at 848).
- 123) *T.CoMetals, LLC v. Dempsey Pipe & Supply*, 592 F.3d 329, 352 (2d Cir. 2010) (parties' incorporation of 2009 ICDR Rule 30(1) (permitting arbitral tribunal to correct awards), and submission of applications to arbitral tribunal under Rule 30(1), constitute "clear and unmistakable evidence" of their intention to grant arbitrator, subject to very deferential judicial review, competence to determine scope of tribunal's authority under Rule 30(1)).
- 124) For criticism of this decision, see Kirby, *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.: Are There Really No Limits on What An Arbitrator Can Do in Correcting An Award?*, 27 J. Int'l Arb. 519, 528 (2010) ("Just because a tribunal has the power to interpret the parties' chosen procedural rules does not mean it has the power to rewrite them to give itself powers the parties never intended. There are limits and district courts properly vacate awards in those (fortunately rare) cases where arbitrators exceed them.").
- 125) *T.CoMetals, LLC v. Dempsey Pipe & Supply*, 592 F.3d 342 (2d Cir. 2010).
- 126) *See, e.g., Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 473 (5th Cir. 2012); *E.E. Cruz v. Coastal Caisson, Corp.*, 346 F.App'x 717, 720 (2d Cir. 2009); *E. Seaboard Constr. Co. v. Gray Constr., Inc.*, 553 F.3d 1, 6 (1st Cir. 2008); *Lovelace v. Showroom Auto, LLC*, 2019 WL 3254949, at *6-7 (E.D.N.Y.); *Data Mountain Solutions, Inc. v. Giordano*, 680 F.Supp.2d 110, 118 (D.D.C. 2010); *LaurinTankers Am., Inc. v. StoltTankers, Inc.*, 36 F.Supp.2d 645 (S.D.N.Y. 1999) (power to correct award is inherent in arbitrators' mandate).
- 127) *McClatchy Newspapers v. Cent. Valley Typographical Union No. 46*, 686 F.2d 731, 734 n.1 (9th Cir. 1982); *Waddell v. Holiday Isle, LLC*, 2009 WL 2413668, at *3 (S.D. Ala.).
- 128) *See, e.g., Danella Constr. Corp. v. MCITelecommc'ns Corp.*, 993 F.2d 876 (3d Cir. 1993); *Fred Meyer, Inc., v. Teamsters Local 206*, 463 F.Supp.2d 1186, 1192 (D. Or. 2006) (district court upheld arbitrator's amendment of decision in order to extend jurisdiction to resolution of remedial matters, holding "The doctrine *functus officio* is not applicable where the arbitrator did not attempt to change his opinion in a substantive way"); *Alcatel Space SA v. Loral Space & Commc'ns, Ltd.*, 2002 WL 1391819, at *4 (S.D.N.Y.) (if an award is "ambiguous ... the court should remand to the arbitrators for further findings").
- 129) *LaurinTankers Am., Inc. v. StoltTankers, Inc.*, 36 F.Supp.2d 645, 650 (S.D.N.Y. 1999).
- 130) U.S. FAA, 9 U.S.C. §11 ("an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award"; the award "is imperfect in matter of form not affecting the merits of the controversy").
- 131) *See, e.g., Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980); *Nat'l Shipping Co. of Saudi Arabia v. Transamerican S.S. Corp.*, 1992 U.S. Dist. LEXIS 18725 (S.D.N.Y.) (modifying award to correct undisputed "mathematical error").

- 132)** See, e.g., *Woods v.P.A.M. Transp. Inc.*, 440 F.App'x 265, 269-70 (5th Cir. 2011) (reversing district court's "correction" of arbitrator's pre-award interest rate); *EljerMfgInc. v.KowinDev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) ("When an arbitration award orders a party to pay damages that have already been paid or which are included elsewhere in the award, a court may modify the award. Double recovery constitutes a materially unjust miscalculation which may be modified under [§11 of the FAA]."); *TransnitroInc. v. MV WAVE*, 943 F.2d 471, 474 (4th Cir. 1991). But see *Stone & Youngberg v. Kay Family Revocable Trust*, 2012 WL 6571634, at *1 (9th Cir.) ("We have no authority under the Arbitration Act to vacate or modify the arbitration award to prevent a potential double-recovery by Defendant").
- 133)** U.S. FAA, 9 U.S.C. §12.
- 134)** See, e.g., U.S. Revised Uniform Arbitration Act, §§20, 24(a)(1), 24(a)(3) (2000) (arbitrator may "modify or correct an award" when "there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award" or "the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted."); U.S. Uniform Arbitration Act, §§9, 13 (1955).
- 135)** See *Spector v. Torenberg*, 852 F.Supp. 201, 206-07 (S.D.N.Y. 1994) ("Since the arbitration took place in New York, the authority of the arbitrators to modify their award is governed by [New York law], which is not preempted by the FAA"); *Pine Valley Prods. v. S.L. Collections*, 828 F.Supp. 245, 249 (S.D.N.Y. 1993) (N.Y. C.P.L.R. §7511, authorizing arbitrator to modify award, not preempted by FAA). See also *Bear v. Edward D. Jones & Co., LP*, 2006 WL 2469144, at *1 (Wash. App.) (discussing RCW 7.04.175 of Washington Arbitration Act, which allows arbitrator to correct or modify award when there is evident miscalculation of figures, and holding that "the [FAA] does not preempt the provisions of the Washington Arbitration Act applicable here. ... The relevant provisions here are not in conflict with the FAA, and therefore, state law applies.").
- 136)** Smit, *Correcting Arbitral Mistakes*, 10 Am. Rev. Int'l Arb. 225, 227 (1999).
- 137)** That is true, for example, in the United States and Switzerland. See §24.03[B][2]-[3].
- 138)** See §24.03[A].
- 139)** See §24.03[B][6].
- 140)** Authority in the context of state-to-state disputes also recognizes an arbitral tribunal's inherent power to correct its award. ILC, *Draft on Arbitral Procedure Prepared by the International Law Commission at Its Fourth Session, 1952*, U.N. Doc. A/CN.4/59, Art. 26 ("As long as the time limit set in the *compromis* has not expired, the tribunal shall be entitled to rectify mere typographical errors or mistakes in calculation in the award").
- 141)** On the other hand, if parties agree to exclude the possibility of corrections, then this agreement should in principle be accepted; indeed, this result is required by Article II of the New York Convention. In particular, it is difficult to see how the parties' contractual preservation of the historic approach to the *functus officio* doctrine should be regarded as invalid or unenforceable. Nonetheless, because such an agreement is atypical and can produce anomalous results, it should be found only where the parties have used express language and clearly intended such a result.
- 142)** *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* §4-33, Reporters' Note a (2019) ("Often requests to correct or modify awards are merely attacks on the factual or legal premises upon which the tribunal's calculations are based (rather than on the calculations themselves)").
- 143)** See, e.g., 2013 UNCITRAL Rules, Art. 38; 2017 ICC Rules, Art. 36; 2016 SIAC Rules, Art. 33; 2014 ICDR Rules, Art. 33; 2020 LCIA Rules, Art. 27; 2012 Swiss Rules, Art. 36; 2018 HKIAC Rules, Art. 38; 2015 CIETAC Rules, Art. 53; 2011 CRCICA Rules, Art. 38; 2018 DIS Rules, Art. 40; 2017 SCC Rules, Art. 47; 2018 VIAC Rules, Art. 39; 2020 WIPO Rules, Art. 68.
- 144)** See §24.02_[B]; §24.03[B] (especially §24.03[B][6]). As noted above, however, some authorities hold that the Model Law's statutory provisions for corrections are mandatory. See §24.03[B][1].
- 145)** The ICC Rules' provisions regarding corrections were only introduced in 1998. Prior to 1998, it was expected that the Secretariat's and Court's internal review would correct any errors. That expectation was unduly hopeful, and the ICC permitted corrections on an *ad hoc* basis, based on the general rule that the Court should seek to ensure that an ICC tribunal renders an enforceable award. See Daly, *Correction and Interpretation of Arbitral Awards Under the ICC Rules of Arbitration*, 13(1) ICC Ct. Bull. 61, 62 (2002). In 1998, the decision was made to regularize this practice. Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 322-24 (2d ed. 2005).
- 146)** Article 34 of the 2017 ICC Rules provides: "Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form." For commentary on the earlier, but identical, Article 33 of the 2012 ICC Rules, see Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 312-16 (2d ed. 2005); J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-1181 to 1220 (2012); J. Grierson & A. van Hooft, *Arbitrating Under the 2012 ICC Rules* 215-17 (2012).
- 147)** Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 312-16, 323 (2d ed. 2005); J. Grierson & A. van Hooft, *Arbitrating Under the 2012 ICC Rules* 215-17 (2012); Smit, *Correcting Arbitral Mistakes*, 10 Am. Rev. Int'l Arb. 225 (1999).

- 148) 2017 ICC Rules, Art. 36(1).
- 149) *Id.* at Arts. 36(1)-(2).
- 150) *Id.* at Art. 36(2). Unlike other institutional rules, the ICC Rules provide for any correction of the award to be submitted to the ICC Secretariat and Court for review and approval. *Id.* at 36(1)-(2).
- 151) ICC, *Note on Correction and Interpretation of Arbitral Awards* (2014). The *Note* provides that, while the tribunal should issue corrections in the form of an “Addendum,” it should express its conclusion in the form of a “decision” if it rejects the request. According to the *Note*, a “decision” rejecting correction must be submitted to the ICC Court for further scrutiny. This is to avoid a situation in which a national court may set aside the decision based on the argument that it is defective because it was not scrutinized by the ICC Court pursuant to the ICC Rules. See Daly, *Correction and Interpretation of Arbitral Awards Under the ICC Rules of Arbitration*, 13(1) ICC Ct. Bull. 61, 62 (2002) (commenting on an earlier version of the *Note*); Marquais, *Les Impacts de l’Addendum de l’Article 35 du Reglement d’Arbitrage de la CCI sur les Delais du recours en Annulation, En Droits Suisse, Anglais et Francais*, 2015 Rev. Arb. 781.
- 152) ICC, *Note on Correction and Interpretation of Arbitral Awards* (2014).
- 153) See §24.03[B].
- 154) Daly, *Correction and Interpretation of Arbitral Awards Under the ICC Rules of Arbitration*, 13(1) ICC Ct. Bull. 61, 63 (2002); J. Fry, S. Greenberg & F. Mazza, *The Secretariat’s Guide to ICC Arbitration* ¶¶3-1256, 3-1265 (2012) (“Note to Parties: Requests for correction or interpretation are not appeals in disguise”); H. Verbist, E. Schäfer & C. Imhoos, *ICC Arbitration in Practice* 193-94 (2d ed. 2015).
- 155) J. Grierson & A. van Hooft, *Arbitrating Under the 2012 ICC Rules* 216-17 (2012).
- 156) ICC, *Extracts from ICC Addenda and Decisions on the Correction and Interpretation of Arbitral Awards*, 13(1) ICC Ct. Bull. 72 (2002). In 2004, 43 requests for correction were submitted to tribunals under the ICC Rules, of which 18 were rejected (58% resulting in addendum). ICC, *2004 Statistical Report*, 16(1) ICC Ct. Bull. 5, 13 (2005). Since 2004, the number of applications have generally increased each year, with 42 in 2005 (48% resulting in addendum), 40 in 2006 (57%), 32 in 2007 (54%), 40 in 2008 (75%), 57 in 2009 (46%), 51 in 2010 (55%), and 74 in 2011 (55%). See J. Fry, S. Greenberg & F. Mazza, *The Secretariat’s Guide to ICC Arbitration* ¶3-1267, Table 41 (2012); ICC, *2006 Statistical Report*, 18(1) ICC Ct. Bull. 5, 13 (2007) ICC, *2005 Statistical Report*, 17(1) ICC Ct. Bull. 5, 13 (2006).
- 157) *Addendum in ICC Case No. 10386*, in *Extracts from ICC Addenda and Decisions on the Correction and Interpretation of Arbitral Awards*, 13(1) ICC Ct. Bull. 86-87 (2002).
- 158) See, e.g., 2013 UNCITRAL Rules, Art. 38; 2016 SIAC Rules, Art. 33; 2014 ICDR Rules, Art. 33; 2020 LCIA Rules, Art. 27; 2012 Swiss Rules, Art. 36; 2018 HKIAC Rules, Art. 38; 2015 CIETAC Rules, Art. 53; 2016 DIFC-LCIA Rules, Art. 27; 2018 DIS Rules, Art. 40; 2017 IIA Rules, Art. 38; 2017 SCC Rules, Art. 47; 2018 VIAC Rules, Art. 39; 2020 WIPO Rules, Art. 68.
- 159) D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 811 (2d ed. 2013) (“Article 38 permits correction of errors in the award that the arbitral tribunal made unintentionally or heedlessly”); T. Webster, *Handbook of UNCITRAL Arbitration* ¶38-2 (3d ed. 2019) (“Article 38 permits what are in essence technical corrections to an Award. Article 38 does not permit a Tribunal to reconsider an Award where there is otherwise a problem with it”).
- 160) See §24.03[C].
- 161) 2013 UNCITRAL Rules, Art. 38(1).
- 162) *Id.* at Art. 38(2).
- 163) See, e.g., *Harris Int’l Telecomms, Inc. v. Iran*, Decision No. DEC 73-409-1 of 26 January 1988, XIV Y.B. Comm. Arb. 413 (1989); *Am. Bell Int’l, Inc. v. Iran*, Decision No. DEC 58-48-3 of 19 March 1987, 14 Iran-US CTR 173, 174 (1987); *UnidyneCorp. v. Iran*, Decision Case No. DEC 122-368-3 of 9 March 1994, 1994 WL 1095552; *Picker Int’l Corp. v. Iran*, Decision No. DEC 48-10173-3 of 8 October 1986, 12 Iran-US CTR 306, 307 (1986) (“The Tribunal finds that the wording used in the Award ... exactly reproduces the language of Article III, ¶3 of the Claims Settlement Declaration and therefore is more appropriate than the formulation proposed by the Agent. ... For the foregoing reasons, the Tribunal determines that no correction or interpretation of the Award is warranted and denies the Request.”); *Panacaviar, SA v. Iran*, Decision No. DEC 57-498-1 of 10 February 1987, 14 Iran-US CTR 100, 101 (1987) (“[T]he Request argues that the Tribunal ... mischaracterized the nature of the underlying dispute between the Parties and seeks a ‘correction’ of this alleged mischaracterization. ... Insofar as the Request constitutes an attempt by the Respondents to reargue certain aspects of the Case and to disagree with the conclusions of the Tribunal in its Interim Award, there is no basis in the Tribunal’s Rules of Procedure or elsewhere for review of an award on such grounds. ... The Tribunal finds that the present request for a ‘correction’ does not fall within the scope of Article 36.”). *Judgment of 11 January 2018*, DFT 4A_56/2017 (Swiss Fed. Trib.) (rejecting challenge against arbitral award and addendum by which the arbitral tribunal had denied a party’s request for “correction,” which criticized the method of calculation chosen by the arbitral tribunal for the determination of an earnout). See also Caron & Reed, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 Arb. Int’l 429, 436 (1995); T. Webster, *Handbook of UNCITRAL Arbitration* ¶38-03 (3d ed. 2019).

- 164) See, e.g., *Gold Reserve Inc. v. Venezuela, Decision Regarding the Claimant's and the Respondent's Requests for Corrections* in ICSID Case No. ARB(AF)/09/1 of 15 December 2014, ¶38 (citing G. Born, *International Commercial Arbitration* 3125, 3138-39 (2d ed. 2014)); *AmcoAsia Corp. v. Indonesia, Decision on Supplemental Decision and Rectifications* in ICSID Case No. ARB/81/1 of 17 October 1990, XVII Y.B. Comm. Arb. 73 (1992); *Judgment of 17 April 2013*, DFT 4A_669/2012 (Swiss Fed. Trib.) (noting party's successful request for correction based on arbitral tribunal's failure to incorporate its decision on costs into operative part of award).
- 165) The Iran–U.S. Claims Tribunal rejected a number of requests because they were not timely. See Caron & Reed, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 Arb. Int'l 429, 436 (1995); T. Webster, *Handbook of UNCITRAL Arbitration* ¶38-05 (3d ed. 2019).
- 166) *Gold Reserve Inc. v. Venezuela, Decision Regarding the Claimant's and the Respondent's Requests for Corrections* in ICSID Case No. ARB(AF)/09/1 of 15 December 2014, ¶38.
- 167) *Sedco, Inc. v. NIOC, Decision No. DEC 64-129-3 of 22 September 1987*, 16 Iran–US CTR 282, 284 (1987).
- 168) English Arbitration Act, 1996, §57(7). See also 2017 ICC Rules, Art. 36(3) (“A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award”). See also Indian Arbitration and Conciliation Act, §33(2) (“interpretation [of the Award] shall form part of the arbitral award”).
- 169) See, e.g., *Judgment of 12 January 2005*, DFT 131 III 164, 167 (Swiss Fed. Trib.); *Judgment of 20 December 2006*, 34 Sch 17/06 (Oberlandesgericht München). See also *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* §1.1 Reporters' Note o (2019) (“If an award intended by the tribunal to be its last ('final') award is returned to it by a party for correction, supplementation, or interpretation as contemplated by many arbitration statutes and rule formulae ... the award that emerges from that reconsideration will be the final award, whether or not the tribunal altered the award”); Schlosser, in F. Stein & M. Jonas (eds.), *Kommentar zur Zivilprozessordnung* §1058, ¶9 (22d ed. 2002).
- In contrast, a decision supplementing the initial award may be enforced separately. See Wagner, in F.-B. Weigand (ed.), *Practitioner's Handbook on International Arbitration* 811 (2002). A supplemental award can also be subject to separate annulment and enforcement proceedings. See §24.05[A].
- 170) See Wilske & Stendel, *Entscheidung über die Abweisung von Auslegungs- und Berichtigungsanträgen – Zwingend Durch Schiedsspruch oder auch Durch Beschluss?*, 2017 SchiedsVZ 247 (decision rejecting application to correct or interpret award should take form of procedural order).
- 171) Daly, *Correction and Interpretation of Arbitral Awards Under the ICC Rules of Arbitration*, 13(1) ICC Ct. Bull. 61, 67 (2002); J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶3-1288 (2012) (“Addendum to an addendum”); T. Webster & M. Bühler, *Handbook of ICC Arbitration* ¶36-29 (4th ed. 2018).
- 172) See *Judgment of 22 October 2009, GlobaleRe AG v. Liquidators of ICD*, Case No. 08/13030 (Paris Cour d'Appel) (partially annulling award because tribunal had issued “addendum” that reduced amounts awarded); *Judgment of 12 January 2005*, DFT 131 III 164, 167 (Swiss Fed. Trib.); Schlosser, in F. Stein & M. Jonas (eds.), *Kommentar zur Zivilprozessordnung* §1058, ¶9 (22d ed. 2002).
- 173) See, e.g., *Judgment of 11 September 2013*, Case No. 11-17.201 (French Cour de Cassation Civ. 1) (annulment of original award necessarily results in annulment of interpretative award); *Judgment of 6 October 2004*, DFT 130 III 755, 763 (Swiss Fed. Trib.); *Judgment of 29 September 1983*, 1983 WM 1207, 1208 (German Bundesgerichtshof).
- 174) See 1976 UNCITRAL Rules, Art. 40(4). See also Caron & Reed, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 Arb. Int'l 429, 451 (1995); S. Kurochikin, O. Skvortsov & A. Kontelnikov, *Arbitration in Russia* 175 (2019) (“Correction, interpretation, and amendment of an award may lead to additional expenses. However, the tribunal, as a rule, cannot claim any additional fees for these actions.”); S. Nappert, *Commentary on the UNCITRAL Arbitration Rules 2010: A Practitioner's Guide* 155 (2012) (“[Article 40(4) of the 1976 UNCITRAL Rules] was premised on the belief that arbitrators did not deserve additional fees for an interpretation, correction or completion that was due to their own shortcomings”); T. Webster, *Handbook of UNCITRAL Arbitration* ¶40-36 (3d ed. 2019).
- 175) 2013 UNCITRAL Rules, Art. 40(3). See also Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 325-26 (2d ed. 2005) (fees payable if application not due to tribunal's fault); S. Nappert, *Commentary on the UNCITRAL Arbitration Rules 2010: A Practitioner's Guide* 156 (2012) (“[Article 40(3) of the 2010 UNCITRAL Rules] was needed to encourage arbitrators to draft the award with optimal clarity and to deal expeditiously with any frivolous requests for an interpretation, correction or completion of the award by a party seeking a reversal of the initial award”).
- 176) Williams & Buchanan, *Corrections and Interpretations of Awards Under Article 33 of the Model Law*, 4 Int'l Arb. L. Rev. 119, 125 (2001). See also J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶3-1282 (2012) (generally, no advance on costs fixed “where an initial and cursory review of the application suggests that the need for correction or interpretation may have been caused by an error or shortcoming of the arbitral tribunal”).
- 177) *Hylev. Doctor's Assocs., Inc.*, 198 F.3d 368, 372 (2d Cir. 1999).

- 178)** Williams & Buchanan, *Corrections and Interpretations of Awards Under Article 33 of the Model Law*, 4 Int'l Arb. L. Rev. 119, 125 (2001).
- 179)** See [§13.05_\[B\]](#); [§13.06\[C\]\[2\]\[b\]](#).
- 180)** For commentary, see Bantekas & Ullah, *Article 33: Correction and Interpretation of Award; Additional Award*, in I. Bantekas et al. (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 846-57 (2020); Bond, Paralika & Secomb, *ICC Rules of Arbitration, 2012*, in L. Mistelis (ed.), *Concise International Arbitration* 427-30 (2d ed. 2015); de C. Frôes, *Correction and Interpretation of Arbitral Awards*, in *Liber Amicorum in Honour of Robert Briner* 285 (2005); Do, *Plaidoyer pour la Reconnaissance Effective du Renvoi de la Sentence à l'Arbitre pour Éviter l'Annulation dans les Pays de Civil Law*, 2018 Rev. Arb. 337; J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-1265 to 1303 (2012); Gunter, *L'Interprétation de la Sentence: Examen de Quelques Questions à la Lumière d'un Cas Réel*, 14 ASA Bull. 574 (1996); Kaufmann-Kohler & Rigozzi, *Correction and Interpretation of Awards in International Arbitrations Held in Switzerland*, 16(4) Mealey's Int'l Arb. Rep. 25, ¶¶16-22 (2001); Knutson, *The Interpretation of Final Awards: When Is A Final Award Not Final?*, 11(2) J. Int'l Arb. 99 (1994); Kühn, *Rectification and Interpretation of Arbitral Awards*, 7(2) ICC Ct. Bull. 78 (1996); H. Verbist, E. Schäfer & C. Imhoos, *ICC Arbitration in Practice* 194 (2d ed. 2015); Vollmer & Bedford, *Post-Award Arbitral Proceedings*, 15(1) J. Int'l Arb. 37, 41-44 (1998); T. Webster & M. Bühler, *Handbook of ICC Arbitration* ¶¶36-9 to 29 (4th ed. 2018); T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶37-1 to 21 (3d ed. 2019); Williams & Buchanan, *Corrections and Interpretations of Awards Under Article 33 of the Model Law*, 4 Int'l Arb. L. Rev. 119 (2001).
- 181)** See, e.g., *Procedural Order of 6 January 2003 in ICC Case 11451 (Extract)*, in ICC, *Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders Issued by Arbitral Tribunals Acting Under the ICC Rules of Arbitration (2003-2004)* (2010) ("As to the scope of 'interpretation', which might be regarded as broader than the 'correction' feature, there is virtual unanimity that an application of that sort cannot be used to seek revision, reformulation or additional explanations of a given decision"); T. Webster, *Handbook of UNCITRAL Arbitration* ¶37-06 (3d ed. 2019) ("However, this type of request can easily become an attempt to re-argue the case, which should be avoided. Article 37 does not permit a Tribunal to change the Award but only to interpret it").
- 182)** Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 325-26 (2d ed. 2005).
- 183)** See *Delimitation of the Continental Shelf (U.K. v. France)*, XVII R.I.A.A. 271, 296 (P.C.I.J. 1978) ("A request for interpretation must, therefore, genuinely relate to the determination of the meaning and scope of the decision, and cannot be used as a means for its 'revision' or 'annulment', processes of a different kind to which different considerations apply"); *Case Concerning the Factory Chorzów*, PCIJ Series A, No. 9, 4 et seq. (P.C.I.J. 1928). See also *Wintershall AG v. Qatar, Final Ad Hoc Award of 31 May 1988*, 28 I.L.M. 833, 835-36 (1989) ("The Tribunal agrees with the Claimants that the 'principle of *res judicata* prevents the re-opening of necessarily decided points. It does not prevent the clarification of a decision nor the giving of a decision on points which an award has left undecided").
- 184)** See [§2.01_\[A\]\[1\]](#); [§11.04\[A\]\[3\]\[e\]](#); [§15.04_\[B\]\[1\]](#); [§17.02\[A\]](#) (especially [§17.02\[A\]\[3\]\[b\]\[i\]](#)); [§17.02\[G\]\[3\]\[a\]](#); [§24.02_\[A\]](#); [§24.03\[B\]\[1\]](#).
- 185)** See [§24.04\[B\]](#).
- 186)** UNCITRAL Model Law, Art. 33(1)(b).
- 187)** See [§24.04_\[B\]](#); UNCITRAL Model Law, Arts. 33(1), (4).
- 188)** See *Award in SIAC Case No. 6 of 6 February 1998*, cited in P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 441 (4th ed. 2019).
- 189)** See [§24.04\[C\]](#).
- 190)** UNCITRAL Model Law, Art. 33(1)(b). See Bantekas & Ullah, *Article 33: Correction and Interpretation of Award; Additional Award*, in I. Bantekas et al. (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 851 (2020) ("The arbitral tribunal can issue an interpretation concerning some points in the award, if the parties consent to it"); P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 439 (4th ed. 2019); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 890 (1989) ("the Commission decided that the arbitral tribunal would have the power to interpret the award only if the parties agreed, either in advance or at the time of the request for interpretation, to provide this power"); Knutson, *The Interpretation of Final Awards: When Is A Final Award Not Final?*, 11(2) J. Int'l Arb. 99 (1994).
- 191)** P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 438 (4th ed. 2019) ("It was stated that [Article 33(1)(b)] 'invited attempts on the part of both the winner and the loser to get changes made in the merits of the award' and that it 'might be used as a means for the losing party to harass the arbitral tribunal'"); Sanders, *UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future*, 21 Arb. Int'l 443, 464 (2005).
- 192)** As discussed below, an ambiguous or uncertain award is exposed to annulment in many jurisdictions. See [§25.04_\[C\]](#); [§26.05\[C\]\[3\]\[d\]](#); [§26.05\[C\]\[5\]](#).
- 193)** Alternatively, the parties' arbitration agreement may be interpreted as impliedly authorizing interpretation of an ambiguous award (subject to express agreement to the contrary). See also [§24.03\[B\]\[6\]](#).

- 194) This is, for example, the conclusion under Swiss law. See §24.04[B]. A representative instance of an *ad hoc* arbitration where an award (albeit a partial award) was interpreted is *Final Award in Ad Hoc Case of 31 May 1988, Wintershall AG v. Qatar, Final Ad Hoc Award of 31 May 1988*, 28 I.L.M. 833, 835-36 (1989).
- 195) The drafters of the UNCITRAL Rules (which contain a parallel provision to that in the Model Law) considered replacing the term “interpretation” with references to “clarification” or “explanation.” S. Baker & M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran–United States Claims Tribunal* 192 (1992).
- 196) P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 438 (4th ed. 2019).
- 197) S. Baker & M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran–United States Claims Tribunal* 192 (1992). But see Daly, *Correction and Interpretation of Arbitral Awards Under the ICC Rules of Arbitration*, 13(1) ICC Ct. Bull. 61 (2002) (scope of interpretation should be left to discretion of tribunal under ICC Rules).
- 198) See H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 891 (1989).
- 199) *Id.*
- 200) *PepsiCo, Inc. v. Iran, Decision No. DEC 55-18-1 of 19 December 1986*, 13 Iran–US CTR 328, 329 (1986).
- 201) See, e.g., *Norman Gabay v. Iran, Decision No. DEC 99-77-2 of 24 September 1991*, 27 Iran–US CTR 194, 195 (1991); *Uiterwyk Corp v. Iran, Decision and Correction to Partial Award of 22 November 1988*, 19 Iran–US CTR 171, 172-73 (1988); *Am. Bell Int’l, Inc. v. Iran, Decision No. DEC 58-48-3 of 19 March 1987*, 14 Iran–US CTR 173, 174 (1987); *Paul Donin de Rosiere v. Iran, Decision No. DEC 57-498-1 of 10 February 1987*, 14 Iran–US CTR 100, 101-02 (1987); *PepsiCo, Inc. v. Iran, Decision No. DEC 55-18-1 of 19 December 1986*, 13 Iran–US CTR 328, 329-30 (1986); *Ford Aerospace & Commc’ns Corp. v. Air Force of Iran, Decision No. DEC 47-159-3 of 2 October 1986*, 12 Iran–US CTR 304, 305 (1986); *Judgment of 2 February 2017*, 2018 NJOZ 584, 593 (Oberlandesgericht Frankfurt) (interpretative award may clarify that arbitral tribunal’s prior “decision” on costs constitutes a binding award); *Judgment of 13 September 2017*, 2018 Rev. Arb. 225 (French Cour de Cassation Civ. 1) (ambiguously formulated interest rate in dispositive part of award could not be enforced when parties could, and had failed to, ask for clarification from arbitral tribunal). See also Bantekas & Ullah, *Article 33: Correction and Interpretation of Award; Additional Award*, in I. Bantekas et al. (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 851-52 (2020) (“There may be situations where a statement needs to be clarified, or it is uncertain whether some specific issues have been dealt with in the award or reserved for future determination. Interpretation can be used whenever the final award does not contain the minimum information necessary to grasp the tribunal’s line of reasoning.”); Caron & Reed, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 Arb. Int’l 429, 431 (1995); T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶37-12 (3d ed. 2019) (“the essence of an interpretation should be to remove an ambiguity in particular as to the method in which the operative part of the Award should be understood”).
- 202) See, e.g., French Code of Civil Procedure, Art. 1485(2); German ZPO, §§1058(1)(2); Belgian Judicial Code, Art. 1715(1)(b); Singapore International Arbitration Act, Schedule 1, Art. 33(1)(b); Swedish Arbitration Act, §32; British Columbia International Commercial Arbitration Act, §33(1)(b); Greek Code of Civil Procedure, Art. 894; Japanese Arbitration Law, Art. 42; Indian Arbitration and Conciliation Act, Art. 33(1)(b); Malaysian Arbitration Act, §35(2); Russian International Arbitration Law, Art. 33(1); South Korean Arbitration Act, Art. 34(1)(2); Costa Rican Arbitration Law, Art. 33(1)(b).
- 203) The FAA provides only for corrections and modifications, and not for interpretations. U.S. FAA, 9 U.S.C. §11. Some U.S. courts appear to have considered the alleged ambiguity of an award in confirmation and/or vacatur proceedings. See, e.g., *Gen. Re Life Corp. v. Lincoln Nat’l Life Ins. Co.*, 909 F.3d 544, 549 (2d Cir. 2018) (arbitral tribunal did not exceed authority by clarifying temporal scope of premium payments ordered in award); *E. Seaboard Constr. Co. v. Gray Constr., Inc.*, 553 F.3d 1, 6 (1st Cir. 2008) (arbitrator did not exceed authority by revisiting initial award and clarifying amount of award); *Int’l Ass’n of Machinists & Aerospace Workers v. Hawaiian Airlines*, 2010 WL 4688809, at *9 (D. Haw.) (vacating arbitrator’s supplemental decision and remanding to arbitrator for clarification and interpretation of original decision); *Gerling Global Reins. Corp. v. Yasuda Fire & Marine Ins. Co.*, 1999 WL 553767, at *1 (S.D.N.Y.) (“a district court may also consider challenges to an award’s clarity when considering a petition for confirmation”).
- 204) Note that, while the English Arbitration Act, 1996, does not provide for “interpretations,” §57 of the Act permits corrections to remove or clarify ambiguities. See §24.03[B][2].
- 205) See §24.03[B][6], for a similar analysis in the context of corrections to an award. Even before the ICC Rules were amended in 1998 to provide expressly for the possibility of interpretations, ICC practice was to permit interpretations in limited circumstances. Kühn, *Rectification and Interpretation of Arbitral Awards*, 7(2) ICC Ct. Bull. 78, 81-82 (1996).

- 206) See *Judgment of 2 November 2000*, DFT 126 III 524, 527 (Swiss Fed. Trib.); B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶1521 (3d ed. 2015); Berti & Schnyder, in S. Berti (ed.), *International Arbitration in Switzerland* Art. 190, ¶197 (2000). *Contra* Poudret, *L'Interprétation des Sentences Arbitrales*, in C. Reymond & E. Bucher (eds.), *Swiss Essays on International Arbitration* 278-82 (1984).

In contrast, the 2011 Swiss Code of Civil Procedure, which applies to domestic Swiss arbitration, provides that each party may request the tribunal to interpret the award. See Swiss Code of Civil Procedure, Art. 388.

- 207) See, e.g., *Torch Offshore LLC v. Cable Shipping Inc.* [2004] EWHC 787, ¶28 (Comm) (English High Ct.) (“It seems to me that [§]57(3)(a) can be used to request further reasons from the arbitrator or reasons where none exist”); *RC Pillar & Sons v. Edwards* [2001] All ER (D) 232, ¶58 (TCC) (English High Ct.) (“once the arbitrator had been asked to make corrections to his award ... it was incumbent on him to consider all possible accidental slips, omissions or ambiguities in the award”). See also *World Trade Corp. v. C. Czarnikow Sugar Ltd* [2004] EWHC 2332, ¶8 (Comm) (English High Ct.) (“Unless their award is so opaque that it cannot be ascertained from reading it by what evidential route they arrived at their conclusion on the question of fact there is nothing to clarify. To arrive at a conclusion of fact expressly on the basis of evidence that was before them does not call for clarification for it is unambiguously clear that they have given more weight to that evidence than to other evidence.”). See also T. Webster, *Handbook of UNCITRAL Arbitration* ¶37-04 (3d ed. 2019) (“Section 57 of the English Arbitration Act of 1996 does not provide for interpretation of Awards; however, the better view is that art. 37 would be upheld as reflecting the parties’ arbitration agreement as the English Arbitration Act 1996 does not prohibit interpretation of Awards”).
- 208) See, e.g., *Gen. Re Life Corp. v. Lincoln Nat’l Life Ins. Co.*, 909 F.3d 544 (2d Cir. 2018) (acknowledging “well-settled rule in this Circuit that when asked to confirm an ambiguous award, the district court should instead remand to the arbitrators for clarification”); *Local 1982, Int’l Longshoremen’s Ass’n v. Midwest Terminals of Toledo Int’l, Inc.*, 694 F.App’x 985, 987 (6th Cir. 2017) (“remand to the arbitration panel is both justified and appropriate in light of the ambiguous award”); *Turner v. United Steelworkers of Am.*, *Local 812*, 581 F.3d 672, 676 (8th Cir. 2009) (“Without question, a reviewing court may ask the arbitrator to clarify an award”); *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 830 (10th Cir. 2005) (remanding for clarification of “vague description of ‘purchase rights’”); *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 334 (3d Cir. 1991) (“courts have uniformly stated that a remand to the arbitration panel is appropriate in cases where the award is ambiguous”); *Nat’l Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 844-45 (6th Cir. 1985); *Olympia & York Fla. Equity Corp. v. Gould*, 776 F.2d 42, 45 (2d Cir. 1985) (“there is sufficient evidence of lack of a ‘mutual, final, and definite award’ within §10(d) to warrant a remand to the arbitrators to enable them to state what their true intention was”); *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108 (2d Cir. 1980) (remanding for interpretation of order against sale of “similar devices”); *United Elec., Radio & Mach. Workers of Am. v. Gen. Elec. Co.*, 2020 WL 1542375, at *3 (W.D. Pa.) (“when the remedy awarded by the arbitrator[] is ambiguous, a remand for clarification of the intended meaning of an arbitration award is appropriate”) (quoting *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 334 (3d Cir. 1991)); *Verizon Pa. LLC v. Commc’ns Workers of Am.*, *AFL-CIO*, *Local 1300*, 2020 WL 1508463, at *8 (E.D. Pa.) (“[w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify”) (quoting *Office & Prof’l Employees Int’l Union, Local No. 471 v. Brownsville Gen. Hosp.*, 186 F.3d 326, 331 (3d Cir. 1999)); *Three Bros Trading, LLC v. Generex Biotech. Corp.*, 2019 WL 3456631, at *3 (S.D.N.Y.) (“an arbitration award may be remanded back to the [a]rbitrator for clarification if the ‘award is incomplete or ambiguous’ and the court ‘is unable to discern how to enforce it’”); *Tully Constr. Co./A.J. Pegno Constr. Co. v. Canam Steel Corp.*, 2015 WL 906128, at *19-20 (S.D.N.Y.) (remanding to arbitrator to issue a reasoned award); *Fisher v. Gen. Steel Co.*, 2011 U.S. Dist. LEXIS 125826 (D. Colo.) (“While I have the authority to vacate the arbitrators’ award ... I find that remanding the matter back to the arbitrator is more appropriate”); *Wakeman v. Aqua2 Acquisitions, Inc.*, 2011 WL 666028, at *4 (D. Minn.) (clarification of award is exception to *functus officio* doctrine); *Ernest v. Lockheed Martin Corp.*, 2010 WL 3516639, at *1 (D. Colo.) (remanding to arbitrator for “mutual, final and definite award on the limited issue of back pay damages”); *Unite Here Local 26 v. Taj Hotel Boston*, 731 F.Supp.2d 95, 102 (D. Mass. 2010); *United Food & Commercial Workers v. Acme Mkts, Inc.*, 2009 WL 1867668 (E.D. Pa.) (remanding to arbitrator to clarify scope of award); *Hermanad Independiente de Empleados Telefonicos v. P.R. Tel. Co.*, 498 F.Supp.2d 454 (D.P.R. 2007); *Alcatel Space SA v. Loral Space & Commc’ns, Ltd.*, 2002 WL 1391819, at *4 (S.D.N.Y.) (if award is “ambiguous ... the court should remand to the arbitrators for further findings”); *Escobar v. Shearson Lehman Hutton, Inc.*, 762 F.Supp. 461, 464 (D.P.R. 1991) (remanding to arbitrator to clarify). See also *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* §4-34 (2019) (remand by U.S. court to arbitral tribunal of award made in United States).

- 209) *Turner v. United Steelworkers of Am.*, *Local 812*, 581 F.3d 672, 676 (8th Cir. 2009).

- 210)** *Raymond Jones Fin.Servs. Inc. v. Bishop*, 596 F.3d 183, 194-95 (4th Cir. 2010) (district court did not abuse its discretion in remanding an award to tribunal for clarification).
- 211)** *Bhd of Locomotive Eng'rs & Trainmen v. Union Pac. Railroad Co.*, 500 F.3d 591, 593 (7th Cir. 2007) (refusing to remand to arbitral tribunal: "A party subject to an arbitration award cannot be permitted to base a claim that the award is ambiguous on an immaterial change in his conduct after the award is rendered. Trivial ambiguities in arbitration awards are not a ground for refusing to enforce them – here as elsewhere, *de minimis non curat lex* – and even less so are trivial ambiguities manufactured by the party seeking to use them to invalidate an award"); *Three Bros Trading, LLC v. GenereX Biotech. Corp.*, 2019 WL 3456631, at *3 (S.D.N.Y.) ("Remand should not be granted where the court can resolve any alleged ambiguities in the award by modification"); *NoluPlastics, Inc. v. ValuEng'g, Inc.*, 2004 WL 2314512, at *4 (E.D. Pa.) (court may correct award when "the true intent of the Arbitrator is clear and this Court may make the appropriate corrections without remanding the case"); *Fischer v. CGA Computer Assocs., Inc.*, 612 F.Supp. 1038, 1041 (S.D.N.Y. 1985) ("Remand to an arbitrator should not be granted where the court can resolve any alleged ambiguities in the award pursuant to 9 U.S.C.A. §11 which authorizes court to modify or correct arbitrator's award when it is imperfect in matter of form").
- 212)** *See, e.g., United Elec., Radio & Mach. Workers of Am. v. Gen. Elec. Co.*, 2020 WL 1542375, at *3 (W.D. Pa.) (denying GE's request "for the Court to fashion an appropriate enforcement order" where the court finds that the language of award is unambiguous); *Duke Energy Int'l Peru Inv. No. 1 Ltd v. Peru*, 892 F.Supp.2d 53 (D.D.C. 2012) (denying Peru's motion to dismiss, or alternatively, remand to arbitral tribunal: "Respondent has demonstrated no ambiguity sufficient to warrant the exceptional remedy of remand"). *See also Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* §4-34, comment b (2019) ("A court does not remand if it may by consulting the arbitral record ascertain with certainty the tribunal's intent").
- 213)** *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* §4-34, Reporters' Note a (2019) ("Remand is usually surgically framed").
- 214)** 2013 UNCITRAL Rules, Art. 37(1).
- 215)** During deliberations of the 2010 revisions to the UNCITRAL Rules, the Working Group refused to accept a proposal "to clarify that ¶(1) might apply to the interpretation of part of the award only, along the lines of Article 33(1)(b) of the Model Law." S. Nappert, *Commentary on the UNCITRAL Arbitration Rules 2010: A Practitioner's Guide* 148 (2012). *See also* T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶37-1 to 21 (3d ed. 2019).
- 216)** *See, e.g.*, 2017 ICC Rules, Art. 36; 2016 SIAC Rules, Art. 33(4); 2012 Swiss Rules, Art. 35; 2018 HKIAC Rules, Art. 39; 2006 ICSID Rules, Rules 50-51; 2011 CRCICA Rules, Art. 37; 2018 DIS Rules, Art. 40; 2017 SCC Rules, Art. 47(1); 2018 VIAC Rules, Art. 39(1)(1.2).
- The ICC adopted a provision expressly permitting interpretations of awards in 1998, at the same time that it permitted corrections. *See* §24.03[C]. There was (and remains) greater controversy as to the former than the latter. Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 323 (2d ed. 2005).
- 217)** *See, e.g., Wintershall AG v. Qatar, Final Ad Hoc Award of 31 May 1988*, 28 I.L.M. 833, 835-36 (1989) (issuing interpretation of partial award, relying on parties' agreement to UNCITRAL Rules, notwithstanding provisions in law of arbitral seat for interpretation).
- The parties' agreement regarding interpretations should be regarded as an aspect of their general autonomy over the arbitral procedures and arbitrators' authority. *See* §15.02_[E]; §24.02_[B][5]; §24.03[B][6].
- 218)** *See, e.g., Feldman v. Mexico, Correction and Interpretation of the Award in ICSID Case No. ARB(AF)/99/1 (NAFTA) of 13 June 2003* (no interpretation permitted when "the Respondent ... effectively is seeking a new decision"); *Karim-Panahiv. U.S.A., Decision No. DEC 108-182-2 of 27 October 1992*, 28 Iran-US CTR 318, ¶3 (1992) (no interpretation permitted "when a party seeks to reargue the case or disagrees with the conclusions reached by the Tribunal"); *Am. Bell Int'l, Inc. v. Iran, Decision No. DEC 58-48-3 of 19 March 1987*, 14 Iran-US CTR 173, 174 (1987) ("does not identify any aspect of the Award where the Tribunal's interpretation is necessary").
- 219)** *Procedural Order of 6 January 2003 in ICC Case 11451 (Extract)*, in ICC, *Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders Issued by Arbitral Tribunals Acting Under the ICC Rules of Arbitration (2003-2004)* 18-20 (2010).
- 220)** F. Schwarz & C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* ¶29-005 (2009) ("As the legislative materials make clear, this was intended to avoid setting aside proceedings where an explanation from the tribunal suffices to clarify existing ambiguities in the award; it is not intended, however, to provide the parties or the arbitrators with an instrument to modify the award"); T. Zuberbühler, C. Müller & P. Habegger (eds.), *Swiss Rules of International Arbitration: Commentary* 384-85 (2d ed. 2013) ("the interpretation shall not provide an occasion for the arbitral tribunal to reconsider its decision nor to clarify any obscurity or ambiguity in the grounds of the decision").
- 221)** D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 803 (2d ed. 2013), citing to *Karim-Panahiv. U.S.A., Decision No. DEC 108-182-2 of 27 October 1992*, 28 Iran-US CTR 318, ¶3 (1992), cited in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 803 (2d ed. 2013).

- 222) See, e.g., *MethanexCorp. v. U.S.A.*, *Tribunal Letter re Request for Interpretation of Award in NAFTA Case of 25 September 2002*. See also Daly, *Correction and Interpretation of Arbitral Awards Under the ICC Rules of Arbitration*, 13(1) ICC Ct. Bull. 61, 63-64 (2002); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶¶24-95 (2003); H. Verbist, E. Schäfer & C. Imhoos, *ICC Arbitration in Practice* 193-94 (2d ed. 2015) (interpretation subject to strict conditions so as to prevent parties from resisting enforcement of award).
- 223) See, e.g., *Addendum in ICC Case No. 10189*, 13(1) ICC Ct. Bull. 81, 85-86 (2002); *Addendum in ICC Case No. 10172*, 13(1) ICC Ct. Bull. 79, 80-81 (2002); *Addendum in ICC Case No. 6653*, in J.-J. Arnaldez, Y. Derains & D. Hascher (eds.), *Collection of ICC Arbitral Awards 1991-1995* 525-29 (1997).
- 224) See 2020 LCIA Rules, Art. 27 (limiting tribunal's power to correct any ambiguities in award but not expressly providing for interpretation); 2020 WIPO Rules, Art. 68 (limiting tribunal's power to make corrections to award or to make additional award). See also 2015 CIETAC Rules, Art. 53; 2016 DIFC-LCIA Rules, Art. 27.
- 225) See §24.03[B][6].
- 226) For commentary, see Bantekas & Ullah, *Article 33: Correction and Interpretation of Award; Additional Award*, in I. Bantekas et al. (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 853-55 (2020); P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 439-40 (4th ed. 2019); Do, *Plaidoyer pour la Reconnaissance Effective du Renvoi de la Sentence à l'Arbitre pour Éviter l'Annulation dans les Pays de Civil Law*, 2018 Rev. Arb. 337; Garnier, *Interpréter, Rectifier et Compléter les Sentences Arbitrales Internationales*, 1995 Rev. Arb. 565; J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration* ¶¶765-66 (2d ed. 2007); M. Rubino-Sammartano, *International Arbitration: Law and Practice* 1534-35 (3d ed. 2014); T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶39-1 to 17 (3d ed. 2019).
- 227) UNCITRAL Model Law, Art. 33(3).
- 228) *Id.* See §24.03_[B][1]; §24.04[A].
- 229) UNCITRAL Model Law, Art. 33(3). The Model Law's legislative history indicates that the 60-day period runs from publication of the award. H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 892 (1989) ("The Working Group specifically stated with respect to all of the time limits governing tribunal action in Article 33 that 'there was no need for ... an explicit statement [that the time period ran from receipt of the request] since the correct answer [was] obtained clearly from the current text [which lacked the qualification]'").
- 230) UNCITRAL Model Law, Art. 33(3).
- 231) *New York Convention*, Art. V(1)(c). See *Todd Petroleum Mining Corp. Ltd v. Shell (Petroleum Mining) Co. Ltd*, (2014) NZCA 507, ¶35 (Wellington Ct. App.) (citing G. Born, *International Commercial Arbitration* 3124-25 (2d ed. 2014)). See also §26.05[C][4][c][ii].
- 232) See §26.05[C][4][c][ii].
- 233) English Arbitration Act, 1996, §57(3)(b).
- 234) *Id.* at §57(1). See R. Merkin, *Arbitration Law* ¶18.124 (2014 & Update July 2019); M. Mustill & S. Boyd, *Commercial Arbitration* 341 (2d ed. 1989 & Companion 2001).
- 235) See, e.g., French Code of Civil Procedure, Art. 1485(2); German ZPO, §1058(1)(3); Belgian Judicial Code, Art. 1715(3); Netherlands Code of Civil Procedure, Art. 1061; Italian Code of Civil Procedure, Art. 826; Singapore International Arbitration Act, Schedule 1, Art. 33(4); Japanese Arbitration Law, Art. 43; Indian Arbitration and Conciliation Act, Art. 33(4); Russian International Arbitration Law, Art. 33(3); South Korean Arbitration Act, Art. 34(1)(3).
- 236) *Judgment of 4 June 2002*, 1 Sch 22/01 (Oberlandesgericht Stuttgart).
- 237) Swedish Arbitration Act, §32.
- 238) See, e.g., *Judgment of 2 November 2000*, DFT 126 III 524, 527 (Swiss Fed. Trib.); J. Waincymer, *Procedure and Evidence in International Arbitration* 1342 (2012) ("Civilian jurisdictions have tended to allow tribunals to subsequently deal with omissions without any express basis in the statute or rules ...").
- 239) Similar conclusions apply to corrections and interpretations. See §23.03; §23.05_[A]; §26.05[C][4][c][ii].
- 240) *GlassMolders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182Bv. Excelsior Foundry Co.*, 56 F.3d 844, 846-47 (7th Cir. 1995); *Local P-9, United Food & Commercial Workers Int'l Union v. George A. Hormel & Co.*, 776 F.2d 1393, 1394-95 (8th Cir. 1985); *Mercury Oil Refining Co. v. Oil Workers Int'l Union*, 187 F.2d 980, 983 (10th Cir. 1951) (when "arbitrators have executed their award and declared their decision they are *functus officio* and have no power or authority to proceed further"); *Int'l Ass'n of Machinists & Aerospace Workers v. Hawaiian Airlines*, 2010 WL 4688809, at *9 (D. Haw.) (vacating arbitrator's supplemental decision and remanding to arbitrator for clarification and interpretation of original decision); *Am. Int'l Specialty Lines Ins. Co. v. Allied Capital Corp.*, 149 N.E.3d 33, 37 (N.Y. 2020).
- 241) *Trade & Transp., Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191, 195 (2d Cir. 1991).

- 242)** *SeeGen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544, 548-49 (2d Cir. 2018) (recognizing exception to *functus officio* “where an arbitral award fails to address a contingency that later arises”); *Brown v. Witco Corp.*, 340 F.3d 209, 219 (5th Cir. 2003) (recognizing three exceptions to *functus officio* doctrine, allowing an arbitrator to “(1) correct a mistake which is apparent on the face of his award; (2) decide an issue which has been submitted but which has not been completely adjudicated by the original award or (3) clarify or construe an arbitration award that seems complete but proves to be ambiguous in its scope and implementation”); *Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000) (same); *ASSiljestadv.HidecaTrading, Inc.*, 678 F.2d 391, 392 (2d Cir. 1982) (upholding award of interest supplementing original award); *Verizon Pa. LLC v. Commc'nsWorkers of Am., AFL-CIO, Local 1300*, 2020 WL 1508463, at *8 (E.D. Pa.) (recognizing three exceptions to *functus officio* doctrine, allowing an arbitrator to “(1) correct a mistake which is apparent on the face of [her] award”; (2) decide an issue “which has been submitted,” but not has been completely adjudicated; and (3) clarify ambiguity “[w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed.”) (quoting *Office & Prof'l Employees Int'l Union, Local No. 471 v. Brownsville Gen. Hosp.*, 186 F.3d 326, 331 (3d Cir. 1999)); *Reg'lLocal Union No. 846 v. Gulf Coast Rebar, Inc.*, 194 F.Supp.3d 1096, 1101 (D. Ore. 2016) (remanding issue of damage calculation to arbitrator where initial award was final but did not resolve issue of damages); *Ernest v. Lockheed Martin Corp.*, 2010 WL 3516639, at *1 (D. Colo.) (remanding award to arbitrator for “mutual, final and definite award on the limited issue of back pay damages”); *McQueen-Starling v. UnitedHealth Group, Inc.*, 2010 WL 768941, at *7 (S.D.N.Y.) (remanding to arbitrator to supplement or clarify facts); *Heimlich v. Shivji*, 441 P.3d 857, 864 (Cal. 2019) (“Section 1283.4 [of California Arbitration Act] requires that an award ‘include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy.’ In light of this duty, courts have inferred that when a putatively final arbitration award omits resolution of an issue necessary to decide the parties’ controversy, the arbitrator retains power to amend the award to address the undecided issue ... This retention of authority stems from the statutory obligation to decide all issues within the scope of the arbitrator’s assignment. It flows as well from the policy underlying that duty: ‘[T]he fundamental purpose of contractual arbitration is to finally resolve all of the issues submitted by the parties as expeditiously as possible, without the time and expense burdens associated with formal judicial litigation.’”)
- 243)** 2013 UNCITRAL Rules, Art. 39(1). The application must be made within the same 30-day time limit as applications for a correction or interpretation. [See §24.03\[C\]](#); [§24.04\[C\]](#). *See also* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 821-37 (2d ed. 2013) (Iran–US Claims Tribunal experience with additional awards).
- 244)** *See, e.g.*, 2016 ICDR Rules, Art. 33(1); 2016 SIAC Rules, Art. 33(3); 2020 LCIA Rules, Art. 27(3); 2012 Swiss Rules, Art. 37; 2018 HKIAC Rules, Art. 40; 2006 ICSID Rules, Rule 49; 2011 CRCICA, Art. 39; 2017 SCC Rules, Art. 48; 2018 VIAC Rules, Art. 39.
- 245)** Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 323 (2d ed. 2005).
- 246)** *Id.*; J. Fry, S. Greenberg & F. Mazza, *The Secretariat’s Guide to ICC Arbitration* ¶¶3-1277 to 1278 (2012); ICC, *Extracts from ICC Addenda and Decisions Rendered Under Article 29 of the ICC Rules of Arbitration*, 13(1) ICC Ct. Bull. 72 (2002).
- 247)** *See* [§24.02\[A\]](#); [§24.03\[A\]](#).
- 248)** *See* [§24.04\[A\]](#); [§26.05\[C\]\[4\]\[i\]](#).
- 249)** *Judgment of 20 December 2006*, 34 Sch 17/06 (Oberlandesgericht München). *See also* S. Nappert, *Commentary on the UNCITRAL Arbitration Rules 2010: A Practitioner’s Guide* 152 (2012) (“The Working Group agreed, after discussion, to delete the words ‘without any further hearings or evidence’ in the new version of ¶(2) so as to allow the possibility for the tribunal to convene further hearings or request evidence or pleadings”); T. Webster, *Handbook of UNCITRAL Arbitration* ¶39-15 (3d ed. 2019) (“Article 39(2) expressly permits the Tribunal to extend the time limit set out in that article. This is in recognition of the fact that the issues raised for the additional Award may be complex, and may necessitate further hearings.”).
- 250)** *Judgment of 20 December 2006*, 34 Sch 17/06 (Oberlandesgericht München) (three-week time limit sufficient in light of statutory principle that decision on supplementation should be rendered within two months after motion to supplement award).
- 251)** *Id.*; *Judgment of 30 August 2002*, 11 Sch 01/02 (Oberlandesgericht Hamburg).
- 252)** *See* Geimer, in R. Zöller (ed.), *Zivilprozessordnung* §1058, ¶4 (31st ed. 2016); Münch, in G. Lücke & P. Wax (eds.), *Münchener Kommentar zur Zivilprozessordnung* §1058, ¶20 (3d ed. 2008).
- 253)** For commentary, *see* P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 444-90 (4th ed. 2019); J. Fry, S. Greenberg & F. Mazza, *The Secretariat’s Guide to ICC Arbitration* ¶¶3-1304 to 1314 (2012); R. Merkin, *Arbitration Law* ¶20.35 (2014 & Update July 2019); Ortolani, *Article 34: Application for Setting Aside as Exclusive Recourse Against Arbitral Award*, in I. Bantekas et al. (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 897-98 (2020); Schlosser, in F. Stein & M. Jonas (eds.), *Kommentar zur Zivilprozessordnung* §1059, ¶27 (22d ed. 2002); H. Verbist, E. Schäfer & C. Imhoos, *ICC Arbitration in Practice* 195 (2d ed. 2015); T. Webster & M. Bühler, *Handbook of ICC Arbitration* ¶¶36-30 to 46 (4th ed. 2018).

- 254) UNCITRAL Model Law, Art. 34(4). See P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 445 (4th ed. 2019); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 920-22 (1989); Sanders, *UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future*, 21 *Arb. Int'l* 443, 466 (2005).
- 255) UNCITRAL, *Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9/264, Art. 34, ¶14 (1985).
- 256) See, e.g., *Metro. Prop. Realizations Ltd v. Atmore Inv. Ltd* [2008] EWHC 2925 (Ch) (English High Ct.) (remitting award to arbitrator for redetermination because award contained an error); *Judgment of 30 May 2008*, 11 Sch 09/07 (Oberlandesgericht Hamburg); *Transp. deCargaision(Cargo Carriers) v. Indus. Bulk Carriers*, [1990] CanLII 3028 (Québec Ct. App.) (1990) (rejecting argument that award was within exclusive jurisdiction of arbitral tribunal under Article 34(4) of Model Law); *Metalclad v. Mexico*, [2001] BCSC 664 (B.C. Sup. Ct. 2001) (remitting award to ICSID tribunal to address issue of interest).
- 257) UNCITRAL, *Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9/264, Art. 34, ¶14 (1985) (“Unlike in some common law jurisdictions, the procedure is not conceived as a separate remedy but placed in the framework of set aside proceedings”).
- 258) *D. Frampton & Co. v. SylvioThibeault & Navigation Harvey & Frères Inc.*, XIX Y.B. Comm. Arb. 257 (Canadian Fed. Ct. 1988) (1994); *Corp. Transnacional de Inversiones, SA de CV v. STET Int'l, SpA*, (2000) 49 OR3d 414 (Ontario Ct. App.); *Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey*, [2001] 1 SLR 624 (Singapore High Ct.), *rev'd on other grounds*, [2001] 3 SLR 237 (Singapore Ct. App.).
- 259) See, e.g., English Arbitration Act, 1996, §§68(3), 69; Swiss Intercantonal Concordat, Arts. 39-40. See *Husmann (Euro.) Ltd v. Ahmed Pharaon* [2003] EWCA Civ 266 (English Ct. App.); *F Ltd v. M Ltd* [2009] EWHC 275 (TCC) (English High Ct.) (remitting award to tribunal because of court's inability to identify basis for award's treatment of issue); *Sanhe Hope Full Grain Oil Foods Prod. Co. v. Toepfer Int'l Asia Pte* [2007] EWHC 2784 (Comm) (English High Ct.) (remitting to tribunal to apply contractual provision misinterpreted in award); *PT Putrabali Adyamuliv. Societe Est Epices* [2003] EWHC 3089 (Comm) (English High Ct.) (remitting award to tribunal to assess damages).
- 260) See, e.g., Russian International Arbitration Law, Art. 34; Ukrainian Arbitration Law, Art. 34; Costa Rican Arbitration Law, Art. 34(4); Egyptian Arbitration Law, Arts. 52-54; Tunisian Arbitration Code, Art. 78(4).
- 261) UNCITRAL, *Report the Work of Its Eighteenth Session*, U.N. Doc. A/40/17, ¶306 (1985). See also P. Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 452 (4th ed. 2019); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 920 (1989) (remission is “a useful mechanism for curing procedural defects without having to set aside the award”).
- 262) See §24.03_[B][6]; §24.04_[B]; §24.05[A].
- 263) See 2017 ICC Rules, Art. 36(4). See also J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-1304 to 1314 (2012); Webster, *Functus Officio and Remand in International Arbitration*, 27 *ASA Bull.* 441, 461-64 (2009).
- 264) English Arbitration Act, 1996, §§68(2)(g), 68(3)(a). See §25.04[J][1]. See also German ZPO, §1059; Swedish Arbitration Act, §35.
- 265) Hascher, *La Révision en Arbitrage International*, in *Liber Amicorum Claude Reymond* 111, 116 (2004) (“the revision of awards has provided little inspiration to contemporary legislations where international arbitration is involved”); Poncet, *Obtaining Revision of “Swiss” International Arbitral Awards: Whence After Thalès?*, 2009:2 *Stockholm Int'l Arb. Rev.* 39, 41-42 (although Swiss Law on Private International Law is silent on issue, Federal Tribunal has authority to remit award to arbitral tribunal for reconsideration); Schwartz, *Thoughts on the Finality of Arbitral Awards*, in L. Lévy & Y. Derains (eds.), *Liber Amicorum Serge Lazareff* 569, 576 (2011) (“In most other jurisdictions, the parties are only left with recourse before the courts” in cases of fraud during the arbitral proceedings).
- 266) See *Judgment of 2 November 2000*, 2001 *NJW* 374 (German Bundesgerichtshof). As noted above, however, §1059(4) of the ZPO provides for judicial remission of an arbitral award to the tribunal in appropriate cases. That authority has been exercised in cases involving claims of falsified documents. *Judgment of 30 May 2008*, 11 Sch 09/07 (Oberlandesgericht Hamburg).
- 267) See, e.g., 2017 ICC Rules; 2020 ICDR Rules; 2014 LCIA Rules.
- 268) *Judgment of 25 May 1992*, 1993 *Rev. Arb.* 91 (French Cour de Cassation Civ. 1). One commentator has explained that “the deceived arbitrator must be given the opportunity to revisit what he was not able to judge in the context of a fair proceeding and finally to discharge his mandate.” Hascher, *La Révision en Arbitrage International*, in *Liber Amicorum Claude Reymond* 111 (2004).

The Cour de Cassation reached this conclusion notwithstanding the withdrawal (in the 1981 reform of French arbitration law) of previously existing statutory power to seek revision of awards in cases of fraud. French Code of Civil Procedure, Art. 1507 (in force until 2011); de Boissésou, *L'Arbitrage et la Fraude*, 1993 *Rev. Arb.* 3, 10-11.

- 269) For a description of a dispute involving Braspetro Oil Services Ltd and a Libyan state entity, see Hascher, *La Révision en Arbitrage International*, in *Liber Amicorum Claude Reymond* 111, 116 (2004); Schwartz, *Thoughts on the Finality of Arbitral Awards*, in L. Lévy & Y. Derains (eds.), *Liber Amicorum Serge Lazareff* 569 (2011).
- 270) E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1599 (1999); J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration* ¶846 (2d ed. 2007).
- 271) Hascher, *La Révision en Arbitrage International*, in *Liber Amicorum Claude Reymond* 111, 116 (2004).
- 272) French Code of Civil Procedure, Art. 1502(2). See Do, *Plaidoyer pour la Reconnaissance Effective du Renvoi de la Sentence à l'Arbitre pour Éviter l'Annulation dans les Pays de Civil Law*, 2018 Rev. Arb. 337, 345; J.-B. Racine, *Droit de l'Arbitrage* ¶¶998-1004 (2016).
- 273) See, e.g., *Judgment of 6 October 2009, Thales v. Frontier AG Berne*, DFT 4A_596/2008 (Swiss Fed. Trib.) (revising award based on new facts found in criminal investigation because, although Swiss Law on Private International Law is silent, Swiss courts have jurisdiction to review and order revision of awards made in Switzerland, in addition to statutory annulment authority, where new evidence demonstrates that award was procured by criminal fraud); *Judgment of 14 March 2008*, DFT 134 III 186 (Swiss Fed. Trib.); *Judgment of 9 July 1997*, 15 ASA Bull. 506 (Swiss Fed. Trib.) (1997); *Judgment of 11 March 1992*, 1993 Rev. Arb. 115 (Swiss Fed. Trib.). See also Berti & Schnyder, in S. Berti (ed.), *International Arbitration in Switzerland* Art. 190, ¶¶93-96 (2000); Poncet, *Obtaining Revision of "Swiss" International Arbitral Awards: Whence After Thalès?*, 2009:2 Stockholm Int'l Arb. Rev. 39, 52-53.
- 274) Poncet, *Challenging Awards Under Swiss Law: The Power to "Revise" Arbitral Awards*, 11(2) Int'l Arb. L. Rev. 88 (2008); Poncet, *Obtaining Revision of "Swiss" International Awards: Whence After Thalès?*, 2009:2 Stockholm Int'l Arb. Rev. 39, 49-52.
- 275) *Judgment of 28 September 2010*, DFT 4A_144/2010, ¶2.1.2 (Swiss Fed. Trib.). See B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶1498 (3d ed. 2015) ("it should suffice if the newly discovered evidence serves to prove a fact that already existed when the challenged award was made, no matter whether such evidence already existed at that time or only came into existence thereafter.").
- 276) See *Judgment of 23 July 2012*, DFT 4A_570/2011 (Swiss Fed. Trib.) ("since revision is an alternative legal recourse as compared to [annulment], it is not admissible to invoke one of the grounds contained in this provision if it was discovered before the time limit to appeal ran out"); *Judgment of 30 April 2012*, DFT 4A_763/2012 (Swiss Fed. Trib.) (in order to justify extraordinary remedy of revision, "investigations ... could and should have been carried out during the arbitral proceedings"; this "did not imply a general discovery obligation" but did require "diligence ... which is inherent to this extraordinary legal recourse").
- 277) Schwartz, *Thoughts on the Finality of Arbitral Awards*, in L. Lévy & Y. Derains (eds.), *Liber Amicorum Serge Lazareff* 569, 576 (2011) ("Although new facts or new evidence may not carry with them the same taint as fraud, they nevertheless may call into question the integrity of the arbitral process where they reveal a decision to be patently wrong and may therefore legitimately affect perceptions by users as to whether justice is being done").
- 278) Derains, *La Revision des Sentences dans l'Arbitrage International*, in *Liber Amicorum Claude Reymond* 165, 176 (2004) ("Contrary to the [French] Cour de cassation, the [Swiss Federal Tribunal] does not remit the revision request to the arbitrators. Relying on legal scholars' almost unanimous opinion, it considers itself as the authority having jurisdiction over the request."); Hascher, *La Révision en Arbitrage International*, in *id.* at 111, 116 (citing award where tribunal held that "[t]he clear binding conclusion of the [Swiss Federal Tribunal's] judgment is that only State Courts have jurisdiction over the revision of international arbitral awards" which avoids "disorganized" situation that would result if annulment actions were initiated in national court and revision requests were initiated before arbitral tribunal).
- 279) See award cited §24.07; *LincolnRiahiv. Iran, Decision No. DEC 133-485-1 of 17 November 2004*, 2004 WL 2812132, ¶¶35-43; *Lehigh Valley Railway (U.S.) v. Germany, Awardin Mixed Claims Commission of 15 December 1933*, 34 Am. J. Int'l L. 154 (1940); *Bilounev. Ghana Inv.Ctr, Ad Hoc Awards of 27 October 1989 & 30 June 1990*, XIX Y.B. Comm. Arb. 11, 22 (1994); Caron & Reed, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 Arb. Int'l 429, 444-45 (1995).
- 280) *Bilounev. Ghana Inv.Ctr, Ad Hoc Award on Jurisdiction and Liability of 27 October 1989*, XIX Y.B. Comm. Arb. 11, 21 (1994).
- 281) Award in ICC Case No. 6079, summarized in Hascher, *L'Autorité de la Chose Jugée des Sentences Arbitrales, Travaux du Comité Français du Droit International Privé 2000-2002* 17, 27 (2004).
- 282) Fadlallah, *Nouveau Recul de la Révision au Fond: Motivation et Fraude dans le Contrôle des Sentences Arbitrales Internationales*, 337 Gaz. Pal. 5 (2000) ("A revision request should normally be brought before the authority which rendered the disputed decision. It is this authority which is in the best position to decide if it was misled or if the alleged fraud had an impact on its decision."); Hascher, *La Révision en Arbitrage International*, in *Liber Amicorum Claude Reymond* 111, 116 (2004) ("the procedural advantage arising from the fact that the arbitrator is in the best position to rule on the admissibility of a revision request and to rule on the impact of new evidence on the previous award only exists if it is the same arbitrator who had rendered the previous award").

- 283)** Derains, *La Revision des Sentences dans l'Arbitrage International*, in *Liber Amicorum Claude Reymond* 165, 176 (2004) (“First of all, this corresponds to the parties’ will not to submit their dispute to state courts. But more importantly, it is obvious that revision by the arbitrators is more cost-efficient.”).
- 284)** *But see* Caron & Reed, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 *Arb. Int’l* 429, 445 (1995) (possibility that tribunal has inherent powers to reconsider its award could easily be abused).
- 285)** See §24.02[B][5].
- 286)** Hascher, *La Révision en Arbitrage International*, in *Liber Amicorum Claude Reymond* 111, 116 (2004) (describing award where ICC arbitral tribunal seated in Paris applied requirements of French law regarding revision of award).
- 287)** These include competence-competence, provisional measures, disclosure and remedial authority. See §19.03 [D]; §23.07 [F]; §23.09 [B]; §27.03[E].
- 288)** Hascher, *La Révision en Arbitrage International*, in *Liber Amicorum Claude Reymond* 111, 116 (2004) (“The logic of the principle according to which the arbitrators choose the procedural rules without being constrained by a national procedural law should rather favor an autonomous system of revision that preserves the international character of the arbitration”).
- 289)** See §25.04 [J]; §26.05[C][11].
- 290)** See §25.04 [J]; §26.05[C][11].
- 291)** *Judgment of 19 December 1995, Westman Int’l Ltd v. Euro.GazTurbines*, 1996 *Rev. Arb.* 49 (French Cour de Cassation) (while procedural fraud may constitute grounds for revocation, it can also constitute grounds for annulment of award as violation of international public policy); Fadlallah, *Nouveau Recul de la Révision au Fond: Motivation et Fraude dans le Contrôle des Sentences Arbitrales Internationales*, 5 *Gaz. Pal.* 337.
- 292)** Fadlallah, *Nouveau Recul de la Révision au Fond: Motivation et Fraude dans le Contrôle des Sentences Arbitrales Internationales*, 5 *Gaz. Pal.* 337 (“the court which annuls [the award] cannot rule [on the merits] instead of the arbitrators”); Hascher, *La Révision en Arbitrage International*, in *Liber Amicorum Claude Reymond* 111, 116 (2004) (“when granting the application, the court annuls without ruling on the merits”).
- 293)** The ICC, SIAC, ICDR, LCIA, HKIAC, DIS and VIAC arbitration rules all lack any provision for internal administrative appeals from or challenges to an arbitral award. See, e.g., 2016 SIAC Rules, Art. 32(11).
- 294)** As noted below, many institutional arbitration rules include waivers, expressed in varying terms, of rights to challenge arbitral awards. See §25.07[A]. The principal exception to this involves provisions in a number of institutional rules for an arbitral tribunal to make “corrections” to its awards during a very limited period following publication of the award; as discussed above, these corrections are typically limited to matters of obvious slips or mathematical miscalculations. See §24.03 [C]; §24.04[C].
- 295)** ICSID Convention, Art. 52. See C. Schreuer et al., *The ICSID Convention: A Commentary* Art. 52 (2d ed. 2009). For examples of annulment decisions, see *Blusun SA v. Italy, Decision on Annulment in ICSID Case No. ARB/14/3 of 13 April 2020*; *Victor Pey Casado v. Chile, Decision on Annulment in ICSID Case No. ARB/98/2 of 8 January 2020*; *Teinver SA v. Argentina, Decision on Annulment in ICSID Case No. ARB/09/1 of 29 May 2019*; *RSMP Prod. Corp. v. Saint Lucia, Decision on Annulment in ICSID Case No. ARB/12/10 of 29 April 2019*; *Churchill Mining v. Indonesia, Decision on Annulment in ICSID Case No. ARB/12/14 and 12/40 of 18 March 2019*; *Tenaris SA v. Venezuela, Decision on Annulment in ICSID Case No. ARB/12/23 of 28 December 2018*; *Suez, Sociedad General de Aguas de Barcelona SA v. Argentina, Decision on Respondent Application for Annulment in ICSID Case No. ARB/03/17 of 14 December 2018*.
- 296)** ICSID Convention, Art. 52(1).
- 297)** *Id.* at Art. 52(2).
- 298)** *Id.* at Art. 52(3).
- 299)** C. Schreuer et al., *The ICSID Convention: A Commentary* Art. 52, ¶10 (2d ed. 2009); *OI European Group BV v. Venezuela, Decision on the Application for Annulment in ICSID Case No. ARB/11/25 of 6 December 2018*, ¶61 (“Even if an *ad hoc* annulment committee reaches a decision to annul, partially or totally, an ICSID award, that committee does not have the mandate to revisit the merits of the case in which the annulled award was rendered.”).
- 300)** ICSID Convention, Art. 52(6). The ICSID Arbitration Rules provide that “[i]f the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled.” See 2006 ICSID Rules, Rule 55(3) (“Resubmission of Dispute after an Annulment”). See also ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID* ¶35 (2016) (“[t]he function of an *ad hoc* Committee ... is not to rule on the merits of the parties’ dispute if it decides to annul, would be the task of a new Tribunal should either party resubmit the dispute following annulment of the award.”).

- 301)** C. Schreuer et al., *The ICSID Convention: A Commentary* Art. 52, ¶¶8-13 (2d ed. 2009); *Capital Fin. Holdings Luxembourg SA v. Cameroon, Decision on Annulment in ICSID Case No. ARB/15/18 of 25 October 2019*, ¶116 (finding that annulment is not an appeal but an “extraordinary” and “exceptional” remedy); *Bernhard von Pezold v. Zimbabwe, Decision on Annulment in ICSID Case No. ARB/10/15 of 21 November 2018*, ¶239 (“The object and purpose of annulment proceedings is not to test the substantive correctness of the award.”); *Iberdrola Energía SA v. Guatemala, Decision on Annulment in ICSID Case No. ARB/09/5 of 13 January 2015*, ¶74 (distinguishing between appeal and annulment: the former could modify the award on merits, the latter could only invalidate or confirm the award, in whole or part); *Cont’l Cas. Co. v. Argentine, Decision on Annulment in ICSID Case No. ARB/03/9 of 16 September 2011*, ¶81 (“In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1).”); *Compañía de Aguas del Aconquija SA v. Argentine, Decision on Annulment in ICSID Case No. ARB/97/3 of 3 July 2002*, 41 I.L.M. 1135, ¶¶62-66 (2002).
- 302)** *Mobil Exploration and Dev. Inc. v. Argentina, Decision on Annulment in ICSID Case No. ARB/04/16 of 8 May 2019*, ¶44 (noting that the annulment committee’s mandate is to verify the integrity of the award); *Tenaris SA v. Venezuela, Decision on Annulment in ICSID Case No. ARB/12/23 of 28 December 2018*, ¶43 (“An annulment committee should not qualify a tribunal’s reasoning as superficial, substandard, deficient, wrong or otherwise faulty. All this would reassess the reasoning of the tribunal which is only appropriate for an appeal.”); *M.C.I. Power Group LC v. Ecuador, Decision on Annulment in ICSID Case No. ARB/03/6 of 19 October 2009*, ¶24 (“the role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness”); *MTDEquity Sdn Bhd v. Chile, Decision on Annulment in ICSID Case No. ARB/01/7 of 21 March 2007*, ¶54 (“[T]he role of an *ad hoc* committee in the ICSID system is a limited one. It cannot substitute its determination on the merits for that of the tribunal. Nor can it direct a tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one.”).
- 303)** ICSID, *The ICSID Caseload: Statistics 18* (2019).
- 304)** *Fraport AG Frankfurt Airport Serv. Worldwide v. Philippines, Decision on Annulment in ICSID Case No. ARB/03/25 of 23 December 2010*; *Enron Corp. Ponderosa Asset, LP v. Argentina, Decision on Annulment in ICSID Case No. ARB/01/03 of 30 July 2010*; *Sempra Energy Int’l v. Argentina, Decision on Annulment in ICSID Case No. ARB/02/16 of 29 June 2010*.
- 305)** ICSID, *Background Paper on Annulment for the Administrative Council of ICSID* (2012). See also ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID* (2016).
- 306)** See, e.g., Blome, *Contractual Waiver of Article 52 ICSID: A Solution to the Concerns with Annulment?*, 32 *Arb. Int’l* 601, (2016) (“The operation of Article 52 has also been met with concerns of expansive interpretation of the grounds of review, the risk of unmeritorious applications and the procedure’s excessive time and cost.”); Bottini, *Present and Future of ICSID Annulment: The Path to An Appellate Body?*, 31 *ICSID Rev.* 712 (2016) (advocating for the adoption of an appeal mechanism as a method of improvement to award review mechanisms); Shin, *Annulment*, in M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* 699 (2015) (“While *ad hoc* committees have consistently recognized the limited nature of annulment proceedings and the distinction between annulment and appeal, decisions of committees have not always been consistent with the design of the ICSID annulment mechanism.”).
- 307)** 2016 GAFTA Arbitration Rules, Art. 10(1).
- 308)** *Id.* at Art. 12(3).
- 309)** *Id.* at Art. 12(4).
- 310)** This is true insofar as the statutes or regulations of the body so provide or the parties have concluded a specific arbitration agreement.
- 311)** See 2019 CAS Rules, Rule 47.
- 312)** See §1.02_[B][5]; §24.02. As discussed below, an internal appeal process will likely prevent an award from becoming final or binding while on appeal. See §26.05[C][7].
- 313)** See §1.02[B][7].
- 314)** See §1.02_[B][6]; §15.02.
- 315)** See §2.01[A][1][a]; §11.05[11.04[A][3][f]; §15.02[A].

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THE SECRETARIAT'S GUIDE TO ICC ARBITRATION

A Practical Commentary on the 2012 ICC Rules of Arbitration
from the Secretariat of the ICC International Court of Arbitration

With the assistance of Benjamin Moss

Foreword by John Beechey
Preface by Peter Wolrich



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Foreword

The latest iteration of the ICC Rules of Arbitration—the 2012 Rules—is the result of one of the most extensive, consultative exercises ever undertaken by the ICC. A decision to review and revise the highly regarded 1998 Rules was taken by the ICC Commission on Arbitration in October 2008. In the months that followed, members of the Commission and of the Task Force set up by the Commission, together with members of the international arbitration community at large, submitted a very considerable number of comments and proposals for changes to the Drafting Sub-Committee tasked with the production of a draft of the new Rules.

Commission Chairman Peter Wolrich, who, with Michael Bühler and Laurie Craig, chaired the Drafting Sub-Committee, explains the genesis of the new Rules in some detail in his preface to this book. It is right, however, that I, too, acknowledge the contribution to the successful conclusion of this exercise of so many individuals, including in-house counsel, whose views were widely canvassed, and the members of the parallel Task Force considering the new Rules from the point of view of state parties under the able chairmanship of Eduardo Silva Romero and Peter Goldsmith. Such comprehensive consultations and the changes resulting from them reflected in the new Rules demonstrate the extent to which the ICC has taken account of the views of users of its Rules.

The 2012 Rules remain true to the drafting ethos of previous editions of the Rules. Nothing has been changed for the sake of change. Such changes and innovations as have been made reflect the dramatic evolution in the nature and scope of the Court's user base and practice in the fourteen years since the promulgation of the 1998 Rules, not least the explosion in the numbers of multiparty disputes (particularly from Latin America), the all-pervasive use of electronic media and means of communication, and increasing pressure on arbitrators and institutions alike to ensure that time and cost constraints are respected.

User demands included assurances as to the availability of arbitrators; early clarification of the nature and basis of claims; the ability to call upon an emergency arbitrator procedure; and more certainty as to when an award might be expected after the conclusion of a hearing and the filing of post-hearing briefs. In large part, these demands have been met in the new Articles 4(3), subparagraphs (c) and (d); 11(2); 29; and 27, subparagraph (b). Multi-party disputes are the subject of Articles 7–10 of the 2012 Rules, a group of provisions that constitute one of the principal innovations of the new Rules.

Traditionally the ICC has laid, and continues to lay, great store upon the ability of the parties to ICC arbitration to agree upon substantial elements of the procedure applicable to “their” arbitration and their expectation that such agreements will be respected. In turn, it is to be hoped that parties will take full advantage of the opportunity to play an active part in the shaping of the arbitral procedure as Article 24 and, specifically, Article 24(4), of the new Rules invites them to do. The importance of this element of direct party involvement cannot be overstated.

The Guide, which takes the reader through the 2012 Rules from start to finish, will be an indispensable work of reference for all involved in ICC arbitration, whether they come new to such proceedings or are “old hands”, and whether they do so as a party, counsel or arbitrator. While the 2012 Rules have already been the subject of numerous commentaries, none could be as authoritative a Guide as that which Jason Fry, Simon Greenberg and Francesca Mazza have compiled.

Not only were all three authors intimately involved in the drafting of the new Rules, but as three of the then most senior members of the Secretariat, their knowledge of the practices of the Court and Secretariat is unrivalled. All three authors have also overseen the revision of all of the Secretariat’s standard form letters and other administrative documentation to ensure their compatibility with the provisions of the new Rules—a daunting task in itself. There is simply no one better qualified to provide a detailed overview of the new Rules and their operation. At the time of publication, all three of the authors will have taken up new posts outside the ICC or be on the point of doing so. This final contribution on their part to the work of the Court and Secretariat is consistent with the qualities of excellence and commitment that have been the hallmark of their work while at the ICC and for which, on behalf of the ICC Court, I offer my thanks and sincere appreciation.

John Beechey

President

ICC International Court of Arbitration

Preface

The Guide you have before you is designed to provide you with an in-depth presentation and analysis of the new ICC Rules of Arbitration in force as of 1 January 2012. This Guide has the great advantage of providing insights into the Rules from the perspective of the Secretariat of the ICC International Court of Arbitration, and its authors were active participants in the preparation of the new Rules. By way of introduction to this invaluable resource, I would like to give you, from my own perspective as Chairman of the ICC Commission on Arbitration and as one of the principal draftsmen of the new Rules, an inside view into exactly how the Commission went about revising the Rules and what the goals of the revision process were.

In accordance with the Constitution of the ICC, ICC technical documents with regard to dispute resolution, including ICC Rules, are normally prepared by the ICC Commission on Arbitration. Our Commission was thus entrusted with the task of proposing revisions to the ICC Rules of Arbitration to the ICC governing bodies. The previous revision of the Rules dated from 1998, and while the Rules were functioning effectively and there was no urgent reason for change, it was felt that after so many years it would be useful to take a fresh look at them in order to bring them up-to-date and ensure that they will continue to be useful to arbitration users worldwide for many years to come.

The revision of the Rules was accomplished in accordance with a step-by-step process. First, we held three consultations to ensure that we would benefit from a wide range of ideas and suggestions concerning desirable changes or additions to the Rules. The first consultation took the form of a conference that we organized for the arbitration community at large to solicit and discuss ideas. Next, we consulted and obtained a large number of suggestions and proposals from the ICC National Committees. Suggestions and proposals were also provided by the ICC International Court of Arbitration and its Secretariat. Finally, we consulted the ICC Commission Task Force on Arbitration Involving States or State Entities. That Task Force, which included representatives of states and persons with significant experience working with states, provided us with useful suggestions for making the Rules more obviously applicable to arbitrations involving states.

With this input in hand, we set up an organizational structure to carry out the actual work of revising the Rules. A Task Force on the Revision of the ICC Rules of Arbitration was created, and I was asked to serve as Chairman of this Task Force along with two Co-Chairs, Michael Bühler and Laurie Craig. Francesca Mazza, the Secretary of the Commission, was asked to serve as Secretary to the Task Force.

In order to have a wide input into the process of reviewing and revising the Rules, it was decided not to limit the number of members of the Task Force. The Task Force was then constituted with over 180 members. This guaranteed a thorough review of the Rules. However, given that number, it was necessary to set up a much smaller Drafting Sub-Committee, which we referred to as the DSC. The role of the DSC was to go through the Rules article by article and draft proposals for amendments or new provisions to be submitted to the Task Force.

The DSC was constituted with twenty members who represented diverse geographical locations and diverse legal systems. DSC members came from five different continents and fourteen different countries. In addition, they represented all categories of players in ICC arbitration. Some DSC members were mainly counsel, others were mainly arbitrators. The Court was represented by Andrew Foyle and the Secretariat was represented by Jason Fry. John Beechey, the President of the Court, and the Vice-Chairs of the Commission were ex-officio members.

Most importantly, it was decided to have two representatives from the user community as DSC members. These were Anke Sessler from a major German company and John Sander from a major US company. We considered this to be an extremely important step because, of course, the Rules exist to serve the international user community, and we felt it to be very important to ensure that their views were taken into account in the revision process. In fact, the user representatives consulted with a much larger group of users worldwide and were able to provide us with key insights into the needs and concerns of the user community.

With the above organizational structure in place, this is how we proceeded. The first DSC meeting was held in March 2009. Over the next two years, the DSC met once a month in one or two-day sessions. It went through the existing Rules article by article and drafted proposed amendments or new articles. Its proposals were then presented in groups to the Task Force which debated and approved them during a number of plenary Task Force meetings held over the two-year period.

All of the proposals that were approved by the Task Force were then submitted to ICC National Committees and Groups and to the Commission as a whole. The proposals were then fully debated and discussed by the Commission which also approved the amended articles by groups during four plenary Commission meetings.

This process illustrates the extent to which the Rules revision benefited from the hard work and careful consideration of a large number of very talented people, and, while it is not possible to name them all, I wish to take this opportunity to thank them most sincerely for their excellent cooperation and work.

With respect to the substance of the Rules revision process, we decided to adopt a few basic guiding principles to focus the choices to be made in revising the Rules.

The first guiding principle was that only changes that are genuinely useful or genuinely necessary should be made. This follows from the old adage that “if it isn’t broken, don’t fix it”. The existing Rules have worked well, and we considered that making too many minor “clean-up” improvements could actually result in more confusion than benefit. We often reminded ourselves of this principle when we were tempted to make language improvements.

The second guiding principle was to retain, to the greatest extent possible, the key and distinguishing features of ICC arbitration, such as the Request, the Answer, the Terms of Reference and the scrutiny of the award by the Court.

A third basic guiding principle was to be economical in the drafting, to avoid being overly prescriptive and to retain the universality and flexibility of ICC arbitration. This told us not to over-legislate in the Rules but rather to continue to draft in terms of basic principles rather than trying to spell everything out. This allowed us to retain the cross-cultural character of the Rules as well as their flexibility and openness to party autonomy.

While following these guiding principles, we also brought a number of innovations into the Rules. These new features were inspired by the desire to provide additional transparency with respect to practices of the Court and the Secretariat, the desire to develop explicit provisions for improving the time and cost efficiency of arbitration, and the desire to respond to requests from the user community. In particular, we included three entirely new sets of provisions in the Rules, which are discussed in great detail in this Guide. These provisions concern efficient case management, multiparty disputes and emergency arbitrator proceedings.

The case management provisions set forth means to establish a tailor-made procedure for the arbitration that is time and cost effective. Under the new provisions, as enunciated in Articles 22–24 and Appendix IV, the tailor-making process has now become a formal requirement. Various other ICC changes, also discussed in this Guide, improve the time and cost efficiency of ICC arbitration.

The new section on multiparty and multicontract arbitration deals with the joinder of an additional party, cross-claims between claimants or between respondents, claims arising out of more than one contract, and the consolidation of separate arbitrations pending under the Rules. These provisions, as set forth in Articles 7–10, are entirely new and make explicit various aspects of multiparty disputes that were not previously dealt with in the Rules.

Finally, the emergency arbitrator provisions provide the parties with an opportunity, under certain conditions, to obtain urgent interim or conservatory measures from an emergency arbitrator when those measures cannot await the constitution of an arbitral tribunal.

In conclusion, I have no doubt that this Guide will provide you with valuable explanations and inside information regarding the 2012 ICC Rules of Arbitration. On behalf of all of the members of the ICC Commission on Arbitration, I would like to express the sincere hope that the new Rules will serve you well for many years to come.

Peter Wolrich
Chairman
ICC Commission on Arbitration

ARTICLE 35(1): CORRECTION ON THE ARBITRAL TRIBUNAL'S INITIATIVE

On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.

- 3-1256 **Purpose.** Article 35(1) allows an arbitral tribunal to correct an award that has already been approved, signed and notified to the parties. The provision should be used only for mistakes that could alter the meaning of an award. It is rarely used in practice because most such mistakes by the arbitral tribunal can and should be identified during the Court's scrutiny process (Article 33) and any remaining error is more likely to be spotted by a party when reviewing an award after receiving it and in this case will lead to an application under Article 35(2). The time limit of thirty days removes the risk of any persisting uncertainty over the finality of the award's content.
- 3-1257 **2012 modifications.** None.
- 3-1258 **Procedure for making a correction.** The arbitral tribunal should send the Secretariat a draft "addendum"⁷² that clearly lays out the desired corrections. In practice, an arbitral tribunal will usually contact the Secretariat before submitting its addendum to seek the Secretariat's views on the best way to proceed. Articles 31, 33 and 34 apply *mutatis mutandis* to any addendum. The addendum should therefore be reasoned and will be subjected to the Court's scrutiny process under Article 33. The arbitral tribunal must not send its correction directly to the parties.
- 3-1259 The form and content of addenda, as well as the procedure for their scrutiny and notification, are discussed in detail under Article 35(3).
- 3-1260 **Time limit.** The provision states that an arbitral tribunal's draft addendum must be submitted to the Court for approval within thirty days of the date of the award, which is determined pursuant to Article 31(3). However, the Court's practice is to consider this time limit met if the addendum is received by the Secretariat (as opposed to the Court) within that time.
- 3-1261 The time limit applies to all kinds of awards, whether final, partial, interim or by consent. If the time limit for correcting a partial or interim award has expired, the arbitral tribunal cannot simply make the correction in its next award. Rather, the parties must agree to extend the time limit, which they rarely do. In the event that an arbitral tribunal discovers an important error after the expiry of the time limit, it should inform the Secretariat.

⁷² The Court employs special terminology for the decisions made by arbitral tribunals under Articles 35(1) and 35(2) (see paragraphs 3-1291-3-1293).

Table 40: Number of addenda rendered by arbitral tribunals on their own initiative to correct their awards, 2007-2011

2007	2008	2009	2010	2011	Total
1	2	2	6	4	15

- 3-1262 **Scope of Article 35(1).** The provision is restricted to clerical, computational and typographical mistakes, and mistakes of a similar nature. The arbitral tribunal cannot rectify flaws it discovers in its own reasoning or add references.
- 3-1263 Clerical, computational and typographical mistakes are usually small, but their consequences can be significant. The mistakes that arbitral tribunals will tend to identify and seek to correct include those concerning the calculation of damages or interest, the misspelling of a word that may affect the meaning of a sentence, or the use of one word where another was clearly intended (e.g. “respondent” instead of “claimant”).
- 3-1264 In an unusual case from 2009, the arbitral tribunal signed the wrong version of an award, after apparently printing out an earlier version rather than the final version. The Secretariat, which was not in a position to identify the error, subsequently notified the signed version to the parties. The arbitral tribunal discovered the error, revoked the award, and asked the Secretariat to notify the correct version to the parties.

ARTICLE 35(2): APPLICATION BY A PARTY FOR THE CORRECTION OR INTERPRETATION OF AN AWARD

Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.

- 3-1265 **Purpose.** Article 35(2) enables a party to request corrections of the kind described above in Article 35(1). A party may in addition request an interpretation of any part of an award that lacks sufficient clarity. The provision offers a rapid and simple procedure for dealing with such corrections and interpretations.⁷³

⁷³ For more information on correction and interpretation of awards, see B. Daly, “Correction and Interpretation of Arbitral Awards under the ICC Rules of Arbitration” (2002) 13:1 *ICC International Court of Arbitration Bulletin* 61.

Note to Parties

REQUESTS FOR CORRECTION OR INTERPRETATION ARE NOT APPEALS IN DISGUISE

Article 35(2) does not provide a means of appeal. It does not permit the arbitral tribunal to review the substance of its reasoning or deal with additional claims or arguments. It is limited to situations involving clear errors or vague language. Any application made under Article 35(2) that falls outside its scope may prompt the arbitral tribunal to order the applicant to pay the arbitral tribunal's fees and expenses, the ICC administrative expenses and any costs incurred by the other parties.

3-1266 **2012 modifications.** Minor linguistic adjustments.

3-1267 **How to make an application.** A party must file an application under Article 35(2) with the Secretariat, not with the arbitral tribunal. The application should refer to Article 35(2), bear the relevant ICC case file number, be in writing, contain reasons, and attach any document upon which it relies. However, parties should not include new documents since the application should refer only to the award and, if necessary, to any previously filed submissions or evidence. It cannot introduce new evidence. The application may be submitted by any means, including fax and email. The Secretariat does not require hard copies.

Table 41: Applications by parties for correction or interpretation of awards, 2007–2011

	2007	2008	2009	2010	2011	Total
Number of applications	32	40	57	51	74	254
As percentage of total awards rendered	9%	10%	14%	11%	15%	12%
Number of applications resulting in an addendum	17	30	26	28	41	142
As percentage of applications for correction or interpretation	53%	75%	46%	55%	55%	56%

3-1268 **Time limit for making an application.** The Secretariat must receive the application within thirty days from the date on which the applicant receives the award in accordance with Article 34(1). Any dispute over whether an application under Article 35(2) has been filed within that time limit will be decided by the arbitral tribunal. If the Secretariat receives such an application well outside the time limit, it might advise the applicant that it is not in a position to take any further steps or forward it to the arbitral tribunal.

- 3-1269 The arbitration law at the place of the arbitration may provide a different time limit for the submission of requests for correction or interpretation. However, the Court and ICC arbitrators have generally considered that, unless the time limit specified by the national law is found to be mandatory under that law, the time limit specified in the Rules will prevail.
- 3-1270 **Procedure following receipt of the application.** Upon receiving an application under Article 35(2), the Secretariat will determine whether to invite the Court to fix a special advance on costs for dealing with the application in accordance with Article 2(10) of Appendix III (see paragraphs 3-1279–3-1285). Once any advance on costs has been paid in full, the Secretariat will notify the other parties of the application. By separate letter sent the same day, it will notify the arbitral tribunal and invite it to fix a time limit for the other parties to comment on the application. Upon being notified of the application, the arbitral tribunal will take control of the procedure for correction or interpretation.
- 3-1271 **Time limit for the other parties' comments.** The arbitral tribunal should promptly fix a time limit, normally not exceeding thirty days, for any comments from the other parties. Where the correction appears straightforward (e.g. correcting a miscalculation or inserting missing language), the arbitral tribunal may wish to fix little more than seven to ten days, whereas more extensive requests for interpretation may require the full thirty days. It would be very unusual for an arbitral tribunal to consider it necessary to fix a time limit in excess of thirty days.
- 3-1272 The time limit is intended to prevent delays rather than to set an absolute cut-off. Accordingly, the arbitral tribunal may, if it sees fit, take account of comments submitted after the expiry of the time limit, provided this does not delay the submission of the draft addendum or decision pursuant to Article 35(3). Furthermore, the Rules do not prevent the arbitral tribunal from authorizing a further round of submissions or comments from the parties in those rare cases where such steps are considered necessary.
- 3-1273 **Time limit for submitting the draft addendum or decision.** A draft addendum or decision⁷⁴ must be submitted to the Court for approval within thirty days of the expiry of the last time limit set by the arbitral tribunal for parties' comments. However, a tolerance considers the time limit to have been met if the arbitral tribunal submits its draft to the Secretariat (rather than the Court) within that time. Although not expressly stated, the Court may extend the time limit if need be and in practice does so from time to time.

⁷⁴ For a definition of these terms, see paragraphs 3-1291–3-1293.

- 3-1274 **Scope of the provision.**⁷⁵ The corrections that parties may request are identical to those that the arbitral tribunal is entitled to make pursuant to Article 35(1) (see paragraphs 3-1262–3-1264). The arbitral tribunal will determine whether the requested correction falls within the scope of Article 35(2) and whether it is necessary to make the correction. In some cases, the arbitral tribunal may acknowledge the error but, given its insignificance, refuse to correct it.
- 3-1275 In practice, applications for interpretation (as opposed to correction) are rarely accepted. Most arbitral tribunals find that to be admissible a request for interpretation must seek to clarify the meaning of an operative part of the arbitral tribunal’s decision. Therefore, requests for interpretation should generally target the dispositive section of the award or other parts that directly affect the dispositive section or the parties’ rights and obligations. Most such ambiguities will normally have been identified by the Court during the scrutiny process.
- 3-1276 Many applications for interpretation amount to attempted appeals aimed at altering the meaning of an award, raising an additional issue or attempting to have the arbitral tribunal reconsider its decision or the evidence. Article 35(2) does not empower an arbitral tribunal to revise the outcome or reasoning of its award. Attempted appeals accordingly do not fall within the scope of Article 35(2).
- 3-1277 **Additional rights under national laws.** The arbitration law at the place of the arbitration may grant parties additional rights relating to the completion of awards. For example, some laws allow parties to request an additional award addressing claims presented in the arbitration but omitted from the award.⁷⁶ In many instances, these additional rights will be waivable or subject to contrary agreements between the parties. By agreeing to ICC arbitration, the parties may in such cases be limited to the scope of correction and interpretation permitted by Article 35(2). In this regard, the Secretariat’s Note on Correction and Interpretation of Arbitral Awards (“Note”) states as follows:

Where the relevant national law or court practice provide specific circumstances in which an arbitral tribunal may render certain decisions other than corrections or interpretation regarding an award which had been approved and notified, such situations shall be treated in the spirit of this Note.

⁷⁵ Examples of the provision’s application are provided in B. Daly, “Correction and Interpretation of Arbitral Awards under the ICC Rules of Arbitration” (2002) 13:1 *ICC International Court of Arbitration Bulletin* 61. See also M. Hauser-Morel & J.H. Nedden, “Correction and Interpretation of Arbitral Awards and Additional Awards” in *Post Award Issues*, ASA Special Series No. 38 (2011) chapter 2.

⁷⁶ This possibility is offered by Article 33(3) of the UNCITRAL Model Law on International Commercial Arbitration, “[u]nless otherwise agreed by the parties”.

- 3-1278 The arbitral tribunal will therefore need to determine whether its power to revise the award is limited to the provisions of Article 35(2), or whether additional non-waivable (or non-waived) rights exist under local law. The Court has in a number of exceptional cases approved addenda in which arbitral tribunals have relied on the law at the place of the arbitration to correct omissions in their awards.
- 3-1279 **Costs.** Article 2(10) of Appendix III empowers the Court to fix a special advance on costs to cover the arbitral tribunal's fees and expenses and the ICC administrative expenses arising from a procedure for correction or interpretation under Article 35(2).⁷⁷ If a special advance is fixed, the applicant must pay it in full before the Secretariat notifies the application to the other parties and the arbitral tribunal.
- 3-1280 If, upon receipt of an application under Article 35(2), the Secretariat considers that the circumstances could necessitate an advance on costs, the Secretariat's management will be consulted to decide whether the matter should be submitted to the Court.
- 3-1281 The Secretariat will invite the Court to fix an additional advance only where the costs of the arbitration have already been fixed by the Court pursuant to Article 37, i.e. where the application is for the correction or interpretation of a final award. If the request concerns a partial or interim award, the Court may be invited to increase the advance on costs pursuant to Article 36(2).
- 3-1282 The Court's power to fix a special advance under Article 2(10) of Appendix III is discretionary. It generally does not do so where an initial and cursory review of the application suggests that the need for correction or interpretation may have been caused by an error or shortcoming of the arbitral tribunal. The applicant should not have to pay a fee to correct such an error.
- 3-1283 Applications made under Article 35(2) are not infrequently disguised attempts to appeal an award. In such cases, the applications are often lengthy and complicated, requiring the arbitral tribunal to undertake significant work before rejecting the application as falling outside the scope of Article 35(2). The Court will almost certainly fix an additional advance in such cases.

⁷⁷ Article 2(10) of Appendix III differs from the corresponding provision in the 1998 Rules. The provision now refers to remissions under the new Article 35(4) and extends the advance on costs to cover the ICC administrative expenses. It reads: "In the case of an application under Article 35(2) of the Rules or of a remission pursuant to Article 35(4) of the Rules, the Court may fix an advance to cover additional fees and expenses of the arbitral tribunal and additional ICC administrative expenses and may make the transmission of such application to the arbitral tribunal subject to the prior cash payment in full to the ICC of such advance. The Court shall fix at its discretion the costs of the procedure following an application or a remission, which shall include any possible fees of the arbitrator and ICC administrative expenses, when approving the decision of the arbitral tribunal."

- 3-1284 The amount of the advance is at the Court's discretion and depends on the nature of the application. In most recent cases it has fallen between US\$ 5,000 and US\$ 10,000. When the Court approves the arbitral tribunal's Article 35(2) decision, it will fix the arbitral tribunal's fees and the ICC administrative expenses. If there are three arbitrators, their fees are usually allocated in the same proportions as when fixing the costs of the arbitration pursuant to Article 37 (see paragraphs 3-1462–3-1465).
- 3-1285 If the Court has not fixed an additional advance, it has the power to fix fees for the arbitral tribunal and/or ICC administrative expenses when approving the arbitral tribunal's decision under Article 35(2).⁷⁸ This power is rarely, if ever, used. In the rare event that it is used, the Secretariat will withhold notification of the addendum or decision to the parties until these costs are paid.
- 3-1286 The arbitral tribunal may award costs against a party when making its decision. Such costs may include both those fixed by the Court (if any) and legal and other costs incurred by the parties. For example, where, as often happens, the arbitral tribunal decides to reject an application because it is groundless or outside the scope of Article 35(2), it may decide to order the applicant to pay the other side's costs and to bear any costs fixed by the Court. Normally, only the applicant will have advanced the costs fixed by the Court, so no payment from one side to the other will be needed. An arbitral tribunal should only award costs to a party that has claimed them.
- 3-1287 In the past it was rare for arbitral tribunals to include orders on costs in their decisions under Article 35(2). Such orders have become more frequent since 2010, when it became more common for the Court to fix special advances pursuant to Article 2(7) of Appendix III to the 1998 Rules, now Article 2(10) of Appendix III to the 2012 Rules.
- 3-1288 **Addendum to an addendum.** As an addendum correcting or interpreting an award forms part of the award (as specified in Article 35(3)), the addendum itself may be subject to an application for correction or interpretation made by a party pursuant to Article 35(2) or even spontaneous correction by the arbitral tribunal pursuant to Article 35(1). The thirty-day time limit for the parties to make such an application will start to run on the date they receive the addendum. Although rare, such applications are not unknown. In a 2007 case, for example, the claimant had requested the correction of a few typographical errors in the final award. It then requested a small correction to the resulting addendum twenty-five days after it had received the addendum, as paragraphs were misnumbered in one of its appendices. The arbitral tribunal rendered a second addendum shortly thereafter.

⁷⁸ In relation to the arbitral tribunal's fees and expenses, this possibility is specifically foreseen in the Note.

ARTICLE 35(3): DECISIONS ON CORRECTION OR INTERPRETATION

A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. The provisions of Articles 31, 33 and 34 shall apply *mutatis mutandis*.

- 3-1289 **Purpose.** Article 35(3) defines the form of decisions made by arbitral tribunals under Articles 35(1) and 35(2). As an addendum, the decision becomes part of the award it is modifying and, as such, must meet the requirements of all awards rendered under the Rules. Articles 31, 33 and 34 therefore apply, meaning in particular that the addendum must be reasoned and will be scrutinized by the Court.
- 3-1290 **2012 modifications.** Minor linguistic adjustments.
- 3-1291 **Terminology: “addenda” and “decisions”.**⁷⁹ The Court’s practice is to reserve the term “addendum” for decisions that result in the correction or interpretation of an award.
- 3-1292 Where the Article 35(2) application is entirely rejected and no order is made on costs, the decision will be called a “decision”. The Court does not consider a decision to be part of the award. Nonetheless, while not expressly stated in Article 35(2), the Court will require decisions to meet the same requirements as addenda with respect to form. In particular, decisions are scrutinized in the same way as addenda and must indicate the reasons why the arbitral tribunal is rejecting the application for correction or interpretation (see paragraphs 3-1295–3-1297). This will enable the Court to assess whether the decision has been correctly characterized or is in fact an addendum (and vice versa). For this reason it is necessary for the Court to scrutinize both. Also, imposing these requirements is a precautionary measure, as certain state courts may consider that a decision forms part of the award.
- 3-1293 Where the Article 35(2) application is entirely rejected and the arbitral tribunal makes an order in regard to costs pursuant to Article 35(2), the decision will then be called a “decision and addendum”. While differentiating the decision from an addendum, which corrects or interprets the award, the name dispels any doubt over whether the decision regarding costs forms part of the award for the purpose of enforcement.
- 3-1294 **Decision making by three-member arbitral tribunals.** Article 31(1), which permits awards that are not unanimous, also applies to decisions under Article 35(2). In practice, addenda and decisions will rarely be made by a majority because their content usually proves much less divisive than the

⁷⁹ This distinction in terminology is clearly set out in the Note (see paragraph 3-1277), which also states that both addenda and decisions are subjected to the same scrutiny process.

merits of the case. The Court has nonetheless seen dissents from time to time. In one such case from 2010 the award being corrected was unanimous but a co-arbitrator dissented from the decision not to correct or interpret the award.

3-1295 **Reasoning.** As stated in Article 31(2), all awards must provide reasoning. An addendum or decision should explain why a request for correction or interpretation is, or is not, accepted and, as the case may be, order or refuse an amendment to the award. In this respect the Note states:

An Addendum or a Decision shall contain the reasons upon which it is based (Article 31(2)). It shall also include operative conclusions (“*dispositif*”), which set out any modification of the operative conclusions in the relevant award or a finding that the application is rejected. The Court will scrutinize this Addendum or the Decision (Article 33), after which it will be signed by the arbitrators (Article 31 (1) and (3)) and notified to the parties by the Secretariat (Article 34).

3-1296 An arbitral tribunal should not exaggerate the extent of its reasoning when faced with a meritless or straightforward application. In the Court’s experience, arbitral tribunals sometimes include extensive reasoning in decisions in an effort to strengthen the reasoning in their initial award. The Court will usually request that the arbitral tribunal remove superfluous reasoning, which can be counterproductive and even cast some doubt on the arbitral tribunal’s original reasoning.

3-1297 When rejecting a request for interpretation, an arbitral tribunal should in most cases merely provide a reasoned confirmation that the award is sufficiently clear. Similarly, a decision rejecting a request for correction normally need go no further than a concise, reasoned statement to the effect that a request falls outside the scope of Article 35(2) or does not identify an actual mistake.

3-1298 **Other required content.** As with awards, addenda and decisions should include a number of other features. In particular, the document should:

- a) be correctly entitled “addendum”, “decision” or “decision and addendum”, according to the definitions set out in paragraphs 3-1291–3-1293;
- b) include all basic formalities such as (i) the ICC case reference number, (ii) the names and contact information of the parties, their counsel, and the members of the arbitral tribunal, (iii) the place of the arbitration, (iv) the date of the addendum or decision, and (v) the arbitrators’ signatures;
- c) clearly specify that it is an addendum to, or a decision concerning, the award to which it relates. It should also indicate all procedural steps from the approval of the award by the Court (e.g. the date of the award and the date it was received by each party);

- d) where Article 35(2) applies, indicate the date on which the application was made and whether it was made within the time limit provided in the Rules;
- e) where Article 35(2) applies, describe the contents of each of the requests for correction or interpretation contained in the application;
- f) provide reasoning for the arbitral tribunal's decisions in relation to each request in the application (including an indication of whether a request falls outside the scope of the Rules) or in relation to each correction made on the arbitral tribunal's own initiative;
- g) as noted above, include a dispositive order correcting or interpreting the award or rejecting the application; and
- h) if one or more parties request a decision on costs, decide on such requests and fix the costs to be borne by each party.

3-1299 Apart from the above formalities, the Court does not normally require the arbitral tribunal to repeat any other information that has already been set out in the award itself.

3-1300 **Addendum and decision checklist.** At the time of writing, the Court and its Secretariat were in the process of completing a checklist to assist arbitral tribunals with the preparation of addenda and decisions. The checklist, once approved, will be sent to arbitral tribunals together with the Note and will function similarly to the ICC Award Checklist (see paragraphs 3-1195–3-1197).

3-1301 **Partial acceptance of an application pursuant to Article 35(2).** Where the arbitral tribunal rejects certain parts of a party's application while accepting others, it should place all these decisions into a single addendum. So long as it contains the correction or interpretation of at least one aspect of the award, an addendum can incorporate other decisions rejecting requests for correction or interpretation. In a recent case, the arbitral tribunal prepared both an addendum and a separate decision in response to a single application. When scrutinizing the documents, the Court requested that both be merged into a single addendum.

3-1302 **Scrutiny process.** The Court will scrutinize all decisions and addenda in accordance with Article 33. The Court will verify that the arbitral tribunal has given clear reasons for any modification and that it has not unnecessarily tried to justify its previous decisions.

3-1303 **Notification of the decision.** Once the draft is approved pursuant to Article 33, the procedure for finalizing and notifying addenda and decisions mirrors that of awards. Accordingly, the arbitral tribunal must finalize the document after considering the Court's comments. It must then sign the requisite number of copies and submit them to the Secretariat for notification to the parties in accordance with Article 34(1).

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Chapter 22: Life after Death: The Arbitral Tribunal's Role Following Its Final Award

Stuart Isaacs

§22.01 INTRODUCTION

Most writings by academics and practitioners on arbitration law and practice focus on the many and varied issues that arise up to the publication of an arbitral award and in connection with the subsequent enforcement of the award. They cover the considerations that arise from as early in time as the decision by the parties to a contract on what form of dispute resolution provisions should be included in it, the parties' and the arbitral tribunal's preparations for an arbitration once an arbitration clause is invoked, the conduct of the arbitral proceedings up to and following an oral hearing and the making of the award by the tribunal. The issues that are then discussed progress to those that arise at the stage of the enforcement of an award in terms of the role of the courts and the grounds on which a party may apply to have an arbitration award set aside.

In contrast, less attention has been paid to the position after a tribunal has rendered its final award and before the enforcement stage is reached. This is perhaps because of a misunderstanding of the scope of the *functus officio* doctrine and an assumption that after the tribunal has rendered its award it has no continuing role to play.

So the object of this short essay is to explore that corner of arbitration law and practice concerned with the scope of the tribunal's role after it has rendered its final award, with particular reference to the position in Singapore, Hong Kong and England. Contrary to the general assumption just mentioned, the tribunal's responsibilities and tasks do *not* end with the final award. There *is* life after death. And the after-life is, hopefully, a subject of interest.

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It looks at the position under the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') and the UNCITRAL Arbitration Rules (2013). It also looks at the involvement of arbitral institutions in the post-award stages of an arbitration, with particular reference to the current SIAC Rules of Arbitration (6th ed., 2016) ('the SIAC Rules') and HKIAC Administered Arbitration Rules (2013) ('the HKIAC Rules') and also to the LCIA and ICC Rules of Arbitration and to certain provisions of the English Arbitration Act 1996. Globally, there are of course, many other institutions, each with its own set of arbitration rules and its own approach towards the matters which are the subject of this essay.

[A] The *Functus Officio* Doctrine

Once a tribunal has rendered its final award it is said to be *functus officio*. But what does that Latin expression entail in practice? A useful starting point is briefly to explain the doctrine of *functus officio*. Literally, the expression means having discharged one's office. In the present context, it means that once a final award has been rendered, the tribunal's authority to act ceases and the reference to arbitration terminates. Article 32(3) of the Model Law provides that 'the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings...'. The same doctrine applies to a tribunal's partial award in relation to the matters which it decides. One of the consequences of the doctrine is that the parties cannot prolong the arbitration proceedings by repeated applications to the tribunal which would result in the tribunal having to revisit matters which it has already decided.

In *International Petroleum Refining & Supply SDAD Ltd v. Elpis Finance SA (The 'Faith')* [1993] 2 Lloyd's Rep 408, a dispute under a charterparty was referred to arbitration. In the arbitration proceedings, the claimant ship owners stood to receive an award in their favour of USD 35,000; and the respondent charterers stood to receive an award of costs in their favour. The tribunal published a reasoned award and informed the parties that the award could be taken up on payment of the tribunal's costs of about GBP 6,000. But of course neither of the parties knew at that stage what the outcome of the arbitration was; and neither in fact took up the award within the twenty-one day period laid down under the former Arbitration Act 1979 for seeking a review of the award. The award, which was in the ship owners' favour, was in fact not taken up until over a year after it had been published. The disgruntled charterers then wrote to the tribunal with further submissions but, after various correspondence, the tribunal replied that it was not appropriate for it to comment since '[p]lainly we have no jurisdiction to reconsider [the award]'. The charterers then applied to the English Commercial Court for an extension of time for leave to appeal the award. In the course of refusing the application, Hobhouse J said at page 410 that the tribunal's response was 'entirely appropriate'. The tribunal, having

published its award, was *functus officio*. An award made with jurisdiction should be final and, since the charterers' application overlooked that basis principle it was fundamentally flawed.

More recently, in *Emirates Trading Agency LLC v. Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm), Popplewell J referred at [26] to: ●

a longstanding rule of common law that when an arbitrator makes a valid award, his authority as an arbitrator comes to an end and, with it, his powers and duties in the reference: he is then said to be *functus officio* (see Mustill and Boyd's *The Law and Practice of Arbitration* 2nd Edition pp. 404-405 and Companion Volume 404-414). This applies as much to a partial award as to a final award: see *Fidelitas* per Diplock LJ at p. 644B-E. Absent agreement of the parties, the tribunal may only reconsider or review its decision if the matter is remitted following a successful challenge to the award in Court, or pursuant to the express powers of correction or reconsideration conferred by section 57 of the Act or by the arbitral rules which the parties have agreed to govern the reference. Otherwise the tribunal has no authority or power to do so.

As a result of the *functus officio* doctrine, the tribunal cannot reopen the case even if fresh evidence comes to light that would have been material to the decision reached. There are other remedies available in that situation such as a remission of the award by the court, on an application to it, to the tribunal.

If a tribunal has ruled that it has no jurisdiction, and thus has become *functus officio*, it has no power to reconsider or reverse its initial award. (1) In *Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey* [2000] SGHC 260, following the making of a final award dismissing the claimant's claim and the respondent's counterclaim, an arbitrator acceded to the respondent's request for a fresh hearing and then made a further award in which he reversed his decision in the earlier award and allowed the counterclaim. In application of the *functus officio* doctrine, the Singapore High Court held that the second award was a nullity since the arbitrator had lacked the power to reverse the original award. G P Selvam J pointed out that Article 32 of the Model Law expressed the doctrine of finality and *functus officio* and that there was nothing in the Model Law which authorises the arbitral tribunal to recall or reconsider a final award, after which its mandate was terminated. As the judge observed at [36], '[t]he court has no power to resuscitate a dead arbitrator'.

In that case, the arbitrator had specifically addressed his mind to whether he was empowered to make the second award and concluded that he did. In the judge's words at [33], the arbitrator 'wrote his own writ': he wrongly assumed the authority to add something to the Model Law, in circumstances where the absence of a power in the Model Law to reconsider the decision contained in a final award is deliberate and founded on the principle of finality and public policy to bring an early end to commercial disputes.

Similarly, in *ASG v. ASH* [2016] SGHC 130, the parties to a large construction dispute requested the sole arbitrator not to deal in his award with the issue of costs. However, contrary to that request, the award disposed of the costs issue. The arbitrator, in response to a request for clarification, then proceeded to issue a correction award in which he attempted to withdraw the costs order in the original award and a subsequent costs award. The plaintiff successfully applied to the Singapore High Court to set aside the part of the correction award dealing with costs and the entirety of the costs award on the ground that the arbitrator, having already made an award of costs ● in the original award, was *functus officio* and therefore lacked the jurisdiction to revisit the original costs orders as he had attempted to do in the correction award and the costs award. P 360 Coomaraswamy J concluded that this result was unaffected by the fact that the parties had agreed that the arbitrator should defer his decision on costs for further submissions. Curiously, it appears not to have been argued by the defendant that the arbitrator lacked jurisdiction to make the original costs orders in circumstances where the parties had agreed, during their oral closing submissions at the arbitration hearing, that the issue of costs should not be dealt with in the original award. Instead, the defendant argued that a 'correction' should be made to the original award with the effect of withdrawing the costs orders in the original award.

Where an award is set aside or is declared of no effect by a court, the *functus officio* doctrine does not apply. The reasoning for this is that no valid and effective award has in fact been made, and so the tribunal's jurisdiction is not exhausted by reason of the invalid award having been made. In that situation, the tribunal may proceed to make a fresh award. The court may also remit back to the tribunal for reconsideration in whole or in part an award which it has not set aside or declared to be of no effect, for example where there has been a serious irregularity affecting the tribunal. In that situation, the tribunal will be required to act in accordance with the directions given to it by the remitting court. This may happen, for example, where the tribunal has failed to deal with all the issues put to it, has failed to conduct the proceedings in accordance with the procedure agreed by the parties, or where there is uncertainty or ambiguity as to the effect of the award or a failure to comply with the requirements as to the form of an award.

§22.02 CORRECTION AND INTERPRETATION OF AN AWARD AND ADDITIONAL AWARDS

Where the *functus officio* doctrine does apply, there are, however, certain limited exceptions to it, in particular relating to the correction and interpretation of an award. As pointed out by Born, *International Commercial Arbitration* (2nd ed., 2014, Wolters Kluwer):

Human fallibility guarantees that all arbitral awards, like all national court judgments and academic treatises, will have mistakes, omissions or ambiguities. These will range from typographical errors, to inaccurate references to evidence or legal authorities, to non sequiturs or unpersuasive analysis, to confusion of parties or outright mathematical miscalculations of amounts; they also may involve failures by the arbitrators to address particular arguments, claims or evidence. These errors usually concern minor or incidental issues and have little or no relevance to the tribunal's ultimate awards of damages or other relief.

...

Nevertheless, there are cases where an award contains very serious, but manifest, errors or ambiguities that directly affect one party's rights. Most obviously, an award's damages calculation may contain arithmetic mistakes, or an undisputed fact relevant to a damages award may be erroneously recorded (e.g., the number of lost sales in a particular year, the cost of purchasing replacement goods) or may ● have ordered relief that is hopelessly ambiguous or unintelligible; alternatively the tribunal may simply have failed to address one of the claims presented by the parties.

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In these instances, a party may wish to seek correction, interpretation or supplementation of the arbitral award in order to change the quantum of monetary damages that were awarded, clarify ambiguities, or to address the neglected issue(s). Alternatively, the arbitrators themselves may discover a mistake in their award after notification to the parties, and wish to make a correction upon their own initiative (*sua sponte*). (2)

Article 33(1)(a) and 33(2) of the Model Law provide that the tribunal may, either at the request of a party or on its own initiative, correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature. Article 38(1) and 38(2) of the UNCITRAL Arbitration Rules are to the same effect.

Article 33(1)(b) of the Model Law empowers a party, if so agreed by the parties, without notice to the other party, to request from the tribunal an interpretation of a specific point or part of the award. Article 37(1) of the UNCITRAL Arbitration Rules is to the same effect.

Article 33(3) of the Model Law and Article 39(1) of the UNCITRAL Arbitration Rules contain similar provisions in relation to a request for the tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

Section 69 of the Hong Kong Arbitration Ordinance (Cap 609) provides that Article 33 of the Model Law has effect.

In Singapore, section 3 of the International Arbitration Act (Cap 143A) gives effect to the Model Law, subject to the provisions of the Act. Under section 19B(2) of the Act, on an award being made, the tribunal's powers to vary, amend, correct, review, add to or revoke the award is confined to the powers provided for in Articles 33 and 34 of the Model Law.

Consistently with the Model Law, Rule 33 of the SIAC Rules provides for the correction by the tribunal, at the request of a party or on its own initiative, of any error in computation, any clerical or typographical error or any error of a similar nature; for the making of an additional award and for the interpretation of the award.

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In England, section 57 of the Arbitration Act 1996 is based on Article 33 of the Model Law but is not coextensive with it. Under section 57(3)(a) of the Act, the tribunal has power, on its own initiative or on the application of a party, to correct clerical mistakes or errors arising from an accidental slip or omission or to clarify or remove any ambiguity in the award; and under section 57(3)(b) it also has power to make an additional award in respect of any claim which was presented to the tribunal but was not dealt with in the award. It is worth pointing out that there have been occasions where parties have tried to rely on section 57(3) in order to invite the tribunal to revisit or to correct the substance of its award, on the basis that the party in question believes ● the tribunal's decision to be wrong. However, such a request is beyond the proper scope of section 57(3).

Article 27.1 of the LCIA Arbitration Rules (2014) ('the LCIA Rules') empowers the tribunal, at the request of a party, to correct in the award any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature. Article 27.2 empowers it also to correct any error (including any error in computation, any clerical or typographical error or any error of a similar nature) upon its own initiative. Article 27.3 entitles a party to request the tribunal to make an additional award as to any claim or

cross-claim presented in the arbitration but not decided in any award.

Article 37.1 and 37.3 of the HKIAC Rules permit the correction in the award, at the request of either party or by the tribunal on its own initiative of any errors in computation, any clerical or typographical errors, or any errors of similar nature. By Article 37.4, the tribunal has the power to make any further correction to the award which is necessitated by or consequential on the interpretation of any point or part of the award under Article 38 or the issue of any additional award under Article 39. Article 38 empowers the tribunal, at the request of either party, to request the tribunal to give an interpretation of the award.

The tribunal's power under Article 37.4 to make any further correction is said by the authors of *A Guide to the HKIAC Arbitration Rules* to be a unique provision in the HKIAC Rules which is not found in any other arbitration rules. (3) The same is said to be true in relation to the tribunal's power under Article 38.3 to give any further interpretation of the award which is necessitated by or consequential on the correction of any error in the award under Article 37 or the issue of any additional award under Article 39 and its power under Article 39.3 to make an additional award which is necessitated by or consequential on the correction of any error in the award under Article 37 or the interpretation of any point or part of the award under Article 38. (4)

Article 36(1) of the ICC Arbitration Rules (2017) ('the ICC Rules') provides that, on its own initiative, the tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award. Article 36(2) provides that a party may apply for the correction of an error of the kind referred to in Article 36(1), or for the interpretation of an award.

It can thus be seen that a number of features common to the above jurisdictions emerge:

- (1) corrections may be made both at the request of a party and on the tribunal's own initiative;
- (2) the errors that may be corrected are confined to errors in computation, clerical errors, typographical errors and errors of a similar nature;
- (3) there is no definition of what may comprise such errors;
- (4) there are no additional requirements that must be satisfied before an award may be corrected, for example that the correction must have financial or other consequences for the parties or that it may affect the final outcome of the award;
- (5) tribunals have the power to interpret an award;
- (6) it is open to a party to request the tribunal, under the conditions specified, to make an additional award in respect of any claim which was presented to the tribunal but was not dealt with in the award.

In England, the position appears not entirely the same, at least at first blush. Section 57(3)(a) of the Arbitration Act 1996 refers to 'any clerical mistake or error arising from an accidental slip or omission'. (5) No express reference is made to errors in computation and no provision is made for the correction of errors 'of a similar nature'. On the other hand, the provision includes, in addition to the correction of mistakes under the so-called slip rule, a new power to correct an award so as to 'clarify or remove any ambiguity in the award'. This new power does not permit the arbitral tribunal arbitrators to change its mind completely or to reopen an award to deal with an issue which the award has overlooked. (6)

Article 27.1 and 27.2 of the LCIA Rules straddle the position under the Model Law and the Arbitration Act 1996: the errors capable of correction are as stated in the Model Law but with the additional power conferred under section 57(3)(a) of the Arbitration Act 1996 to correct an award so as to clarify or remove any ambiguity in the award.

Also, the Arbitration Act 1996 contains no express provision whereby the tribunal may, at the request of a party or otherwise, provide an interpretation of the award. The LCIA Rules also do not so provide. It is suggested, however, that the tribunal's ability to give an interpretation of the award is encompassed by its power to correct an award so as to clarify or remove any ambiguity in it. If so, the tribunal's powers in this regard are in fact wider than in the other jurisdictions mentioned since their exercise is not dependent on the making of a request to that effect by a party. In England, the process of interpretation so as to clarify or remove any ambiguity in an award takes the form of a correction of the award rather than a formal interpretation of it. Although in practice this may come down to the same thing, as Born points out, in contrast to a correction, an interpretation or clarification of an award does not alter the previous award's statements or calculations but instead more clearly explains what such statements were intended to mean, without altering them. (7)

However wide the powers are to correct and interpret an award, correction and interpretation do not entail any appeal procedure or any opportunity to rehear procedural or substantive issues which have been, or could and should have been, dealt with in the proceedings and by way of the award.

As already mentioned, the corrections to an award which are envisaged fall into four types: errors in computation, clerical errors, typographical errors and errors of a

similar nature. The identification of what falls within each of those types will usually be straightforward but it is not always the easy matter which it may seem. A particular error may fall into more than one of those types.

Clerical errors can involve such matters as the incorrect names of the parties or tribunal members; incorrect addresses; the incorrect transposition of the parties; or a misspelling which affects the meaning of a word or the use of one word where another was intended.

(8) Strictly speaking, clerical error is confined to a typographical or administrative mistake in the drawing up of the award resulting from a slip of the pen. It does not include errors arising from an accidental slip or omission resulting in something having been inadvertently inserted or left out of the award. In one sense all errors are accidental, since nobody makes a mistake on purpose.

In *Sutherland v. Hannevig Brothers Ltd* [1921] 1 KB 336, the tribunal mistakenly subtracted steaming time from the time that a vessel was on demurrage, instead of adding it to laytime as it should have done. Rowlatt J held that this was not a clerical error because it was an error in the tribunal's thought process and not simply an error affecting the tribunal's expression of its thought. (9) That definition of a clerical error – an error affecting the tribunal's expression of its thought – was followed in *Food Corporation of India and Marasro Cia Naviera Shareholders' Agreement (The 'Trade Fortitude')* [1986] 2 Lloyd's Rep. 209 at 216 by Lloyd LJ and applied by Burton J in *CNH Global NV v. PGN Logistics Ltd and Others* [2009] EWHC 977 (Comm).

Some further illustrations from the world of shipping are pertinent here. In *Gannet Shipping Ltd v. Easttrade Commodities Inc* [2002] 1 Lloyd's Rep. 713, the tribunal failed to incorporate an agreed figure for demurrage into an award. It was held that this was a clerical error: it was an error because it was wrong; and it was accidental because the tribunal's use of the incorrect figure resulted from its misreading of some manuscript amendments made in the laytime calculations submitted by the charterers. The sole arbitrator wrote in the award what he intended to write but he was mistaken in the substance of what he wrote.

Typographical errors are relatively straightforward and call for little comment. There is often an overlap between this type of error and clerical error. Illustrations from practice include reference to a point being 'mute' rather than 'moot' and to the subject matter of an arbitration being a contract relating to the supply of sardines rather than soya beans. More commonly, the currency of sums referred to in an award may be incorrectly typed, for example £ instead of \$ or S\$ instead of US\$. Apart from misspellings, incorrect cross-references could come within the scope of typographical error and perhaps also of clerical error.

P 365 Errors in computation can cover a number of different types of error. For example, the addition or failure to add noughts, incorrect addition, subtraction, ● multiplication or division, an error in calculating the result of a set-off of one party's claim against the other party's counterclaim, errors in the calculation of interest, errors in the calculation of the allocation of costs and errors in the calculation (but *quaere* not the applicability) of taxes such as GST or value added tax. These kinds of error may, depending on the circumstances, also be clerical or typographical errors.

In *CNH Global NV supra*, the tribunal awarded interest on an amount of damages from the date of the award. Pursuant to an application under the predecessor provisions to Article 36(1) of the ICC Rules to correct the award to include interest from the date the sums would have otherwise fallen due, the tribunal issued an addendum to its award which conceded the amendment because of a 'clerical, computational or typographical error, or an error of a similar nature'. The addendum stated that the tribunal had not intended that the successful party should be deprived of interest on its claims for loss of profits which it would have earned during time periods which had expired prior to the making of the award. The claimant unsuccessfully applied to challenge the award on the ground that the tribunal had no power to correct the award under the ICC Rules and therefore there had been a serious irregularity causing substantial injustice within section 68 of the Arbitration Act 1996. In the course of determining that there had been a serious irregularity, Burton J concluded that it was not possible to say that there had been a clerical error, even on the explanation provided by the arbitrators themselves, since the error was more like an error in the tribunal's thought process itself, in the sense that it did not accurately express its intention, and not an error affecting the expression of its thoughts. It was also not a computational or typographical error or an error of a similar nature. (10)

The expression 'errors of a similar nature' is by its nature somewhat open-ended. An error of this nature is broader than a mere clerical error since it may encompass an error that has been made not only by the tribunal itself but also by one of the parties or their representatives. Applying the originally Roman law concept of *ejusdem generis* which has for many years applied in common law jurisdictions, an error of a similar nature must be something close to a clerical, computational or typographical error, albeit not precisely falling within those types. In *Mutual Shipping Corp v. Bayshore Shipping Co Ltd (The 'Montan')* [1985] 1 Lloyd's Rep. 189, the tribunal incorrectly calculated the amount payable under the award as a result of accepting a particular witness' evidence but attributing that witness to the wrong party. The English Court of Appeal held that this was

not a clerical error but an accidental slip or omission which could be corrected because it was due to the arbitrator's mental lapse which caused him to transpose the parties in his mind.

It would thus also cover, for example, the situation where the award failed to identify all of the counsel on the record for the parties; where the award failed to mention all of the witnesses who gave evidence or mentioned the wrong witnesses; and where the calculation of interest in an award omitted to take into account debit notes to which the respondent was entitled.

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In *Tay Eng Chuan v. United Overseas Insurance Ltd* [2009] SGHC 193, the applicant, a litigant in person, filed a notice which requested the arbitral tribunal to clarify and correct and make an additional award for what he considered were 'mistakes' in its award. The alleged 'mistakes' consisted of two instances where the award referred to the financial position of the respondent instead of that of the claimant and three instances where the applicant asked for the award to be corrected so as to 'allow' claims which were rejected in the award. The applicant also sought an additional award for costs to compensate him for his time spent on the arbitration. The issue arose in the context of the applicant's claim for a declaration as to the date when the twenty-eight days prescribed in the Arbitration Act (Cap 10, 2002 Rev Ed) then in force for the making of an application or appeal relating to an arbitral award began to run.

Judith Prakash J held at [16] that the procedure in section 43(1)(a) of the Act for the correction of computational, clerical or typographical errors or other errors of a similar nature:

is to allow for the correction of obvious errors in calculation or phraseology or reference. It does not function as a procedure which allows the arbitrator to correct mistakes in his findings whether those mistakes are mistakes of fact or mistakes of law. If a party to an arbitration considers that such a mistake has been made, then he may challenge the award by using any available arbitral process of appeal or review which is provided in the Act.

Only 'technical and non-substantive' errors are open to correction [18]. Unsurprisingly, the court held that only the first two instances of alleged 'mistakes' referred to in the notice pertained to clerical slips which could properly be corrected. The judge said at [17] that:

The other four 'clarifications and/or corrections' asked for were directed at the substantive findings of the tribunal which the applicant had taken issue with and wanted corrected. The applicant put his request to the arbitrator as a request for correction. He did not ask for an interpretation of the award, a matter in respect of which he would have needed to consent of the respondent. Nor did he ask for the making of an additional award under section 43(4).

It can safely be assumed that the respondent would not have given its consent to a request for the interpretation of the award. Even if it had done so, it must be doubted whether the tribunal would have considered it appropriate to accede to the request. Note that the judge's statement that the applicant did not request the making of an additional award must be read as meaning that he did not request the making of an additional award for clarification of the original award, as opposed to the request for an additional award which was made in respect of the applicant's claim for his costs to compensate him for his time spent on the arbitration.

In *ASG v. ASH supra*, the correction award issued by the arbitrator included a 'correction' which had the effect of withdrawing the costs order made in the original award. A 'correction' of that nature is plainly not within the scope of permissible corrections but the question did not arise directly for decision since that part of the ● correction award dealing with costs was set aside on the ground that the arbitrator was *functus officio* when he purported to make it.

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As already observed, in some cases, the tribunal may give a free-standing interpretation of its award. In other cases, a correction of the award may be necessary in consequence of the interpretation given.

The interpretation of an award is generally understood to be permissible only where the terms of an award are so vague or confusing that a party has a genuine doubt about how the award should be carried out. Hence, where the reasoning in an award is clear but a party alleges that the award is not sufficiently reasoned, it is suggested that the tribunal cannot and should not interpret the award. On the other hand, where the tribunal's reasoning or decision is not clear, it is suggested that the tribunal can and, if it considers it appropriate, should interpret the award. It would also be a step too far to regard as 'interpretation' requests to the tribunal for clarification of its factual findings in order to ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question and for a party to seek so-called interpretation of the award on the basis that the tribunal did not in its award address all of the parties' submissions.

Commentators have disagreed on whether the correction of an award can be used to alter its meaning. Some earlier writers have suggested that it cannot be so used. (11) However, it is submitted that the better view is that expressed by Born, namely that a correction is made precisely in order to alter the effect 'and, on most views of the term, the meaning – of an award'. (12) The question may in the end come down to what is meant by the meaning of an award: as Born observes, it is correct to say that a correction ensures that the arbitrators' true intentions are fully effectuated (and not to alter those intentions) but it is difficult to conclude that a correction does not change the (mistaken) meaning of their original award. (13)

The Secretariat's Guide to ICC Arbitration (14) provides useful guidance on when it may be appropriate for an arbitral tribunal to accede to a request for interpretation:

3-1275 In practice, applications for interpretation (as opposed to correction) are rarely accepted. Most arbitral tribunals find that to be admissible a request for interpretation must seek to clarify the meaning of an operative part of the arbitral tribunal's decision. Therefore, requests for interpretation should generally target the dispositive section of the award or other parts that directly affect the dispositive section or the parties' rights and obligations. Most such ambiguities will normally have been identified by the [ICC] Court during the scrutiny process.

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3-1276 Many applications for interpretation amount to attempted appeals aimed at altering the meaning of an award, raising an additional issue or attempting to have the arbitral tribunal reconsider its decision or the evidence. Article 35(2) [of the 2012 Rules] does not empower an arbitral tribunal to revise the outcome or ● reasoning of its award. Attempted appeals accordingly do not fall within the scope of Article 35(2).

Paragraph 3-1265 of the same work states that the interpretation provisions of the Rules do not permit the arbitral tribunal to deal with additional claims or arguments and that it is limited to situations involving clear errors or vague language. Any attempted appeals fall outside the scope of those provisions and may prompt the tribunal to order the applicant to pay the additional fees, costs and expenses incurred in consequence of the application.

§22.03 TIME LIMITS

There is a clear tension between, on the one hand, the need for finality in the arbitral proceedings and, on the other hand, the existence of ongoing issues in relation to an award which may give rise to a need for its correction, interpretation or supplementation. Thus strict time limits are imposed 'in order to safeguard the finality of awards, to limit uncertainty and to prevent ongoing disputes after an award has been made'. (15) The time limits vary but are invariably relatively short and will be strictly enforced. In the case of institutional arbitration, the request to correct an award or for an additional award is made not to the tribunal itself but to the relevant institution.

Under Article 33 of the Model Law, any request for the correction or interpretation of an award or for an additional award must be made within thirty days of receipt of the award, unless another period of time has been agreed between the parties. If the tribunal considers the request to be justified, it must make the correction or give the clarification within thirty days of receipt of the request and the interpretation then forms part of the award. The tribunal itself has thirty days from the date of the award within which to make a correction. The tribunal is allowed a sixty day period from the date of a request within which to make an additional award. Article 33(4) gives the tribunal the power to extend, if necessary, the period of time within which to make a correction, interpretation or an additional award pursuant to a party's request.

Under Articles 38.1 and 37.2 respectively of the UNCITRAL Arbitration Rules, the tribunal is allowed a period of only forty-five days from receipt of a request within which to make any correction in the award or to give an interpretation of the award.

In England, any application for the exercise by the tribunal of the powers referred to in section 57(1)–(3) of the Arbitration Act 1996 to correct an award or make an additional award must be made within twenty-eight days of the date of the award. Under section 57(4)–(6), if the correction is made at a party's request, the tribunal has twenty-eight days from the date the application was received by the tribunal to make the correction. Any additional award must be made within fifty-six days of the date of the original award. In each case, however, it is open to the parties to agree on a longer period.

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The LCIA Rules apply the time limits laid down by section 57 of the Arbitration Act 1996. Under Article 27 of the LCIA Rules, a request must be made to the Registrar within twenty-eight days of receipt of any award and the correction must be made within twenty-eight days of receipt of the request. The tribunal also has twenty-eight days within which to make any correction on its own initiative, after consulting the parties. The correction takes the form of a memorandum. Any additional award pursuant to a request must be made within fifty-six days of the date of the original award. An additional award made by

the tribunal on its own initiative must, however, be made within twenty-eight days of the date of the award, after consulting the parties.

Under Rule 33 of the SIAC Rules, a request for a correction, interpretation or additional award has to be made to the Registrar within thirty days of receipt of any award. Any correction has to be made or any interpretation given within thirty days of receipt of the request. The tribunal also has thirty days within which to make any correction on its own initiative, after consulting the parties. A correction may be made in the award or in a separate memorandum. Any correction or interpretation forms part of the award. Any additional award must be made within forty-five days of the receipt of the request. Under Rule 33.5, the Registrar may, if necessary, extend the period of time within which a correction, interpretation or an additional Award must be made.

Under Article 36 of the ICC Rules, the procedure is slightly different. On its own initiative, the tribunal may make a correction or interpretation provided that such correction is submitted for approval to the ICC Court within thirty days of the date of the award. Where it is a party which seeks a correction or an interpretation, it must apply to the Secretariat within thirty days of the receipt of the award. After transmittal of the application by the Secretariat to the tribunal, the tribunal must then grant the other party a short time limit, normally not exceeding thirty days, from the receipt of the application by that party, to submit any comments thereon. The tribunal must then submit its decision on the application in draft form to the Court not later than thirty days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide. (16)

In Hong Kong, under Articles 37, 38 and 39 respectively of the HKIAC Rules, the request for correction or interpretation or for an additional award is made not to the HKIAC but to the tribunal and must be made within thirty days of receipt of the award. The thirty-day period for correction or interpretation is shorter than the forty-five days previously provided for. The tribunal may then set a time limit, normally not exceeding fifteen days in the case of a request for a correction or interpretation and thirty days in the case of a request for an additional award, for the other party to comment on such request. The arbitral tribunal must make any corrections or give any interpretation it considers appropriate within thirty days after receipt of the request and must make any additional award within sixty days after receipt of the request but may extend such period of time if necessary. Corrections made of the tribunal's own initiative must be made within thirty days after the date of the award.

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A request for an additional award would be justified where, for example, where the tribunal omitted from its award certain sums admitted by the respondent to be due by way of damages or failed to rule on claims for costs and expenses. In contrast, a request for an additional award in respect of a claim not in fact presented during the arbitration proceedings would not be legitimate.

In some instances, questions may arise as to when an award is received for the purpose of the start date for an application for the correction or interpretation of an award or for an additional award. What happens, for example, where a tribunal sends the parties its award in unsigned form but states that the tribunal has agreed on it and that a signed award will be provided in due course? On a strict approach, time would only begin to run from the date of receipt by the parties of the signed award. But any prudent practitioner would say that the safer course is to take as the start date the date on which the unsigned award is received. Again, what happens where, for reasons of urgency or otherwise, a tribunal informs the parties of the decision contained in the award and states that it will provide its reasons at a later date? In that situation, it is suggested that because any application for correction or interpretation or for an additional award would require the reasons for the tribunal's decision to have been communicated to the parties, time would only begin to run from the date of receipt of the reasoned award.

§22.04 NOTIFICATION AND PUBLICATION OF AN AWARD

This final section looks at some practical issues that arise after the tribunal has made its award relating to its notification to the parties. Unless the *lex arbitri* provides otherwise, these matters may all be open to party autonomy. The parties' agreement on these matters may either result from their selection of a set of arbitration rules which apply to the arbitration or else be the result of a specific ad hoc agreement reached at the start or even in the course of the arbitration proceedings.

The question whether the notification of an award by the tribunal to the parties falls outside the scope of the *functus officio* doctrine or else is an exception to it may be a matter for debate. The answer may depend on whether the applicable rules provide for notification to take place by an arbitral institution or by the tribunal itself. In the former case, notification is no part of the tribunal's function and so the *functus officio* doctrine has no application. In the latter case, notification can be viewed either as part of the tribunal's functions before its mandate terminates or as a purely administrative act and so the doctrine has no application or else as an exception to the doctrine. Although the answer to the question is of little practical significance, the conundrum may be illustrated by the position under the Model Law. Article 32(3) of the Model Law makes

clear that the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of Articles 33 and 34(4) dealing with correction and interpretation. Article 32(1) states that the arbitral proceedings are terminated by the final award (or by an order of the tribunal for the termination of the proceedings in accordance with Article 32(2)). It would seem that this must refer to the *delivery* of the final award to the parties, which has to be done by the arbitrators, ●
P 371 because otherwise the arbitrators would be *functus* and would have no mandate to deliver the award to the parties.

The procedures for the notification of awards differ. One method is the direct delivery of the award by the tribunal itself. Article 31(4) of the Model Law requires a copy of the award to be delivered to each party but does not state by whom. However, Article 34(6) of the UNCITRAL Arbitration Rules directs that the responsibility for the communication of copies of the award signed by the arbitrators lies with the arbitral tribunal itself. Article 2 of the UNCITRAL Arbitration Rules contains useful provisions in a situation where a party may refuse to accept delivery of the award for deemed notification to that person.

A variant of the method prescribed in the UNCITRAL Arbitration Rules is seen in the HKIAC Rules. Article 34.6 of the HKIAC Rules provides that, subject to any lien, originals of the award signed by the arbitrators and affixed with the seal of HKIAC shall be communicated to the parties and HKIAC by the arbitral tribunal, with HKIAC to be supplied with an original copy of the award.

Another method is delivery by the arbitral institution under whose rules the arbitration proceedings are being conducted. Under Rule 32.8 of the SIAC Rules, the responsibility rests with the Registrar to transmit certified copies to the parties upon full settlement of the costs of the arbitration. Similarly, under Article 26.7 of the LCIA Rules, the responsibility rests with the LCIA Court to transmit to the parties the award, authenticated by the Registrar as an LCIA award, provided that all arbitration costs have been paid. The LCIA Rules expressly permit transmission to be made by any electronic means, in addition to paper form (if so requested by any party) and provide that, in the event of any disparity between electronic and paper forms, the paper form shall prevail. Article 35(1) of the ICC Rules gives the Secretariat the responsibility to notify to the parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.

Irrespective of the means of notification of an award to the parties, the effect of notification is threefold. First, notification makes the award final and binding on the parties. Rule 32.11 of the SIAC Rules adds that any award is final and binding 'from the date that it is made'. It is not clear what the effect of those words is: taken literally, the parties are bound from the date that the award is made, even though it may not at that date have been communicated to the parties. Once an award has become final and binding it gives rise to a *res judicata* as between the parties (or their successors) with respect to the subject matter of the arbitration.

Second, the award is enforceable in the place of arbitration, unless the applicable law provides otherwise. Perhaps more importantly, from its notification, the award may be recognised and enforced abroad under the New York Convention. The only exception to this is where the party against whom the award is sought to be enforced provides proof that the award 'has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made' – Article V(1)(e) of the New York Convention.

Third, notification of the award triggers the time limits for any remedies that may be available against it. These cover both agreed time limits for making an application ● to correct or interpret an award and statutory ones such as for making an application to set the award aside.
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Some nice questions may arise in cases where the arbitrator in an institutional arbitration has bypassed the requirement for the institution to notify the parties of the award by delivering the award directly to the parties. Does the award in those circumstances create a *res judicata*? It is suggested that the answer is yes, since the award has been rendered by the tribunal authorised to do so and has been notified to the parties, albeit not through the agreed channel. Would the delivery of the award directly to the parties provide a ground for setting aside the award? For example, under Article 34(2)(a)(iv) of the Model Law, an award may be set aside where the applicant provides proof that 'the arbitral procedure was not in accordance with the agreement of the parties'. It is suggested that there would be a ground for setting aside but that the prospect of the national court dealing with the matter, which has a discretion whether or not to set aside, doing so would be remote. The same consideration would apply in relation to the existence of a ground for refusing recognition of the award under the New York Convention, Article V(2)(d) of which is in materially the same terms as Article 34(2)(iv) of the Model Law.

It is important that, once signed by the arbitral tribunal, the award be notified to the parties without delay. Section 55(2) of the English Arbitration Act 1996 expressly provides that, in the absence of the parties' agreement on the requirements as to notification of the award to the parties, the award is to be notified to them by service of copies of the award without delay after the award is made. The ICC always expressly reminds tribunals

that an award should be transmitted to it for onward notification to the parties as soon as possible after the award is made. The reason why this is important is so that a party is not placed in the position of being too late to challenge an award if the relevant date for recourse against the award is the date on which it was made. An award must, for reasons of equality of treatment, be notified to each party on the same date, so as to make sure that the deadline for making any challenge expires for each party on the same date. If an award were notified only to the winning party and it does not disclose its existence to the losing party until after the time limits for challenging the award has passed, there is obvious unfairness and prejudice to the losing party. (17)

Simultaneous notification to each party may, however, not always be possible, for example where notification has to be made abroad, where email communication may be unreliable and couriers may take more than just a few days to delivery packages. In such cases, the tribunal may again be well advised to anticipate these difficulties by requiring the parties in advance to appoint a representative, preferably in the place of arbitration or where the tribunal is located, who is authorised to receive the award on behalf of the party in question.

▲
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References

- 1) *Fidelitas Shipping Co Ltd v. V/O Exportchleb* [1966] 1 QB 630, *Dredging & Construction Co Ltd v. Delta Civil Engineering Ltd* [2000] CLC 213.
- 2) §24-01, pp. 3112-3113. Born also observes at p. 3123 that it may be an oversimplification to say that the use of the expression *functus officio* means that the tribunal loses its mandate and that it should instead be understood in the sense that, on the making of an award, the tribunal's mandate becomes radically transformed and limited.
- 3) Michael Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press, 2017) 11.94.
- 4) *Ibid.*, 11.101 and 11.104.
- 5) The reference to an accidental slip or omission is a reference back to the limited power of a tribunal that existed in section 17 of the Arbitration Act 1950, the predecessor legislation to the 1996 Act, which did not extend to errors in thought by the tribunal.
- 6) *Buyuk Camlica Shipping Trading & Industry Co Inc v. Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm) at [42].
- 7) Born, §24-04, p. 3141.
- 8) See Michael Moser and Chiann Bao, 11.88, footnote 108 citing John Choong and Romesh Weeramantry *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (2nd ed., 2015) at 385 and 386.
- 9) As suggested in Robert Merkin and Louis Flannery, *Arbitration Act 1996* (5th ed, Informa Law from Routledge) page 236, footnote 24, it seems clear that, on the same facts, under the 1996 Act the tribunal would have the power to clarify the award under section 57(3)(a) and the decision in *Sutherland* would have gone the other way.
- 10) The application failed because although there had been a serious irregularity it was not one which caused substantial injustice.
- 11) For example, Emmanuel Gaillard and John Savage (editors), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* ¶1416 (1999).
- 12) Born, §24-03, p. 3126.
- 13) *Ibid.*
- 14) Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (2012 edition).
- 15) Born, §24-03, p. 3125, referring to Howard Holtzman and Joseph Neuhaus, *A Guide to the Model Law on International Commercial Arbitration: Legislative History and Commentary* 889 (1989) and also Peter Binder, *International Commercial Arbitration and Conciliation in Model Law Jurisdictions* ¶6-100 (3rd ed, 2009).
- 16) For an interesting discussion of the origins of Art. 36, see Eric Schwarz and Yves Derains, *A Guide to the ICC Rules of Arbitration* (2nd ed, 2017) Wolters Kluwer pp. 321 et seq. (in relation to its predecessor provisions in Art. 29 of the 2012 Rules).
- 17) Albeit that the English court, under section 79 of the Act, would have a discretion to extend time.

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Part 4 : Chapter IV - The Arbitral Award

1346-1347. – We shall consider in turn the concept and the classification of arbitral awards (Section I), the process of making an award (Section II), the form of the award (Section III) and its effects (Section IV).

Section I – Concept and Classification of Arbitral Awards

1348. – The concept of the arbitral award has been the subject of considerable debate. The same is true of attempts to define the various types of award that exist. Awards are described as being final, preliminary, interim, interlocutory, or partial, but these terms are often used without sufficient precision. For example, the UNCITRAL Arbitration Rules state that “[i]n addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards,” without actually defining those terms (Art. 32(1)). Similarly, Article 2(iii) of the 1998 ICC Rules states that in those Rules “Award” includes *inter alia* “an interim, partial or final Award,” again without elaborating on the distinction. (1)

It is therefore not only the concept of the arbitral award which requires clarification (§ 1), but also the definition of the various categories of award (§ 2).

§ 1. – The Concept of Arbitral Award

1349. – It is not always easy to identify an arbitral award. In some cases, the arbitrators themselves do not describe their decision as such. One arbitral tribunal will give its decision the title “Findings of the Amiable Compositeur,” (2) while another will describe a purely administrative measure as an award. (3) ●

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1350. – Defining an arbitral award is made more difficult by the fact that most instruments governing international arbitration themselves contain no such definition.

This is the case with many international arbitration laws, including French law. (4) The UNCITRAL Model Law does not give a definition of an arbitral award either, despite such a definition being considered during the drafting stages. The following definition was suggested:

‘award’ means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine[s] any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award. (5)

This text, however, was the subject of so much disagreement, particularly with regard to whether decisions by the arbitrators concerning the jurisdiction of the arbitral tribunal and procedural issues should be considered to be awards, (6) that it was eventually abandoned. The authors of the Model Law instead decided not to give a definition at all. (7) The ICC working group on interim and partial awards likewise found it impossible to reach a consensus on the issue. (8)

Even international conventions on the recognition and enforcement of arbitral awards fail to define the concept of an award. The 1958 New York Convention merely states that:

[t]he term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties

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have submitted (Art. I(2)). ●

Similarly, the main institutional rules do not define what is meant by an award. At best, they simply describe the conditions governing the making of an award (9) and its form. (10)

1351. – Nevertheless, it is essential to identify precisely which of an arbitrator's decisions can be classified as awards and, in particular, to distinguish awards from procedural orders, from orders for provisional measures, and even from agreements between the parties. These distinctions have significant legal consequences, the main one being that only a genuine award can be the subject of an action to set it aside or to enforce it. (11) As a result, the deadlines laid down in such proceedings will only begin to elapse when a genuine award is made. Similarly, only genuine awards are covered by international conventions on the recognition and enforcement of arbitral awards. (12) The characterization of a decision as an award may also have an impact on the application of certain provisions of arbitration rules. For example, Article 27 of the ICC Rules states that an “award” must be submitted in draft form to the International Court of Arbitration for approval prior to being signed.

1352. – However, as with contracts, the characterization of a decision as an award does not depend on the terminology employed by the arbitrators. It is determined solely by

the nature of the decision itself. The inclusion or omission of items such as the names of the arbitrators, the date and the arbitrators' signatures should be irrelevant in the characterization of an award. (13) Those formal aspects may, however, affect the validity of a document which, on the basis of its subject-matter, can be characterized as an award. (14)

1353. – An arbitral award can be defined (15) as a final decision by the arbitrators on all or part of the dispute submitted to them, whether it concerns the merits of the dispute, jurisdiction, or a procedural issue leading them to end the proceedings. (16)

P 738 Several aspects of this definition require further examination. ●

1354. – First, an award is made by the arbitrators. Decisions taken by an arbitral institution, rather than by arbitrators acting in proceedings that the institution administers, are not arbitral awards. Thus, for example, a decision by the ICC International Court of Arbitration rejecting a challenge against an arbitrator does not constitute an award against which an action to set aside can be brought. (17)

1355. – Second, an award resolves a dispute. Measures taken by arbitrators which do not decide the dispute either wholly or in part are not awards. This is true of orders for the hearing of witnesses and document production, for example, which are only procedural steps and as such are incapable of being the subject of an action to set aside. While acknowledging that principle, the Paris Court of Appeals has nevertheless adopted a broad understanding of what constitutes a dispute, holding that:

the reasoned decision by the arbitrator ... whereby, having examined the parties' conflicting arguments, he refused to stay the proceeding, is judicial in nature and constitutes an arbitral award against which an action to set aside can be brought. (18)

1356. – Third, an award is a binding decision. Decisions which only bind the parties on condition that they expressly accept them are not awards. Thus, the decision of an "arbitral tribunal of first instance" which "makes a draft award which is only to become an award if the parties accept it, failing which the dispute is to be submitted to a tribunal of second instance for a definitive award," could not be the subject of an immediate action to set it aside. (19) On that basis, the Paris Court of Appeals held in a 1995 case that "a principle exists whereby, in an arbitration involving two tiers of jurisdiction, an action to set aside can only be brought against the award made at second instance." (20) The same applies to recommendations made by the "neutral" in the various forms of Alternative Dispute Resolution in which the parties have stipulated that such recommendations will not be binding unless expressly accepted by them, directly or through a more

P 739 sophisticated system of exchanging settlement offers. ●

1357. – Fourth, an award may be partial. (21) Decisions by the arbitrators on issues such as jurisdiction, the applicable law, the validity of a contract or the principle of liability are in our opinion genuine arbitral awards, despite the fact that they do not decide the entire dispute and may not lead to an immediate award of damages or other redress. However, the opposite view has found support in Switzerland. Certain leading Swiss authors consider that "decisions, and even substantive decisions, which do not rule on a claim, only constitute partial awards if they put an end to all or part of the arbitral proceedings." According to those authors, all decisions which "decide substantive issues, such as the validity of the main contract, the principle of liability as opposed to the level of damages, etc." do not constitute arbitral awards; they are simply "preparatory or interlocutory decisions" which cannot be the subject of an action to set aside independent of the subsequent award on the parties' claims on the merits. (22) That analysis is based on a narrow understanding of the concept of a claim which, according to these authors, covers a request for an award of damages or other redress but not for an initial finding as to liability. Along with other Swiss authors, (23) we disagree with this view. A decision on jurisdiction, the applicable law or the principle of liability, for example, is a final decision on one aspect of the dispute. It should therefore be considered as an award, against which an immediate action to set aside can be brought. We are not convinced, from a theoretical standpoint, that there is a compelling justification for deferring the possibility for the parties to bring an action to set aside once the arbitrators have made a decision which they present as being final, as far as that aspect of the dispute is concerned, and binding on the parties. From a practical standpoint, such deferral would also lead to unnecessary delay and expense. If, for instance, the award on the principle of liability is to be set aside, the parties have a clear interest in knowing the outcome as soon as possible, as that may save them all or part of the cost of an expert proceeding or lengthy hearings on the quantum of damages. This is the position taken by the French courts. (24) In Switzerland, the Federal Tribunal has held that, under the 1987 Private International Law Statute, an action to set aside can only be brought against awards regarding the constitution of the arbitral tribunal and its jurisdiction—even where the tribunal finds in favor of its jurisdiction—where it would cause irreparable harm not to accept the immediate action to set aside or where the award puts an end to the entire dispute. (25)

A peculiarity of ICSID arbitration should be noted in this respect. Contrary to the position generally adopted in other types of arbitrations, a decision by the arbitrators on jurisdiction is not considered by the Centre as being an award, and it cannot be the subject of an immediate action in annulment before an *ad hoc* committee unless it puts

P 740 an end to the ● dispute. This explains why the 1984 decision on jurisdiction made in the *SOABI v. Senegal* (26) case, for example, was carefully entitled “decision” rather than “award,” (27) although ICSID arbitrators have not always been as cautious. (28)

§ 2. – Different Categories of Award

1358. – The concepts of final award (A), partial award (B), award by default (C) and award by consent (D) each require explanation.

A. – Final Awards and Interim Awards

1359. – The expression “final award” (“*sentence definitive*”) is used to mean very different things.

It sometimes refers to an award which includes a decision on the last aspect of a dispute and which, as a result, terminates the arbitrators' jurisdiction over that dispute as a whole. In that sense, “final” awards are distinguished from “interim,” “interlocutory,” or “partial” awards, none of which puts an end to the arbitrators' brief. That was the definition used by the working group preparing the UNCITRAL Model Law, although it is important to note that it was precisely the controversy over this terminology which led UNCITRAL to abandon its attempts to define the concept of an award. (29) Traces of the working group's definition can be found in the Model Law, which states in Article 32, paragraph 1 that a final award terminates the arbitral proceedings. Prior to 1998, Article 21 of the ICC Rules of Arbitration drew a distinction between “partial” and “definitive” awards. The 1998 rules simply refer to interim, partial and final awards, without defining those terms (Art 2(iii)). (30) Many English-speaking commentators also use the term “final” to describe an award deciding the last aspects of a dispute. (31) ●

P 741 The expression “final award” is also sometimes used to describe an award which puts an end to at least one aspect of the dispute. In that sense, a final award is distinguished from an interim award (or from a procedural order) which do not terminate any aspect of the dispute, nor the last stage of that dispute. Thus interpreted, a final award does not necessarily cover the entire dispute, nor the last stage of that dispute. An award on liability, for example, is a final award, despite the fact that it may also order expert proceedings to provide the arbitrators with an evaluation of the damage or loss, following which further hearings will take place. That approach can be seen in the Dutch Code of Civil Procedure, Article 1049 of which provides that “the arbitral tribunal may render a final award, a partial final award, or an interim award.” (32) The Belgian legislature followed suit, at first implicitly, then explicitly in its statute of May 19, 1998. Article 1699 of the Belgian Judicial Code now reads “[t]he arbitral tribunal takes a final decision or renders interlocutory decisions, through one or more awards.” A number of Swiss commentators appear to take the same position. (33) We believe this approach to be consistent with contractual practice, as it reflects what is meant by the words “final and binding,” which are often used in arbitration agreements to describe any award or awards to be rendered by the arbitral tribunal. Interestingly, this is also how the 1996 English Arbitration Act uses the same words. (34)

We consider the latter interpretation to be the better one: as discussed above, an award is a decision putting an end to all or part of the dispute; (35) it is therefore final with regard to the aspect or aspects of the dispute that it resolves. (36)

B. – Partial Awards and Global Awards

1360. – The parties may decide that the arbitrators shall rule on a particular aspect of a dispute (such as jurisdiction, the governing law or liability) by making a separate award, referred to as a partial award. To avoid confusion, we suggest that partial awards should be contrasted with global awards, rather than with final awards. As discussed above, the term “final” refers to the impact of the award, whether partial or not, on the portion of the dispute resolved by the arbitrators. (37) ●

In the absence of an agreement between the parties on this matter, the arbitrators are responsible for deciding whether it is appropriate to decide by way of partial awards.

Some laws expressly give the arbitrators freedom to do so. In particular, Article 188 of the Swiss Private International Law Statute provides that “[u]nless the parties have agreed otherwise, the arbitral tribunal may make partial awards.” (38) The arbitrators are given the same option by Article 1049 of the Dutch Code of Civil Procedure, Article 1699 of the Belgian Judicial Code and Section 29 of the 1999 Swedish Arbitration Act. Similarly, English law provides that unless the parties agree otherwise the arbitration agreement is deemed to empower the arbitrators to make partial awards at their discretion. (39) Although the French New Code of Civil Procedure does not mention it explicitly, the same rule applies in French law.

Some arbitration rules also expressly refer to the arbitrators' power to render partial awards. (40)

1361. – The arbitrators' freedom to determine whether it is appropriate to make partial awards can only be exercised within the limits set forth by the parties themselves. For instance, in the *SOFIDIF* case, the Paris Court of Appeals interpreted the terms of reference as stipulating that the arbitrators were to rule by separate awards on

jurisdiction and on the merits of the dispute. The Court concluded that the award, which had disregarded that provision, should be set aside under Article 1502 3° of the New Code of Civil Procedure on the grounds that the arbitrators had exceeded the limits of their brief. (41) The *Cour de cassation* overruled that decision on the grounds that the Court of Appeals could only reach that conclusion if the obligation to make separate awards resulted from an “express, precise clause of the terms of reference.” (42) Thus, under French international arbitration law, directions by the parties on this point, provided that they are sufficiently clear and precise, may lead an award to be set aside if they are disregarded by the arbitrators. (43) ●

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1362. – In the absence of any stipulation by the parties, the arbitrators' decision as to whether it is appropriate to make partial awards will depend on the circumstances of the case. (44)

The usefulness of partial awards on jurisdiction will mainly depend on whether the issues of jurisdiction will be determined by the same facts as those determining the merits. If that is the case, it will be preferable to make a single award covering both jurisdiction and, assuming the arbitrators' jurisdiction is confirmed, the merits. If, on the other hand, jurisdiction appears to be a separate issue and the substantive issues to be resolved by the tribunal if it retains jurisdiction are complex, it will generally be appropriate to decide by way of a separate award. By stating that “[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award,” the UNCITRAL Rules appear to encourage the use of partial awards on jurisdiction (Art. 21(4)), as does the Swiss Private International Law Statute, which provides in Article 186, paragraph 3, that “[t]he arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision.” (45) The more cautious approach found in the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, which previously required the arbitrators to invoke “special reasons” in order to render a partial award in the absence of an agreement of the parties to that effect (Art. 27 of the 1988 Rules), is no longer found in the 1999 Rules (Art. 34).

The question of whether it is appropriate to make a separate award on the applicable law also depends on the circumstances of the dispute. If the governing law is determined in a separate award, the parties will not need to present their arguments on the merits in the light of each different law which might otherwise apply to the dispute, including general principles of law. (46) However, to do so may delay the outcome of the dispute and oblige the arbitrators to choose a governing law without being fully aware of the impact this decision may have on the merits. (47) ●

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It is impossible to assess in the abstract when separate awards on liability and quantum of damages are appropriate. A partial award on liability may encourage a settlement and enable the arbitrators to determine more accurately the brief of any expert appointed to assist in the evaluation of damages. On the other hand, it may delay the outcome of the proceedings and bind the arbitrators before they are fully aware of all the facts of the case. In short, the decision depends entirely on the circumstances of each case.

C. – Default Awards

1363. – As discussed earlier, default by one of the parties does not bring the arbitral proceedings to an end. In order to satisfy the requirements of due process and equal treatment of the parties, it is sufficient for each party to be given an equal opportunity to present its case. (48) Default by a party does not therefore prevent the making of a valid award. There is no obligation on the arbitrators to simply accept the arguments of the party which is present or represented, nor indeed to increase the burden of proof on that party so as to compensate for the other's failure to participate, provided the defaulting party has been properly invited to attend. In other words, an award made following default proceedings is no different from one made following proceedings where all parties participate. In both cases, the rules of due process are satisfied. Thus, having established that the various documents submitted to the arbitral tribunal had invariably been sent to the defaulting party by means of two different couriers, a court was founded to reject an action to set aside brought against a default award, on the grounds that “the provisions of the [ICC] Rules adopted by the parties had been observed and no specific formal requirements were required to ensure that the proceedings complied with the rules of due process.” (49)

D. – Consent Awards

1364. – In some cases, the parties succeed in reaching a settlement in the course of the proceedings. If they do so, they may simply formalize their agreement in a contract and terminate the arbitral proceedings. Alternatively, they may want their decision to be recorded by the arbitral tribunal in the form of an award. This is referred to as a consent award. In obtaining a consent award, the parties expect their settlement to benefit from the authority and effects attached to an award. Admittedly, in certain legal systems, (50) a settlement is *res judicata* in any event, so in that respect it gains nothing from being embodied in an award. However, the parties may seek a consent award in order to enjoy the recognition and ● enforcement procedures provided for in widely-ratified international conventions on arbitration. (51)

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1365. – The first question that arises here is whether the arbitrators are obliged to make a consent award where the parties so request. Most modern arbitration laws, which promote the principle of party autonomy, will require them to do so. This is clearly the case in French law. A number of arbitration rules also expressly invite the arbitrators to record the agreement reached by the parties in a consent award. The 1998 ICC Rules provide, in Article 26 (Art. 17 of the previous Rules), that:

[i]f the parties reach a settlement after the file has been transmitted to the Arbitral Tribunal ..., the settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and if the Arbitral Tribunal agrees to do so.

Similar provisions appear in the 1998 LCIA Rules (Art. 26.8), the 1999 Stockholm Chamber of Commerce Rules (Art. 32(5)) and the Euro-Arab Chambers of Commerce Rules (Art. 24-1). In ICSID arbitration, the parties' settlement may give rise to an order recording the discontinuance of the proceedings. If the parties so request, the arbitral tribunal can incorporate the settlement in an award under Article 43 of the ICSID Rules.

1366. – The second question arising in connection with consent awards is whether, like ordinary awards, they benefit from the recognition and enforcement mechanisms provided for in international conventions and national legislation. Neither the 1958 New York Convention nor the 1961 European Convention expressly refers to consent awards. Nevertheless, in determining whether those conventions apply, one should, in our opinion, interpret those instruments in order to determine their scope rather than consider the position in the jurisdiction where the disputed award is made. (52)

P 746 The lack of case law on this issue (53) makes it difficult to take a firm view. (54) If an award is defined as being restricted to a decision whereby the arbitrators resolve all or part of a ● dispute, it seems doubtful that a decision which simply endorses the agreement of the parties could be considered to be an award. (55) However, the UNCITRAL Model Law provides a strong argument in favor of applying the ordinary regime for awards by stating in Article 30, paragraph 2 that a consent award “has the same status and effect as any other award on the merits of the case.” Thus, in countries which have adopted the Model Law, the issue will be resolved by simply applying the ordinary legal rules governing the recognition and enforcement of awards. It could be that the position of the Model Law will have a wider impact, as the adoption of the rule set out in Article 30, paragraph 2 reveals the existence of a consensus which is liable to support a similar interpretation of other international instruments.

Section II – The Making of The Award

1367. – An arbitral award (56) is made by the arbitrators (§ 1) subject, in some cases, to approval by an arbitral institution (§ 2). The award must be made within any time-limit fixed by the parties or by law (§ 3).

§ 1. – Role of the Arbitrators

1368. – The role of the arbitrators is to resolve all of the disputed issues by one or more decisions, (57) and to express those decisions in a document which is subject to certain formal requirements, and which is known as the arbitral award. The process which enables the arbitrators to reach such a decision is referred to as the deliberations. Although one cannot go as far as to say that there can be no deliberations where the dispute is heard by a sole arbitrator, the regime governing the deliberations is of practical importance only where there is an arbitral tribunal comprising more than one member.

P 747 1369. – The requirement for deliberations is not always expressly set out in international arbitration statutes. For instance, no such requirement exists in French international arbitration law, and none of the grounds for setting aside an award listed in Article 1502 of the New Code of Civil Procedure refers directly to deliberations. Nevertheless, they do constitute a fundamental condition under French law, which will apply even where neither the parties nor their chosen arbitration rules make reference to them. It might be argued that the absence of proper deliberations constitutes a violation of due process justifying the ● setting aside of an award. However, this would run contrary to the principle of the arbitrators' independence, as it is only where the arbitrators are not independent of the parties that any unequal treatment of the party-appointed arbitrators in the conduct of the deliberations would amount to a breach of due process or equality of the parties. (58) It is therefore generally considered that the existence of proper deliberations is in itself a requirement of international procedural public policy, a breach of which will also constitute a ground for the setting aside of the award. (59)

1370. – Similarly, international arbitration statutes generally give no further indication as to how deliberations are to be conducted. They must, however, satisfy certain conditions, which we shall now examine.

A. – The Decision-Making Process

1371. – Where the arbitral tribunal comprises more than one arbitrator, it is necessary to determine how its decisions are to be made in the event that the arbitrators are not unanimous.

Some arbitration rules simply state that in such circumstances the decision is to be taken by a majority of the arbitrators. That is the position taken in the UNCITRAL Arbitration Rules (Art. 31(1)), the AAA International Arbitration Rules (Art. 26) and the ICSID Rules (Art. 16(1)). The case law generated under the UNCITRAL Rules by the Iran-United States Claims Tribunal illustrates one of the difficulties which may arise when a majority is required. Where one arbitrator does not participate in the deliberations or takes a position which the other arbitrators consider to be unreasonable, in order to avoid delaying the award indefinitely, another arbitrator—generally a co-arbitrator—must accept the views of the third arbitrator—generally the chairman—which may lead the first arbitrator to endorse an award with which he is not in agreement. Some arbitrators have gone as far as stating in a separate opinion that they consider the result to be unsatisfactory but endorse it only in order to create a majority which complies with the requirements of the rules. (60)

P 748 Other rules have chosen to specify that where a majority cannot be obtained, the chairman of the arbitral tribunal can decide alone. That system was introduced by the ICC Rules of ● Arbitration in 1955, and is found today in Article 25, paragraph 1 of the 1998 Rules. (61) It has since been followed by the Euro-Arab Chambers of Commerce, (62) the LCIA Arbitration Rules (Art. 26.3) and the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Art. 30) among others. Article 46 of the International Arbitration Rules of the Zurich Chamber of Commerce adopts a similar approach, but restricts the chairman's discretion by stipulating that an award in favor of the winning party can be neither less than the lowest proposal made by the co-arbitrators, nor greater than their highest proposal.

These two different approaches are also found in arbitration legislation. The UNCITRAL Model Law (Art. 29), the Netherlands Code of Civil Procedure (Art. 1057), the 1996 English Arbitration Act (Sec. 22(1)) (63) and the new German law on arbitration (Art. 1052 ZPO) have followed the traditional position found in the UNCITRAL Arbitration Rules. In contrast, the 1987 Swiss Private International Law Statute (Art. 189, para. 2), the 1988 Spanish Arbitration Statute (Art. 34) and the 1999 Swedish Arbitration Act (Sec. 30, para. 2) have followed the ICC Rules in this respect and provide that if no majority is possible, the award can be made by the chairman alone.

Provisions enabling the chairman to reach a decision alone are intended to ensure that where the arbitrators have strongly differing views, the chairman need not side with one or other of the co-arbitrators so as to obtain a majority. Although the chairman is entitled to decide alone, he or she may prefer to opt for a compromise solution. In practice, there have been very few cases where the decision-making process might have failed but for a clause of this kind. In 1995, of the 203 awards submitted to the Court of Arbitration, none was made by the chairman alone under Article 19 of the ICC Rules (now Art. 25(1)). (64) In 1996, of the 217 awards submitted to the Court, only one was made by the chairman alone and in 1997, of the 227 awards submitted, just two were made by the chairman. (65) In 1998, of the 242 awards submitted, again only one was made by the chairman alone. Nevertheless, the very existence of the possibility for the chairman to decide alone will probably persuade the co-arbitrators to take a more reasonable attitude in certain cases.

P 749 As French law is silent on this issue, it is not inconceivable that where the parties do not agree otherwise the French courts would accept such a practice, even where it is not ● expressly provided for in the applicable arbitration rules. This seems preferable to compelling the chairman of the arbitral tribunal to side with one of the co-arbitrators or to declare that, in the absence of a majority, no award can be made. Nonetheless, all of the arbitrators must have been given the opportunity to participate in the deliberations. (66)

B. – Methods of Communication Between the Arbitrators

1372. – Most modern laws contain no requirements as to the form of the deliberations. As stated by the French *Cour de cassation* in a decision of January 28, 1981, which remains valid following the reform of May 12, 1981, “no particular form is required for the deliberations of the arbitrators.” (67) By majority voting or by virtue of the powers of the chairman under the rules governing decision-making, (68) the arbitral tribunal is free to determine the conduct of the deliberations. (69) The arbitrators can thus meet to deliberate, or exchange questionnaires, (70) notes or draft awards, or communicate by telephone, fax or video-conference. (71) In this respect, the Swiss Federal Court has rightly ruled that an award made by circulating a draft among the arbitrators satisfied the requirement for deliberations. (72)

C. – Refusal of an Arbitrator to Participate in the Deliberations

P 750 1373. – An arbitrator cannot obstruct the making of an award by simply refusing to participate in the deliberations. Just as compliance with the rules of due process only entails providing the parties with an opportunity to present their case even though they may choose not to do so, (73) the requirement for deliberations will be satisfied if each of the arbitrators is given an equal opportunity to take part, in a satisfactory manner, in the discussions among the arbitrators and in the drafting of the award. The French *Cour de cassation* has ● recognized that a party's right to a fair hearing, which was claimed to have been breached where no deliberations took place, was satisfied where the missing

arbitrator was “given the opportunity to make comments on the proposed amendments to the initial draft of the award.” (74) The same solution is also embodied in certain modern arbitration statutes, such as the 1999 Swedish Arbitration Act (Sec. 30, para. 1). Article 26.2 of the LCIA Rules thus expresses a widely accepted rule in providing that where an arbitrator refuses to participate in the making of the award “having been given a reasonable opportunity to do so, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator’s failure to participate in the making of the award.” (75) The 1998 revision of the ICC Rules introduced, as a means of accelerating the procedure, Article 12, paragraph 5, pursuant to which:

[s]ubsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court ..., the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration.

The application of this provision, which raises certain difficulties concerning the principle of the equality of the parties, (76) should, in our view, remain the exception in practice. Nevertheless, Article 12, paragraph 5 is likely to dissuade arbitrators from resigning for the sole purpose of delaying the outcome of the arbitration. (77)

D. – Secrecy of Deliberations

1374. – Although, again, most laws do not explicitly require deliberations in international arbitration to be secret, (78) such secrecy is generally considered to be the rule. (79) This means that views exchanged during the deliberations cannot be communicated to the parties. However, this does not prevent the arbitrators from indicating in their award that their decision was reached by a majority or unanimously. (80) Non-compliance with the P 751 ● requirement of secrecy could render the arbitrator in breach personally liable, (81) but would not invalidate the award. (82)

§ 2. – Role of the Arbitral Institution

1375. – In *ad hoc* arbitration, the award is the work of the arbitrators alone. However, where the parties have chosen to submit their dispute to institutional arbitration, the institution is sometimes responsible for reviewing a draft of the arbitrators’ award. The purpose of that review is usually to enable the institution to maximize the chances of awards made under its supervision being enforced.

1376. – Most international arbitration laws are silent on this issue, and arbitral institutions are therefore free to determine how they review awards and, by adopting their arbitration rules, the parties confer contractual status on the involvement of the institution.

Under the heading “Scrutiny of the Award by the Court,” the ICC Rules provide, in Article 27 (Art. 21 of the previous Rules), that:

[b]efore signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal’s liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form. (83)

The ICC International Court of Arbitration thus has the power to review the form of the award, and to draw the attention of the arbitrators to substantive issues which it considers to be problematic. This distinction between form and substance is sometimes delicate. Contrary to the view put forward by some authors, (84) the scrutiny by the International Court of Arbitration of the form of the award does not extend to ensuring compliance with the entire arbitral procedure. For example, it does not entail checking P 752 ● whether proper adversarial ● hearings took place on each disputed issue, unless the existence of a procedural flaw in that area is evident from simply reading the award. (85) In 1998, of the 242 draft awards submitted to the Court for scrutiny, 18 were returned to the arbitrators, 5 for reasons of form, 3 for reasons of substance, and 3 on both grounds; 62 awards were approved subject to modifications as to their form, after which the Court, through a smaller committee, reviewed compliance with the Court’s decision. (86)

Some arbitration rules, such as those of the Euro-Arab Chambers of Commerce (Art. 24-4) or those of the Chambre franco-allemande de commerce et d’industrie (COFACI) (Art. 23), contain provisions similar to those of the ICC Rules. Others, such as the LCIA Rules or the AAA Rules, have no such system and leave the arbitrators solely responsible for both the form and the substance of the award.

1377. – The ICC being headquartered in Paris, the French courts have had the occasion to specify that as the review exercised by arbitral institutions is merely “administrative,” the institution need not state the reasons for any amendments it may require. (87) In the context of ICC arbitration, the French courts have also held that as the ICC International Court of Arbitration is not an “arbitrator of second instance,” it is not obliged to examine all the documents submitted to the arbitrators by the parties. (88)

1378. – Some authors have questioned both the benefit of submitting draft awards to an arbitral institution for approval and even the validity of awards made under such conditions. (89)

The difficulty is whether the draft award submitted by the arbitrators for review by the institution is in fact a true award which terminates the arbitrators' jurisdiction over the case and is *res judicata*. If that were the case, any subsequent intervention by the arbitral institution would infringe upon the independence of the arbitral tribunal and, because the award effectively terminates the arbitrators' mandate, (90) the institution would be powerless to alter it. However, because arbitration is based essentially on the principle of party autonomy, the award is not properly made until it is delivered in accordance with the conditions which the parties themselves have fixed by adopting the institution's arbitration rules. (91) Courts which have had to review the scrutiny of awards exercised by arbitral institutions—in practice, the ICC—have generally rejected the arguments of parties ● challenging the validity of an award solely on the grounds that it was rendered after scrutiny by an arbitral institution. (92) Likewise, an arbitral institution reviewing an award in accordance with the conditions contained in its arbitration rules cannot be accused of infringing upon the arbitrators' independence, which concerns the relationships between the arbitrators and the parties, or of failing to keep the deliberations secret, provided that the institution itself observes that secrecy. (93)

§ 3. – Time-Limits for Making the Award

1379. – The question of when the arbitral tribunal must make its award, which raises the issue of the duration of the arbitrators' functions, (94) depends on whether or not the parties have specified a time-limit for that purpose.

A. – Where the Parties Have Specified No Time-Limit

1380. – Where the parties have not set a deadline before which the arbitrators are to make their award, the next question is whether they have nevertheless chosen a mechanism for doing so.

1° Where the Parties Have Chosen a Mechanism for Fixing a Deadline

1381. – Where the parties have not set a time-limit within which the arbitrators are to make their award, a mechanism for fixing that time-limit may be found in rules incorporated by reference in their arbitration agreement.

1382. – They may have adopted a procedural law specifying a deadline or designating the authority responsible for setting that deadline. For example, if French law is chosen to govern the proceedings, the six month period provided for in Article 1456, paragraph 1 of ● the New Code of Civil Procedure will apply, (95) and can be extended, under paragraph 2 of the same Article, by the parties or by the courts. (96)

1383. – The parties may also have incorporated in their agreement arbitration rules containing provisions as to the deadline for making the award.

The French courts have firmly established the principle that time-limits and extensions fixed by a pre-designated third party—in practice, an arbitral institution—are binding on the parties just as if they had been established by the parties themselves. (97)

Arbitration rules vary considerably on this issue. For example, the ICC Rules of Arbitration fix a time-limit for rendering the award of six months from the signature or approval by the International Court of Arbitration of the terms of reference. (98) However, the International Court of Arbitration may “pursuant to a reasoned request from the arbitrator or if need be on its own initiative, extend this time-limit if it decides it is necessary to do so.” (99) The previous ICC Rules made the effectiveness of the terms of reference, and thus the point of departure of the six months time period, subject to payment of the advance on costs. This condition has been removed in the 1998 Rules and is replaced by the striking out of any claims made by the non-paying party. This allows the six-month period to run from the date of the last signature of the terms of reference or from that of the notification by the secretariat to the arbitral tribunal of the Court's approval of the terms of reference (Art. 24(1)). The decision to extend a deadline is made by the International Court of Arbitration. (100) The Court need not inform the parties of its intention to extend the deadline, ● or even advise them of the date on which such extension may be decided. (101) Its decision is of an administrative nature, and no grounds need be given. (102) Where an excessive delay is attributable to the arbitrators, the International Court of Arbitration may resort to the provisions of the Rules concerning the replacement of arbitrators, which apply where the arbitrators fail to perform their duties within the stipulated time-limits. (103)

Conversely, the LCIA Rules, which are silent on this issue, and the AAA International Rules (Art. 24) leave the arbitrators and the arbitral institution in full control of the deadlines before which the award must be made, unless the parties have provided otherwise. In the case of *ad hoc* arbitration, the UNCITRAL Rules of course take a similar approach.

2° Where the Parties Have Not Chosen a Mechanism for Fixing a Deadline

1384. – Where the parties have determined neither the deadline within which the arbitral tribunal must make its award, nor any mechanism for fixing that deadline, French international arbitration law imposes no limit on the period within which the arbitrators are to make their award. Even prior to the 1981 reform, it had been held that the old Article 1007 of the Code of Civil Procedure, which required the award to be rendered

within the deadline fixed by the submission agreement or, in the absence of such a deadline, within three months, applied only to arbitrations governed by French procedural law and was not a requirement of international public policy. (104) That position was reinforced by the fact that the 1981 Decree remained silent on this point. (105) Thus, Article 1456, paragraph 1 of the New Code of Civil Procedure, which provides that “[i]f the arbitration agreement does not specify a time-limit, the arbitrators' mission shall last only six months from the day when the last arbitrator accepted his or her mission,” does not apply to international arbitration unless the parties have chosen French law to govern the procedure. (106) In the 1994 *Sonidep* case, the *Cour de cassation* confirmed that “in international arbitration, French law ... does not require the arbitrators' powers to be confined, in the absence of a contractual deadline, within a statutory deadline.” (107)

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This liberal approach has been followed in Dutch law, which underlines the arbitral tribunal's discretion on this issue (Art. 1048 of the Code of Civil Procedure), and by Swiss or Swedish law which, like French law, remain silent on the question. Other legal systems, such as those of Sweden prior to the 1999 Arbitration Act (108) and Belgium, (109) provide that even in international cases the arbitrators must make their award within six months, although they differ as to the starting-point for that time-limit. The UNCITRAL Model Law offers a more flexible approach, providing that where an arbitrator fails to complete his or her functions within a reasonable period of time and does not resign, and the parties do not agree to terminate his or her mandate, either party can ask the court responsible for the constitution of the arbitral tribunal to decide on the termination of that mandate (Art. 14). No recourse is available against such a decision.

B. – Where the Parties Have Specified a Time-Limit

1385. – In both institutional and *ad hoc* arbitration, the parties are free to fix a precise deadline within which the arbitrators must make their award. Arbitration agreements sometimes contain express provisions to that effect. The benefit of such clauses depends on the circumstances, because the parties will often have difficulty in making a realistic assessment of the time required to resolve disputes which may arise between them. (110) The use of such clauses is justified where they are confined to particular issues capable of being quickly resolved by the arbitrators. (111) However, they are liable to become pathological where the chosen arbitral institution is unable to enforce them or, in the case of an *ad hoc* arbitration, where the seat of the arbitration prevents rapid, easy access to the courts for the purpose of constituting the arbitral tribunal. The main danger of such clauses stems from the time required to constitute the arbitral tribunal. Certain clauses stipulate that the period of time within which the award is to be made will begin to elapse at a date prior to the constitution of the arbitral tribunal. In that case, any party keen to obstruct the arbitration need only delay its appointment of an arbitrator in order to jeopardize the entire proceedings. (112) The only means of ensuring that such tactics do not prevent the arbitration from taking place is to obtain rapid support from the court responsible for assisting with the constitution of the arbitral tribunal.

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1386. – Clauses in which the parties limit the duration of the arbitrators' mission raise two questions: the first concerns the possibility of extending the deadline, and the second concerns the arbitrators' failure to comply with it.

1° Extending the Deadline Fixed by the Parties

1387. – The deadline set by the parties for the delivery of the award can of course be extended by their mutual agreement, which may be express or implied. (113)

In the absence of such an agreement, can the deadline initially fixed by the parties nevertheless be extended? Of course, as they are bound by the parties' agreement, the arbitrators would create grounds on which their award could be set aside if they were to disregard a deadline fixed by the parties. This was established by the French *Cour de cassation* in its 1994 decision in the *Degrémont* case:

the principle that the time-limit fixed by the parties, either directly or by reference to arbitration rules, cannot be extended by the arbitrators themselves is a requirement of both domestic and international public policy, in that it is inherent in the contractual nature of arbitration. (114)

Where French law has been chosen to govern the procedure, the problem is resolved by Article 1456, paragraph 2 of the New Code of Civil Procedure, (115) which provides that: [t]he contractual time-limit may be extended either by agreement of the parties or, at the request of either of them or of the arbitral tribunal, by the President of the *Tribunal de Grande Instance* or, [if the arbitration agreement has expressly referred to him as nominating authority,] by the President of the *Tribunal de Commerce*.

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In the event that the law governing the procedure does not contain a similar provision, it is necessary to determine whether the courts can intervene. In France, it has been suggested that their jurisdiction should be based on Article 1493, paragraph 2, which confers jurisdiction on the President of the Paris Tribunal of First Instance to resolve difficulties with the constitution of the arbitral tribunal in international arbitrations held in France. (116) The intervention of the courts to extend unrealistic time-limits is appropriate, at least where the seat of the arbitration is located in France. However,

strictly speaking, this is not a difficulty which concerns the constitution of the arbitral tribunal. In the absence of any statutory provision expressly allowing for such intervention, the courts have had to create such a rule themselves. They have done so by interpreting the intentions of the parties. In a case where neither the parties nor the arbitrators had chosen French law to govern the proceedings, the President of the Paris Tribunal of First Instance retained jurisdiction over a request for an extension of a time-limit on the grounds that the arbitrators had implicitly chosen French law to govern the procedure, which enabled him to base his decision on Article 1456 of the New Code of Civil Procedure. (117) The validity of that approach has been confirmed by several decisions concerning international arbitrations held in France but not expressly governed by French law: in each case, (118) the President of the Paris Tribunal of First Instance applied Article 1456, paragraph 2. That extensive application of Article 1456, paragraph 2 is both legitimate, as the arbitration has a connection with France, and appropriate, because the only consequence of such court intervention is to maintain the effectiveness of an arbitration agreement which has not provided a mechanism for extending the deadline for making the award. It has also been held that each of the arbitrators, acting alone, is entitled to apply for an extension, as they could incur personal liability by allowing the time-limit to expire. (119) This safety net for the parties under French law can prove to be invaluable. However, for it to be successful, the request for an extension must be made prior ● to the expiration of the deadline fixed by the parties, as the courts cannot resurrect proceedings once the deadline has passed. (120)

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Since the 1996 reform, English law has shared the concerns found in French law, and allows the courts to intervene, where necessary, to extend the deadlines fixed by the parties. Under Section 50 of the 1996 Arbitration Act, the court may, if requested by a party or the arbitral tribunal, and after remedies available in the arbitration have been exhausted, extend the deadline for making an award "if satisfied that a substantial injustice would otherwise be done." This is different from French law (121) in that the court may extend a deadline that has expired (Sec. 50(4)). Similar provisions apply to extensions of deadlines fixed by the parties for the beginning of arbitral proceedings or of other dispute resolution procedures which must be exhausted before arbitral proceedings can begin (Sec. 12). These decisions can only be appealed with leave from the court (Secs. 12(6) and 50(5)).

2° Breach of the Time-Limit Fixed by the Parties

1388. – Under French law, an award made after the expiration of the deadline fixed by the parties for the making of the award may be set aside on the grounds that it was made on the basis of an expired agreement, under Article 1502 1° of the New Code of Civil Procedure. An award made abroad under the same circumstances could be refused enforcement in France on the same grounds. (122) Further, the making of an interim or partial award (123) does not cause the deadline for making subsequent awards to be suspended even where an action is pending to set aside the interim or partial award. (124)

In ICC arbitration, it is important to remember that the award is made not when the draft award is submitted by the arbitrators to the International Court of Arbitration, (125) but after the Court has approved the draft. The award must therefore be approved within the agreed time-limit. (126) However, this did not prevent the ICC, in a case which provides a perfect illustration ● of fast-track arbitration, from ensuring that an award was made within nine weeks of the request for arbitration, as required by the parties. (127)

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Section III – Form of The Award

1389. – As a general rule, an arbitral award will be in writing.

Some legal systems expressly require an award to be in writing. (128) This rule exists in French domestic arbitration law, (129) but it has been considered unnecessary to specifically require an award in writing in international arbitration. (130) Oral awards are thus not precluded, but they remain extremely rare, which is fortunate given the evidential difficulties which they are liable to create at the enforcement stage. (131)

Most institutional arbitration rules provide that the award must be made in writing. (132)

1390. – Most arbitration laws and rules also contain provisions concerning the language of the award (§ 1), the reasons for the award (§ 2), dissenting opinions (§ 3), and information which must appear in any award (§ 4). In some legal systems, there are certain formal requirements concerning the filing of the award (§ 5).

§ 1. – Language of the Award

1391. – In principle, the award is made in the language of the arbitral proceedings. (133) The parties could of course agree otherwise and ask for the award to be made in a different language. If and when enforcement is sought, the award may have to be translated into the ● language of the country where it is to be enforced, under Article IV, paragraph 2 of the 1958 New York Convention.

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§ 2. – Reasons for the Award

1392. – Most recent statutes on international arbitration do require the arbitrators to

state the reasons for their decision in their award. Such a requirement is found, for example, in the Belgian Judicial Code (Art. 1701(6)), in the Netherlands Code of Civil Procedure, except for awards by consent and awards in quality arbitrations (Art. 1057 (4) (e)), and in the German ZPO (new Article 1054(2) in force as of January 1, 1998). Even in the English tradition, which has long been in favor of not giving grounds for awards, the advantages of stating reasons are gaining recognition in international arbitration. (134) Both English case law (135) and the 1996 Arbitration Act (136) now reflect this trend. Thus, the position most often taken is that adopted in Article VIII of the 1961 European Convention:

[t]he parties shall be presumed to have agreed that reasons shall be given for the award unless they (a) either expressly agree that reasons shall not be given; or (b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.

The approach of the UNCITRAL Model Law is similar, allowing the parties to choose that no reasons be given, but presumes that, in the absence of any indication to the contrary, their intention was that the arbitrators should state the grounds for their award (Art. 31(2)).

Where the choice is left to the parties, their preference may be indicated in the arbitration agreement, or it may result from their choice of a procedural law (137) or of arbitration rules which require reasons to be given. (138) The additional provision in some rules that the grounds for the award need only be given where the parties do not provide otherwise is self-evident. Arbitration rules, by definition, are only binding because the parties have chosen to adopt them, and the parties can agree to depart from them as they see fit. ●

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1393. – Where the procedural law or arbitration rules which the parties may have chosen are silent as to whether reasons are to be given, as was the case with the ICC Rules in force prior to January 1, 1998, will there be a presumption in favor of or against requiring grounds to be stated? (139) The French courts consider that unless the parties agree otherwise, grounds for the award should be given. Thus, in a case concerning an ICC arbitration held in France under the 1975 ICC Rules, the Paris Court of Appeals reviewed whether reasons for the award had been given because:

since it was not established that, in the absence of any indication in the ICC Rules, the parties or the arbitrators had intended to submit the dispute to a procedural law which does not oblige the arbitrators to state the grounds for the award, that obligation applied. (140)

This solution reflects the parties' expectations, particularly in ICC arbitration, where the scrutiny of the International Court of Arbitration over the draft award submitted by the arbitrators (141) has always implied that the reasons for their decision will be given. This is now explicitly stated in the 1998 Rules, Article 25(2) of which provides that “[t]he Award shall state the reasons upon which it is based.”

As a result, virtually all international arbitral awards give reasons, with the exception of certain quality arbitrations. (142)

1394. – In French domestic arbitration, the grounds for the award must be stated. (143) No such requirement exists in French international arbitration law, and the parties therefore have the option of requiring the arbitrators to give reasons. The mere fact that an award contains no reasons does not cause it to violate the French notion of international public policy and make it incapable of being recognized or enforced in France. (144) ●

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The French courts would only censure the failure to give reasons if the law governing the proceedings required reasons to be given, (145) or if the failure to give reasons concealed a violation of due process. (146) In both such cases the award would be set aside or refused enforcement. (147)

1395. – Where the grounds for the award must be stated, that does not mean that they must be well-founded in fact or law. A court reviewing the award to ensure that reasons have been given will not of course review the substantive findings of the award. Thus, even grounds that are clearly wrong will satisfy the requirement that the arbitrators state the reasons for their award. (148) However, the French *Cour de cassation* has held that giving contradictory reasons could be considered as amounting to giving no reasons at all. (149) Nevertheless, a contradiction in the grounds for an award will only be contrary to international public policy if it is “established that the ... arbitral proceedings were governed by a law requiring that grounds be stated.” (150)

The Belgian Courts, on the other hand, have ruled that the potential contradiction between two reasons in the award could not be reviewed by the courts, as it pertained to the merits ● of the dispute. (151) This solution is, in our view, preferable to that accepted in French law, although it would still be extremely rare for the French courts to set aside an award on the basis of the existence of contradictory reasons in the award. (152)

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§ 3. – Dissenting Opinions

1396. – Where an award is made by a majority of the arbitrators, an arbitrator in the

minority may want to express his or her views as to what the outcome of the dispute should have been, in a document intended for the parties and generally referred to as a dissenting or minority opinion. (153)

In international arbitration, several issues surrounding dissenting opinions need to be distinguished: their admissibility (A), their usefulness (B) and the applicable legal regime (C).

A. – Admissibility of Dissenting Opinions

1397. – Influenced by the practice followed by their courts, lawyers trained in common law systems generally consider the issuance of dissenting opinions to be normal practice. (154) Authors of the civil law tradition, on the other hand, tend to consider dissenting opinions to be inappropriate, if not unlawful. (155) ●

P 765 1398. – Some civil law commentators (156) have argued that dissenting opinions are prohibited in so far as they constitute a breach of the secrecy of the deliberations provided for in certain domestic arbitration statutes. (157) This argument is unconvincing. First, such domestic arbitration provisions apply only where the parties have expressly chosen them to govern the procedure. Even in that case, a breach of the secrecy of the deliberations may not be considered a ground on which the award can be set aside. For instance, it is the case neither in French domestic law (158) nor, pursuant to Articles 1502 and 1504 of the New Code of Civil Procedure, in French international arbitration law. Second, and more importantly, expressing a dissenting opinion does not necessarily entail breaching the secrecy of the deliberations, provided that the dissenting arbitrator does not reveal the views expressed individually by the other arbitrators. (159)

This latter view represents the dominant trend in civil law jurisdictions which, without actually encouraging dissenting opinions, generally do not consider them to be unlawful. (160) A number of civil law commentators share that view. (161) However, given the controversy which arose during the drafting stage, the authors of the UNCITRAL Model Law preferred to avoid expressly taking sides on this issue. (162) ●

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B. – Usefulness of Dissenting Opinions

1399. – It is sometimes argued, in support of dissenting opinions, that the open criticism of flaws allegedly affecting the arbitral proceedings, or the public expression of differing views on a particular issue, tends to strengthen the legitimacy of the arbitral proceedings and to lead to more thorough reasoning on the part of the majority. (163) It is also suggested that dissenting opinions give some arbitrators or parties cosmetic satisfaction. Rightly or wrongly, dissenting opinions are often felt to be particularly useful in arbitrations where one or more of the parties is a government. (164) For example, the 1965 ICSID Convention specifically allows for dissenting opinions (Art. 48(4)).

1400. – Against dissenting opinions it has been argued that they provide an arbitrator with an easy alternative: instead of pursuing the deliberations so as to reach a unanimous award, arbitrators may prefer not to do so if, by means of a dissenting opinion, they can demonstrate to the party that appointed them that they “defended its interests.” Also, dissenting opinions are sometimes thought to encourage bias, as they reveal the views of party-appointed arbitrators. Above all, they are felt to weaken the authority of the award. (165) In many cases, a dissenting opinion is intended by its author as a critique of the majority decision, setting the scene for an action to set the award aside. For example, the dissenting opinion issued by the minority arbitrator in the *Klößner* case (166) was the basis of the subsequent setting aside of the award by an *ad hoc* committee. (167) However, the practice of issuing dissenting opinions is successfully implemented in the vast majority of cases, and should not be prohibited solely because it is liable to be abused. Besides, such a prohibition would be futile in that the only remedy would be the personal liability of the dissenting arbitrator, as opposed to any effect on the award itself. Indeed, it would be paradoxical, to say the least, if the attitude of the arbitrator representing the minority view were to affect the validity of the award to which he or she is opposed.

1401. – Although it would be unfortunate for dissenting opinions to become common practice, one should not, on the other hand, overestimate their importance. In particular, it ● would not be appropriate to give too much consideration to the dissenting arbitrator's views on the merits of the dispute in an action to set aside the award rendered by the majority.

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Those who believe in the effectiveness of professional codes of ethics suggest that the practice of giving dissenting opinions should be regulated only by ethical rules of conduct drawn up for use by arbitrators. (168)

1402. – The various institutional arbitration rules deal with dissenting opinions in different ways.

The UNCITRAL Model Law does not take sides on the issue. Neither do the Rules of the LCIA (Art. 26), the AAA (Art. 27 of the International Arbitration Rules) or the Euro-Arab Chambers of Commerce. This does not amount to a rejection of the practice of issuing dissenting opinions. It simply leaves the issue to be resolved either by the law governing the arbitral proceedings, by custom, or by the arbitration agreement.

Article 47, paragraph 3 of the ICSID Rules, which reproduces Article 48, paragraph 4 of the Washington Convention, provides that “[a]ny member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.” (169) The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce likewise allow for dissenting opinions (Art. 32(4) of the 1999 Rules). By contrast, the arbitration rules of the Franco-German Chamber of Commerce and Industry (COFACI) expressly prohibit arbitrators from giving dissenting opinions (Art. 21.4).

The ICC Rules of Arbitration have evolved on this point. In the version in force prior to January 1, 1998, the Internal Rules of the International Court of Arbitration, which formed an annex to the ICC Rules, provided in Article 17 that the Court “pays particular attention to the respect of ... the mandatory rules of the place of arbitration, notably with regard to ... the admissibility of dissenting opinions.” Since January 1, 1998, Article 6 of the Internal Rules has replaced the previous Article 17, and maintains the earlier rule, but without referring to the particular case of dissenting opinions. This reflects the fact that the ICC Rules are not hostile to the principle of dissenting opinions, and no longer even underline the fact that, in certain legal systems, such opinions can jeopardize the validity of the award. In principle, if a dissenting opinion has been prepared, it is submitted to the Court in draft form together with the draft award made by the majority, and the Court will then decide, on the basis of the requirements of the applicable law, whether to send the dissenting ● opinion to the parties. (170) In practice, the Court cannot prevent an arbitrator from sending a dissenting opinion directly to the parties, although any court reviewing the award would not then consider the dissenting opinion as forming part of the award. (171) In 1998, of the 242 awards submitted to the International Court of Arbitration, 15 were accompanied by a dissenting opinion. (172)

C. – The Legal Regime Governing Dissenting Opinions

1403. – A dissenting opinion can only be issued when the majority has already made the decision which constitutes the award. Until then, any document issued by the minority arbitrator can only be treated as part of the deliberations. However, once the majority decision has been reached, it is preferable for the author of the dissenting opinion to communicate a draft to the other arbitrators so as to enable them to discuss the arguments put forward in it. The award made by the majority could then be issued after the dissenting opinion, or at least, after the draft dissenting opinion. (173) Admittedly, unlike a judge issuing a separate opinion within a permanent court such as the International Court of Justice, the dissenting arbitrator will generally be less inclined to follow such a procedure. (174)

1404. – As regards the legal nature of a dissenting opinion, authors generally conclude from the fact that the award is rendered by a majority that the dissenting opinion is not part of the award. (175) That analysis is correct, except where the arbitration rules chosen by the parties or the law applicable to the procedure provide otherwise. In ICC arbitration, the dissenting opinion is not examined by the International Court of Arbitration under Article 27 of the Rules (Art. 21 of the previous Rules), as the Court takes the dissenting opinion into account for purposes of information only. (176) In other words, the dissenting opinion does not ● form part of the award. (177) In any event, the issue is of little consequence in practice, as the dissenting opinion will, in proceedings reviewing the award, have no effect on the award's validity or enforceability. (178) On the other hand, it is preferable for the dissenting opinion to accompany the award when the latter is communicated to the parties, or if it is filed with a court or even published. (179) However, it will not be considered unlawful to disregard the dissenting opinion. As the Swiss Federal Tribunal rightly observed,

the dissenting opinion is not part of the award. Unless the arbitration agreement so provides or the majority agrees otherwise, the minority arbitrator cannot require it to be attached to the award or communicated to the parties together with the award The dissenting opinion is separate from the award; it affects neither the reasons nor the result. Consequently, any procedural flaws with regard to its drafting or communication will have no effect on the award. (180)

1405. – In an action to set aside or resist enforcement of the award, a dissenting opinion, regardless of whether or not it was permitted by the arbitration rules or by the law of the seat, has no authority except as an element of fact. Thus, if the dissenting arbitrator states that a procedural breach was committed—for example, that a document was sent by one party to the arbitral tribunal but was not communicated to the other party—that is simply a fact which a court may take into consideration as evidence, but to which it is not obliged to attribute special importance. Both the dissenting arbitrator's assessment of the facts of the case and the legal reasoning used have no particular authority. In this respect, the minority opinion will not affect the outcome of an action against the award made by the majority, especially where, as is usually the case, no review of the merits can take place in the context of that action.

§ 4. – Information Which Must Appear in the Award

1406. – Failing agreement between the parties, some legal systems leave it to the arbitrators or, in practice, to the applicable arbitration rules to decide what information must be included in the award. This is the case in French law on international arbitration.

P 770 In French domestic arbitration, ●

[t]he arbitral award shall indicate:

- the names of the arbitrators who made it;
- its date;
- the place where it was made;
- the last names, first names or denomination of the parties, as well as their domicile or corporate headquarters;
- if applicable, the names of the counsel or other persons who represented or assisted the parties.

(181) The award must be signed by all the arbitrators or, “if a minority among them refuses to sign it, the others shall mention the fact.” (182) Although French international arbitration law makes no reference to those provisions, the parties may nevertheless choose to apply them by having French law govern the procedure. In any case, the requirements contained in those provisions are generally observed in international arbitration practice. Some of them, such as the identification of the parties and the arbitrators, as well as the signature of the award by a majority of the latter, are matters of common sense. To disregard them could create difficulties in enforcing the award, if only on a practical level. (183) However, it is important to note that if one or other of those items were omitted, that alone would not invalidate an award made in France in an international arbitration. (184) In a domestic arbitration, an action against the award based on the claim that the name of one of the parties was incomplete and hence incorrect was held to be inadmissible, as such a case was not provided for by Article 1484 of the New Code of Civil Procedure. (185) The same would necessarily apply in French international arbitration law.

Some legal systems do explicitly require that similar details be included in international arbitral awards, although they do not provide that the failure to do so will constitute a

P 771 ground on which the award can be set aside. (186) ●

1407. – Where the procedural law is silent on this question, arbitral institutions will have a free rein. The rules of most institutions contain provisions concerning the date and the signature of the award, and the place where it was made. (187)

A. – Date of the Award

1408. – Arbitration rules and legislation do not always contain an explicit requirement that the date of the award be specified. (188) However, the date is particularly important because “[o]nce it is made, the arbitral award is *res judicata* in relation to the dispute it resolves.” (189)

B. – Signature of the Arbitrators

1409. – Where the decision is not unanimous, one or more of the arbitrators may refuse to sign the award. As they could hardly allow such a refusal to obstruct the arbitration, all institutional arbitration rules enable the majority to overcome that difficulty, subject to certain conditions. The UNCITRAL Rules (Art. 32(4)), the LCIA Rules (Art. 26.4 of the 1998 Rules), and the AAA International Rules (Art. 26(1) of the 1997 Rules) provide that in such cases the reason for the arbitrator’s failure to sign should be stated in the award. Under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the award must contain the confirmation by the remaining arbitrators that the arbitrator whose signature is missing took part in the deliberations. (190) In French international arbitration law, the signatures of a majority of the arbitrators is sufficient, although the requirements discussed above reflect good practice and should be systematically followed. Some legal systems have taken a less formal approach: Swiss law, for example, provides that “[t]he signature of the presiding arbitrator shall suffice.” (191) Such a position would only be acceptable in French law if agreed by the parties, directly or by

P 772 reference to arbitration rules. ●

As held by the Paris Court of Appeals in a 1997 decision regarding an award made under the ICC Rules, the fact that the arbitrators did not sign the award on the same day is not a ground for setting aside the award or refusing to enforce it. (192)

C. – Place Where the Award is Made

1410. – In international arbitration, the place where the award is made must be mentioned in the award only if the parties have specified, either directly or by reference to arbitration rules, that it should be included. This raises a question as to whether the award should necessarily be made at the place of the seat of the arbitration. Some commentators consider that it should, suggesting that if the award were to be made elsewhere, the seat of the arbitration might move as a result. This would have a number of consequences, particularly with regard to the law applicable to the proceedings, access to the courts for an action to set aside, and the applicability of the 1958 New York Convention. (193) In fact, however, the seat of the arbitration depends on the choice made by the parties or, in the absence of such a choice, by the arbitral institution or the arbitrators. It cannot depend on the place where, perhaps for reasons of convenience, the award is made. (194) The real issue is whether the arbitrators are required, given that a

particular place has been fixed as the seat of the arbitration, to make the award in that place, and if so, what would be the consequences of their making the award elsewhere. In legal systems which do not specifically address this point, such as French law, the most liberal approach should be adopted. The arbitrators will only be obliged to make the award in a specific place if that is the intention of the parties. That will be the case in particular where the arbitration rules chosen by the parties provide for the award to be made in a certain place. For example, Article 16, paragraph 4 of the UNCITRAL Arbitration Rules, adopted in 1976, provides that the award must be made at the place of the seat of the arbitration. By contrast, the ICC Rules of Arbitration state that “the arbitral award shall be deemed to be made at the place of the arbitration proceedings” as fixed by the parties or by the Court (Art. 25(3), replacing Art. 22 of the previous Rules), it being specified that the arbitral tribunal “may deliberate at any location it considers appropriate” (Art. 14(3)). The trend in recent arbitration rules is to follow this approach.

P 773 For example, the 1999 version of the Arbitration Rules of the ● Arbitration Institute of the Stockholm Chamber of Commerce has been modified to that effect (Art. 32(1), replacing Art. 28(1) of the 1988 Rules). The UNCITRAL Model Law contains a similar provision. (195)

§ 5. – Recipients of the Award

1411. – The award is communicated to the parties directly by the arbitrators or, if the arbitration rules so provide, via the arbitral institution. (196)

In France, there is no requirement that the award be filed with any judicial authority, unlike in Switzerland, for example, in the case of arbitrations governed by the 1969 *Concordat*, (197) in Belgium (Art. 1702, para. 2 of the Judicial Code), and in the Netherlands (Art. 1058 of the Code of Civil Procedure (198)). It is only when the recognition or enforcement of an award is sought in France that it becomes necessary to establish the existence of the award by producing the original award or a certified copy (Art. 1499 of the New Code of Civil Procedure). However, in practice, it is not unusual for a copy of the award to be filed with the clerk of the Tribunal of First Instance. (199)

1412. – It is generally considered that the arbitral award, like the existence of the arbitral proceedings, is confidential. The confidentiality of both the proceedings and the award is of course one of the attractions of arbitration in the eyes of arbitration users. It is expressly endorsed by the UNCITRAL Arbitration Rules, which provide that “[t]he award may be made public only with the consent of both parties.” (200) The 1965 ICSID Convention and the ICSID Arbitration Rules likewise prohibit the Centre from publishing the award without the consent of the parties. (201) Some arbitral awards refer to the principle of confidentiality, occasionally adding qualifications. (202) The principle is not threatened by the fact that anonymous extracts from awards may be published, as is the case in the *Yearbook* ● *Commercial Arbitration* and the *Journal du Droit International*, particularly for ICC and ICSID awards. (203)

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On the other hand, the award will become public if court proceedings are initiated concerning its validity or enforcement. In addition, the only remedy available where a party breaches confidentiality will be damages. That involves establishing not only the source and unlawful nature of the disclosure, but also the existence of resulting loss, which will never be easy. (204) Nevertheless, the principle remains intact. It was reiterated in a 1986 decision by the Paris Court of Appeals in a case where an action to set aside an award made in England was brought before the French courts, which clearly had no jurisdiction, so as to allow “a public debate on facts which should have remained confidential” to take place. That breach of confidentiality led to a substantial award of damages against the party at fault, and the Court observed that “it is inherent in the nature of arbitral proceedings that the utmost confidentiality should be maintained in resolving private disputes as both parties had agreed.” (205) The principle of confidentiality was enforced in even harsher terms on September 10, 1998 by the Stockholm City Court in the *Bulbank* matter. In this case, the attorneys of the party which obtained a favorable award on jurisdiction from an arbitral tribunal sitting in Stockholm published the award without the consent of the other side. The other party demanded that the arbitration proceedings be discontinued because of that publication. The arbitral tribunal rejected the argument and went on to make an award on the merits. This award was held invalid by the Stockholm City Court on the grounds of the breach of confidentiality which occurred in the proceedings. This decision was unquestionably too severe and has been rightly reversed by the Svea Court of Appeals on ● March 30, 1999. (206) The incident nevertheless shows that the confidentiality of the arbitral process is not to be taken lightly.

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Section IV – Immediate Effects of the Award

1413. – The making of the arbitral award has a number of immediate effects. It terminates the arbitrators’ jurisdiction over the dispute which they have resolved (§ 1) and marks the point in time from which the award is *res judicata* with regard to that dispute (§ 2). From that time onwards, the award can be voluntarily performed by the parties. However, to obtain recognition or enforcement of the award, a number of formalities must be satisfied. These will be addressed as part of our examination of actions to enforce and set aside arbitral awards. (207)

§ 1. – Termination of the Arbitrators’ Jurisdiction

1414. – Certain recent statutes on international arbitration contain provisions empowering the arbitrators to interpret the award, correct clerical errors, issue an additional award on claims which may have been omitted, and sometimes modify or cancel an award obtained by fraud. Provisions on some or all of these issues are found in the UNCITRAL Model Law (Art. 33), the 1986 Netherlands Arbitration Act (Arts. 1060 and 1061 of the Code of Civil Procedure), the 1996 English Arbitration Act (Sec. 57), the 1997 German arbitration statute (Art. 1058 of the ZPO), the 1998 Belgian arbitration statute (new Art. 1702 bis of the Judicial Code) and the 1999 Swedish Arbitration Act (Sec. 32). Other legal systems, including French international arbitration law, (208) are silent, leaving these questions to the parties who are free to select an appropriate procedural law or arbitration rules. (209)

P 776 Even where not provided for in the applicable procedural law, an arbitral award should certainly be considered as ending the arbitrators' jurisdiction over the dispute it resolves. ● That results from the nature of the agreement between the parties and the arbitral tribunal to resolve the dispute. (210) On the other hand, the absence of provisions of French law applicable to international arbitration is particularly unfortunate when a question arises as to the exceptions that can be made to the principle that the award terminates the arbitrators' jurisdiction. There is an equally great need in international arbitration to provide the parties with a mechanism enabling them to obtain the interpretation of the award (A), to correct clerical errors (B), or even to have the award extended to cover issues which the arbitrators have failed to address (C). The same is true of the possibility of requesting that the arbitrators withdraw an award obtained by fraud (D).

A. – Interpretation of the Award

1415. – The interpretation of an arbitral award is only really helpful where the ruling, which is generally presented in the form of an order, is so ambiguous that the parties could legitimately disagree as to its meaning. By contrast, any obscurity or ambiguity in the grounds for the decision does not warrant a request for interpretation of the award. It is probably for that reason that institutional arbitration rules have traditionally considered it unnecessary to provide for the possibility of asking the arbitral tribunal to interpret their award. However, in 1976, the UNCITRAL Rules so provided at Article 35. This provision sets out the relevant time-limits (thirty days from receipt of the award within which to submit the request, and forty-five days from receipt of the request to reply) and indicates that the party submitting the request must notify the other party. Once the interpretation has been given, it forms part of the award. (211) The same system is now also provided for at Article 30 of the AAA International Arbitration Rules, although the deadline for the arbitrators' reply is reduced to thirty days. A similar mechanism exists in ICSID arbitration, (212) but the request is not subject to a deadline, and if the request cannot be submitted to the initial arbitral tribunal, it is even possible to constitute a new tribunal for that purpose. (213) Similarly, and in contrast to the previous Rules, the revised ICC Rules which entered into force on January 1, 1998 allow the parties to seek the interpretation of an award within 30 days of it being made ● (Art. 29). (214) In contrast, the LCIA rules allow corrections of the award, but not its interpretation. (215)

P 777 Arbitration statutes now provide for the possibility of having the award interpreted by the arbitral tribunal. The UNCITRAL Model Law was the first to do so (Art. 33), (216) followed by the Belgian and the Swedish legislatures in 1998 and 1999 respectively. (217) The 1996 English Arbitration Act, like the LCIA Rules, only provides for the correction and not for the interpretation of the awards. (218)

B. – Correcting Clerical Errors

1416. – In the absence of any corrective mechanism, the presence of a clerical error in the arbitrators' ruling can create serious problems. One need only consider the example of an error in calculating the total award of damages to appreciate the absurdity of the situation where a party is definitively ordered by the award to pay a sum higher or lower than that intended by the arbitral tribunal. (219)

P 778 As a result, arbitration rules generally contain provisions enabling the arbitral tribunal itself, subject to certain time-limits and to compliance with the requirements of due process, to correct any clerical errors which arise. (220) One of the weaknesses of the ICC Rules of Arbitration prior to their 1998 revision lay in their failure to provide for such a mechanism, as the scrutiny of awards by the International Court of Arbitration does not always prevent clerical errors from appearing in the final award. Admittedly, the courts were sometimes able to correct an error during proceedings to set aside or enforce an award, (221) but these were only indirect remedies. Happily, the 1998 ICC Rules do now provide, at Article 29, for the correction of the award, which can be requested by a party or be carried out by the arbitral tribunal on its own initiative. In the latter case, the correction must be submitted for approval ● to the ICC International Court of Arbitration within thirty days of the award. In the former case, the party's request must be made within thirty days of the award, with the tribunal reaching a decision after rapidly obtaining comments from the other party. Correction is only possible with respect to a "clerical, computational or typographical error or any errors of similar nature contained in an Award"(Art. 29(1)). This means that where the arbitration rules or the procedural law allow the arbitrators to correct clerical errors, (222) that remedy cannot be used to alter

the meaning of the decision. (223)

In the absence of any similar statutory provision, the courts in certain jurisdictions have held that arbitrators are entitled to rectify their award where there is a clerical error. (224) However, more recent arbitration statutes often explicitly allow for the correction of errors where the parties have not so agreed. This is the case of the UNCITRAL Model Law, (225) the 1994 Italian arbitration statute, (226) the 1996 English Arbitration Act, (227) the 1998 Belgian arbitration statute and the 1999 Swedish Arbitration Act, (228) as well as French law on domestic arbitration. (229)

C. – Additional Awards

1417. – In some cases, the arbitral tribunal fails to decide one of the heads of claim. This situation is not to be confused with that where the tribunal does not respond to all the allegations, or even all the arguments put forward by the parties. A failure to decide on certain heads of claim is sometimes easy to remedy, where the procedural law (230) or the arbitration rules allow a party to seek an additional award from the arbitral tribunal in such circumstances. Such a mechanism is found in Belgian law (Art. 1708 of the Judicial Code), the UNCITRAL Model Law (Art. 33(3)), the 1986 Netherlands Arbitration Act (Art. 1061 of the Code of Civil Procedure), the 1994 Italian arbitration statute (Art. 826 of the Code of Civil Procedure), the 1996 English Arbitration Act (Sec. 57(3)(b)), the 1997 German Act (Art. P 779 1058(1)(3) of the ZPO) and the 1999 Swedish Arbitration Act (Sec. 32). ●

In addition, the UNCITRAL Arbitration Rules (Art. 37), the AAA International Arbitration Rules (Art. 30(1)), the LCIA Rules (Art. 27.3) and the ICSID Rules (231) all contain provisions to that effect. This is not the case of the 1998 ICC Rules, where the issue was discussed at the drafting stage and the proposal was ultimately rejected. (232)

Where there is no mechanism enabling the arbitrators to make an additional award, their failure to decide one of the heads of claim will be a ground on which the award may be set aside. (233)

D. – Withdrawal of an Award Obtained by Fraud

1418. – Until 1981, the French courts were able to correct an award made in France and obtained by fraud. There has been considerable discussion as to whether such an action is still available in the absence of a specific statutory provision to that effect. The possibility of fraud, through the submission of false documents or otherwise, seemed so serious that many commentators were of the view that such an action should remain available. (234)

Doubtless wishing to avoid directly conflicting with the objectives of the French legislation enacted in 1981, the French courts will allow a defrauded party to seek redress from the arbitral tribunal itself, provided that the latter is still constituted or “can be reconvened.” (235) This cumbersome solution, which entails reconvening the arbitral tribunal within an undetermined period following the making of the award, has rightly been the subject of some criticism. (236) We shall consider the issue in more detail when examining the actions which lie against arbitral awards. (237)

§ 2. – *Res Judicata*

1419. – Certain legal systems specify that, once rendered, an arbitral award is *res judicata*. This is the case for instance in Belgium (Art. 1703 of the Judicial Code) or in the Netherlands (Art. 1059 of the Code of Civil Procedure). Similarly, the German Statute of P 780 December 22, 1997, unlike the UNCITRAL Model Law on which it is largely based, ● provides, in Article 1055 of the ZPO, that “[t]he arbitral award has the same effect between the parties as a final and binding court judgment.”

In France, Article 1476 of the New Code of Civil Procedure stipulates that “[o]nce it is made, the arbitral award is *res judicata* in relation to the dispute it resolves.” This provision applies to “awards made abroad or made in international arbitration” as a result of the cross-reference in Article 1500 of the same Code.

This means that once an award has been made, the same dispute between the same parties cannot be submitted to the courts. Before the award is made, the courts are obliged to decline jurisdiction where they find that an arbitration agreement exists. (238) Only if the resulting award were to be set aside or refused recognition or enforcement on the grounds that the arbitrator had ruled “in the absence of an arbitration agreement or on the basis of an agreement that was void or had expired” (Art. 1502 1° of the New Code of Civil Procedure) would it be possible to submit the same dispute to the French courts, provided of course that they have international jurisdiction to hear the case. (239)

Although in 1981 the French legislature may have sought to attribute a leading role in international arbitration to party autonomy, it could not have overlooked the need to establish a rule confirming the *res judicata* effect of arbitral awards. This rule is primarily directed at the French courts, which must hold inadmissible any action seeking resolution of a dispute which has already been decided by arbitration. Neither the intentions of the parties nor arbitration rules can provide otherwise, as the issue concerns the functioning of the French judicial system.

As a corollary of the fact that an arbitral award is *res judicata*, the French courts consider

that, as soon as it is made, it

constitutes a title in respect of which protective measures can be sought, the only effect of the suspensive nature of an action to set it aside (240) being to prevent its enforcement—subject to the possibility of requesting provisional enforcement from the court hearing the action to set the award aside. (241) ●

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- 1) See YVES DERAINS AND ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 36 *et seq.* (1998).
- 2) See CA Paris, 1e Ch., Sec. Supp., Jan. 13, 1987, T.F.E. v. L'Haridon, No. 86.4496, unpublished.
- 3) See, *e.g.*, December 23, 1982 Partial Award in ICC Case No. 3896, Framatome S.A. v. Atomic Energy Organization of Iran (AEOI), 110 J.D.I. 914 (1983), and observations by S. Jarvin; for an English translation, see X Y.B. COM. ARB. 47 (1985).
- 4) On this issue, generally, see IBRAHIM NAGUIB SAAD, LA SENTENCE ARBITRALE (ESSAI D'UNE DÉFINITION EN DROIT FRANÇAIS ET EN DROIT ÉGYPTIEN) (Thesis, University of Paris (France), 1969); Yves Derains, *La sentence arbitrale*, in FONDATION POUR L'ÉTUDE DU DROIT ET DES USAGES DU COMMERCE INTERNATIONAL, DROIT ET PRATIQUE DE L'ARBITRAGE INTERNATIONAL EN FRANCE 69 (Y. Derains ed., 1984).
- 5) See *United Nations Commission on International Trade Law, Seventeenth Session, New York, 25 June – 13 July 1984, Report of the Working Group on International Contract Practices on the Work of its Seventh Session (New York, 6-17 February 1984)*, UN Doc. A/CN.9/246, Mar. 6, 1984, ¶ 192.
- 6) On this issue, see *infra* para. 1357.
- 7) On this issue, see François Knoepfler and Philippe Schweizer, *Making of Awards and Termination of Proceedings*, in ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 160 (1989); HOWARD M. HOLTZMANN AND JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION – LEGISLATIVE HISTORY AND COMMENTARY 154 (1989).
- 8) See Martin Hunter, *Final Report on Interim and Partial Awards*, ICC BULLETIN, Vol. 1, No. 2, at 26, 27 (1990).
- 9) See *infra* paras. 1367 *et seq.*
- 10) See *infra* paras. 1389 *et seq.*
- 11) See, *e.g.*, CA Paris, Feb. 18, 1986, Péchiney v. Marlio, 1990 REV. ARB. 727, and observations by C. Jarrosson.
- 12) See, *e.g.*, CA Paris, Nov. 21, 1991, Foroughi v. Eshragh, 1992 REV. ARB. 494, and M.-C. Rondeau-Rivier's note; Supreme Court of Queensland, Oct. 29, 1993, Resort Condominiums Int'l Inc. v. Bolwell, in which the court refused to treat as an award covered by the New York Convention an order to adopt a certain form of conduct during the arbitral proceedings (9 INT'L ARB. REP. A1 (Apr. 1994); see also the commentary by Michael Pryles, *Interlocutory Orders and Convention Awards: the Case of Resort Condominiums v. Bolwell*, 10 ARB. INT'L 385 (1994)).
- 13) But see the unsatisfactory decisions on this point of the Paris Court of Appeals which has refused to characterize as awards documents which do not comply with certain requirements of form, when that should only lead the court to set such awards aside (CA Paris, Feb. 18, 1986, *Péchiney*, *supra* note 11; CA Paris, Nov. 21, 1991, *Foroughi*, *supra* note 12).
- 14) See *infra* para. 1406.
- 15) This definition is taken almost verbatim from the reasoning given in CA Paris, Mar. 25, 1994, Sardisud v. Technip, 1994 REV. ARB. 391, and C. Jarrosson's note.
- 16) On this last point see, in the context of the discussion of the 1987 Swiss Private International Law Statute, PIERRE LALIVE, JEAN - FRANÇOIS POUDRET, CLAUDE REYMOND, LE NOUVEAU DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE 405-06 (1989).
- 17) CA Paris, Jan. 15, 1985, Opinter France v. Dacomex, 1986 REV. ARB. 87, and E. Mezger's note, *aff'd*, Cass. 2e civ., Oct. 7, 1987, 1987 REV. ARB. 479, and E. Mezger's note.
- 18) CA Paris, July 7, 1987, Pia Investments Ltd. v. Cassia, 1988 REV. ARB. 649, and E. Mezger's note. See also the case law cited *supra* para. 1226, note 43.
- 19) See Cass. 1e civ., June 1, 1987, Société Commerciale de Produits Agricoles v. Société Coopérative de la Roche Clermault, No. 86-11.457, unpublished, in a case where the appealing party unsuccessfully argued only that there had been a breach of due process in the commencement of the second-tier arbitral proceedings. See also CA Paris, Oct. 24, 1991, Sicopag v. Ets. Louis Laprade, 1992 REV. ARB. 494, and M.-C. Rondeau-Rivier's note.
- 20) CA Paris, July 7, 1995, Corelf v. Worldwide, 1996 REV. ARB. 270, and E. Loquin's note, which concerns the Rules of the Paris Maritime Arbitration Chamber, which provide for two arbitral instances where the amount in dispute exceeds a certain level, and specify that “where the dispute is heard by the higher instance, the award made by that instance will be considered the only award made in the proceeding.”
- 21) On the concept of partial awards, see *infra* paras. 1360 *et seq.*
- 22) LALIVE, POUDRET, REYMOND, *supra* note 16, at 406-07.

- 23) See, e.g., ANDREAS BUCHER, PIERRE - YVES TSCHANZ, INTERNATIONAL ARBITRATION IN SWITZERLAND 129 (1988); Marc Blessing, *The New International Arbitration Law in Switzerland – A Significant Step Towards Liberalism*, 5 J. INT'L ARB. 9, 65 (June 1988).
- 24) CA Paris, Mar. 25, 1994, *Sardisud*, *supra* note 15.
- 25) Fed. Trib., Oct. 3, 1989, *M.G. v. P.G.*, 1990 BULL. ASA 44; Fed. Trib., Feb. 6, 1990, *Deutsche Babcock AG v. House of Trade and Contracting Co.*, 1990 BULL. ASA 163, and the critical commentary by Jean-François Poudret, *La recevabilité du recours au tribunal fédéral contre la sentence partielle de l'art. 188 LDIP*, 1990 [SW.] JOURN. TRIB. 354.
- 26) Decision of Aug. 1, 1984, by A. Broches, president, K. M'Baye and H. van Houtte, arbitrators, in ICSID Case No. ARB/82/1, *Société Ouest Africaine des Bétons Industriels v. State of Senegal*, 113 J.D.I. 221 (1986), and observations by E. Gaillard; see also 117 J.D.I. 211 (1990); 6 ICSID REV. – FOREIGN INV. L.J. 217 (1991).
- 27) On this issue, generally, see E. Gaillard, observations following the May 16, 1986 decision of the *Ad hoc* Committee in ICSID Case No. ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia*, 114 J.D.I. 174, 185-86 (1987).
- 28) See, for example, the September 25, 1983 “Award” on Jurisdiction in Case No. ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia*, 23 I.L.M. 351 (1984); X Y.B. COM. ARB. 61 (1985); 1 ICSID REP. 389 (1993); for a French translation, see 1985 REV. ARB. 259; 113 J.D.I. 201 (1986), and observations by E. Gaillard.
- 29) See *supra* para. 1350 and HOLTZMANN AND NEUHAUS, *supra* note 7, at 867.
- 30) See DERAINS AND SCHWARTZ, *supra* note 1, at 36.
- 31) See, e.g., MICHAEL J. MUSTILL, STEWART C. BOYD, COMMERCIAL ARBITRATION 24 (2d ed. 1989); ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 356-57 (2d ed. 1991); W. LAURENCE CRAIG, WILLIAM W. PARK, JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 321 (2d ed. 1990); RUSSELL ON ARBITRATION ¶ 6.003 (D. Sutton, J. Kendall, J. Gill eds., 21st ed. 1997).
- 32) See also the commentary on this provision in PIETER SANDERS, ALBERT JAN VAN DEN BERG, THE NETHERLANDS ARBITRATION ACT 1986, at 28 (1987).
- 33) See LALIVE, POUURET, REYMOND, *supra* note 16, at 412. *But see* Fed. Trib., Oct. 3, 1989, *supra* note 25, at 48.
- 34) See Sec. 58(1) of the 1996 English Arbitration Act; RUSSELL ON ARBITRATION, *supra* note 31, ¶ 6.006.
- 35) See *supra* paras. 1355 and 1357.
- 36) On the distinction between the definitive nature of an award and the fact that it is made “in the last resort,” which must be specified in French domestic arbitration in order to avoid an appeal before the courts, see *infra* para. 1597.
- 37) See *supra* para. 1359. See the “Partial Final Arbitral Award” made under the auspices of the Geneva Chamber of Commerce and Industry on March 7, 1996, *L. Ltd. v. The Foreign Trade Association of the Republic of U.*, 1997 BULL. ASA 494.
- 38) The Swiss *Concordat* already contained this rule at Article 32.
- 39) Sec. 47 of the 1996 English Arbitration Act (“Awards on different issues”). For a comparative law analysis, see MAURO RUBINO - SAMMARTANO, INTERNATIONAL ARBITRATION LAW 405 *et seq.* (1990).
- 40) See, e.g., Art. 2(iii) of the 1998 ICC Arbitration Rules (Art. 21 of the previous Rules); Art. 26.7 of the 1998 LCIA Rules; Art. 32(1) of the UNCITRAL Arbitration Rules; Art. 27(7) of the 1997 AAA International Arbitration Rules; Art. 34 of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
- 41) CA Paris, Dec. 19, 1986, *O.I.A.E.T.I. v. SOFIDIF*, 1987 REV. ARB. 359, and the commentary by Emmanuel Gaillard, *L'affaire SOFIDIF ou les difficultés de l'arbitrage multipartite (à propos de l'arrêt rendu par la Cour d'appel de Paris le 19 décembre 1986)*, *id.* at 275.
- 42) Cass. 1e civ., Mar. 8, 1988, *Sofidif v. O.I.A.E.T.I.*, 1988 Bull. Civ. I, No. 64; 1989 REV. ARB. 481, and C. Jarrosson's note; for an English translation, see 3 INT'L ARB. REP. B1 (Mar. 1988).
- 43) See *supra* para. 1236.
- 44) On this issue, see ICC Awards No. 3790 (1983), French contractor v. Libyan employer, 110 J.D.I. 910 (1983), and observations by S. Jarvin; for an English translation, see XI Y.B. COM. ARB. 119 (1986); No. 5639 (1987), *Bank v. African owner*, 114 J.D.I. 1054 (1987), and observations by S. Jarvin; No. 5073 (1986), U.S. exporter v. Argentine distributor, XIII Y.B. COM. ARB. 53 (1988); the February 5, 1988 Partial Award on Liability by J. Stevenson, president, I. Brownlie and B. Cremades, arbitrators, *Wintershall A.G. v. Government of Qatar*, 28 I.L.M. 795 (1989); XV Y.B. COM. ARB. 30 (1990).
- 45) However, once a partial award on jurisdiction is made, the party which wants to contest it in an action to set aside must bring this action without delay; see Swiss Fed. Trib., Apr. 19, 1994, *Les Emirats Arabes Unis v. Westland Helicopters Ltd.*, 1994 BULL. ASA 404, 406 and the references cited therein. See also *supra* para. 1357. In Austria, see, in favor of a partial award on certain substantive issues being subject to an immediate action to set aside, Austrian *Oberster Gerichtshof*, June 25, 1992, *S Establishment for Commerce v. H Corporation*, XXII Y.B. COM. ARB. 619 (1997).
- 46) See *infra* paras. 1594 *et seq.*

- 47) For an example of a partial award on the applicable law, see ICC Award No. 3267 (1979), Mexican construction company v. Belgian company (member of a consortium), VII Y.B. COM. ARB. 96 (1982); for a French translation, see 107 J.D.I. 961 (1980), and observations by Y. Derains; for an example of a refusal to rule on the applicable law in a partial award, see the letter of the chairman of the arbitral tribunal in ICC Case No. 6465, 121 J.D.I. 1088 (1994), and observations by D. Hascher, especially at 1092-93.
- 48) On this issue, generally, see *supra* para. 1224.
- 49) CA Paris, Mar. 24, 1995, Bin Saud Bin Abdel Aziz v. Crédit Industriel et Commercial de Paris, 1996 REV. ARB. 259, and J.-M. Talau's note.
- 50) See, for example, in France, Article 2052, paragraph 1 of the Civil Code.
- 51) On these conventions, see *infra* paras. 1663 *et seq.*
- 52) But see ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 50 (1981), for the view that a consent award may be covered by the New York Convention if considered to be an award in the country in which it was made.
- 53) Consent awards themselves are rarely published. But see the interesting case of a partial award recording the agreement of the parties on the law governing the merits of a dispute, ICC Award No. 4761 (1984), Italian consortium v. Libyan company, 113 J.D.I. 1137 (1986), and observations by S. Jarvin. Given its subject-matter, the contractual nature of this consent award is particularly clear. In fact, the award is simply a formal means of documenting the choice of law agreed by the parties.
- 54) On this issue, see MATTHIEU DE BOISSÉSON, LE DROIT FRANÇAIS DE L'ARBITRAGE INTERNE ET INTERNATIONAL 808-09 (2d ed. 1990); RUBINO - SAMMARTANO, *supra* note 39, at 438; Richard H. Kreindler, *Settlement Agreements and Arbitration in the Context of the ICC Rules*, ICC BULLETIN, Vol. 9, No. 2, at 22 (1998) and, in the context of Article 34 of the Swiss Concordat, which explicitly allows an arbitral tribunal to record, in an award, the agreement bringing a dispute to an end, see PIERRE JOLIDON, COMMENTAIRE DU CONCORDAT SUISSE SUR L'ARBITRAGE 485-87 (1984) and LALIVE, POUURET, REYMOND, *supra* note 16, at 192-93.
- 55) On this definition, see *supra* paras. 1353 *et seq.*
- 56) On awards in ICC arbitration, see Marcel Fontaine, *The ICC Arbitral Process – Part IV: The Award – Drafting the Award – A Perspective from a Civil Law Jurist*, ICC BULLETIN, Vol. 5, No. 1, at 30 (1994), Humphrey Lloyd, *Writing Awards – A Common Lawyer's Perspective*, *id.* at 38.
- 57) For an example of an invitation made by the arbitrators to the parties to negotiate, see the June 7, 1988 Order in ICC Case No. 5282, 121 J.D.I. 1086 (1994), and observations by D. Hascher.
- 58) On the relationships between these two principles, see *infra* para. 1638.
- 59) See DE BOISSÉSON, *supra* note 54, at 800; P. Fouchard, note following Cass. 2e civ., Jan. 28, 1981, *Industrija Motora Rakovica v. Lynx Machinery Ltd.*, 1982 REV. ARB. 425. Compare, in French domestic arbitration, with CA Paris, Apr. 5, 1973, *Le Parisien Libéré v. Ancelot*, 1974 REV. ARB. 17, and G. Flécheux's note.
- 60) See, e.g., H. Holtzmann's opinion in the June 14, 1983 Award of the Iran-U.S. Claims Tribunal in *Economy Forms Corp. v. Iran*, Award No. 55-165-1, 3 Iran-U.S. Cl. Trib. Rep. 42, 55, and the observations by D. Hascher, 121 J.D.I. 1084 (1994). On this issue, generally, see Stephen M. Schwebel, *The Majority Vote of an International Arbitral Tribunal*, in ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 671 (1993); Karl-Heinz Böckstiegel, *Experiences as an Arbitrator Using the UNCITRAL Arbitration Rules*, *id.* at 423, 428.
- 61) On Article 25(1) of the 1998 Rules, see DERAIS AND SCHWARTZ, *supra* note 1, at 284 *et seq.*
- 62) See, e.g., Art. 24-2 of the Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce.
- 63) See also Section 16 of the 1929 Swedish Arbitration Act, in force until April 1, 1999.
- 64) On the mechanism contained in Article 19 of the previous ICC Rules, see CRAIG, PARK, PAULSSON, *supra* note 31, at 329. For an example of an award made following such a procedure, see ICC Award No. 1703 (1973), by G. Lagergren, chairman, with the dissenting opinions by S. Efron and A. El Shalakany, arbitrators, *Société Générale de l'Industrie du Papier "RAKTA" v. Parsons and Whittemore Overseas Co., Inc.*, reprinted in J. GILLIS WETTER, THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE, Vol. V, at 361 (1979); ICC Award No. 3881 (1984), Swiss and German (FRG) companies v. Syrian state-owned company, 113 J.D.I. 1096 (1996), and observations by S. Jarvin. See also DERAIS AND SCHWARTZ, *supra* note 1, at 284 *et seq.*
- 65) See Dominique Hascher, *Scrutiny of Draft Awards by the Court – 1995 Overview*, ICC BULLETIN, Vol. 7, No. 1, at 14 (1996); Dominique Hascher, *Scrutiny of Draft Awards by the Court – 1996 Overview*, ICC BULLETIN, Vol. 8, No. 1, at 17 (1997); Dominique Hascher, *The Application of the Rules by the Court – 1997 Overview*, ICC BULLETIN, Vol. 9, No. 1, at 12, 13 (1998); Fabien Gélinas, *The Application of the Rules by the Court – 1998 Overview*, ICC BULLETIN, Vol. 10, No. 1 (1999).
- 66) See *supra* para. 1369.
- 67) Cass. 2e civ., Jan. 28, 1981, *Industrija Motora Rakovica*, *supra* note 59, upholding CA Paris, Dec. 22, 1978, 1979 REV. ARB. 266, and J. Viatte's note.
- 68) See *supra* para. 1371.

- 69) See Claude Reymond, *The President of the Arbitral Tribunal*, 9 ICSID REV. – FOREIGN INV. L.J. 1, 12 *et seq.* (1994), and for a French version, in ETUDES OFFERTES À PIERRE BELLET 467, especially at 477 *et seq.* (1991); D. Hascher, observations following the questionnaire to co-arbitrators issued by the chairman of the arbitral tribunal in ICC Case No. 5082, 121 J.D.I. 1081, 1083 (1994).
- 70) For an example of a questionnaire drawn up by the chairman of an ICC arbitral tribunal, see 121 J.D.I. 1081 (1994), and observations by D. Hascher.
- 71) Compare with Article 837 of the Italian Code of Civil Procedure (Law No. 25 of Jan. 5, 1994) which provides that “[t]he award shall be made by a majority of the votes of the arbitrators *meeting in person or in video conference*, unless the parties have provided otherwise, and shall be subsequently set forth in writing” (emphasis added).
- 72) Oct. 23, 1985, SEFRI S.A. v. Komgrap, ATF 111 la 336; 1986 BULL. ASA 77.
- 73) See *supra* para. 1224.
- 74) Cass. 2e civ., Jan. 28, 1981, *Industrija Motora Rakovica*, *supra* note 59.
- 75) On this issue, generally, see Emmanuel Gaillard, *Les manoeuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international*, 1990 REV. ARB. 759.
- 76) On the issue, see Emmanuel Gaillard, *When an Arbitrator Withdraws*, N.Y.L.J., June 4, 1998, at 3, and *supra* para. 1136.
- 77) See Andreas Reiner, *Le Règlement d'arbitrage de la CCI, version 1998*, 1998 REV. ARB. 25, 62 *et seq.*; DERAIS AND SCHWARTZ, *supra* note 1, at 193 *et seq.*
- 78) Compare, in French domestic arbitration, with Article 1469 of the New Code of Civil Procedure.
- 79) See DE BOISSÉSON, *supra* note 54, at 802; *comp. with* JEAN ROBERT, L'ARBITRAGE – DROIT INTERNE – DROIT INTERNATIONAL PRIVÉ 310 (5th ed. 1983), whose remarks in this respect were not included in the 6th edition published in 1993.
- 80) See LALIVE, POUURET, REYMOND, *supra* note 16, at 414. On dissenting opinions, see *infra* paras. 1396 *et seq.* and on the confidentiality of the award, see *infra* para. 1412. See also, on the limits to the confidentiality of the deliberations that may result from the review of arbitral awards by the courts, Mary T. Reilly, *The Court's Power to Invade the Arbitrators' Deliberation Chamber*, 9 J. INT'L ARB. 27 (Sept. 1992) and on this issue, generally, Jean-Denis Bredin, *Le secret du délibéré arbitral*, in ETUDES OFFERTES À PIERRE BELLET 71 (1991).
- 81) On arbitrators' liability, see *supra* paras. 1074 *et seq.*
- 82) On the grounds for challenging the award, see *infra* para. 1603.
- 83) On the exercise of this scrutiny in practice, see especially Alain Prujiner, *La gestion des arbitrages commerciaux internationaux: l'exemple de la Cour d'arbitrage de la CCI*, 115 J.D.I. 663, 708 (1988); CRAIG, PARK, PAULSSON, *supra* note 31, at 341 *et seq.*; David T. McGovern, *The ICC Arbitral Process – Part VI: Scrutiny of the Award by the ICC Court*, ICC BULLETIN, Vol. 5, No. 1, at 46 (1994); DERAIS AND SCHWARTZ, *supra* note 1, at 289 *et seq.*
- 84) See CRAIG, PARK, PAULSSON, *supra* note 31, at 343; ANTOINE KASSIS, RÉFLEXIONS SUR LE RÈGLEMENT D'ARBITRAGE DE LA CHAMBRE DE COMMERCE INTERNATIONALE – LES DÉVIATIONS DE L'ARBITRAGE INSTITUTIONNEL 69 (1988).
- 85) See also Eric Loquin, *L'examen du projet de sentence par l'institution et la sentence au deuxième degré – Réflexions sur la nature et la validité de l'intervention de l'institution arbitrale sur la sentence*, 1990 REV. ARB. 427.
- 86) Gélinas, *supra* note 65.
- 87) CA Paris, Jan. 22, 1982, *Appareils Dragon v. Construiimport*, 1982 REV. ARB. 91, 2d decision, and E. Mezger's note.
- 88) CA Paris, Apr. 20, 1972, *Schutte Lanz v. Gallais*, 1973 REV. ARB. 84, and E. Loquin's note; Cass. 2e civ., Jan. 23, 1974, *Schutte Lanz v. Gallais*, 1974 REV. ARB. 296, and E. Loquin's note.
- 89) See KASSIS, *supra* note 84, ¶¶ 76 *et seq.*; PETER SCHLOSSER, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT, Vol. I, 480-83 (1975).
- 90) See *infra* para. 1414.
- 91) See Loquin, *supra* note 85, at 443.
- 92) See Superior Court of the Zurich Canton, June 29, 1979, *Banque Yougoslave de l'Agriculture v. Robin International Inc.*, unpublished, cited by CRAIG, PARK, PAULSSON, *supra* note 31, at 348. Compare with *Bank Mellat v. GAA Development and Construction Co.*, [1988] 2 Lloyd's Rep. 44 (Q.B. (Com. Ct.) 1988), which rejected a challenge based on alleged “misconduct” in that the arbitrators failed to meet to discuss the comments of the arbitral institution. But see, for a case where the award was set aside, the March 10, 1976 decision of the Supreme Court of Turkey discussed in KASSIS, *supra* note 84, at 121.
- 93) For a rebuttal of this argument which is sometimes raised with respect to the institutional review of awards, see also Loquin, *supra* note 85, at 455 *et seq.*; P. Fouchard, 1990 REV. ARB. 527 (reviewing ANTOINE KASSIS, RÉFLEXIONS SUR LE RÈGLEMENT D'ARBITRAGE DE LA CHAMBRE DE COMMERCE INTERNATIONALE – LES DÉVIATIONS DE L'ARBITRAGE INSTITUTIONNEL (1988)).
- 94) On this issue, generally, in French domestic arbitration law, see Philippe Grandjean, *La durée de la mission des arbitres*, 1995 REV. ARB. 39; Eric Loquin, *Arbitrage – Compétence arbitrale – Etendue*, J.- CL. PROC. CIV., Fasc. 1032, ¶¶ 48 *et seq.* (1994).

- 95) On the date on which this period commences, which requires the arbitrators' brief to have been defined, see CA Paris, July 4, 1991, *Etude Rochechouart Immobilier v. Banque Vernes*, 1992 REV. ARB. 626, and observations by J. Pellerin.
- 96) For a discussion of the effectiveness of this provision, despite the ambiguities in certain aspects of the decision of Cass. 1e civ., June 15, 1994, *Communauté urbaine de Casablanca v. Degrémont*, 1995 REV. ARB. 88, 2d decision, see E. Gaillard's note following that decision, especially at 97.
- 97) See, on the fixing of deadlines by the ICC International Court of Arbitration, CA Paris, Jan. 22, 1982, *Appareils Dragon*, *supra* note 87; on the extension of a contractual deadline granted by the ICC International Court of Arbitration, Cass. 1e civ., June 16, 1976, *Krebs v. Milton Stern*, 104 J.D.I. 671 (1977), and P. Fouchard's note; 1977 REV. ARB. 269, and E. Mezger's note; 1978 REV. CRIT. DIP 767; Dalloz, Jur. 310 (1978), and J. Robert's note. See also CA Paris, Feb. 28, 1980, *Financière MOCUPIA v. INVEKO France*, 1980 REV. ARB. 538, and E. Loquin's note. On the fact that, in institutional arbitration, the provisions of the institution's rules regarding the deadline for making the award prevail over those of Article 1456 of the French New Code of Civil Procedure, see ICC Award No. 2730 (1982), *Two Yugoslavian companies v. Dutch and Swiss group companies*, 111 J.D.I. 914 (1984), and observations by Y. Derains. On the other hand, if the institution's rules give the institution, rather than the arbitrators, the power to extend deadlines, the arbitrators would be exceeding their powers were they themselves to rule on that question (see CA Versailles, Jan. 24, 1992, *Degrémont v. Communauté urbaine de Casablanca*, 1992 REV. ARB. 626, and observations by J. Pellerin).
- 98) Art. 24(1) of the 1998 Rules, replacing Art. 18(1) of the previous Rules. On the terms of reference, see *supra* paras. 1228 *et seq.*
- 99) Art. 24(2) of the 1998 Rules, replacing Art. 18(2) of the previous Rules.
- 100) CA Paris, Dec. 3, 1981, *Comptoirs Industriels Réunis Blachère et Cie. v. Société de Développement Viticole (SODEVI)*, 1982 REV. ARB. 91, and E. Mezger's note; CA Paris, Mar. 24, 1995, *Bin Saud Bin Abdel Aziz*, *supra* note 49.
- 101) Cass. 2e civ., June 8, 1983, *Appareils Dragon v. Empresa central de abastecimientos y ventas de equipos*, 1987 REV. ARB. 309, and the commentary by Philippe Fouchard, *Les institutions permanentes d'arbitrage devant le juge étatique (A propos d'une jurisprudence récente)*, *id.* at 225; CA Paris, May 19, 1998, *Torno SpA v. Kumagai Gumi Co. Ltd.*, 13 INT'L ARB. REP. El (July 1998).
- 102) CA Paris, Jan. 22, 1982, *Appareils Dragon*, *supra* note 87. On the rules governing administrative decisions made by arbitral institutions, see *supra* para. 32; CA Paris, May 17, 1983, *Techni Import Professionnel (T.I.P.) v. Electro Scientific Industries (E.S.I.)*, 1987 REV. ARB. 309, and the commentary by Fouchard, *supra* note 101.
- 103) See Art. 12(2) of the 1998 Rules, replacing Art. 2(11) of the previous Rules.
- 104) Cass. 1e civ., June 30, 1976, *Bruynzeel Deurenfabrik N.V. v. Ministre d'Etat aux Affaires Etrangères de la République Malgache*, 104 J.D.I. 114 (1977), and B. Oppetit's note; 1977 REV. ARB. 317, and J. Rubellin-Devichi's note; Gaz. Pal., Jur. 70 (1977), and J. Viatte's note.
- 105) See, e.g., Philippe Fouchard, *La coopération du Président du Tribunal de grande instance à l'arbitrage*, 1985 REV. ARB. 5, 45.
- 106) On this issue, see *supra* para. 1346.
- 107) Cass. 1e civ., June 15, 1994, *Sonidep v. Sigmoil*, 1995 REV. ARB. 88, 1st decision, and E. Gaillard's note.
- 108) Sec. 18, para. 2, of the 1929 Arbitration Act, which applied until April 1, 1999.
- 109) Article 1698, paragraph 2, of the Judicial Code, which provides for a flexible approach to the application of the deadline, subject to review by the courts.
- 110) On this issue, see also P. Fouchard, note following CA Paris, Jan. 17, 1984, *Bloc'h et Fils v. Delatrae Mockfjaerd*, 1984 REV. ARB. 498, where the parties had agreed a period of ten days from the appointment of the arbitrators for the making of the award.
- 111) On fast-track arbitration, see *supra* para. 1248 and the references cited therein.
- 112) A pathological clause occasionally found in practice provides for the period of time for the rendering of the award to run from the date of the arbitration clause.
- 113) For an example of the courts finding an implicit agreement between the parties to extend such a deadline, see TGI Paris, réf., May 21, 1984, *Vivent v. Reflets de Paris*, 1985 REV. ARB. 165, and the commentary by Fouchard, *supra* note 105, at 5; CA Paris, June 26, 1987, *Entreprise Guy Broussail v. Marbrerie du Bel Air*, 1990 REV. ARB. 905, and observations by B. Moreau; CA Paris, June 8, 1990, *Lucas v. Perez Arroyo*, 1992 REV. ARB. 625, 2d decision, and observations by J. Pellerin; CA Paris, Jan. 17, 1992, *Armand Colin v. Diffusion du Livre scolaire Dilco*, 1992 REV. ARB. 625, and observations by J. Pellerin; CA Paris, Feb. 9, 1995, *Marchand v. Sogea Atlantique*, which requires that a tacit extension result from "positive" and unequivocal acts (1996 REV. ARB. 137, and observations by J. Pellerin); CA Paris, May 19, 1998, *Torno*, *supra* note 101, which, more satisfactorily, holds that participation without reservation in the arbitration after the expiration of the deadline is sufficient.

- 114)** Cass. 1e civ., June 15, 1994, *Communauté urbaine de Casablanca v. Degrémont*, 1995 REV. ARB. 88, 2d decision, and E. Gaillard's note; 1994 REV. CRIT. DIP 681, and D. Cohen's note. *See also* CA Paris, Sept. 22, 1995, *Dubois et Vanderwalle v. Boots Frites BV*, where the same grounds were used to justify the refusal to enforce an award made outside France after the expiry of the three month deadline contained in the arbitration clause (1996 REV. ARB. 100, and E. Gaillard's note).
- 115)** On the extension provided for in this Article and its application by the courts, see Grandjean, *supra* note 94. On the application of Article 1456, paragraph 2, to an international arbitration governed by French procedural law, see TGI Paris, réf., June 3, 1988, *Tribunal arbitral v. Bachmann*, 1994 REV. ARB. 538, 2d decision, and observations by P. Fouchard; *see also supra* para. 877.
- 116)** *See* DE BOISSÉSON, *supra* note 54, at 776.
- 117)** TGI Paris, réf., Apr. 3, 1985, *Application des gaz v. Wonder Corp. of America*, 1985 REV. ARB. 170, and the commentary by Fouchard, *supra* note 105. *See also* TGI Paris, réf., May 9, and June 19, 1984, *Font Laugière Chimie (Manufactures Jacques Dugniolles) v. Moaco*, 1985 REV. ARB. 161, and the commentary by Fouchard, *supra* note 105, at 45 *et seq.*
- 118)** TGI Paris, réf., Jan. 12, 1988, *Omnium de Travaux v. République de Guinée*, May 10, 1990 and Oct. 30, 1990, *European Country Hotels Ltd. v. Consorts Legrand*, July 6, 1990, *Irridelco International Corp. v. Ets. Marcel Sebin*, 1994 REV. ARB. 538, and observations by P. Fouchard; *see also supra* para. 866.
- 119)** TGI Paris, réf., Nov. 29, 1989, *Omnium de Travaux v. République de Guinée*, 1990 REV. ARB. 525, and the commentary by Charles Jarrosson, *Le rôle respectif de l'institution, de l'arbitre et des parties dans l'instance arbitrale*, *id.* at 381.
- 120)** TGI Paris, réf., Apr. 3, 1985, *Application des gaz*, *supra* note 117.
- 121)** *See supra* note 120.
- 122)** *See* CA Paris, Jan. 17, 1984, *Bloc'h et Fils*, *supra* note 110; CA Paris, Sept. 22, 1995, *Dubois et Vanderwalle*, *supra* note 114. *See also*, in French domestic arbitration, Cass. 2e civ., May 14, 1997, *Sofiger v. Touchais*, 1998 REV. ARB. 703, and observations by Y. Derains. On the consequences on that part of the proceedings held prior to the expiration of the specified time period, *see*, in French domestic arbitration, Cass. 2e civ., May 18, 1989, *S.a.r.l. Hostin Armes Blanches v. Prieur Sports*, 1990 REV. ARB. 903, and observations by B. Moreau.
- 123)** On these concepts, *see supra* paras. 1359 and 1360.
- 124)** *See*, in French domestic arbitration law, Cass. 2e civ., Apr. 5, 1994, *S.a.r.l. Hostin Armes Blanches v. Prieur Sports*, 1995 REV. ARB. 85, and C. Jarrosson's note; Dalloz, Jur. 363 (1994), and Y. Chartier's note; 1994 RTD COM. 477, and observations by J.-C. Dubarry and E. Loquin; CA Paris, Nov. 10, 1995, *Verbiese v. SEE*, 1997 REV. ARB. 596, and observations by J. Pellerin.
- 125)** *See supra* para. 1376.
- 126)** *See* Cass. 2e civ., Apr. 27, 1981, *Ripolin Georget Freitag v. Henry Clark & Sons*, 1983 REV. ARB. 105, and observations by T. Bernard. *Comp. with* TGI Paris, May 6, 1976, *Clark & Sons Ltd. v. Ripolin Georget*, 1977 REV. ARB. 292, and P. Level's note.
- 127)** *See supra* para. 1248.
- 128)** *See, e.g.*, Art. 1057(2) of the Netherlands Code of Civil Procedure; Art. 1701(4) of the Belgian Judicial Code; Art. 1054(1) of the German ZPO; Art. 31(1) of the UNCITRAL Model Law; Sec. 31 of the 1999 Swedish Arbitration Act. *See also* Art. 48(2) of the 1965 Washington Convention. On the requirement for notarization under Spanish law before the 1988 reform, *see* Spanish *Tribunal Supremo*, Mar. 28, 1994, *ABC v. C. Española, SA*, 1994 REV. ARB. 749, and F. Mantilla-Serrano's note.
- 129)** Art. 1471 of the New Code of Civil Procedure.
- 130)** *Comp. with* Art. 189, para. 2 of the Swiss Private International Law Statute; Section 52 of the 1996 English Arbitration Act, which requires the award to be in writing unless the parties agree otherwise.
- 131)** *See*, for example, in France, Article 1498 of the New Code of Civil Procedure, which requires that the existence of the award be established by the party invoking it.
- 132)** *See, e.g.*, Art. 32(2) of the UNCITRAL Arbitration Rules; Art. 26.1 of the 1998 LCIA Arbitration Rules; Art. 27(1) of the 1997 AAA International Arbitration Rules. Compare with Articles 24 *et seq.* of the 1998 ICC Arbitration Rules (Arts. 21 *et seq.* of the previous Rules) where the same principle is implicit. *See* DERAINS AND SCHWARTZ, *supra* note 1, at 281 *et seq.* *See also* Article 32 of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
- 133)** On this issue, *see supra* para. 1244.
- 134)** *See, e.g.*, Lord Justice Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award*, 4 ARB. INT'L 141 (1988).
- 135)** *See* Johan Steyn, *England*, VIII Y.B. COM. ARB. 3, 23 (1983).
- 136)** *See* Sec. 52(4).
- 137)** *See*, for example, in a case where the parties chose French law to govern the proceedings, CA Paris, May 15, 1997, *Sermi et Hennion v. Ortec*, 1998 REV. ARB. 558, and P. Fouchard's note.

- 138)** See, e.g., Art. 32(3) of the UNCITRAL Arbitration Rules; Art. 32(1) of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; Art. 26.1 of the 1998 LCIA Arbitration Rules; Art. 27(2) of the 1997 AAA International Arbitration Rules; Art. 25(2) of the 1998 ICC Rules. In ICSID arbitration, the Washington Convention specifies itself that reasons must be given (Art. 48(3)); see also Art. 47 of the ICSID Rules.
- 139)** For a commentary in favor of the adoption of a legislative provision on this question, see Eric Loquin, *Perspectives pour une réforme des voies de recours*, 1992 REV. ARB. 321, 340.
- 140)** CA Paris, June 16, 1988, *Swiss Oil v. Petrogab*, 1989 REV. ARB. 309, and C. Jarrosson's approving note; for an English translation, see XVI Y.B. COM. ARB. 133 (1991); CA Paris, Mar. 30, 1995, *Fabre v. Espitalier*, 1996 REV. ARB. 131, and observations by J. Pellerin; CA Paris, June 20, 1996, *PARIS v. Razel*, 1996 REV. ARB. 657, and observations by D. Bureau.
- 141)** See *supra* para. 1376.
- 142)** See *supra* para. 1392.
- 143)** Art. 1471 of the New Code of Civil Procedure.
- 144)** Cass. 1e civ., Nov. 22, 1966, *Gerstlé v. Merry Hull*, JCP, Ed. G., Pt. II, No. 15,318 (1968), and observations by H. Motulsky; 94 J.D.I. 631 (1967), and B. Goldman's note; 1967 REV. CRIT. DIP 372, and P. Francescakis' note; CA Paris, Mar. 25, 1983, *Sorvia v. Weinstein International Disc Corp.*, 1984 REV. ARB. 363, and J. Robert's note; CA Paris, Jan. 22, 1988, *C.F.I.D. v. Ets. A. Arnaud*, 1989 REV. ARB. 251, and Y. Derains' note; CA Paris, Nov. 29, 1990, *Payart v. Morgan Crucible Co.*, 1991 REV. ARB. 659, 1st decision, and observations by J. Pellerin; 118 J.D.I. 414 (1991), and P. Kahn's note; CA Paris, June 28, 1991, *KFTCIC v. Icori Estero*, 1992 REV. ARB. 568, and P. Bellet's note, especially at 571; for an English translation, see 6 INT'L ARB. REP. EL (Aug. 1991); CA Paris, Mar. 26, 1992, *Société nigérienne des produits pétroliers (SONIDEP) v. Sigmoil Resources N.V.*, Dalloz, IR 161 and 169 (1992); CA Paris, May 10, 1994, *Sheikh Mahfouz Salem Bin Mahfouz v. Al Tayar*, 1996 REV. ARB. 66, and C. Jarrosson's note.
- 145)** Cass. 1e civ., Nov. 22, 1966, *Gerstlé*, *supra* note 144; CA Paris, June 28, 1988, *Total Chine v. E.M.H.*, which sets aside an award for the failure to give reasons where the parties had chosen French law to govern the procedure and where the Court made the somewhat superfluous finding that the parties had specified in their arbitration clause that reasons were to be given in the award (1989 REV. ARB. 328, and J. Pellerin's note).
- 146)** CA Paris, Apr. 28, 1976, *Compagnie d'Armement Maritime (CAM) v. Compagnie Tunisienne de Navigation (COTUNAV)*, 1977 REV. ARB. 151, and M. Boitard's note; CA Paris, July 11, 1978, *Compagnie d'Armement Maritime (CAM) v. Compagnie Tunisienne de Navigation (COTUNAV)*, 1979 REV. ARB. 258, and M. Boitard's note; Cass. 1e civ., Mar. 18, 1980, *Compagnie d'Armement Maritime (CAM) v. Compagnie Tunisienne de Navigation (COTUNAV)*, 1980 Bull. Civ. I, No. 87; 1980 REV. ARB. 496, and E. Mezger's note; 107 J.D.I. 874 (1980), and E. Loquin's note.
- 147)** See, even before the 1987 Swiss Private International Law Statute, Fed. Trib., Dec. 12, 1975, *Provenda S.A. v. Alimenta S.A.*, 1977 REV. ARB. 195.
- 148)** Cass. 1e civ., Jan. 22, 1975, *Krebs v. Milton Stern*, 1975 REV. ARB. 309, and E. Mezger's note; CA Paris, Feb. 28, 1992, *Freyssinet International v. Renardet*, 1992 REV. ARB. 649, and observations by D. Cohen.
- 149)** See, e.g., Cass. 1e civ., Dec. 11, 1979, *Elettronica v. Thomson-C.S.F.*, 1982 REV. ARB. 419, and the commentary by Jean Robert, *La dénaturation par l'arbitre – Réalités et perspectives*, *id.* at 405. But see Cass. 1e civ., Feb. 28, 1995, *Société Générale pour l'Industrie v. Ewbank*, 1995 REV. ARB. 597, and D. Bureau's note; 1996 RTD COM. 446, and observations by J.-C. Dubarry and E. Loquin; Cass. 2e civ., Oct. 25, 1995, *GIE commerçants réunis indépendants v. Multimob*, 1996 REV. ARB. 127, and observations by J. Pellerin; CA Paris, June 20, 1996, *Paris*, *supra* note 140; CA Paris, Dec. 11, 1997, *Cubana v. Consavio International Ltd.*, 1999 REV. ARB. 124, and observations by D. Bureau; CA Paris, Mar. 5, 1998, *Forasol v. CISTM*, 1999 REV. ARB. 86, and E. Gaillard's note; CA Paris, 1e Ch., Sec. C, Apr. 2, 1998, *Compagnie Française d'Etudes et de Construction TECHNIP v. Entreprise Nationale des Engrais et des Produits Phytosanitaires dite ASMIDAL (Algérie)*, No. 97/6929, unpublished; CA Paris, 1e Ch., Sec. C, Jan. 19, 1999, *CIC International Ltd. v. Ministre de la Défense de la République Fédérale d'Allemagne*, No. 1998/03375, unpublished.
- 150)** CA Paris, May 6, 1988, *Unijet S.A. v. S.A.R.L. International Business Relations Ltd. (I.B.R.)*, 1989 REV. ARB. 83, and E. Loquin's note. On this issue, generally, see Jean-Louis Delvolvé, *Essai sur la motivation des sentences arbitrales*, 1989 REV. ARB. 149.
- 151)** CA Brussels, Jan. 24, 1997, *Compagnie Inter-Arabe de Garantie des Investissements (CIAGI) v. Banque Arabe et Internationale d'Investissement (BAII)*, 1998 REV. ARB. 181, and J. Linsmeau's note, especially at 198; 1997 BULL. ASA 334; XXII Y.B. COM. ARB. 643 (1997) (*upholding* Brussels Tribunal of First Instance, Jan. 25, 1996, 1997 [BELG.] JOURN. TRIB. 6, and G. Block's note), *aff'd*, Belgian *Cour de cassation*, June 5, 1998, *CIAGI v. BAI*, 1998 BULL. ASA 719, with an introductory note by G. Block at 715; 1998 REV. ARB. 715, and J. Linsmeau's note.
- 152)** E. Gaillard, note following CA Paris, Mar. 5, 1998, *Forasol*, *supra* note 149.

- 153)** A dissenting opinion should be distinguished from a separate or distinct opinion, by which an arbitrator expresses agreement with the decision of the majority, but gives different reasons. Such an opinion is less frequently encountered in arbitration than in certain national courts.
- 154)** But see REDFERN AND HUNTER, *supra* note 31, at 398, who appear to attach substantial importance to the difficulties to which they believe dissenting opinions may give rise in continental legal systems. See also *infra* paras. 1403 *et seq.*
- 155)** See, for example, for a disapproving analysis of dissenting opinions in French international arbitration, ROBERT, *supra* note 79, at 310; these remarks were not included in the 6th edition of 1993; Bredin, *supra* note 80, at 79. See also the reservations expressed by DE BOISSÉSON, *supra* note 54, at 802.
- 156)** ROBERT, *supra* note 79, at 310. See also, in French domestic arbitration law, C. Jarrosson, note following CA Paris, Oct. 15, 1991, *Affichage Giraudy v. Consorts Judlin*, 1991 REV. ARB. 643, 648. This argument was raised before the Paris Court of Appeals, although for procedural reasons the court was not required to decide the issue (see CA Paris, July 7, 1994, *Uzinexportimport Romanian Co. v. Attock Cement Co.*, 1995 REV. ARB. 107, and S. Jarvin's note; for an English translation, see 10 INT'L ARB. REP. D1 (Feb. 1995)).
- 157)** See, e.g., Art. 1469 of the French New Code of Civil Procedure.
- 158)** CA Paris, Mar. 19, 1981, *Barre v. Les Solidaires*, 1982 REV. ARB. 84, and J. Viatte's note.
- 159)** See the views of Claude Reymond, in LALIVE, POUDRET, REYMOND, *supra* note 16, at 416-17. As the opinions of the authors of that publication diverge on this question, the views at 416-17 can be attributed to Claude Reymond alone. Article 945 of Quebec's Code of Civil Procedure specifies that the confidentiality of the deliberations does not exclude dissenting or separate opinions. On the freedom for the arbitrators to express minority opinions unless the parties agree otherwise, see Derains, *supra* note 4, at 73 *et seq.*
- 160)** See, for example, Article 33, paragraph 1 of Spanish Law 36/1988 on Arbitration of December 5, 1988, which states that arbitrators may give dissenting opinions.
- 161)** See, in Swiss law, Reymond, *supra* note 159; BUCHER AND TSCHANZ, *supra* note 23, ¶ 262; Laurent Levy, *Dissenting Opinions in International Arbitration in Switzerland*, 5 ARB. INT'L 35 (1989); Jacques Werner, *Dissenting Opinions – Beyond Fears*, 9 J. INT'L ARB. 23 (Dec. 1992); P. Schweizer, note following Swiss Fed. Trib., May 11, 1992, *D. v. A.*, 1994 REV. SUISSE DR. INT. ET DR. EUR. 117, 126; in Italian law, RUBINO - SAMMARTANO, *supra* note 39, at 429; in Dutch law, SANDERS AND VAN DEN BERG, *supra* note 32, at 86. For an example of a separate opinion in an *ad hoc* arbitration with its seat in The Hague, see the February 5, 1988 Partial Award on Liability, *Wintershall*, *supra* note 44; for a dissenting opinion in an *ad hoc* arbitration with its seat in Paris, see the December 29, 1993 Award by D.G. Wright, president, P. Mayer and C. Molineaux, arbitrators (C. Molineaux dissenting), *Icori Estero S.p.A. v. Kuwait Foreign Trading Contracting & Investment Co.*, 9 INT'L ARB. REP. A1 (Dec. 1994); for a dissenting opinion of the chairman of an arbitral tribunal in an award made in Switzerland, see the Interim Award in ICC Case No. 3879 (Mar. 5, 1984), by E. Bucher, chairman, P. Bellet and N. Mangård, arbitrators, *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, 112 J.D.I. 232 (1985); 1989 REV. ARB. 547; for an English translation, see 23 I.L.M. 1071 (1984); XI Y.B. COM. ARB. 127 (1986).
- 162)** See HOLTZMANN AND NEUHAUS, *supra* note 7, at 837. Article 1054 of the ZPO, which entered into force on January 1, 1998, is also silent on the point. On the fact that dissenting opinions are uncommon in Germany, see OTTOARNDT GLOSSNER, *COMMERCIAL ARBITRATION IN THE FEDERAL REPUBLIC OF GERMANY* 18 (1984).
- 163)** See, for example, the book review by Laurent Lévy and William W. Park, *The French Law of Arbitration by Jean Robert and Thomas E. Carbonneau*, 2 ARB. INT'L 266 (1986); Levy, *supra* note 161, at 39.
- 164)** See, e.g., Levy, *supra* note 161, at 38.
- 165)** See, e.g., DE BOISSÉSON, *supra* note 54, at 802.
- 166)** Award of October 21, 1983 by E. Jimenez de Arechaga, president, W.D. Rogers and D. Schmidt, arbitrators (D. Schmidt dissenting), in ICSID Case No. ARB/81/2, *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, 111 J.D.I. 409 (1984), and observations by E. Gaillard; the dissenting opinion by M.-D. Schmidt appears at 441; for an English translation, see 1 J. INT'L ARB. 145 and 332 (1984); X Y.B. COM. ARB. 71 (1985); 2 ICSID REP. 9 and 77 (1994).
- 167)** See the *Ad hoc* Committee Decision of May 3, 1985, by P. Lalive, president, A.-L. Cocheri and I. Seidl-Hohenveldern, arbitrators, 114 J.D.I. 163 (1987), and observations by E. Gaillard at 184; for an English translation, see I ICSID REV. – FOREIGN INV. L.J. 89 (1986); XI Y.B. COM. ARB. 162 (1986); 2 ICSID REP. 95 (1994).
- 168)** See, for example, Levy, *supra* note 161, at 42, and the draft of the International Bar Association's Code of Ethics for International Arbitrators, which provides that the dissenting arbitrator “should not breach the confidentiality of the deliberations” of the tribunal but that he or she “retains the right ... to draw the attention of the parties to any fundamental procedural irregularity”(cited by Levy, *id.*). See also Canon VI of the Code of Ethics for Arbitrators in Commercial Disputes, jointly adopted by the AAA and the American Bar Association in 1977 (X Y.B. COM. ARB. 132 (1985), with an introductory note by Howard M. Holtzmann at 131).

- 169)** For an example of an award stated to have been made “unanimously,” but which was accompanied by two individual opinions, see the Award dated February 21, 1997 in ICSID Case No. ARB/93/1, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, 125 J.D.I. 243 (1998), and observations by E. Gaillard; for an English translation, see XXII Y.B. COM. ARB. 60 (1997); 36 I.L.M. 1531 (1997); 12 INT’L ARB. REP. A1 (Apr. 1997).
- 170)** On the procedure followed by the ICC, see CRAIG, PARK, PAULSSON, *supra* note 31, at 332 *et seq.*; D. Hascher, observations following the questionnaire in ICC Case No. 5082, *supra* note 69, at 1085; Martin Hunter, *Final Report on Dissenting and Separate Opinions*, ICC BULLETIN, Vol. 2, No. 1, at 32 (1991); DERAINS AND SCHWARTZ, *supra* note 1, at 285-86.
- 171)** See *infra* para. 1404.
- 172)** See Gélinas, *supra* note 65. The number of dissenting opinions in previous years was 20 in 1994 (of 182 awards) (see Dominique Hascher, *Scrutiny of Draft Awards by the Court: 1994 Overview*, ICC BULLETIN, Vol. 6, No. 1, at 51 (1995)); 12 in 1995 (of 203 awards) (see Dominique Hascher, *Scrutiny of Draft Awards by the Court – 1995 Overview*, ICC BULLETIN, Vol. 7, No. 1, at 14 (1996)); 19 in 1996 (of 217 awards) (see Dominique Hascher, *Scrutiny of Draft Awards by the Court – 1996 Overview*, ICC BULLETIN, Vol. 8, No. 1, at 17 (1997)); 3 in 1997 (of the 227 awards) (see Dominique Hascher, *The Application of the Rules by the Court – 1997 Overview*, ICC BULLETIN, Vol. 9, No. 1, at 12 (1998)).
- 173)** See Reymond, *supra* note 161, at 417.
- 174)** For an example, see the response by the president of the arbitral tribunal to a dissenting opinion in ICSID Case No. ARB/82/1, *Société Ouest Africaine des Bétons Industriels v. State of Senegal*, 117 J.D.I. 209 (1990); 6 ICSID REV. – FOREIGN INV. L.J. 289 (1991).
- 175)** See, e.g., ROBERT, *supra* note 79; DE BOISSÉSON, *supra* note 54, at 801; Reymond, *supra* note 161, at 417.
- 176)** Hascher, *supra* note 65.
- 177)** See the October 17, 1980 decision of the Geneva Court of Justice, unpublished, cited by Levy, *supra* note 161, at 40.
- 178)** See Levy, *supra* note 161, at 40.
- 179)** On the confidentiality of awards, see *infra* para. 1412.
- 180)** Fed. Trib., May 11, 1992, D. v. A., 1992 BULL. ASA 381, 386; 1994 REV. SUISSE DR. INT. ET DR. EUR. 117, and the commentary by P. Schweizer.
- 181)** Art. 1472 of the French New Code of Civil Procedure. On the refusal, in French domestic arbitration law, to set aside an award that did not specify a party’s forename, see CA Paris, June 28, 1991, *Boumeddane v. Jardin*, 1992 REV. ARB. 633, and observations by J. Pellerin.
- 182)** Art. 1473 of the French New Code of Civil Procedure. On the setting aside, in French domestic arbitration law, of an award which did not include an arbitrator’s signature and did not refer to his refusal to sign, see CA Paris, Oct. 27, 1988, *Proux v. Guerton*, 1990 REV. ARB. 908, and observations by B. Moreau. Compare with CA Paris, July 5, 1990, *Uni-Inter v. Maillard*, which held a statement that the arbitrators were deciding by majority vote to be sufficient (1991 REV. ARB. 359, and observations by B. Moreau) and CA Paris, October 15, 1991, *Affichage Giraudy*, *supra* note 156, which held that it was not necessary to give the reasons for an arbitrator’s refusal to sign an award for the requirements of Article 1473 to be satisfied.
- 183)** On the case law which wrongly refuses to characterize as awards documents where certain formal requirements are not complied with, see *supra* para. 1352.
- 184)** See Articles 1502 and 1504 of the French New Code of Civil Procedure, which differ on this point from the French domestic law provisions at Article 1484 5°.
- 185)** CA Paris, Mar. 22, 1985, *Ets. Crucke v. Frahuil*, 1987 REV. ARB. 78, and observations by B. Moreau.
- 186)** See Arts. 1057 and 1065 of the Netherlands Code of Civil Procedure; Sec. 52 of the 1996 English Arbitration Act.
- 187)** See, e.g., Art. 32 of the UNCITRAL Arbitration Rules; Art. 25(3) of the 1998 ICC Arbitration Rules (Art. 22 of the previous Rules); Art. 32(1) of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; Art. 27 of the 1997 AAA International Arbitration Rules; Art. 26 of the 1998 LCIA Arbitration Rules.
- 188)** For such a requirement, see, for example, Section 52(5) of the 1996 English Arbitration Act.
- 189)** See the reference in Article 1500 of the New Code of Civil Procedure to Article 1476 of the same Code. On this issue, generally, see *infra* para. 1419.
- 190)** Art. 32(1) of the 1999 Rules. The International Arbitration Rules of the AAA, as revised in 1997, remove the requirement that arbitrators attach a declaration to their award stating that a colleague who did not sign was given the opportunity to do so (Art. 28(3) of the 1993 Rules).
- 191)** Art. 189, para. 2, *in fine* of the Swiss Private International Law Statute. This is also possible under the 1999 Swedish Arbitration Act if the parties have so agreed (Sec. 32, para. 1).
- 192)** CA Paris, June 17, 1997, *Eiffage v. Butec*, 1997 REV. ARB. 583, and observations by D. Bureau.
- 193)** See, e.g., REDFERN AND HUNTER, *supra* note 31, at 304.

- 194)** See CA Versailles, 1e Ch., 1e Sec., Jan. 14, 1987, *Chimimportexport v. Tournant Thierry*, No. 7298/85, unpublished. In this case, the award contained the words “done in Brussels,” although the parties had agreed on a seat in Paris. The award was treated as having been made in France for the purposes of actions to set aside. See also CA Paris, Sept. 22, 1995, *Dubois et Vanderwalle*, *supra* note 114, which held the fact that the award was signed by an arbitrator in France to be of no consequence, and determined the seat of the arbitration on the basis, in particular, of the organization responsible for appointing the arbitrators; CA Paris, Oct. 28, 1997, *Procédés de préfabrication pour le béton v. Libye*, 1998 REV. ARB. 399, and B. Leurent's note; in French domestic arbitration, see CA Paris, Jan. 11, 1996, *Algotherm v. DEP*, 1996 REV. ARB. 100, and E. Gaillard's note. On this issue, generally, see *infra* para. 1590, and on the uncertainties of English law on this point prior to the 1996 reform, see *infra* para. 1593.
- 195)** See Art. 31(3), *in fine*. See also Art. 1693, paragraph 1, *in fine* of the Belgian Judicial Code (Law of May 19, 1998).
- 196)** See, e.g., Art. 28(1) of the 1998 ICC Arbitration Rules (Art. 23(1) of the previous Rules); Art. 26.5 of the 1998 LCIA Arbitration Rules; Art. 27(5) of the 1997 AAA International Arbitration Rules; Art. 48 of the ICSID Arbitration Rules.
- 197)** Art. 35, paras. 1 and 5; under the Swiss Private International Law Statute, filing the award with the court is optional (Art. 193, para. 1).
- 198)** On the fact that, in the Netherlands, the deposit of an award is not a condition precedent to a request for enforcement or an application to set aside, see SANDERS AND VAN DEN BERG, *supra* note 32.
- 199)** On the reasons for the filing of these awards in the absence of an application for enforcement, see SOPHIE CRÉPIN, *LES SENTENCES ARBITRALES DEVANT LE JUGE FRANÇAIS ¶¶ 138 et seq.* (1995).
- 200)** Art. 32(5). *Comp. with* Art. 27(4) of the 1997 AAA International Arbitration Rules.
- 201)** See Art. 48(5) of the Convention and Art. 48(4) of the Arbitration Rules.
- 202)** See, e.g., ICC Award No. 6931 (Geneva, 1992), which, while refusing to grant the party's request in the case being heard, did not rule out the possibility of publishing the award by way of compensation for defamation or passing-off (*Austrian party v. French party*, 121 J.D.I. 1064 (1994), and observations by Y. Derains).
- 203)** On the gradual establishment of arbitral case law, see *supra* paras. 371 *et seq.*
- 204)** See the December 9, 1983 Decision Regarding Provisional Measures in ICSID Case No. ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia*, where the confidentiality issue was decided by an ICSID arbitral tribunal composed of B. Goldman, president, E. Rubin and I. Foighel, arbitrators (24 I.L.M. 365 (1985); XI Y.B. COM. ARB. 159 (1986); 1 ICSID REP. 410 (1993)).
- 205)** CA Paris, Feb. 18, 1986, *Aïta v. Ojeh*, 1986 REV. ARB. 583, and G. Flécheux's note; Dalloz, Jur. 339 (1987). On this issue, generally, see Emmanuel Gaillard, *Le principe de confidentialité de l'arbitrage commercial international*, Dalloz, Chron. 153 (1987); Jean-Louis Delvolvé, *Vraies et fausses confidences ou les petits et les grands secrets de l'arbitrage*, 1996 REV. ARB. 373. See also Jan A.S. Paulsson and Nigel Rawding, *The Trouble with Confidentiality*, ICC BULLETIN, Vol. 5, No. 1, at 48 (1994). On the limits of confidentiality, see in Australian law, High Court of Australia, Apr. 7, 1995, *Esso Australia Resources Ltd. v. Plowman*, 10 INT'L ARB. REP. A1 (May 1995), and the commentary by Marcus S. Jacobs, *Arbitration Confidentiality in Australia*, 10 INT'L ARB. REP. 21 (July 1995); 11 ARB. INT'L 235 (1995); 6 WORLD ARB. & MED. REP. 133 (1995); XXI Y.B. COM. ARB. 137 (1996); for a French translation, see 1996 REV. ARB. 539, and D. Kapelink-Klinger's note; see also Edouard Bertrand, *Confidentialité de l'arbitrage: évolution ou mutation après l'affaire Esso/BHP v Plowman/The Confidentiality of Arbitration: Evolution or Mutation Following Esso/BHP vs. Plowman*, 1996 INT'L BUS. L.J. 169. But see, in England, *Ali Shipping Corp. v. Shipyard Trogir*, [1998] 2 All E.R. 136; [1999] 1 W.L.R. 314; [1998] 1 Lloyd's Rep. 711 (C.A. 1997); for a French translation, see 1998 REV. ARB. 579, and L. Burger's note; see also Peter Sheridan, *Privacy and Confidentiality – Recent Developments: The Divergence Between English and Australian Law Confirmed*, 1 INT'L ARB. L. REV. 171 (1998). On the question of whether documents obtained in an arbitration proceeding, or the award itself, can be used in a related court proceeding, see, in English law, *Hassneh Insurance Co. of Israel v. Stuart J. Mew*, [1993] 2 Lloyd's Rep. 243; XIX Y.B. COM. ARB. 223 (1994) (High Ct., Q.B. (Com. Ct.) 1992); on this issue, generally, see 11 ARB. INT'L 231 (1995) (Special issue on the Confidentiality of International Commercial Arbitration).
- 206)** Svea Ct. of App., Mar. 30, 1999, *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd.*, 14 INT'L ARB. REP. A1 (Apr. 1999). On the City Court decision, see Constantine Partasides, *Bad News from Stockholm: Bulbank and Confidentiality Ad Absurdum*, 13 INT'L ARB. REP. 20 (Dec. 1998).
- 207)** On this issue, see *infra* paras. 1560 *et seq.*
- 208)** Article 1475 of the New Code of Civil Procedure provides that in French domestic arbitration “the award brings an end to the arbitrator's jurisdiction over the dispute it resolves” but that “the arbitrator has the power to interpret the award, to rectify clerical errors and omissions affecting it and to complete it, where he or she has failed to rule on a claim”. For an illustration, see CA Paris, Apr. 18, 1991, *Letierce v. Stolz*, 1992 REV. ARB. 631, and observations by J. Pellerin. In international arbitration, Article 1500 of the New Code of Civil Procedure makes no reference to Article 1475.

- 209) On this issue, generally, see Nathalie Garnier, *Interpréter, rectifier et compléter les sentences arbitrales internationales*, 1995 REV. ARB. 565; David D. Caron and Lucy F. Reed, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 ARB. INT'L 429 (1995); Andrew N. Vollmer and Angela J. Bedford, *Post-Award Arbitral Proceedings*, 15 J. INT'L ARB. 37 (Mar. 1998).
- 210) In Swiss law, see Fed. Trib., Nov. 1, 1996, P.v. A., 1997 BULL. ASA 116.
- 211) For an example of the application of this principle, see the May 31, 1988 *ad hoc* Award, *Wintershall A.G. v. Government of Qatar*, 28 I.L.M. 795 (1989); XV Y.B. COM. ARB. 30 (1990), especially ¶ 89 at 57.
- 212) See Art. 50 of the Washington Convention; Arts. 50 and 51 of the ICSID Arbitration Rules.
- 213) Art. 50(2) of the Washington Convention. On the issue of the interpretation of awards, generally, see Jean-François Poudret, *L'interprétation des sentences arbitrales (étude de droit suisse et de droit comparé)*, in RECUEIL DE TRAVAUX SUISSES SUR L'ARBITRAGE INTERNATIONAL 269 (1984); Roger Perrot, *L'interprétation des sentences arbitrales*, 1969 REV. ARB. 7; Robert D.A. Knutson, *The Interpretation of Arbitral Awards – When is a Final Award not Final?*, 11 J. INT'L ARB. 99 (June 1994); Pierre-Yves Gunter, *L'interprétation de la Sentence: examen de quelques questions à la lumière d'un cas réel*, 1996 BULL. ASA 574. For an example of interpretation performed by a second arbitral tribunal, see ICC Award No. 6233 (1992), *Owner of company registered in Lebanon v. African state*, XX Y.B. COM. ARB. 58 (1995).
- 214) DERAINS AND SCHWARTZ, *supra* note 1, at 298 *et seq.*
- 215) See *infra* para. 1416.
- 216) For its implementation in German law, see Article 1058 of the ZPO.
- 217) New Article 1702 bis, paragraph 1(b) of the Belgian Judicial Code (Law of May 19, 1998); Sec. 32 of the 1999 Swedish Arbitration Act.
- 218) See *infra* para. 1416.
- 219) For an example of a clerical error, which was easily corrected in a system that so permitted, see the October 17, 1990 Decision on Supplemental Decisions and Rectification in ICSID Case No. ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia* (5 INT'L ARB. REP. D1 (Nov. 1990); XVII Y.B. COM. ARB. 73 (1992); 1 ICSID REP. 569 (1993)), which constituted a rectification of the June 5, 1990 ICSID Award on the merits (5 INT'L ARB. REP. D4 (Nov. 1990); XVII Y.B. COM. ARB. 73 (1992); 1 ICSID REP. 569 (1993); for a French translation, see 118 J.D.I. 172, 181 (1991), and observations by E. Gaillard).
- 220) See, e.g., Art. 36 of the UNCITRAL Arbitration Rules; Art. 30 of the 1997 AAA International Arbitration Rules; Art. 27 of the 1998 LCIA Arbitration Rules; Art. 37 of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. See also Art. 49(2) of the Washington Convention and Art. 49 of the ICSID Arbitration Rules.
- 221) See, e.g., CA Paris, Feb. 2, 1978, *Elettronica v. Thomson-C.S.F.*, 1978 REV. ARB. 501, and P. Roland-Lévy's note, *aff'd*, Cass. 1e civ., Dec. 11, 1979, *supra* note 149.
- 222) See Cass. 1e civ., June 16, 1976, *Krebs*, *supra* note 97.
- 223) On Article 29 of the ICC Rules, see DERAINS AND SCHWARTZ, *supra* note 1, at 298 *et seq.*
- 224) See, for example, in the United States, *Danella Constr. Corp. v. MCI Telecommunications Corp.*, 993 F.2d 876 (3d Cir. 1993); 8 INT'L ARB. REP. D1 (Oct. 1993).
- 225) Article 33 and, in German law, Article 1058 of the ZPO.
- 226) Art. 826 of the Code of Civil Procedure (Law of Jan. 5, 1994).
- 227) Sec. 57 of the English Arbitration Act 1996.
- 228) See Article 1702 bis, paragraph 1(a) of the Belgian Judicial Code (Law of May 19, 1998), which also allows the parties to apply to the enforcement court to have the award rectified where the arbitral tribunal cannot be reconstituted (Art. 1702 bis, paragraph 5) and Section 32 of the 1999 Swedish Arbitration Act.
- 229) Art. 1475, paragraph 2 of the New Code of Civil Procedure, referring to Article 461 of the same Code, which deals with the correction of clerical mistakes in court decisions. See JEAN ROBERT, *L'ARBITRAGE – DROIT INTERNE – DROIT INTERNATIONAL PRIVÉ* ¶ 211 (6th ed. 1993).
- 230) See *supra* para. 1414.
- 231) Article 49, which implements Article 49, paragraph 2 of the Washington Convention.
- 232) On the modifications made concerning the interpretation of the award and rectification of clerical errors, see *supra* paras. 1415 and 1416.
- 233) In French law, this would be the case under Articles 1502 3° and 1504 of the New Code of Civil Procedure. On this issue, see *infra* para. 1628.
- 234) See the authors cited *infra* para. 1599.
- 235) Cass. 1e civ., May 25, 1992, *Fougerolle v. Procofrance*, 119 J.D.I. 974 (1992), and E. Loquin's note; 1992 REV. CRIT. DIP 699, and B. Oppetit's note; 1993 REV. ARB. 91, and the commentary by Matthieu de Boissésou, *L'arbitrage et la fraude (à propos de l'arrêt Fougerolle, rendu par la Cour de cassation le 25 mai 1992)*, *id.* at 3; for an English translation, see XIX Y.B. COM. ARB. 205 (1994).
- 236) See E. Loquin, note following Cass. 1e civ., May 25, 1992, *Fougerolle*, 119 J.D.I. 974, 978 (1992).
- 237) See *infra* para. 1599.
- 238) See *supra* paras. 661 *et seq.*

- 239)** Compare, on the conditions governing the *res judicata* effect of foreign awards, the distinctions discussed by ROBERT, *supra* note 79, at 355. These observations are not included in the 6th edition of 1993.
- 240)** See *infra* para. 1591.
- 241)** CA Paris, July 9, 1992, Norbert Beyrard France v. République de Côte d'Ivoire, 1994 REV. ARB. 133, and P. Théry's note.

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Prayers for Relief – The Focus for Organization

Klaus Reichert

(*)

I Introductory Question

What is the object or purpose of organizing arbitral proceedings? Unless the answer to this question is clearly understood, and such understanding is shared between all counsel and the tribunal, from the outset of a case, there is a real risk that the organization does not actually achieve the fair, efficient and expeditious conduct of the arbitration.

This paper proposes a short answer to that question. The object or purpose of arbitral proceedings is the disposition by the tribunal of the parties' respective prayers for relief. The tribunal does not resolve any and every difference of opinion, or disputed fact, or indeed slight, as its sole task (derived from the agreement to arbitrate) is to grant or withhold the prayers for relief. Every step in the organization of the case should be directed towards that task. (1) This paper will now develop support for the answer proposed to the introductory question with the following points in mind: (II) how are disputes settled by arbitration; (III) what is the fundamentally important characteristic of an award; and (IV) how comparisons with national litigation are apt to mislead.

II How are Disputes Settled by Arbitration?

One starts with the basis and uncontroversial premise that an arbitration only exists because of an agreement to resolve disputes by that procedure. Taking a typical example of an arbitration agreement, namely the International Chamber of Commerce (ICC) standard clause:

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

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While much focus in the past has been on the introductory words to such clauses (*all disputes arising out of or in connection with...*) debating on the scope of an agreement to arbitrate with linguistic contortions on whether a dispute arises *under* or *out of*, those debates are largely now over. Perhaps what may have been overlooked is what exactly is meant by the words *shall be finally settled*. Those words are often skipped over as one might readily assume that they speak for themselves. For present purposes they will be looked at in a little more detail.

There is another basic premise which can readily be stated without much fear of contradiction, namely, a dispute is settled by a remedy or relief being granted (or refused) by the tribunal. While the innumerable legal systems and governing laws around the world have a vast array of differing rules and approaches to contract interpretation (for example), one commonly finds that each has remedies to resolve disputes. Legal systems generally do not resolve disputes by having a general enquiry into what happened between parties and thereafter coming up with a just solution. Rather, parties assert that the material facts, by reference to applicable legal principles, give rise to certain remedies.

III What is Fundamentally Important About an Award?

The answer is: the disposition of the claims made as set out at the end of the award. That is what the parties are told to do, or not to do.

The importance of remedies for the purposes of arbitral proceedings is sitting in plain (legal) sight. Three examples are now considered: (1) a reasoned award can be dispensed with by agreement of the parties; (2) *infra petita* as a recourse against an award; and (3) certain institutional rules and practice.

1 Reasons – Fundamental, or Dispensable

Consider the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (the UNCITRAL Model Law) which provides as follows:

"Article 31. Form and contents of award

....

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given....”

In a similar vein, one sees in Sect. 52(4) of the English Arbitration Act 1996:

“The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.”

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Thus, parties are free to agree that reasons can be dispensed with – the articulation by a tribunal of reasons, or grounds, is clearly not considered to be so crucial as to be rendered sacrosanct. Of course it is most unusual for reasons to be dispensed with, but that is not the point; the UNCITRAL Model Law and the English Arbitration Act both permit parties to dispense with reasons. An award rendered under such circumstances is no less an award than one with reasons because, critically, the operative part decides on the prayers for relief advanced by each side. That operative part, deciding on the prayers for relief, brings the dispute to an end.

2 Infra (or Ultra) Petita

Consider Art. 1485 of the French Code of Civil Procedure (CCP) which provides as follows (in relevant part, translated):

“... once an award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award. However, on application of a party, the arbitral tribunal may interpret the award, rectify clerical errors and omissions, or make an additional award where it failed to rule on a claim. The arbitral tribunal shall rule after having heard the parties or having given them the opportunity to be heard.”

Thus, Art. 1485 CCP provides that an arbitral tribunal can complete its award when it failed to rule on a head of claim (“*le tribunal arbitral peut interpréter la sentence ... ou la compléter lorsqu’il a omis de statuer sur un chef de demande*”). It follows that not all omissions give rise to a claim for infra petita. The omission must be related to a claim (“*chef de demande*”), as opposed to a ground for relief put forward in support of a claim (“*moyen*”). A claim is to be understood as a formal request, made by a party to the tribunal, to give a ruling on a specific point. The claim(s) submitted by the parties form(s) the subject matter of a dispute. Grounds, on the other hand, are the reasons forming the basis of a claim.

In Switzerland, the Private International Law Act provides as follows:

“Article 190

....

(2) The award may only be annulled:

...

(c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim[.]”

Similarly with the UNCITRAL Model Law:

“Article 33

....

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to ● make an additional award as to claims presented in the arbitral proceedings but omitted from the award....”

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In short summary: the *chef de demande* is the critical matter for disposition, not the *moyen*.

3 Certain Institutional Rules and Practice

First, consider the current ICC Rules (in relevant part):

“Article 23: Terms of Reference

(1) As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:

...

(c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the

extent possible, an estimate of the monetary value of any other claims;

....

(4) After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.”

Secondly, the current ICC Award Checklist provides as follows (in relevant part) for tribunals to consider when preparing an award:

“7. Dispositive Section, Place of Arbitration, Date, Signature –

- A. Award contains a dispositive section mentioning all orders (including the decision on jurisdiction, if applicable) and nothing more.
- B. Award deals with all of the issues and parties' claims (which should be stated clearly and precisely somewhere in the award and compared to the Terms of Reference), including the parties' most recent requests for relief, and decides nothing more than those issues and claims (state clearly if certain claims are reserved for one or more future awards).”

While the word “claims” and the phrase “requests for relief” appear to be two different things, one might venture to suggest that these are simply interchangeable labels for the same thing, namely, *chef de demande* and not *moyen*. One might consider the French version of Art. 23(1)(c) and 23(4) respectively of the ICC Rules to illustrate this point:

“un exposé sommaire des prétentions [the claims] des parties et des décisions sollicitées [prayers for relief] par chacune d'elles ainsi que le montant de toute demande quantifiée et, dans la mesure du possible, une estimation de la valeur pécuniaire de toute autre demand”

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and

*“Après la signature de l'acte de mission, ou son approbation par la Cour, les parties ne peuvent former de **nouvelles demandes** [the exact language, *prétentions*, used in Art. 23(1)(c) is not replicated, but rather the word *demandes* is used] hors des limites de l'acte de mission, sauf autorisation du tribunal arbitral qui tient compte de la nature de ces **nouvelles demandes**, de l'état d'avancement de la procédure et de toutes autres circonstances pertinentes.”* (Emphasis added.)

Indeed, in French legal thought (2) a claim is defined as:

“What is required from the judge or the arbitrator by one of the parties: the result it wishes to obtain.”

4 Conclusion

It is tentatively suggested that the three foregoing points, namely the dispensable nature of reasons, *infra petita*, and arbitral rules-cum -practice, demonstrate that the disposition of the prayers for relief is the most significant part of any award. The oft-noted practice, namely that the very first thing counsel does when receiving an award is go to the last page, bears this out. While one might thereafter dwell on the reasoning, ultimately that which is to be paid (or not), and enforced if necessary, is to be found on that key last page. In less subtle terms, if one has to enforce and then execute an award as against the assets of a respondent, the bailiff will not be looking at the reasons, but at the last page for the amount of money ordered. Perhaps this is the starkest example of what arbitration is ultimately all about, the satisfaction of an award; hence the importance of the prayers for relief.

IV Is this not the Same as a National Court?

One might observe that all of this is fairly similar to the manner in which a national court goes about its task in deciding the remedy to give to a party, and therefore one often encounters parties approaching the formulation of claims or prayers for relief, and indeed their “pleadings” or “submissions” or “statements” or “memorials” in a manner which roughly corresponds to the domestic litigation rules in the jurisdiction where their lawyers qualified. This national court influence also can carry through into the conception of parties as to how arbitral proceedings evolve, when evidence is adduced, how it is adduced, and when one makes arguments as to the consequences of such evidence. Specifically, there are legal cultures where the trial (i.e., the evidential hearing) is more important than any other aspect of the case, and that is the occasion when the evidence comes out. Thereafter the court can fashion the legal remedy.

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This is apt to mislead in the context of arbitration. A national court (subject of course to its rules, laws, and inherent powers) has the full original or general jurisdiction accorded to a state court. It can fashion remedies having heard evidence. It has a panoply of powers (e.g., in a constitutional context) which engage a public function. An arbitral tribunal has no such wide-ranging constitutionally-backed powers, and its existence and function have a much more limited lifespan with jurisdiction only insofar as is necessary to undertake its task. Once the award is rendered, and any time period for corrections (and the like) is past, the tribunal is *functus officio*.

An illustration of the general jurisdiction of a national court comes from the English Civil Procedure Rules, Part 16(2)(5) (Part 16 sets the requirements of a statement of case in municipal litigation): “The court may grant any remedy to which the claimant is entitled even if that remedy is not specified in the claim form.”

One might readily ask where such a provision can be found in any set of arbitration rules, or in any arbitration law. Which leads one to an observation made during the presentation of these remarks during the ICCA Congress in Sydney, namely, what does *further or other relief* actually mean in the context of international arbitration? One, of course, sees it in virtually every request, answer, memorial, or submission, but what does it mean? Does it mean anything? Or is it an unwarranted cross-over from municipal litigation?

The *Carnelli* case (3) is historically, and legally, engaging. The arbitration was based on the Treaty of Peace between the United States and Italy involving a claim by a US national for war damage done to her property in Salerno in 1943. The United States requested the Commission to:

- “(a) Decide that the claimant is entitled to receive from the Italian Republic, a sum sufficient at the time of payment to make good the loss suffered, which sum is estimated to be on September 28, 1943, 185,300 lire, subject to the necessary adjustment for variation in value between 1943 and the final date of payment.
- (b) Order that the costs of and incidental to this claim be borne by the Italian Republic.
- (c) Give such further or other relief as may be just and equitable.”

The Commissioners (Scanlan and Sorrentino) dealt with the third request in the following terms (the quotation is long but a rewarding read) at pp. 94-96:

“In the Brief submitted at the conclusion of the case, and the Commission desires to emphasize the manner in which the request was raised for the first time in this case, the Agent of the United States requests a determination by the Commission that the giving of ‘such further or other relief as may be just and equitable’ calls for the payment to the claimant by the Italian Government ‘of an appropriate amount of interest’.

(...)

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The request for interest contained in the Brief presented by the Agent of the United States must fail because the Commission does not believe that the question ● of interest on the claim is before it in the instant case; this is a preliminary question to any consideration of the more general question of the responsibility of the Italian Government for the payment of interest on the claim.

Article 7 (a) of the Rules of Procedure of this Commission adopted and promulgated in Rome on June 29, 1950, by the Representatives of the two Governments provides that proceedings before the Commission shall be initiated by the formal filing of a Petition signed by the Agent of the claiming Government, and *that the Petition must contain:*

...

- (iii) a clear and concise statement of the facts in the case; each material allegation should be set forth in a separate paragraph in so far as possible;
- (iv) a clear and concise statement of the principles of law upon which the dispute is based;
- (v) a complete statement setting forth the purpose of the Petition and the relief requested.

The fifth requisite of Article 7 of the Rules of Procedure is clear and unequivocal. There must be contained in the Petition ‘a complete statement setting forth the purpose of the Petition and the relief requested’.

The Petition presented by the Agent of the United States of America on behalf of the claimant herein was deposited with the joint Secretariat on August 28, 1950, about two months after the promulgation of the Rules of Procedure. The relief requested in the Petition has been set out in full in the Statement of the Case, *supra*. There is no direct or indirect reference to interest in the Petition. The request for ‘such further or other relief as may be just and equitable’

contained in the Petition is not a statement which sets forth that one of the purposes of the Petition is the obtaining of interest on the claim or that one of the measures of relief requested is the granting of interest as part of the award.

Inasmuch as the desire for clearly informing the Italian Government of the nature of the case and the relief requested by the Government of the United States was one of the reasons, if not the principal reason, for the requirement laid down in Article 7 (a) of the Rules of Procedure, including the specific requirement that the Petition shall contain a complete statement setting forth the purposes of the Petition and the relief requested, *the request for 'such further or other relief as may be just and equitable' contained in the Petition submitted in the instant case by no means achieves the purpose of informing the Italian Government of a request for interest.*

That the Italian Government did not infer from the request for 'such further or other relief as may be just and equitable' that the Government of the United States was making a request for interest appears clearly from the Answer and the supplemental Answer submitted by the Agent of the Italian Government. When the Agent of the United States for the first time raised the question of interest in the Brief by specifically requesting that interest be allowed on the claim, the Reply Brief of the Italian Government denies vigorously the responsibility of the Italian Government for interests. *If the Petition had included a clear request for interest, it is probable that the same vigorous denial would have been asserted by the Agent of the Italian Government in his Answer or supplemental Answer to the Petition, and the issue would have been clearly developed by the Agents of the two Governments prior to concluding the formal submission of proof.* In any event, the Agent of the Italian Government denied the responsibility of his Government for the payment of interest as promptly as he could after the Agent of the United States had informed him in the Brief that interest was being requested.

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The Agent of the United States at no time requested this Commission to permit the amending of the Petition in this dispute in order to include an express request for interest. It was not until July 16, 1951, that the Commission issued an Order, as requested by the Agent of the United States, that formal submission of proof had been concluded by the Agents of the two Governments. In that Order a period of time was granted to the Agent of the United States to file a Brief in support of his Petition.

Article 11 of the Rules of Procedure of the Commission, entitled 'Briefs and Oral Arguments', makes it clear that Briefs and oral arguments were not intended to include either amendments or additions to the Petitions, Answers, or any other pleadings. The request for interest contained in the Brief in this case is an addition to the request contained in the Petition and cannot be deemed to have been submitted in accordance with the Rules of Procedure of the Commission. It is, therefore, not a request which can be considered by the Commission.

Although Article 18 of the Rules of Procedure reserves to the Commission the right to deviate from these Rules in individual cases, the Commission is satisfied that the Rules of Procedure are in conformity with justice and equity as required by the express provision of Article 83, paragraph 3, of the Treaty of Peace. Therefore, no reason is perceived in the instant case for any deviation under Article 18 of the Rules from the requirements established in Article 7 (a) of the Rules of Procedure, particularly since there is a lack of any evidence in the record that a request for interest on the claim has ever been raised between the two Governments either as a general question under Article 78 or in this specific case at any time prior to the presentation of the Brief in this case by the Agent of the United States of America." (Emphasis added.)

In relatively short order, the conclusion can be drawn that a tribunal does not have general authority to fashion the reliefs to which it feels a claimant is entitled based on the evidence. Secondly, the expression "further or other relief" is meaningless in the arbitration context, and does not rescue a party which should have included a prayer for relief in respect of a claim it might well have made from the outset had the case been thoroughly investigated. Indeed, one might wonder, based on the foregoing, whether the equally oft-used phrase, "the right to amend or supplement these claims is reserved", has the meaning and effect to allow late-blooming prayers for relief such as that advanced by the United States in the *Carnelli* case.

Recollecting that the tribunal's task is, essentially, to resolve the dispute in a binding manner by the grant, or withholding of the prayers for relief sought by the parties. It does not have the authority to give a party something it did not ask for, or decide something which is not legally "alive" merely because it might have been argued at length. Take the example of a claim for a debt amount against which four different defences are raised. If one of the defences succeeds (e.g., the tribunal prioritizes one of the lines of defence for disposition first by way of a partial final award), then the tribunal no longer has

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jurisdiction over the claim as it has been finally determined. The claimant might well wish to have the other three defences (e.g., if something important for a long-term relationship has arisen) decided, but strictly speaking, the tribunal has no authority to do so as the claim which was before it for decision is now legally “dead” or moot.

In England, for the purposes of Sect. 68(2)(d) of the Arbitration Act 1996 (4) Merkin and Flannery note:

“... an ‘issue’ for the purposes of section 68(2)(d) is one that is of decisive effect on the outcome, and not an incidental or peripheral matter, whose resolution is largely immaterial to the overall result or that falls away in the light of other holdings”. (5)

Thus, there is no duty under English law on the part of a tribunal to render an award on defences (for example) which have become moot.

V Conclusion

If one bears in mind that one of the cornerstones of arbitral proceedings is due process, and there is now an expectation that parties are not taken by surprise in any way whatsoever, combining that expectation with the importance of the prayers for relief as set out above, the conclusion one reaches is as follows. The organization of arbitral proceedings must, from the very beginning, focus on what is essential for the disposition of the prayers for relief advanced by the parties. It is essential for the efficient organization of the case that parties must articulate as fully as is possible their prayers for relief at the outset, and no later than the first memorial. Later additions (or “refinements” – a comforting word which belies what is actually meant often in practice by wholesale changes) only give rise to additional expense and investigations. Time must be taken at the outset so that parties advance the prayers for relief they consider they need to make, but also those which they consider that they can support.

On reflection of the wider topic developed during the ICCA Sydney Congress, the conventional wisdom which attaches now to the organization of arbitral proceedings is that all such organization is directed towards articulating everything in writing in advance of any hearing. It is simply inconceivable that anyone now can be taken by surprise at a hearing. If one considers all of the various guidelines, rules, and so on, the overriding message is that the pre-hearing work, all written, is directed towards making sure that the full case and all evidence is plainly laid out before one gets to a hearing. One does not detect any appetite internationally for that to change so that trial by ambush would become the norm. Thus, if that is a working assumption, namely that the organization of arbitral proceedings should continue to have as its object the clear notification of everything before a hearing, then it becomes all too obvious that the risk of overblown and unmoored proceedings is heightened. If one has the key task of the tribunal in mind from the outset, namely, the granting or withholding of the relief sought, then such risks can be abated insofar as is practically possible. Parties must know this from the outset, and be aware that they must bring forward their prayers for relief in full at the earliest opportunity.

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References

- *) Klaus Reichert SC: Barrister at Brick Court Chambers, London; ICCA Governing Board Member.
- 1) The topic discussed in this paper arises from a number of lectures given, first in November 2017, as the Scholar-in-Residence at the Center for Transnational Litigation, Arbitration, and Commercial Law at New York University School of Law, and then in February 2018 at the International Arbitration Institute of the University of Miami.
- 2) P. GIRAUD, “*La conformité de l'arbitre à sa mission*”, sous la direction de Charles Jarrosson, para. 158).”
- 3) Decision No. 5 of 4 March 1952 of the Italian-United States Conciliation Commission, Vol. XIV, pp. 86-96, *Recueil des Sentences Arbitrales*.
- 4) “Sect. 68.
 - (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
 - (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—....(d) failure by the tribunal to deal with all the issues that were put to it....”

- 5) R. MERKIN and L. FLANNERY, *Arbitration Act 1996*, 5 ed. (Informa Law from Routledge 2014) p. 313.

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Kluwer**Arbitration**

LEGAL AUTHORITY AA-112

Neutral Citation Number: [2019] EWHC 430 (Comm)

Claim No. CL-2017-000548

Claim No. CL-2017-000480

**IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)**

IN THE MATTER OF AN ARBITRATION CLAIM

BETWEEN:

ALI ALLAWI

Claimant

-and-

THE ISLAMIC REPUBLIC OF PAKISTAN

Defendant

HEARING ON 15 FEBRUARY 2019 OF:

- 1. Claim No. CL-2017-000480 – Claimant's
Application to set aside Order of Mr Justice
Males dated 1 August 2017**
 - 2. Claim No. CL-2017-000548 – Claimant's
Application for an extension of time to bring a
claim under section 68 Arbitration 1996**
 - 3. Claim No. CL-2017-000548 – Defendant's
Application for security for costs**
-

JERN-FEI NG QC, OWEN LLOYD (Instructed by **Withers LLP**) appeared on behalf
of the Claimant

JOE SMOUHA QC, IAIN QUIRK (Instructed by **Allen & Overy LLP**) appeared on
behalf of the Defendant

Friday, 15 February 2019

(10.30 am)

APPROVED JUDGMENT

MRS JUSTICE CARR:

Introduction

1. There are three applications listed before me as follows:
 - a) the application by the Claimant ("Mr Allawi") for an extension of time to challenge the award ("the Allawi award") in PCA case number 2012/23 ("the Allawi arbitration"), pursuant to section 68 of the Arbitration Act 1996 ("the Act"), ("the extension application");
 - b) Mr Allawi's application to set aside the order of Males J (as then was) dated 31 August 2017 ("the enforcement order"), by which the Defendant ("Pakistan") was granted permission *ex parte* to enforce the Allawi award ("the set aside application");
 - c) (only if Mr Allawi's application on the extension application is granted), Pakistan's application for security for its costs of the section 68 challenge. Mr Allawi has consented in principle to security for future costs in respect of the hearing of the section 68 challenge on its merits but contests the quantum being sought by Pakistan as disproportionate.
2. The basis of the extension application is Mr Allawi's contention that he had been

categorically assured at a meeting at the Goring Hotel in London on 22 September 2016 ("the Goring Hotel meeting") by Mr Shahid Khaqan Abbasi ("Mr Abbasi"), then Pakistan's Minister of Petroleum and Natural Resources, that the Allawi award pursuant to which costs were awarded to Pakistan against Mr Allawi would not be enforced against him. Mr Allawi submits that he acted reasonably in not bringing a section 68 challenge in reliance on that assurance. He acted promptly upon enforcement being pursued in making the extension and set aside applications as soon as he was served with the enforcement order. Pakistan should have but failed to disclose the Goring Hotel meeting and subsequent correspondence referring to the meeting when making the application to Males J. It was clearly a material fact. The enforcement order should consequently be set aside for breach of Pakistan's duty of full and frank disclosure.

3. The arbitral tribunal ("the Tribunal") awarded costs against Mr Allawi in the sum of £2,741,679.03 and €285,241.38, approximately some £3 million sterling in total, together with compound interest with quarterly rests. Mr Allawi says that he simply cannot afford to pay this sum and would be forced into bankruptcy were he obliged to do so. He will suffer substantial and irreparable prejudice if he is not allowed to challenge the Allawi award. By contrast, Pakistan will not suffer any irreparable prejudice if the extension and set aside applications are granted and the section 68 challenge is allowed to proceed to a hearing on its merits. The only prejudice Pakistan will suffer is one of delay, but Pakistan can hardly be heard to complain about this given that it waited for seven months before applying to enforce the Allawi award. Any prejudice Pakistan might suffer were the extension

to be granted is capable of being remedied by an award of interest.

4. Pakistan resists the application. No assurances as alleged were given at the Goring Hotel meeting and in any event in the light of later exchanges in September 2016 and further communications involving Mr Allawi up to 20 December 2016, when a first extension of time to seek to challenge the Allawi award expired, any reliance on any assurances at the Goring Hotel meeting cannot be said to be reasonable. This is a second application for an extension by Mr Allawi. The delay in question is extensive. There would be prejudice to Pakistan. The merits of the section 68 challenge are hopeless.

5. I acceded to an application by Mr Allawi for cross-examination of the relevant witnesses to the meeting on 22 September 2016 and so heard evidence from Mr Allawi and Mr Abbasi, who were the only attendees at the Goring Hotel meeting, and also Ms Ummekulsum Imam, (“Ms Imam”), an intermediary and friend of both men who facilitated the meeting. Although much of the hearing day was occupied by their evidence, the factual dispute needs to be seen in its proper context. It is only a part, albeit an important part, in an evaluation of the merits of an extension application and in particular the reasonableness of the delay in question.

6. The parties devoted their attention essentially to the merits of the extension application. Mr Allawi accepts that without success on the extension application the Allawi award falls to be enforced against him, but he would nevertheless wish

to challenge the enforcement order, even if the extension application fails on the basis of a lack of full and frank disclosure by Pakistan. Pakistan accepts that the enforcement order falls to be set aside if the extension application succeeds. The security for costs application will be relevant only if the extension and set aside applications succeed. Likewise, this judgment is limited to the extension application. Further submissions can follow as necessary.

Background: the Allawi arbitration and Allawi award

7. Mr Allawi is a distinguished academic, a former Iraqi government minister and author, he is a UK/Iraqi dual national, primarily resident in Baghdad, his main business interests for the past 20 years have been his investment in Progas Pakistan Limited ("PPL"), a company in the liquid petroleum gas ("LPG") sector in Pakistan.
8. PPL constructed a large import terminal for LPG at Port Qasim, Karachi, Pakistan ("the terminal"). PPL became insolvent following regulatory changes in Pakistan capping LPG prices. The terminal was then acquired by Sui Southern Gas Company Limited ("SSGC"). Pakistan is a 70 % majority shareholder in SSGC.
9. On 4 April 2012 Mr Allawi brought the Allawi arbitration against Pakistan pursuant to the UK-Pakistan bilateral investment treaty ("the BIT"). At the time of the Allawi arbitration, Mr Allawi indirectly held 9.689 % of the shares in PPL. The arbitration was seated in London and conducted pursuant to the 2010 UNCITRAL

Rules (“the UNICITRAL Rules”). Part of Mr Allawi's case was that the regulatory changes and the subsequent acquisition of the terminal by SSGC amounted to a breach of Article 2(2) of the BIT (“Article 2(2)”) in relation to fair and equitable treatment, full protection and security, unreasonable or discriminatory measures or the duty to observe obligations entered into with regard to investments of nationals of the other contracting party. Mr Allawi also alleged breach of Article 3 of the BIT with respect to the national treatment standard.

10. Progas Energy Limited, Progas Holdings Limited and Sheffield Engineering Company Limited (together "the Progas claimants") had already brought similar arbitral proceedings against Pakistan ("the Progas arbitration") on 23 December 2011. By consent the Progas arbitration was brought before the same tribunal and heard alongside the Allawi arbitration (collectively referred to as "the arbitrations").
11. On 30 August 2016 the tribunal published the Allawi award and the Progas award. In the Allawi award the tribunal found in favour of Mr Allawi on jurisdiction but dismissed his claim on the merits. The tribunal held that Mr Allawi had not established causation of legally relevant damage for the purposes of the BIT. The tribunal found it unnecessary to determine whether Pakistan had breached its obligations under article 2(2) of the BIT (“the Article 2(2) breach issue”). At paragraph 715 of the award the tribunal said:

“In light of the tribunal’s conclusions with respect to causation set out above, the tribunal considers it unnecessary to address the claimant’s claims under

article 2 of the treaty in relation to fair and equitable treatment, full protection and security, unreasonable or discriminatory measures or the duty to observe obligations entered into with regard to investments of nationals or companies of the other contracting party.”

12. The tribunal ruled that Pakistan was entitled to all of its costs. There was an error in computation by the tribunal of that calculation, an error pursued by Pakistan resulting in a correction to the Allawi award on 7 November 2016 with Mr Allawi's liability for costs being increased to the sums previously identified.

The section 68 challenge

13. Mr Allawi seeks to bring a challenge under section 68 of the Act based on the tribunal's refusal to decide the Article 2(2) breach issue. The question is whether the tribunal's failure to deal with an issue put to it amounts to a serious irregularity within the meaning of section 68(2)(d) of the Act which has caused substantial injustice to Mr Allawi.
14. As indicated above, the tribunal found against Mr Allawi on the issue of causation and ordered costs against Mr Allawi on the basis that he had been "*totally unsuccessful*" in his claims on the merits. The tribunal stated that it "*can see no reason why*" Mr Allawi should not bear the costs of the arbitration. Mr Allawi's position is that if he had prevailed on the Article 2(2) breach issue then he would have been partially successful and not "*totally*" unsuccessful.
15. This directly addresses the tribunal's reasoning in the Allawi award and makes it possible, submits Mr Allawi, that the tribunal would have reached a different decision on costs. Specifically the costs allocation could have been affected in two

ways.

16. First, the number of issues in which the parties were each successful would have been different. Secondly, given the nature of the Article 2(2) breach issue, Mr Allawi would have been in a much better position to receive a favourable allocation in respect of costs. Had Mr Allawi succeeded it would have meant he had a bona fide reason to have commenced arbitration and thus should not have been penalised for commencing unsuccessful proceedings by way of costs. An adverse costs order against a claimant would be inappropriate as it would not give effect to the object and purpose of BITs, namely to ensure that states which have voluntarily submitted their governmental actions to oversight in exchange for an inflow of investments are accountable according to international standards.
17. Thus, submits Mr Allawi, there are two reasons, whether cumulatively or alternatively, that provide a sufficient basis for contending that the tribunal might well have looked past the starting position that costs follow the event under Article 42(1) of the UNCITRAL Rules.
18. It was common ground between the parties in their costs submissions that success is a relative concept. Reliance is placed by Mr Allawi, through Mr Ng QC on his behalf, on a trilogy of cases: *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, 24 July 2008, an arbitration commenced under the ICSID convention; *Lauder v Czech Republic*, 3 September 2001, an arbitration under the UNCITRAL Rules; and *Hesham Talaat M Al-Warraq v The Republic of Indonesia*,

15 December 2014, another arbitration under the UNCITRAL Rules.

Extension and set aside applications

19. As indicated, the basis of Mr Allawi's application is that he had been categorically assured at a meeting at the Goring Hotel in London on 22 September 2016 by Mr Abbasi that the Allawi costs award would not be enforced against him. There is a helpfully agreed chronology. In summary these are the main events.

20. On 30 August 2016, the awards in both the arbitrations were published. On 1 September 2016, Mr Abbasi gave a press release recording the dismissal of the case against Pakistan which was reported in the Express Tribune. The report stated that Progas had filed two claims against the government of Pakistan. Mr Abbasi was reported as saying that Mr Allawi had filed a damages claim of \$70 million and other claims amounting to \$503 million had been filed by Progas. Further, Mr Abbasi was said to have revealed that the court also ordered the petitioners to pay \$11 million to Pakistan to cover the expenses it had incurred during the proceedings.

21. On 11 September 2016 Mr Allawi met Ms Imam at a cafe in London. Between 20 and 22 September 2016, Ms Imam arranged a meeting between Mr Allawi and Mr Abbasi. On 20 September 2016 she emailed Mr Allawi with a subject title "*Minister in town*":

"I returned to London for a couple of days because Shahid Abbasi sb is in town. He may be available to meet either this evening or tomorrow.

I strongly suggest you see him. I think it can only potentially help and not hinder your cause/case. Please let me know if you will be available at short notice."

22. Mr Allawi replied the same day thanking Ms Imam:

"... irrespective of the outcome I am greatly appreciative of your good offices to mediation."

She replied:

"... I have great respect for you and your work. All I am doing is introducing two friends to each other ... not much effort. Shahid SB will probably be back in town Thursday. I think it may be better for the two of you to speak bilaterally, please let me know if that is okay."

23. At around 2.00 pm on 22 September 2016, Ms Imam texted Mr Allawi saying that Mr Abbasi was available to meet at 8.00 pm that evening. Mr Allawi responded by text: that was fine, and he asked where Mr Abbasi was staying.

24. Thus it was that later that evening at around 8.00 pm for 55 minutes Mr Allawi and Mr Abbasi met at the Goring Hotel. The contents of that meeting are, as already indicated, in dispute.

25. Later that evening at around 10.00 pm Mr Allawi sent a WhatsApp message to Ms Imam stating that he had had "*an excellent meeting*" with Mr Abbasi, continuing "*inshallah, the issue will be put to rest*". Ms Imam also stated that later that evening Mr Abbasi telephoned her from the airport. It was very unusual for him to call her by telephone. He stated that he just wanted to say that he had had a meeting with Mr Allawi. According to Ms Imam he said to her:

"Please ask Mr Allawi not to forego his legal rights."

26. At around 9.30 am the next day, 23 September 2016, Mr Allawi typed up a note ("the Goring note"). It started with a section headed "*Background*" and moved on to a section headed "*Meeting*". After a lengthy section it read:

*"He then stated categorically that he had given instructions to his team (lawyers?) not to pursue the enforcement case against myself. But to proceed only against the Progas group of companies. In fact he stated that he had said as much in his press briefing when the award was made, when he had stated that adverse costs awarded of \$11 million were made against Progas while pointedly not mentioning the adverse costs awarded against myself. **Abbasi reassured me that I should not be concerned at all that the adverse costs award against me would be pursued or enforced.** He reiterated during the conversation that he saw no practical purpose in enforcing the adverse costs award against myself. He said that he saw no point or gain to be made if I was pushed into bankruptcy but I believe he was also motivated by the peculiar outcome of the tribunal's adverse costs award and perhaps that the judgment may not have been fair to me ... after discussing the situation in Iraq and general areas where Pakistan and Iraq could cooperate in the future I rose to leave around 8.55. **In parting, Abbasi reiterated once again what he had said. There will be no enforcement of the adverse costs award against me and that he has so instructed his people and I should not concern myself regarding this matter.**"*

(Emphases added)

27. At around 10.30 am that day, Mr Allawi also spoke to Ms Imam by telephone twice. He said that he furnished her with detail of the assurances. She agreed that they had spoken but did not recall what he had said.
28. On 27 September 2016, at around 8.15 am in the morning, Mr Allawi emailed Ms Imam in the following terms:

"Following my talk with Shahid Abbasi last week, and the assurances that he gave me that he will not enforce the adverse costs awarded against me, I have taken an irrevocable measure not to pursue my right to challenge and appeal the tribunal's decision at the High Court in London. I have a right to

do so until today. This will give Pakistan an unchallenged award against me. I have done this because I trusted his representations. If you find it appropriate to relay this matter to him, then please feel free to do so. Personally I think he should know that I acted entirely on the basis of our discussions at the Goring Hotel. I appreciated his candour and I believed his remarks. By following this route of foregoing my right of appeal the two arbitral cases are entirely separate, my case has effectively ended, the arbitral award against me is now unchallenged by me and the matter rests with the good offices of the minister and the government. I am sure inshallah that I have made the right decision."

29. Ms Imam responded:

"Conveyed your thoughts. The feedback is please don't forego your legal right, he will try to ensure only the company and not you personally are pursued."

30. Mr Allawi responded shortly after 3.20 pm:

"Can you please elaborate on this? Is he asking me to pursue the appeal?"

31. Ms Imam responded:

"Yes, his message says: Mr Allawi should not forego his legal right to appeal."

32. Just after 4.00 pm Mr Allawi thanked Ms Imam for "*this very timely report*". It was timely because on that day, the last date before time would otherwise expire, the Progas claimants were applying to the Commercial Court for an extension of time. That application was made on the express basis that it would enable both a challenge of the awards under section 68 and section 69 of the Act. It was made on a protective basis as time to appeal or challenge the awards would run out before the tribunal had considered what was to be an application for an additional award. Flaux J (as then was) granted the application, extending time to 20 December 2016.

33. In the event, Mr Allawi too joined that application and also the application for

an additional award. During the course of his evidence, I asked Mr Allawi the timing of his instruction to join the application to extend time, without wishing to breach any legal privilege. He could not recall the timing precisely. Mr Ng however indicated that the instruction was given at 3.56 pm on 27 September 2016. After the hearing, Mr Allawi's lawyers provided a heavily redacted chain of email communications to confirm the above. It appears from that chain that as, at 25 and 26 September 2016, Mr Allawi's position was that he would not be joining any appeal as *"he was fully engaged in managing the adverse cost award against him personally; this is of highest priority for him and he does not believe exposing himself to any further costs is wise or desirable"*. He was clear that he *"would take his chances with the Pakistan side trying to enforce the award against him"*. Mr Allawi confirmed his instruction not to enter an application at 8.33 am on 27 September. However, at 3.56 pm, and so after the feedback from Mr Abbasi via Ms Imam not to forego his right to appeal, he emailed to say that he had now agreed to reverse his earlier decision and formally requested that his lawyers file an appeal and challenge on his behalf together with the Progas claimants.

34. Mr Smouha QC for Pakistan identifies that the procedural position is unsatisfactory. Concerns are raised over the completeness of the review exercise carried out by Mr Allawi's lawyers, waiver of privilege and the extent of redaction. Mr Allawi would have been cross-examined on the communications, albeit that a request to recall Mr Allawi is expressly not pursued.
35. As indicated, Mr Allawi also joined the Progas claimants in applying to the tribunal

for an additional award pursuant to UNCITRAL Rule 39, alleging that the tribunal had failed to deal with the lawfulness of Pakistan's actions.

36. On 28 September 2016, Pakistan requested a correction of the Allawi award pursuant to article 38 of the UNCITRAL Rules, increasing the amount of costs to be ordered against Mr Allawi. The tribunal acceded to this request in a correction which it published on 7 November 2016.
37. On 15 November 2016 the tribunal dismissed the application by the Progas claimants and Mr Allawi for an additional award.
38. A week later, on 23 November 2016, Allen & Overy LLP (“Allen & Overy”), acting for Pakistan, wrote to Quinn Emanuel LLP (“Quinn Emanuel”), Mr Allawi’s former lawyers, copied to other lawyers for Mr Allawi, requesting payment of the costs awarded to Pakistan forthwith and seeking the destruction or return of confidential information. The letter stated in terms:

“For the avoidance of doubt, if payment is not made forthwith, the respondent will pursue all available remedies for enforcement (through the appropriate court(s).”

39. Mr Allawi responded directly on 3 December 2016 acknowledging receipt of this letter. He stated that Quinn Emanuel no longer acted for him and went on:

"I am unable to pay costs in this matter, I did not take out nor do I hold any form of adverse costs insurance. Please note that I live in Iraq and address any further communication to my attention personally at my email address above."

40. On 27 February 2017, Mr Allawi emailed Ms Imam:

" ... on a more personal level I am grateful that minister Shahid Abbasi has been faithful to his representations. I for my part have desisted from joining with others in a formal appeal against the ruling. I would like to thank you again for your vital efforts in arranging the meeting that brought us together."

41. On 27 July 2017, Pakistan applied for permission to enforce the Allawi award pursuant to section 66 of the Act. Males J (as he then was) granted that application on 1 August 2017.

42. The enforcement order was served on Mr Allawi on 16 August 2017. On the same day, Mr Allawi wrote to Mr Abbasi, who by now had just been elected Prime Minister of Pakistan, as follows:

"... if you recall, during our meeting on 22 September 2016, at the Goring Hotel in London, you affirmed that the government of Pakistan would not pursue the adverse costs awarded against me in the Progas arbitration case. You further explained that this decision was the reason I was not named in your press release on costs in this matter. In reliance on your assurance I did not pursue the appeal against the arbitration tribunal's decision alongside the other claims. Almost a year has since passed, during which time no action for enforcement has been taken against me and the spirit of our discussion has at all times been maintained which substantiated the outcome of our meeting. This morning however while I was on vacation in London I was served with a UK court order filed by Allen & Overy on behalf of Pakistan to enforce the adverse costs claim against me. I cannot understand what has prompted this move as it runs directly against your assurance and the spirit of our discussions ... I would in the circumstances request you to take suitable steps to uphold your assurances which have at all times been upheld until their recent and regrettable development. I of course have no means for meeting the adverse costs demand which I believe to be grossly unfair ... I therefore request respectfully that this matter is reconsidered in the spirit of our discussions in London last year."

43. On 17 August 2017, Ms Imam texted Mr Allawi as follows:

" ... got a msg saying he received your letter & doesn't know how it started, he will look into it."

44. Mr Allawi wrote to Mr Abbasi in similar vein on 20 and 25 August 2017, referring to Mr Abbasi's assurances and seeking an amicable and consensual resolution. He received no response, chasing through Ms Imam.

45. On 25 August 2017, Mr Allawi's solicitors wrote formally to Allen & Overy referring to "*a clear violation of the agreement*" reached between Mr Allawi and Mr Abbasi. Allen & Overy responded on 5 September 2017 denying that any assurances had been given. On 6 September 2017, Mr Allawi issued the current extension of time application.

Extension application: the law

46. Mr Allawi seeks an extension of time pursuant to CPR rule 62.9 to the time fixed by section 70(3) of the Act to bring a section 68 challenge. The relevant principles on such an application were helpfully summarised by Popplewell J in *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 Lloyd's Reports ("Terna"), at [27] to [34] as follows:
 - a) the length of delay;
 - b) whether the party who permitted the time limit to expire and was subsequently delayed did so reasonably in the circumstances;
 - c) whether the respondent to the application caused or contributed to the delay;
 - d) whether the respondent would by reason of the delay suffer irreparable prejudice in addition to the mere loss of time if the application were to proceed;

- e) whether the arbitration has continued during the period of the delay;
- f) the strength of the application
- g) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

47. These principles were drawn from a series of authorities which included *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, [2003] 2 CLC 1 which (at [39]) appears to be the source of the further comment in *Terna* (at paragraph 27(iii)) that the first three factors identified above are the “*primary factors*”. In *Naviera* at [39] Mance LJ (as then was) had commented that Andrew Smith J had had well in mind in that case as “*primary factors*” the first three factors. For my part I do not read that judgment as authority for the proposition that the first three factors are necessarily of more significance than any others. What weight each factor is to be attributed will depend on the facts of each case. All factors are relevant for consideration.

48. I turn then to the first factor. On any view the delay is extremely lengthy. The normally permitted time for challenge is 28 days. Mr Allawi’s present application was made a year from expiry of the normal time limit and over eight months from the extension granted by Mr Justice Flaux. Section 1(a) of the Act provides that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. As Popplewell J emphasised in *Terna* at [27(i)]:

“Section 70(3) of the Act requires challenges to an award under section 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act and which is enshrined in section 1(a). The party seeking an extension must therefore show that the

interests of justice require an exceptional departure from the timetable laid down by the Act, any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act.”

49. At [28] Popplewell J confirmed that the length of delay is to be judged against the yardstick of 28 days; thus a delay measured even in days is significant. A delay measured in many weeks or in months is substantial (see also *Daewoo Shipbuilding & Marine Engineering Company Limited v Songa Offshore Equinox Limited and another* [2018] EWHC 548 (Comm) at [78]).

50. Additional features here beyond the period in question include the ease with which Mr Allawi could have pursued a challenge - simply by remaining joined with the Progas claimants - and his full awareness of the relevant time limits and the importance of compliance with those time limits.

51. The fact that Pakistan did not take steps to enforce for seven months is nothing to the point. There is no fixed time period within which an award creditor must apply to enforce. For Mr Allawi it was suggested that the timing could be explained by a change of personnel within the Pakistani government at relevant ministerial level leading to a change of heart away from Mr Abbasi, who would have been aware of the assurances given to Mr Allawi in September. There is no evidential basis for this sort of inference. Pakistan pointed to the ongoing challenge by the Progas claimants during this period. The date of Pakistan's application to enforce, 27 July 2017, was the same date as that on which Pakistan issued its application for summary dismissal of the Progas claimants' challenge under section 68 of the Act on the basis that it stood no real prospect of success.

52. It is not appropriate to speculate on reasons for the timing of Pakistan's application to enforce against Mr Allawi. None of it affects in any way the onus on a party who wishes to challenge to challenge in time.
53. I turn then to the second factor. On the facts, the question is the extent to which Mr Allawi acted reasonably in not joining the Progas claimants' section 68 challenge on 20 December 2016, being the last day prior to expiry of the applicable time limit. The test of reasonableness is an objective one to be applied to the facts and circumstances as I find them to be.
54. This brings into play the factual dispute between the parties and specifically the dispute as to what was said at the meeting in the Goring Hotel in the evening of 22 September 2016. There is little common ground between the parties on this meeting, except its date and timing.
55. I make the following broad findings of fact sufficient for the purpose of this application. It is not necessary for me to resolve every disputed fact that has been raised.
56. As is often the case, the truth lies somewhere between the parties' competing version of events. Although the witnesses' reliability has been called into question, no one has suggested that any of the witnesses have been deliberately untruthful in any way. There are simply genuine differences of recollection or interpretation.

Mr Allawi was a well-prepared witness ready to argue his case. He appeared nervous, which is how Ms Imam also described him at their meeting on 11 September 2016 and understandably anxious. Mr Abbasi was a calm and composed witness. Ms Imam was also composed, though clearly somewhat uncomfortable with the position in which she found herself, placed in between two men, both of whom she regards as a friend. She repeated her respect for Mr Allawi on several occasions.

57. As for the purpose of the meeting, certainly Mr Allawi's anxious purpose was to discuss the award with Mr Abbasi. Given the timing of the meeting so soon after the award and the fact that Mr Abbasi knew that Mr Allawi really wanted to see him during his short visit to England, I find it unlikely that Mr Abbasi thought that the meeting was just to discuss Mr Allawi's "*writings and speeches in particular on Shia/Sunni and Pakistani/Iraq relations*". Mr Abbasi knew about the Allawi award, albeit at a high level of generality only, as evidenced by the press release. He knew from Ms Imam that Mr Allawi really wanted to see him. (I should add that whilst Mr Allawi sought to portray Mr Abbasi as having an in depth knowledge of the arbitration proceedings, for example from his attendances at the arbitral proceedings, I do not accept that Mr Abbasi did have such knowledge. In fact Mr Abbasi had only attended once to support the former Prime Minister for a partial day whilst the latter was giving evidence.)
58. Thus I find that Mr Abbasi understood that the purpose of the meeting at least might be to touch on the Allawi award. He did not however have any cause to

anticipate that he might be called upon to make any sort of firm assurance or guarantee to Mr Allawi in relation to the Allawi award at this meeting or to prepare for such an eventuality. He only had a few hours' notice of meeting. Ms Imam was quite clear that she did not go into any details, either with Mr Allawi or with Mr Abbasi, in advance of meeting. It was not her place. She did not think that she would have told Mr Abbasi, even in gist, that the meeting was to relate to Mr Allawi's costs liability under the Allawi award. She would typically only text Mr Abbasi and communications were generally very brief. She had spoken to Mr Abbasi about Mr Allawi in the past in general terms. She did not think that anything of any substance was said by her to Mr Abbasi in advance. She probably just said that Mr Allawi really wanted to see Mr Abbasi, would Mr Abbasi have time?

59. It is common ground that the Allawi award was discussed at the meeting. Mr Abbasi denies that the question of settlement was discussed. I find it, however, likely that Mr Allawi did raise the question of possible settlement, building on his idea of charitable contribution to the health sector. This was something that had been clearly on his mind, as evidenced by his discussion with Ms Imam on 11 September 2016. It was part of his plan.
60. However, on the critical question of fact, and despite the able submissions of Mr Ng to the contrary, I find it unlikely that Mr Abbasi expressly and unequivocally assured Mr Allawi at this meeting that the Allawi award would not be enforced by Pakistan against Mr Allawi. I find that he did not. Even if he knew

that the Allawi award might be discussed, it is difficult to imagine that Mr Abbasi viewed himself as having authority on the spot effectively to make such an unequivocal and important assurance, something which he said would have required cabinet approval. On any view, the costs award against Mr Allawi was for a substantial amount of money. No one appears to have believed that the Progas claimants were going to be good for any recovery. Mr Ng suggested that the motivation may have been Mr Allawi's political influence with Iraq, which could have benefited Pakistan. But this was speculation. This was the first time that Mr Abbasi had ever met Mr Allawi and then only in a short meeting which covered a large number of areas, including Mr Allawi relating the history of the Progas project and his involvement.

61. Equally and relatedly, it is most unlikely that Mr Abbasi told Mr Allawi at the meeting that he had already instructed his team not to pursue enforcement against Mr Allawi, given how recent the award was and the limitations of Mr Abbasi's knowledge. Again, I find that he did not and that no such instruction had been given, either then or before the press release of 1 September 2016. It is wholly inconsistent with what happened later that month and subsequently. In particular I have in mind Pakistan's letter of 28 September 2016 asking the tribunal to correct the costs award against Mr Allawi by increasing it. There is no suggestion that Mr Allawi was unaware of this step. Whilst Mr Allawi's evidence was that the advice given to him on 27 September 2016 not to forego his legal rights was just a "belt and braces approach" by Mr Abbasi/Pakistan, that can hardly be said of the step of aggression taken by Pakistan on the cost award the next day.

62. Mr Allawi's evidence and his note of the meeting states that Mr Abbasi went on to say that this was why the press release, of which Mr Allawi was no doubt aware at the time, had referred only to the costs award of \$11 million which on the figures did not include the costs award against Mr Allawi. On this thesis, Pakistan would have had to decide within 24 hours or so of the publication of the award that it would unequivocally not enforce against Mr Allawi. Again this seems unlikely. Mr Abbasi would also have had to be aware of this line of reasoning by the time of meeting. I do not accept that Mr Abbasi was so intimately involved either in terms of the content of the press release, which he said was a statement of the type routinely handed out to the minister to be read in public and prepared by the permanent secretary to the government, or the Allawi award. Moreover, the press release itself does not reveal that the \$11 million figure excludes the costs award against Mr Allawi. On the contrary, it states that that was the figure ordered against "the petitioners" all together. Mr Abbasi said that he did not see the full Allawi award itself until the day of the hearing before me.

63. I find it more likely that, as Mr Abbasi said, no promises were made but that he did say that he would see what if anything he could do for Mr Allawi but he could not make any promises. This finding is consistent with Mr Abbasi on a very general level being sympathetic to Mr Allawi. Moreover and importantly, Mr Allawi confirmed in his evidence that he would construe a statement to that effect as being consistent with the categorical assurance that he says he received. Thus he viewed Ms Imam's message to him on 27 September that Mr Abbasi "*will try to ensure*

only the company and not you personally are pursued" as consistent with the agreement. It was put to him that this was very different from a promise but he said not; if he had thought otherwise he would have responded. For him it was a further confirmation.

64. Mr Allawi therefore appears to have interpreted Mr Abbasi's words incorrectly as a categorical assurance. If he did so, it was unreasonable.
65. In reaching these conclusions I have of course considered carefully the Goring note on which Mr Ng for Mr Allawi places heavy reliance. He submits that it is the only virtually contemporaneous written record of the meeting. It is of course an important document (see for example *Terry v Watchstone Limited* [2018] EWHC 3082 at [51] to [53]).
66. However, the Goring note is a self-serving and highly subjective document. It is certainly not an attendance note in traditional style. There are some odd inaccuracies, for example recording Mr Abbasi saying to Mr Allawi that Mr Abbasi had sought out a meeting with Mr Allawi after the Allawi award. It is littered with Mr Allawi's interpretations, for example as to what to make of Mr Abbasi's silence and body language, alongside statements of belief, for example that Mr Abbasi "*strongly implied*" that the award against Mr Allawi was unfair or incorrect. Mr Ng makes the fair point that where the note records the assurances said to have been made by Mr Abbasi however it does so as a matter of "hard" fact. But those "hard" statements reflect Mr Allawi's interpretation of what was said, an interpretation that

will have been influenced by his “soft” conclusions elsewhere as to Mr Abbasi's beliefs and the inferences he chose to draw.

67. Moreover, the Goring note is not the only document. There are recorded communications around the meeting, both before and after, from which inferences may legitimately be drawn. Those communications do not undermine but rather are consistent with or support my conclusions.

68. Mr Allawi informed Ms Imam almost immediately after the meeting that it had been an “*excellent*” meeting but it had been an excellent meeting for Mr Allawi who had gained support from Mr Abbasi.

69. Mr Abbasi's call to Ms Imam on 22 September after the meeting is consistent with the concern on Mr Abbasi's part that Mr Allawi might be reading too much into Mr Abbasi's indication that he would see what he could do to help Mr Allawi. It is powerful evidence of Mr Abbasi's good faith and concern for Mr Allawi. It also demonstrates that Mr Abbasi knew on the critical day for present purposes that he could not guarantee any result for Mr Allawi. Absent bad faith, which is not alleged, this points strongly against the giving by Mr Abbasi of any absolute guarantees.

70. I consider next the first email of 27 September 2016 from Mr Allawi. Mr Ng says this is effectively another contemporaneous note of the meeting. I disagree. It is a curious message - certainly it was not correct to the extent that it indicated that

Mr Allawi had taken an irrevocable decision. He knew that he had not, which is exactly why he was writing just before the deadline on 27 September 2016. He was seeking to create some sort of documentary record, but did not succeed in doing so. The mere fact of the message reveals a degree of uncertainty and doubt at least in Mr Allawi's own mind as to his position.

71. I do not lay any significance on Mr Abbasi's failure to respond directly in terms to that message contradicting the allegations of assurances. First, the communications were being conducted through Ms Imam and so carry a layer of communicative complication in terms of transmission. These were also not formal communications between lawyers. Secondly, Mr Abbasi's response was effectively one of denial. The advice not to forego his legal rights demonstrated that Mr Allawi's position was not guaranteed. Moreover a correction was advanced: Mr Abbasi would try to ensure that Mr Allawi was not pursued personally.
72. Further uncertainty is revealed in Mr Allawi's position after 22 September and up to 27 September. He told his lawyers that he was "*fully engaged in managing*" the adverse costs award and that he would "*take his chances*". This is inconsistent with any agreement with Mr Abbasi that Pakistan would not enforce against him, of which Mr Allawi also does not appear to have informed his lawyers. It is consistent with Mr Abbasi informing Mr Allawi that he would see what he could do to help him.
73. When Mr Allawi was told not to forego his legal rights, Mr Allawi did not respond

with an exclamation of surprise or even outrage, indicating that such a step could hardly be necessary in the light of the agreement reached with Mr Abbasi at the meeting on 22 September.

74. I have already referred to Pakistan's request to the tribunal of 28 September 2016. As already indicated, this is inconsistent with any decision having been taken by Pakistan not to pursue Mr Allawi and inconsistent with any assurance to the contrary having been given by Mr Abbasi.
75. The enforcement letter from Allen & Overy of 23 November 2016 is also consistent with my findings. Mr Allawi said that he saw this just as a paper exercise to close the file. That begs the question why he chose to reply at all as he did, taking care to identify his correct address for any further communications. He did not in the face of the clear threat of litigation refer to any binding commitment on the part of Pakistan not to enforce; it would have been the obvious time to do so.
76. The statement in Mr Allawi's email of 27 February 2017 to Ms Imam that Mr Abbasi had been faithful to his representations does not of course specify the representations in question. The lack of enforcement steps to date was consistent as well with Mr Abbasi having stated that he would simply try to see what he could do to help Mr Allawi. In any event, insofar as Mr Allawi's references were references to unequivocal assurances by Mr Abbasi, they rested on Mr Allawi's original misinterpretation.

77. I do not consider Mr Abbasi's response to Mr Allawi's letter of 16 August 2017 to be inconsistent with my findings either. Again, the response was conveyed through a text message from Ms Imam and was very brief. His response that he would look into the enforcement proceedings is wholly consistent with Mr Abbasi saying that he would see what he could do to help Mr Allawi. Mr Abbasi was newly elected, and not engaging with the detail of the letter.
78. For all these reasons I find that Mr Abbasi did not give any unequivocal assurance as alleged by Mr Allawi at the meeting on 22 September 2016. But even if he had been given such assurances, there are material developments thereafter and up to 20 December 2016 to consider.
79. In considering the reasonableness of Mr Allawi's failure to progress his challenge in time at the end of December 2016, I bear in mind the earlier context as set out above and assume for present purposes against my findings that Mr Abbasi had given oral assurances as alleged. I nevertheless would conclude that it was not reasonable for Mr Allawi to drop his challenge as he did. On any view, by the end of the year Mr Allawi knew that his position was at risk and he was not guaranteed anything. He had been told explicitly not to forego his legal rights. He then joined the Progas claimants in seeking an extension of time. There was Pakistan's request of 28 September, the tribunal's resulting correction and finally the 23 November 2016 letter from Allen & Overy.
80. Mr Allawi states that he did not understand the advice not to forego his legal right

to be contradicting the assurance he had been given at the Goring Hotel meeting. He said he understood it to be no more than a belt and braces approach of ensuring that he would not have to pay the \$3 million in costs awarded against him. This is a little difficult to understand but even if true does not explain away Pakistan's request of 28 September or Allen & Overy's letter of 23 November. Mr Allawi's response to that letter is not consistent with a belief that it was just a formal letter containing no genuine expressions of intent and if he did genuinely hold the belief that there was no real threat of enforcement proceeding because of that letter, then that simply was not a reasonable position to take, even after making all due allowances for context. Having seen that it was necessary or at least desirable for him to seek the extension of time in September, there was no good reason for him then abandoning that protection in December. There is no reasonable basis for a change of position. The position is *a fortiori* even stronger if no assurances were made in the first place.

81. In summary, in my judgment Mr Allawi did not act reasonably in permitting the time limit to expire in December 2016.
82. In the light of these findings, turning to the third factor, it cannot be said that Pakistan through its relevant minister Mr Abbasi materially caused or contributed to the delay in question.
83. As for the fourth factor, Mr Allawi submitted that the only prejudice that Pakistan would suffer would be one of delay, about which it could not sensibly complain in

the light of the delay in seeking enforcement. Any such prejudice could be remedied in interest and Mr Allawi had agreed in principle to providing security for costs. I do not accept that there would be no meaningful irremediable prejudice to Pakistan. Given what Mr Allawi says about his financial position, Pakistan would in all probability be put to further costs which it would not recover, any award of security for costs would be unlikely fully to cover Pakistan's costs, nor would an award of interest compensate for delay if Mr Allawi is impecunious.

84. Mr Ng suggested there was a real possibility of Mr Allawi ending up not only in an improved position on costs but in a position where there was no costs award against Mr Allawi at all by reference to the trilogy of cases cited on his section 68 challenge. It is not helpful to carry out a minute examination of the facts of each case, but even at first blush there are differences which could justify different costs results. For example in those cases multiple breaches were established and/or there was a failed counterclaim or the claimant, though unsuccessful, was found to have been justified in commencing the proceedings against culpable procedural conduct on the part of the respondent. The cases certainly do not establish some principle whereby whenever a breach of investment treaty is established but not causation and damage the appropriate order is one of no order as to costs.

85. I consider the submission to be a farfetched proposition on the facts of this case, given the approach of this tribunal to the question of costs in circumstances where Mr Allawi's Article 2(2) claim was not the only allegation of breach but one of several and in circumstances where his monetary claims have failed on causation

and so failed all together.

86. The fifth factor has no bearing in this case, since the arbitration has not continued.
87. As for the sixth factor, I am not persuaded that the section 68 challenge itself is strong. Rather it is weak, a factor militating against the granting of the extension sought. I am quite prepared to accept for present purposes that the outcome on the issue of breach may have been relevant to the question of costs, see the approach in *Vee Networks Limited v Econet Wireless International Limited* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Report 192 at 209, even though Mr Allawi might face an uphill struggle in that regard given the tribunal's approach to the question of costs (in particular looking at what it said at paragraphs 782 and 783 of the Allawi award). The tribunal was always going to be best placed to assess the correct outcome on costs. It was aware of all the issues and those which it had and had not decided.
88. What I find very difficult to accept is that the tribunal was accordingly obliged to reach a conclusion on the question of breach. As I put it during the course of the hearing, this would be to allow the tail to wag the dog. No court or tribunal is ever obliged to determine every issue raised or issues which it decides do not arise in the light of other findings: see *HBC Hamburg Bulk Carriers GmbH & Co KG v Tangshan Haixing Shipping Company Limited* [2006] EWHC 3250 at [10], *Petrochemical Industries Company (KSC) v The Dow Chemical Company* [2012] EWHC 2739 (Comm) and *Secretary of State for the Home Department v Raytheon*

Systems Limited [2014] EWHC 4375 TCC at [33g)].

89. Mr Ng accepted that in simple cases, perhaps involving private law rights, it would be permissible for a tribunal to ignore certain issues, deciding only those necessary for it to reach an overall outcome. But he submits that the nature of a breach of a bilateral investment treaty obligation by a contracting state is "*special*" because it "*underpins investment treaty arbitration*". I could not identify any principled basis for a different approach requiring a tribunal to determine an issue for the purpose of costs arguments. No authority was cited in support and there certainly is no general statement to that effect in the three cases relied upon by Mr Allawi.

90. Additionally, as Mr Smouha submitted, this is not a situation where the tribunal wholly "*failed to deal*" with the issue of the alleged Article 2(2) breach; it expressly addressed it in paragraph 175 of the Allawi award. As Mr Justice Flaux, as he then was, put it in *Primera Maritime (Hellas) Limited v Jiangsu Eastern Heavy Industry Company Limited* [2014] 1 Lloyd's Reports 255 at [40], provided the tribunal has dealt with it, it does not matter whether it has done so "*well, badly or indifferently*".

91. Mr Ng drew my attention to the separate pleaded claim for a declaration of breach recorded at paragraph 419 of the Allawi award and made reference to the order of Phillips J on 18 October 2017, when he dismissed Pakistan's attempt to dismiss the Progas claimants' application to set aside the challenge under section 68. *Inter alia* Phillips J stated that it seemed at least arguable that the Progas claimants were

entitled to determination of their claim for declarations. I was told that there was no equivalent to paragraph 715 in the Allawi award in the award in the Progas proceedings. It is difficult to say more without a fuller understanding of the arguments and submissions in the Progas arbitral proceedings.

92. I have not been taken to anything to suggest that the pleaded claim for a declaration by Mr Allawi added anything in terms of substantive outcome on the overall merits. Mr Allawi's claim for very substantial damages failed in any event. Nor have I been taken to any material which suggests that the claim for declaratory relief was an important self-standing element of the claim bringing with it particular or material consequences beyond costs such that the tribunal was obliged to resolve it.

93. In any event, the tribunal dealt with the claim for declaratory relief. As the tribunal commented when dismissing the UNCITRAL Rule 39 application, the tribunal in fact decided at paragraph 797(b) of the Allawi award that the claimant's case failed in its entirety. It went on to address all other claims at paragraph 797(g) as follows:

“All other claims and requests for relief by both parties are dismissed.”

94. The tribunal recorded that there were no claims left undecided by the Allawi award. It seems to me that Mr Allawi's complaint is in reality more naturally classed either as a complaint about the dismissal of the claim for declaratory relief, which has not been raised, or as a complaint about the costs order made in circumstances where there had been no determination on the issue of breach. That neutral outcome on

that issue should, it could be said, have been reflected in the tribunal's costs order but that again is not how it has been put nor would the cost order of course be susceptible to appeal under section 69 of the Act.

95. I should add for the sake of completeness that even if the proposed challenge could not be said to be intrinsically weak, it can certainly not be said to be strong.
96. Again, for the sake of completeness and in any event, given the delay in question, and the absence of good reason for it, I would ultimately have exercised my discretion in the same way whatever the merits of the underlying section 68 challenge.
97. As for the final factor, I consider fairness in the broadest sense. Stepping back, it would not in the broadest sense be unfair to Mr Allawi were he to be denied the opportunity of bringing a section 68 challenge. I recognise that he believes that this would cause him prejudice, indeed what he describes as irremediable and substantial prejudice likely to lead to his bankruptcy. However, for the reasons set out above, there has been excessive delay without good reason. The substantive challenge is weak or at least cannot be said to be strong. There would be prejudice beyond delay to Pakistan were the extension to be granted. A consideration of all the relevant factors leads in my judgment to the clear conclusion that the extension application falls to be dismissed and I dismiss it accordingly.

LEGAL AUTHORITY AA-113



Neutral Citation Number: [2019] EWHC 1285 (Comm)

Case No: CL-2018-000194

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 22/05/2019

Before :

MRS JUSTICE COCKERILL DBE

Between :

ZCCM INVESTMENTS HOLDINGS PLC
- and -

Claimant

(1) KANSANSHI HOLDINGS PLC
(2) KANSANSHI MINING PLC

Defendants

AND IN THE MATTER OF AN ARBITRATION

Between :

ZCCM INVESTMENTS HOLDINGS PLC
- and -

Claimant in the
Arbitration

(1) KANSANSHI HOLDINGS PLC
(2) KANSANSHI MINING PLC

Defendants in
the Arbitration

Hannah Brown Q.C and James Petkovic (instructed by **Cooke, Young and Keidan LLP**)
for the **Claimant**

Michael Black Q.C and Edward Knight (instructed by **Amsterdam & Partners LLP**) for the
Defendants

Hearing dates: 26, 27, 28 March 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MRS JUSTICE COCKERILL DBE

Cockerill J:

Introduction

1. On 22 February 2018 a Tribunal consisting of Michael Collins QC, Glen Davis QC and J. William Rowley QC produced a 22 page document entitled “*Ruling on Claimant’s Permission Application*”. That document “The Ruling” has given rise to a raft of applications which I have heard over the course of three days. Those applications are:
 - a) The Original Arbitration Claim by ZCCM Investments Holdings plc (“ZCCM”) under s. 68(2)(a)/(d) of the Arbitration Act 1996 (“the Act”) (“the Original Arbitration Claim”).
 - b) ZCCM’s challenge under s.68(2)(g) of the Act (“the Fraud Claim”).
 - c) ZCCM’s application seeking an extension of time (and related relief) to bring the Fraud Claim (“the Extension Application”).
 - d) The issues raised in the Respondent’s Notice of Kansanshi Holdings Limited (“KHL”) namely whether:
 - i. The Ruling was not an award but merely a procedural order; and
 - ii. The Original Arbitration Claim is barred by s. 70 of the Act because ZCCM has not exhausted any available recourse under s. 57 of the Act.
2. I consider the issues in the order set out below:

Background	Paragraph 3
The Original Arbitration Claim	Paragraph 26
<i>Ruling or Award</i>	<i>Paragraph 27</i>
<i>S.68: The Law</i>	<i>Paragraph 49</i>
<i>Issue 1</i>	<i>Paragraph 64</i>
<i>Issue 2</i>	<i>Paragraph 81</i>
<i>Issue 3</i>	<i>Paragraph 94</i>
<i>Issue 4</i>	<i>Paragraph 97</i>
<i>Issue 5</i>	<i>Paragraph 115</i>
<i>Exhaustion of Remedies</i>	<i>Paragraph 128</i>
The Fraud Claim	Paragraph 136
<i>Amendment/Extension of Time</i>	<i>Paragraph 147</i>
<i>The Merits of the Fraud Claim</i>	<i>Paragraph 164</i>

<i>Remaining Issues</i>	<i>Paragraph 200</i>
Conclusion	Paragraph 221

Background

3. ZCCM is a majority-state owned enterprise, effectively holding government interests in mining concerns. It has been referred to as a parastatal of the Zambian Government.
4. The First Defendant KHL is part of the First Quantum group of companies (“the FQ Group”) which is engaged in the mining sector. It is an indirect but wholly owned subsidiary of a company known as FQM Finance Limited (“FQMF”), which is itself a 100% subsidiary of First Quantum Minerals Limited (“FQML”), the ultimate holding company. FQMF undertook the global treasury function for the FQ Group.
5. Kansanshi Mining PLC (“KMP”) is a mining company which owns one of the largest copper mines in Zambia. KHL owns 80% of the share capital of KMP and the remaining 20% is owned by ZCCM. The relationship between KHL, ZCCM and KMP is governed by an Amended and Restated Shareholders’ Agreement dated 20 December 2001 (“the ASHA”). KHL consequently controls the management of KMP, governed by a Management Agreement dated 18 March 2004.
6. Between 2006 and 2014, KMP made certain transfers to FQMF from time to time (“the Transfers”). ZCCM says these were deposits of cash reserves. Between at least June 2009 and March 2014, the amounts were very significant and I am told at one point they reached US\$2.238 billion. It seems to be common ground that these monies were repaid by the end of 2014/early 2015. Interest was paid by FQMF to KMP at 30-day LIBOR.
7. In the arbitration ZCCM sought to pursue a claim (“the Claim”) on behalf of KMP that the Transfers were made in breach of the ASHA and in breach of fiduciary duty and that KHL had dishonestly misrepresented the nature of the Transfers to ZCCM from 2007, giving rise to a claim in deceit. Further or alternative claims were made for inducement of breach of the Management Agreement, conspiracy to injure by unlawful means, inducement of breach of fiduciary duty, dishonest assistance and tortious breach of duty. These claims were set out in a Notice of Arbitration settled by leading Counsel which runs to 42 pages.
8. The loss claimed was damages, representing the additional interest that it was said should have been paid on the Transfers (at “*at least LIBOR plus 5%*”), alternatively an account of profits arising out of the breach of fiduciary duty. The amount of that claim was estimated at US\$267 million.
9. Because of KHL’s control of KMP any such claim is required to be brought as a derivative claim. The parties agreed the common law position required ZCCM to obtain permission from the Tribunal to pursue the derivative claim.
10. Between 10 and 12 January 2018 the Tribunal heard ZCCM’s application for permission to continue a derivative claim on behalf of KMP.

11. The Arbitration was conducted under the UNCITRAL Arbitration Rules 2010. The applicable law was Zambian law, which incorporated the English common law principles which applied to derivative claims prior to the Companies Act 2006.
12. In order to obtain permission, ZCCM was obliged to demonstrate a *prima facie* case. The Tribunal considered carefully what that amounted to and concluded that “*in order to make out a prima facie case ZCCM needs to demonstrate that, giving it the benefit of the doubt on disputed issues of fact, the claim that it wishes to bring on KMP’s behalf has a realistic prospect of success.*” That conclusion is not disputed.
13. ZCCM’s case on its application was that;
 - a) The understanding of its appointees to the Board of KMP (“the ZCCM directors”) based on express representations made by KHL/its appointed directors of KMP’s board (“the KHL directors”) and/ or others within the FQ Group, was that:
 - i. KMP’s monies were being held by FQMF on deposit with reputable international financial institutions for KMP’s use and were readily available for KMP’s working capital requirements.
 - ii. Therefore, interest at 30 day LIBOR was a fair and appropriate rate and a better rate than KMP could otherwise expect to obtain by use of the monies.
 - b) What ZCCM and its directors on KMP’s Board did not know was that the FQ Group was using KMP’s monies.
 - c) Therefore, ZCCM had established a *prima facie* case against KHL under the heads to which I have alluded.
 - d) The primary case was put in misrepresentation; but the other claims were said essentially to flow from one or other aspect of the misrepresentation claim. Thus, it was said that:
 - i. There was breach of fiduciary duty by (*inter alia*) the KHL directors by which KMP’s monies were paid to and used for the benefit of FQ Group without disclosure of the use to which the monies were put, benefitting FQ Group to the detriment of KMP, by obtaining use of KMP’s monies at below the market rate and putting those funds at risk.
 - ii. There was breach by KHL of the Amended Shareholders’ Agreement (“ASHA”), in particular Clause 11 requiring all contracts with Affiliates to be on Arm’s Length Terms and disclosure of the Affiliate’s interest and implied terms to act in good faith and give full and not false information.
 - iii. There was a substantial loss suffered by KMP, in particular, reflecting the interest which it should have been paid at an Arm’s Length rate, namely the rate applicable to an unsecured commercial loan. It pointed to the interest payable under a US\$300 million senior term loan and US\$700 million revolving credit facility with the interest payable on

both being LIBOR plus 3% as evidence that 30 day LIBOR was well below genuine market rates.

14. As I have said, the Ruling runs to 22 pages. Some seven pages of that length is devoted to a careful summary of the facts, including the history of the exchanges between the parties from 2007 when the KMP board was first told of the transfers made to FQMF and an agreement was reached to charge interest on such transfers. That history included, in brief, the following features:
 - a) The inclusion of the sums transferred in the KMP audited accounts as an inter-company loan to FQMF bearing interest at LIBOR;
 - b) A memorandum of 11 October 2010 from KHL to ZCCM containing certain statements including as to the payment of commercial interest and as to FQMF's status being the FQ Groups global treasury function managing funds with highly rated financial institutions;
 - c) ZCCM's request for a loan on similar terms;
 - d) Later accounts noting the loan was repayable on demand;
 - e) The approval of the KMP Board to provide loans on similar terms to both shareholders;
 - f) ZCCM's request for a one-off dividend to compensate it for not having participated in shareholder loans earlier.
15. At paragraphs 36 of the Ruling the Tribunal summarised the claims under six sub-headings. At paragraph 37 it summarised, by a quote from ZCCM's skeleton, the representations which were at the heart of those claims. It then (between paragraphs 39 and 49) summarised the relevant law applicable to applications to pursue derivative claims. Between paragraphs 50 and 65 it discussed the claims, before concluding its decision and dealing with the orders sought and costs.
16. It is plain that the Tribunal well understood the case being made to it. At paragraph 50 of the Ruling it refers to a "*constant theme*" with the following components:
 - a) Dishonest representation that:
 - i. The monies were held on deposit whereby the full amount was immediately available for repayment;
 - ii. For that reason, the interest rate was the best available;
 - b) In fact, FQMF was using the monies for the purposes and to the benefit of the FQ Group.
17. Consistently with the approach which they had found should be taken to the application, the Tribunal accepted at paragraph 53 that ZCCM had established a *prima facie* case that the relevant representations were made. At paragraph 54 it accepted that a *prima facie* case had been made out that FQMF used the monies or some part of them

otherwise than on deposit and that it had been acknowledged that some part were used by FQMF.

18. At paragraph 55 the Tribunal says: "*However, in order to establish that, if its evidence were accepted, [ZCCM] would succeed at trial [it] also has to demonstrate a prima facie case as to both (i) the falsity of the representations that were made and (ii) the loss that was suffered by KMP as a result.*"
19. Perhaps the key passage of that Ruling is at paragraphs 58 to 59. As I will refer to it repeatedly below I reproduce those paragraphs in full here:

"58. Addressing, first, ZCCM-IH's focus on the characterisation of the arrangement as a deposit that was managed by highly-rated financial institutions, it is impossible to divorce the references in the contemporaneous material to the transaction as a "*deposit*" from the references to the same transaction as a "*loan*". For the purposes of determining whether or not a statement was made dishonestly, regard has to be had to the entirety of the relevant material, and not just to selected parts of it. In particular:

a. it is apparent from a review of the record that the terms "*deposit*", "*short-term deposit*", "*loan*", and "*intercompany loan*", along with other similar terms, were all used interchangeably by both KHL and ZCCM-IH to refer to the same transaction: for example, KHL's Memorandum, upon which ZCCM-IH particularly relies, refers repeatedly to both "*the deposit*" and "*the loan account*", as does ZCCM-IH's Related Party Financing paper, which was prepared several years later;

b. shortly after ZCCM-IH first began to question the arrangement, in December 2010, it sought not to obtain a better rate of return for KMP, but rather to secure a similar shareholder loan for itself. While the two are not inconsistent, in looking for a similar loan pro-rated to its shareholding ZCCM-IH was plainly not treating the arrangement simply as a deposit arrangement, in which KMP's monies could not be put to use by the recipient of the loan for its own purposes: on the contrary, it was asserting that FQMF had derived a benefit from transfer to it of KMP's funds, and that it, ZCCM-IH, should be afforded the opportunity to do the same. Indeed, in March 2011 ZCCM-IH itself proposed a shareholder loan arrangement that, as noted above, included terms (i) that the applicable interest rate on the loans would be the LIBOR 30 day rate; (ii) that part of the loan funds must be placed on deposit with approved banks as determined by KMP (the "*Escrowed Amount*"); and (iii) that the loan balance, which was not escrowed, may be used by the shareholders for their general corporate purposes – in other words, it made a proposal in almost precisely the same terms as the arrangement that it contends in this arbitration that KHL dishonestly failed to tell it about;

c. there is no evidence that the value of KMP's funds loaned to FQMF was not available for use if needed: on the contrary, amounts were repaid to KMP, together with interest, as and when required.

59. The thrust of ZCCM-IH's case is that it was deliberately and dishonestly misled by KHL into believing that the transaction was not in fact a loan (implicit in which is an entitlement on the part of the borrower to use the funds it has borrowed in any way it sees fit), but we are unable to accept ZCCM-IH's submission that KHL's characterisation of the arrangement as a "*deposit*" had the dishonest connotation that ZCCM-IH now ascribes to it in circumstances where both parties repeatedly described the same arrangement as a "*loan*"; where – having had the arrangement described both as a "*deposit*" and as a "*loan*" (e.g. in the Memorandum) – ZCCM-IH sought a similar loan for itself; and where it is undisputed that (i) KMP's funds were repayable on demand; and (ii) they were repaid as and when required, with interest. On the contrary, taken in the round, and in the context of all the discussions that took place in relation to the arrangement over the period in question, as reflected in the contemporaneous documentation, KHL's description from time to time of the arrangement as a "*deposit*" was, not in our judgment, obviously or necessarily dishonest. To establish a *prima facie* case of dishonesty it is insufficient, as a matter of law, to point to representations that are consistent with honesty, unless there is some additional factor that "*tilts the balance*", which is not the case here."

20. The Tribunal then went on to find:

- a) At paragraphs 60-2 that the same point could be made in relation to the representations as to the rate of return. The Tribunal found that ZCCM had put in no evidence to support the assertion that a better rate of return could have been obtained and that the only independent evidence was a report of KPMG which supported LIBOR as arms' length based on an analysis of short term interest rates. Hence it found the representations were consistent with honesty;
- b) At paragraphs 63-5 that the case on loss was bound to fail in the light of the facts that (i) ZCCM had known about the rate of interest and not suggested an alternative arrangement, (ii) KMP had extensive capital requirements which made short term deposit arrangements sensible and (iii) there was no evidence that the directors of KMP could not properly have made this arrangement.
- c) At paragraph 67 it found:

"ZCCM-IH has in our judgment failed to make out a *prima facie* case either as to falsity or as to loss. These conclusions are fatal to ZCCM-IH's permission application, whichever way it is put. Most of ZCCM-IH's causes of action are founded on its allegations of deliberate dishonesty which in our view fail to meet the threshold for a finding of dishonesty. All of its causes

of action are dependent upon proof of loss, as to which ZCCM-IH has put in no evidence."

21. Following the publication of the Ruling, ZCCM brought the Original Arbitration Claim on 22 March 2018. That raises grounds under s. 68(2)(a) and (d) of the Act (failure to deal with issues, and failure to comply with the duty of fairness). KHL raised its arguments as to the nature of the Ruling and exhaustion of remedies in its Respondent's Notice dated 12 April 2018. An application was made to strike out the claim on the basis of the argument that the Ruling was not an Award. That application was not successful.
22. ZCCM then sought to bring the Fraud Claim (i.e. s.68(2)(g) challenge) and an application for an extension of time in relation to that challenge on 1 June 2018.
23. On 20 July 2018, there was a directions hearing (originally scheduled to be the hearing of the application to amend). Jacobs J ordered that ZCCM's 1 June 2018 extension application should be dealt with at this hearing.
24. On 15 March 2019 I (i) refused KHL's application to cross-examine Ms Mkandawire and (ii) gave directions for this 26-28 March 2019 hearing.
25. It is fair to say that the bulk of the argument before me was addressed to the Fraud Claim. However, I will consider the Original Arbitration Claim first, not just because it is first in time, but also because the range of issues raised by it require a close consideration of the Ruling, which consideration is then relevant also to the issues which arise on the Fraud Claim.

The Original Arbitration Claim

26. ZCCM contends that there were serious irregularities which have caused it substantial injustice under s. 68(2)(d) by reason of the failure of the Tribunal to deal with five key issues that were put to it and, in one case, also under s. 68(2)(a) by reason of the failure by the Tribunal to comply with its general duty under section 33 of the Act by wrongly proceeding on the basis that an issue was not in dispute.
27. However, before dealing with this I should deal with what is a threshold issue: whether the decision was one which is capable of giving rise to a section 68 challenge. The question of whether if so any such challenge is precluded because available remedies have not been exhausted, I shall deal with in the context of the individual challenges.

The Ruling: Procedural Order or an Award?

28. The starting point for this is s. 68(1) which provides:

"A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)."

29. KHL relies on the decision of Waller LJ in *Fletamentos Maritimos SA v Effjohn International BV* (No. 2) [1997] 2 Lloyd's Rep 302, at 306:

“I have always understood the position to be that there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award. Basically, the position is, as I understand the authorities, that the Court has never had some general power to supervise arbitration and review interlocutory decisions. The power which it does have comes from the Arbitration Acts. It follows that there can be an examination as to whether there has been misconduct at any stage which may lead to the arbitrator being removed. But the power to review and remit under s. 22 applies to awards. (See Mr. Justice Donaldson (as he then was) in *Exormisis Shipping S.A. v. Oonsoo*, [1975] 1 Lloyd's Rep. 432; *Three Valleys Water Committee v. Bunnie*, (1990) 52 B.L.R. 47, a decision of Mr. Justice Steyn (as he then was); and Lord Donaldson, M.R. in *King v. Thomas McKenna Ltd.*, [1991] 2 Q.B. 480 at p. 490B-C). In so far as the Judge relied on s. 22(1) (which speaks of matters rather than awards), as providing the power to review and remit a decision not in the form of an award, it seems to me with respect his view is inconsistent with well-established authorities.”

30. KHL says that this is just such a case. In the first place it contends that the Ruling related to a “procedural device” which was needed because ZCCM has no cause of action with respect to the Claim. It relies on the fact that this form of action has been specifically described as a “*procedural device to get over the difficulty that as a practical matter no authority can be obtained to bring the action in the company's name*”: *Wallersteiner v Moir* (No. 2) [1975] QB 373, 399. It also points to the judgment of Briggs J (as he then was) which described it in *Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] EWHC 348 (Ch); [2013] Ch 551 at paragraph 26 not just as a “*procedural device*” and as a “*piece of procedural ingenuity designed to serve the interests of justice*”.
31. KHL says that the only issue determined by the Ruling was that ZCCM could not pursue the Claim. KMP's causes of action are unaffected and there is no prohibition upon KMP pursuing the action itself.
32. It submits that conclusion is supported by the transcripts in that the form of the decision to be rendered was expressly canvassed by the Chairman of the Tribunal in the closing stages of the hearing and submissions made by both parties. Having offered the preliminary view that a procedural order was appropriate on an application for permission the Chairman asked for the parties' views. KHL asked for an award, whereas ZCCM sought a procedural order. As their counsel said: “...*ordinarily one would proceed by way of procedural order with reasons*”.
33. That discussion, says KHL, is then reflected in the title of the ruling: “*Ruling on Claimant's Permission Application*”. Nowhere does the Ruling purport to be an award.

34. It also refers to the fact that, in discussing costs at the end of the Ruling, the Tribunal noted that the arbitration was not brought to an end and the Tribunal has not been rendered *functus officio*.
35. ZCCM submits that the ruling is properly to be regarded as an award. It refers me to a number of authorities including *Cargill SrL Milan v P Kadinopoulos SA* [1992] 1 Lloyd's Rep 1, *Ranko Group v Antarctic Maritime SA* (unreported, Commercial Court, 12 June 1998), *The Smaro* [1999] 1 Lloyd's Rep 225, *Brake v Patley Wood Farm LLP* [2014] EWHC 4192 (Ch) and *Uttam Galva Steels Limited v Guvnor Singapore Pte Limited* [2018] EWHC 1098 [2018] 2 Lloyd's Rep. 152.
36. It submits that the hallmark is whether a ruling is a final determination of a particular issue or claim in the arbitration or not. It says that the Ruling was a final determination of the claims in the arbitration because it determined that ZCCM had failed to establish a *prima facie* case in respect of the claims it wished to bring on KMP's behalf and refused permission to continue the derivative claim. As such, it says the Ruling brought the arbitration proceedings to an end; it is not open to ZCCM to re-argue the matter before the Tribunal. It notes that in correspondence KHL subsequently referred to proceedings being at an end.
37. It also relies on certain "*indicia of form*" in terms of the fact that despite the discussion at the hearing the Ruling is not called a Procedural Order, was signed by all three arbitrators, is fully reasoned and gives a location.

Discussion

38. On this issue I conclude that KHL's argument is to be preferred.
39. The authorities on this subject do not enunciate any set of principles by which such a consideration should be governed. They arise in a wide variety of circumstances ranging from decisions on interlocutory rulings regarding disclosure through strike out applications and including amendment disputes with jurisdictional aspects. Nor is there a plainly analogous case.
40. A consideration of these authorities (and also of the cases of: *Michael Wilson v Emmott* [2009] 1 Lloyd's Rep 162 (Teare J), *Enterprise Insurance Company Plc v U-Drive Solutions (Gibraltar) Limited* [2016] EWHC 1301 (QB) at [39] (HHJ Moulder as she then was) and *The Trade Fortitude* [1992] 1 Lloyd's Rep 169 (Anthony Diamond QC)) however suggests the following points:
 - a) The Court will certainly give real weight to the question of substance and not merely to form: *Emmott* at paragraph 18 (by concession); *Russell on Arbitration* (24th edition, 2015) at [6-003].
 - b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal *functus officio*, either entirely or in relation to that issue or claim: *Cargill* at 5, *The Smaro* at 247; *Enterprise Insurance* at [39].

- c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award whereas a decision relating purely to procedural issues is more likely not to be an award. *Brake* at [25], *The Smaro* at 247; *Emmott* at [19-20], *Cargill* at 5, *The Trade Fortitude* at 175.
 - d) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status: *The Trade Fortitude* at 175 *Emmott* at [19-20].
 - e) It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it: *Emmott* at [18]; *Ranko* p 4.
 - f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning: *Emmott* at [19 -20]; *Uttam Galva Steels* at [29]; *The Trade Fortitude* at 175; *The Smaro* at 247.
 - g) While the authorities do not expressly say so I also form the view that:
 - i. A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.
 - ii. The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award: *The Smaro* at 247, *Ranko* p 4.
41. I turn then to consider this Ruling in the light of these factors. As to the substance, this is in essence a procedural ruling. While it is not at all akin to the kinds of decisions which will be set out in a basic procedural order – dealing with timetables, disclosure, form of statements and so on, and it is final to its subject matter, the Ruling does not decide an issue of substance relating to the claim. It is not a final decision on the merits of any of the claims. It is a decision on a procedural issue (a derivative claim being itself a procedural device, and this being a decision on leave to bring that form of claim) which has a discretionary element. The bottom line is that the arbitration is not over and the Tribunal is not *functus*. Before that can happen there will have to be an award on the merits. It is possible that the claim could be pursued by KMP, although as matters stand (with KHL being *de facto* in control of KMP) that is obviously unlikely.
42. There is in my judgment a valid contrast with striking out for want of prosecution. In *Enterprise* it was agreed that dismissing a claim for want of prosecution must result in an award. That is because it brings the claim to an end. Here, by contrast, there is no such finality. So much for the substance.
43. As to the form of the Ruling, it is certainly true that the document which emerged was not a simple procedural order. However, nor is it in its form what one would expect to

see by way of Award in a multi-million pound multi-claim arbitration; while 22 pages is not nothing, a much longer and more detailed document would very probably be expected by way of an award.

44. Certainly, it does include reasons; but here one can see from the transcript that the parties were expecting reasons even with a procedural order – as indeed is often the case, as can be seen in the authorities. The other formalities having been included is hardly surprising once one is dealing with reasons. Further those reasons are, as I shall indicate below, somewhat compressed. There is not a point by point analysis of each claim raised. Rather there is a “triaging” of the issues, explaining what the Tribunal sees as the clear path through. This is entirely consistent with a Ruling on a complex procedural issue; it is less so with an award - as the authorities considered below on the question of dealing with all issues, and the arguments deployed in the arbitration claims indicate.
45. As for the inclusion of reasons, and their length (ie the fact that there were reasons at all), one should perhaps also bear in mind that this very distinguished and experienced Tribunal will have had well in mind that the substance of this document might well be the subject of challenge once the arbitration was determined. If ZCCM’s claim were dismissed in a final award, the Tribunal having refused an application to permit a derivative claim, the award might well be challenged on the basis that the Tribunal had erred or misconducted itself in approaching the matter on that basis. It was therefore plainly appropriate for the Tribunal to give some guidance to the parties as to how the exercise had been conducted; albeit that that guidance was not as full as a reasoned award. The form of the Ruling therefore resonates best as a ruling, not as an award.
46. To this one may add the evidence of the debate at the hearing. This has two aspects. The first is that in the light of the debate as to the nature of the decision, if the Tribunal had intended to produce an Award it seems overwhelmingly likely that it would have called it that.
47. The second feeds into the reasonable recipient test. The reasonable recipient, in the light of the debate between the Tribunal and the parties would itself have expected the document not to be an award and that if, contrary to initial indications, an award was being produced, the Tribunal would have said so. Or, to put it the other way around, what was expected was an order with reasons; that is what the Tribunal on its face produced. That is what a reasonable recipient would read the Ruling as being.
48. It follows that the Ruling is not an award and no s. 68 challenge can arise. However I will deal with the other issues raised for completeness.

S. 68: The Law

49. S. 68(2) provides:

“(1) A party to arbitral proceedings may ... apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

...

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

(a) failure by the tribunal to comply with section 33 (general duty of the tribunal); ...

(d) failure by the tribunal to deal with all the issues that were put to it; ...”

50. It is common ground that the court will only accede to an application under section 68(2)(a) or (d) in extreme cases where the Tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. I have been reminded of the words of Field J in *Latvian Shipping Company v The People’s Insurance Company OEJSC* [2012] EWHC 1412 (Comm):

“the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults ... Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it”

51. There is much further authority to similar effect. In *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm); [2013] 2 C.L.C. 901, Flaux J (as he then was) said:

“6. ...the focus of the enquiry under section 68 is due process, not the correctness of the tribunal's decision. As the DAC Report states, and numerous cases since have reiterated, the section is designed as a long-stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected....

30. A number of cases have emphasised that the court should read the Award in a reasonable and commercial way and not by nitpicking and looking for inconsistencies and faults. ... A similar point was made by Teare J in *Pace Shipping v Churchgate Nigeria Ltd* [2009] EWHC 1975 (Comm); [2010] 1 Lloyd's Rep 183 at [20] specifically deprecating a minute textual analysis.”

52. I also referred, given the nature of the challenge, to a considerable number of authorities on the subject of what is an “issue” for the purposes of such a challenge.

53. As a starting point I was referred to the summary in *Russell on Arbitration* (24th Edn.) (2015). paragraph 8-105:

“... the Court of Appeal has said that they do not mean each and every point or argument in dispute. Rather they mean those issues which the tribunal has to resolve. ...The “issue” must be

an important or fundamental issue, for only a failure to deal with such could be capable of causing substantial injustice. There is also a difference between a failure to deal with an issue and a failure to provide sufficient reasons for a decision on that issue. ... The court will not nit-pick through the reasons in an award. ... Once the court has identified the issue and the tribunal has dealt with it in any way that is the end of the enquiry. It does not matter for the purposes of ground (d) whether the tribunal has dealt with it well, badly or indifferently.”

54. As the first line indicates, this reflects *dicta* in a variety of cases. So in *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 at paragraphs 48 to 49:

“[49] In my judgment “*issues*” certainly means the very disputes which the arbitration has to resolve. In this case the dispute was about the open market rent for this property. The arbitrator decided that. In order fairly to resolve that dispute the arbitrator may have subsidiary questions, “*issues*” if one likes, to decide en route. Some will be critical to his decision. Once some are decided, others may fade away.”

55. In *Petrochemical Industries v Dow* [2012] EWHC 2739. Andrew Smith J rejected Dow’s argument that because the Tribunal had dealt with the issue of remoteness of loss, it could not be said to have failed to deal with the issue of assumption of responsibility for Dow’s consequential loss:

“[20] ...: general issues can often be broken down into more specific issues. An “*issue*” of remoteness, itself an aspect of the “*issue*” whether damages are recoverable, might well embrace sub-issues, and I think that sub-section 68(2)(d) can cover sub-issues of this kind.

[21] The assumption of responsibility question ... is, to my mind, an “*issue*” within the meaning of sub-section 68(2)(d). It is not simply a way of presenting the question of foreseeability, and not simply an argument in support of a contention that losses were not within the First Limb or the Second Limb of *Hadley v Baxendale*. It can be difficult to decide quite where the line demarking issues from arguments falls, but here almost the whole of Dow's claim could have depended ... upon how the assumption of responsibility question was resolved. I accept PIC's submissions about whether it was an issue because this accords with what I consider to be the ordinary and natural meaning of the word, and I find support for this conclusion in that, as I see it, fairness demanded that the question be “dealt with” and not ignored or overlooked by the Tribunal, assuming it was put to them.”

56. In *Soeximex v Agrocorp* [2011] EWHC 2743; [2012] 1 Lloyd’s Rep. 52, Gloster J set aside an award where the Tribunal had held that a contract was not void for illegality

under US and EU Regulations on one basis but failed to address two different and distinct arguments under the Regulations.:

“[19] ... But, although the Board expressly referred to the evidence of Mr Newcomb in its Award..., there is no indication that it addressed what was clearly an important and discrete issue. Paragraph 7.12 of the Award (where the evidence and the Board’s conclusion in relation to listed persons is set out) does not address the point.

[20] ... the Board appears to have overlooked the issue as a separate issue altogether, and concentrated on the identity of the specific suppliers; ... If the Board had indeed been addressing the wider argument, it is inconceivable that it would not have addressed its reasons for not accepting – or treating as irrelevant – Mr Newcomb’s unchallenged evidence.”

57. Characteristically careful consideration was given to what is an issue and what is a step in the evaluation of the evidence by Colman J in *World Trade Corp v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm):

“On analysis, these criticisms are all directed to asserting that the arbitrators misdirected themselves on the facts or drew from the primary facts unjustified inferences. Those facts are said to be material to an “issue”, namely what were the terms of the oral agreement. However, each stage of the evidential analysis directed to the resolution of that issue was not an “issue” within Section 68(2)(d). It was merely a step in the evaluation of the evidence. That the arbitrators failed to take into account evidence or a document said to be relevant to that issue is not properly to be regarded as a failure to deal with an issue. It is, in truth, a criticism which goes no further than asserting that the arbitrators made mistakes in their findings of primary fact or drew from the primary facts unsustainable inferences.”

58. Reference was also made to *Transition Feeds LLP v Itochu Europe plc* [2013] EWHC 3629 (Comm); [2013] 2 CLC 920. There Field J rejected an argument that the two issues not dealt with were merely arguments in the broader issue of what was the correct measure of damages.

“[32] ... The issue of the non-applicability of the Rotterdam resale prices for the reasons on advances by the Buyers to the Board was a quite distinct issue from the Sellers’ claim for an increase in the damages. It was an issue raised fair and square before the Board by the Buyers and yet it received no mention at all by the Board in their Award. In my judgment, even after a fair, reasonable and commercial reading of the Award, the conclusion must be that the Board failed to deal with this issue.”

59. That decision was then considered by Gavin Kealey QC sitting as a Deputy High Court Judge in *Buyuk Camlica Shipping Trading and Industry v Progress Bulk Carriers* [2010] EWHC 442 (Comm):

“[38] ... As those observations recognise, there should be some form of communication, normally in the form of a decision, by an arbitral tribunal to the parties from which the latter can ascertain whether or not an essential issue has dealt with. It is not sufficient for an arbitral tribunal to deal with crucial issues in *pectore*, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section 68(2)[d] is to ensure that all those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined.”

60. There is also authority, which was relied on by KHL to the effect that once the Court has identified the issue and the Tribunal has dealt with it in any way that is the end of the enquiry. It does not matter whether the Tribunal has dealt with it well, badly or indifferently: *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) at [33] where he also deals with the question of cursory reasons:

“(vi) If the tribunal has dealt with the issue in any way, Section 68(2)(d) is inapplicable and that is the end of the enquiry (Primera at paragraphs 40-1); it does not matter for the purposes of Section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.

(vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length (*Latvian Shipping v Russian People’s Insurance Co* [2012] 2 Lloyd’s Rep 181, paragraph 30).”

61. The other issue on which authority was cited was the meaning of “*substantial injustice*”, in relation to which the first case relied on was: *Transition Feeds LLP v Itochu Europe plc* [2013] EWHC 3629 (Comm); [2013] 2 C.L.C. 920. There Field J, approving paragraph 20.8 of *Professor Merkin’s Arbitration Law* including:

“[23] ... By contrast, if it is realistically possible that the arbitrator could have reached the opposite conclusion had he acted properly in that the argument was better than hopeless, there is potentially substantial injustice. The accepted test now seems to be that there is substantial injustice if it can be shown that the irregularity in the procedure caused the arbitrators to reach a conclusion which, but for the irregularity, they might not have reached, as long as the alternative was reasonably arguable.”

62. Secondly Popplewell J in *Terna Bahrain Holding v Bin Kail Al Shansi* [2012] EWHC 3283 (Comm) [2013] 1 All E.R. (Comm) 580:

"In determining whether there has been substantial injustice, the Court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

63. Against this background I turn to consider the issues which were said to be neglected by the Tribunal.

Issue 1: Failure to deal with the allegation that KHL expressly represented to ZCCM how FQMF was holding the monies.

64. ZCCM's first point relates to the fact that it alleged that KHL made express misrepresentations as to the basis upon which FQMF was holding KMP's monies, namely that KMP's monies would be:

- a) Held on deposit accounts maintained by FQMF with reputable international financial institutions/managed by highly rated international financial institutions; and
- b) Retained on deposit accounts for KMP's use and were readily available as and when needed to meet KMP's working capital requirements.

65. The complaint is that although the Ruling does refer, in recital of ZCCM's case, to the alleged express representations as to how FQMF was going to use the monies and it held that it would be assumed that the KHL directors did make the representations as contended for by ZCCM, the Tribunal did not then address the crucial issue, namely whether there was a *prima facie* case that the express representations were false (and therefore dishonest).

66. ZCCM contends that the Tribunal only considered the respective implications of the use of the words "*deposit*" and "*loan*" to describe the arrangement as between KMP and FQMF. It points to paragraph 59, where the Tribunal held that "*implicit*" in the word loan "*is an entitlement on the part of the borrower to use the funds it has borrowed in any way it sees fit*" and that "*KHL's description from time to time of the arrangement as a 'deposit' was not ... obviously or necessarily dishonest*". It says that this shows the Tribunal wrongly focussed on the position as between ZCCM and FQMF and not the critical point which was the representation as to use of the monies.

67. It says that while the Tribunal did address the question of the description of the arrangement, which was one representation alleged, the Tribunal should have (but did not) address the separate and distinct issue of whether there was a *prima facie* case that the express representations as to how FQMF would actually use the monies (managed by first rate financial institutions/available on demand) were false. In essence it says

that the Tribunal diverted its attention to address only part of one representation, and not all of both.

68. It submits that had the Tribunal addressed the issues of the express representations as to what FQMF was going to do with KMP's monies, the Tribunal must have found that there was, at least, a *prima facie* case that the express representations were false (and therefore dishonest).
69. It says that there is no route round this via the "*issue*" argument by saying that these representations were merely arguments presented by ZCCM in support of the claim, or evidence to be weighed up by the Tribunal in making a determination of the issues; rather these were separate and distinct allegations.
70. KHL submits that this approach is unfair and unrepresentative of the Ruling. The submissions of both parties concentrated very largely on the representations alleged to have been made about the terms and use of the Transfers and whether those representations were true. It submits that the Ruling at paragraphs 56-59 deals with the allegations in question clearly.

Discussion

71. On this issue I accept KHL's submission. The Ruling requires to be read carefully and in the light of the allegations. It must also, as the authorities make clear, be read constructively rather than destructively. There are two particular aspects to this. The first is the extent to which the different allegations, although pleaded as separate representations, interact with each other. This is similar to but distinct from the "*issue*" argument.
72. ZCCM's case, as I have summarised it above, essentially had three aspects:
 - a) False representation that KMP's monies were being held by FQMF on deposit with reputable international financial institutions for KMP's use.
 - b) False representation that KMP's monies were readily available for KMP's working capital requirements (when in fact FQMF was using them).
 - c) Therefore, false representation that interest at 30 day LIBOR was a fair and appropriate rate and a better rate than KMP could otherwise expect to obtain by use of the monies.
73. Aspect (c) plainly follows from (a) and (b), but a false representation as to the second part of (a) (reputable financial institutions) also implies falsity of (b). The representations alleged are therefore entwined.
74. The second aspect is that it can easily be seen that the case run by ZCCM had a multiplicity of overlapping claims; these are distinct issues but with some common components. Where that is the case, it makes perfect sense for the Tribunal to "*triage*" the issues, dealing with common factors which would either make or break a number of different claims. One should not therefore expect to see every single aspect dealt with, where there was an overlap. Indeed, ZCCM rightly accepted that the Tribunal had no need to deal with an issue if, based on a conclusion relating to a logically anterior

issue, it did not arise. This point is in fact specifically dealt with in the judgment of Akenhead J in *Raytheon*:

"A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an 'issue'. It can 'deal with' an issue where that issue does not arise in view of its decisions on the facts or its conclusions. A tribunal may deal with an issue by so deciding a logically anterior point."

75. The same must also be the case if based on a logically subsequent, but also necessary issue (a prime example being loss), the claim would necessarily fail.
76. Once one approaches the matter in this way it is not necessary under this head to look at the question of whether the matter relied on was itself an issue or an aspect of an issue; that is an argument which is really predicated on a conclusion that the representation was ignored. The essence of the position is that the representation was not ignored. It is plain from [56] that the Tribunal understood that what was alleged was threefold and that the question of "deposit" formed only one part of that. Embedded in this first "deposit" allegation however was the allegation of management by highly rated financial institutions; that was because it was the antithesis of use by FQMF. It should further be noted that this was ZCCM's own case at bottom: as Ms Brown QC put it more than once in submissions, "*the money cannot be in two places at once*". Therefore, to the extent that the Ruling deals with one side of the coin, the Tribunal deals also with the other.
77. Further in terms of the substance of the consideration, the Tribunal plainly had well in mind the need to construe the representation which was alleged against the relevant background. To that end the Tribunal performed a careful recital of the background in the early part of the ruling. It also flagged at [52] the need for the pleaded allegations, where an inference of fraud is sought to be made, to be ones which are not consistent with honesty. That is critical to understanding what the Tribunal found. So, it assumed (rightly) in ZCCM's favour, that the representation was made. On falsity, and assuming the representation to be as alleged, it essentially presumed this also in favour of ZCCM at [54] based on the evidence before it, and the information imbalance at this stage of trial.
78. The Tribunal then did not find that the words alleged had not been used; rather it rejected both the representation as to deposit and the specific inference which ZCCM sought to draw (highly rated financial institutions managing the funds) on the basis that, having considered the totality of the evidence, a proper construction of the words was one which was (i) not dishonest and (ii) did not mislead KMP. Part of that background of course was ZCCM's understanding, which was to be inferred from it having requested a loan on similar terms. The finding was clear: "*we are unable to accept ZCCM's submission that KHL's characterisation of the arrangement as a deposit had the dishonest connotation that ZCCM now ascribes to it.*". With that conclusion on dishonesty on "loan vs deposit" goes the conclusion on dishonesty as to fund management. With the conclusion on dishonesty on the fund management representation goes a conclusion as to the use of the monies.
79. Furthermore of course all three representations would (on the Tribunal's reasoning) fail in any event because of the loss issue.

80. It is fair to say that the Tribunal's mode of dealing with this conclusion under the heading of falsity might tend to be a little confusing. The approach is also somewhat compressed. But the exercise performed is ultimately clear. It is quite plain to me that the Tribunal did consider falsity as regards the representation complained of; they regarded it and dealt with it as hand in glove with dishonesty and with reliance.

Issue 2: Failure to address the issue of breach of fiduciary duties.

81. The second issue relates to fiduciary duties. ZCCM says that at the core of its case was the allegation that, in particular, the KHL directors acted in breach of their fiduciary duties to KMP by transferring KMP's monies to FQMF while (i) failing to disclose the actual use to which the monies were put and (ii) paying a rate of interest which did not reflect a commercial rate applicable to the use and risk to which FQMF was in fact putting the monies (i.e. a commercial lending rate rather than an on-demand deposit rate).
82. It says that the existence and breach of the fiduciary duties as alleged by ZCCM were crucial issues in ZCCM's permission application. They were separate to, and independent of, the issue of whether KHL/the KHL directors misled the ZCCM directors as to use to which the KMP monies were put.
83. ZCCM says that the only mention of fiduciary duties is where the Tribunal addresses, in the context of loss, an entirely different point which did not reflect ZCCM's case. It points to [64]:

“Moreover, critically in this context, whether or not to place the monies on longer-term deposits, or to use them in some other way, would be a management decision, to be taken by the KMP board; and there is no evidence that the KHL directors on that board, acting in accordance with their fiduciary duties and in the best interests of KMP, could not quite properly have decided that putting the monies on short-term deposit was the right thing to do.”

84. This, it says, addresses a breach of fiduciary duty which was not alleged; ZCCM never alleged that the directors could not properly have decided that putting the money on short term deposit was an appropriate course.
85. KHL says that this is a classic example of an overcritical reading of an award, which is directly contrary to the correct legal approach in this area. It submits that the Tribunal dealt with this on a "rolled up" basis when it dealt with dishonesty and ZCCM's knowledge and that it further dealt specifically with the breach of fiduciary duty of the directors (the claims were advanced as those of inducement of breach of the directors' fiduciary duties, alternatively dishonest assistance) at [64]. To the extent that it is necessary to do so it also invokes the *Raytheon* approach and contends that this was an issue which did not arise since the Tribunal had decided there was no reprehensible conduct, and therefore the issue did not require to be dealt with.

Discussion

86. I accept the submission that there was no failure to deal with the question of fiduciary duties. Again, in my judgment, what one sees in the Ruling is a streamlining of the issues by the Tribunal. This can be seen when in conclusion, the Tribunal said [67]:
- “For these reasons, ZCCM has in our judgment failed to make out a *prima facie* case either as to falsity or as to loss. These conclusions are fatal to ZCCM’s permission application, whichever way it is put.”
87. In other words, the Tribunal formed the view that all of the claims alleged hinged either on falsity or on loss (or both). Having reached conclusions on these two fundamental points it concluded that it need not deal *seriatim* with each iteration of the argument, whether put forward as representation or breach of fiduciary duty or breach of shareholders' agreement or so forth.
88. I concur with that analysis. The breach of fiduciary duty claim was pleaded as breaches of the directors’ duties of full and frank disclosure as regards the use of the monies, the fact that LIBOR was below a commercial rate for that use and consequently as secret profits/failures to act in KMP's best interests. Hence in essence the fiduciary duty claim had two components (i) misrepresentation/failure to disclose use by FQMF and (ii) paying a rate of interest which did not reflect a commercial rate.
89. The former point is the one already considered under Issue 1. It fails for the same reason. The latter is effectively the same as Issue 4; and its substance will be considered together with that issue.
90. It is clear from the passages I have considered that the breach of fiduciary duty was dismissed as a matter of fact. What the Tribunal did was to consider the main ground first and in detail, and then to look at whether anything survived if that failed, given the overlap between the cases being run. It must be borne in mind that, as I have noted earlier, the case was put on a plethora of bases. It was a perfectly sensible way of dealing with the issues for the Tribunal to adopt the course which it did. There was no failure to deal with the issue. It was dealt with clearly, and the conclusion was clear.
91. To the extent that a challenge were made to the Tribunal’s conclusion that all the alternative heads of claim failed on the basis of its factual conclusions that they were subsumed into the two main questions, such a challenge would be a matter of law and could only be subject to appeal on that basis under section 69. This can be seen from the authority of *Protech Projects Construction (Pty) Ltd v Al-Khara & Sons* [2005] EWHC 2165; [2005] 2 Lloyd’s Rep. 779 at [34].
92. No such challenge has explicitly been made. Certainly no such appeal has been commenced and any appeal would now be long out of time.
93. The question of exhaustion of remedies, which was raised by KHL, therefore does not strictly arise. However, I deal with it separately for completeness after the individual issues.

Issue 3: Tribunal’s failure to deal with the issue of breach of the ASHA

94. This challenge is based on the fact that Clause 11 ASHA required that all contracts with Affiliates including FQMF be on “Arm’s Length Terms” as defined at Clause 1.1 including a requirement that “*the parties in negotiating the transaction have sought to promote their own best interest in accordance with fair and honest business methods.*”. Clause 11.2 also required disclosure in writing to the Board of any interest of the Affiliate in any proposed contract.
95. For the same reasons as ZCCM alleged that the arrangement between KMP and FQMF was made in breach of fiduciary duty, it contended that the arrangement was not on Arm’s Length Terms and was in breach of Clause 11 of the ASHA.
96. It follows that this ground of challenge stands or falls with the previous one.

Issue 4: Failure to deal with the case put to it by ZCCM in relation to the rate of interest paid by FQMF to KMP

97. This was the ground on which ZCCM really concentrated the most fire, and as noted above, a part of Issues 2 and 3 now hinges on the outcome of this ground. It was ZCCM’s case that a commercial Arm’s Length rate of interest should have been paid by FQMF to KMP which reflected the actual use/risk to which FQMF put the monies, i.e. using them to fund FQ Group’s business, namely the rate applicable on an unsecured commercial loan, rather than an on-demand deposit rate.
98. ZCCM says that no “issue” argument can arise in that it was a fundamental issue in the arbitration, cutting across all aspects of its claim: misrepresentation, breach of fiduciary duty, breach of ASHA. Indeed, in dealing with exhaustion of remedies Ms Brown QC for ZCCM conceded that the conclusion on loss rendered Issues 2 and 3 foregone conclusions.
99. The primary basis upon which ZCCM sought to establish a *prima facie* case of loss in relation to all of these heads was that KMP should have received a rate of interest reflecting a commercial unsecured loan rate. ZCCM contended that there was evidence of such rates and that the Tribunal nonetheless failed to address this crucial issue at all.
100. What was necessary, it submitted, was for the Tribunal to address the issue of whether LIBOR was a commercial Arm’s Length rate when the monies were being used to fund FQ Group business. Instead, the Tribunal addressed the issues of express misrepresentation and proof of loss on a basis which was not contended for by ZCCM and which ZCCM had expressly disavowed. Indeed, ZCCM contended that the Tribunal had not even properly identified the issue. On that basis it submitted it should be assumed that the issue was not properly dealt with.
101. ZCCM submitted that the position is not dissimilar to that in *Transition Feeds LLP v Itochu Europe plc* in that the Tribunal failed to address the key argument raised by ZCCM as to how its loss should be calculated on a *prima facie* basis.
102. KHL submitted that the Tribunal did deal with this issue. It submitted that the Tribunal dealt extensively with interest rates and loss at paragraphs 60 to 65, including the rate of interest paid by FQMF to KMP.

103. Specifically, the Tribunal referred both to ZCCM's failure to adduce any evidence that a higher rate of interest could be obtained at paragraph 60 but also to "*the only independent evidence*" being a KPMG report dated 13 November 2014 at paragraph 61, which concluded that: "...*the one-month LIBOR rates on deposits under the Deposit Agreement were not below the Arm's Length rate.*"
104. It conceded that the Tribunal might have dealt with the question more fully. However, what mattered was that it was dealt with.
105. Further or in the alternative KHL contended that the Tribunal's conclusions were conclusions of fact, and were not properly open to challenge.

Discussion

106. One difficulty for ZCCM on this argument is that its attempt to divorce the representation as to the rate of interest and as to the use of the funds is artificial. The reality is that ZCCM's entire position comes down to a claim that it should have received a higher rate of interest. The claim for a misrepresentation (or breach of fiduciary duty) as to the non-availability of a higher rate of interest is not conceptually distinct from its claim for misrepresentation (or breach of fiduciary duty) as to the use of the money. At bottom ZCCM's case is constructed thus: we should have got a higher rate of interest because of the use of the funds (about which you lied to us).
107. Thus, it follows that if there is no case with a realistic chance of success on the first head, there could be no case with a realistic chance of success as regards the rate of interest; because the interest rate is dependent on the use of funds. There is no separate misrepresentation pleaded that KHL represented that LIBOR was an Arm's Length rate for the use to which the funds were actually put (because it formed no part of ZCCM's case that it was told this). One might therefore conclude that the case failed for this reason.
108. But in addition, the Tribunal have (entirely correctly) highlighted a separate and critical point. This is that one needs to look at the counterfactual which must govern any assessment of loss. It is not enough to say (i) you lied about the rate relevant to the use you were making of the funds, therefore (ii) we are entitled to that higher rate. ZCCM must bridge the gap by showing that what they would have done if the lie had not been told is that they would have taken advantage of that rate; i.e. they must have a case on causation. On this point ZCCM's case is dependent on an implicit assertion that if it had been told that FQMF intended to use the monies it would either have bargained for a different rate with FQMF or would have got a better rate elsewhere.
109. But as the Tribunal has spotted, that must be tested against the known facts. In particular given that (*ex hypothesi*) KMP had (or understood itself to have) free use of its funds, it could have got a better return elsewhere anyway, and chose not to do so. That implies that the causation case is not good. That evidence is, as the Tribunal notes, bolstered by the other known facts – it notes at paragraph 63 that a suggestion to tie up part of the monies for a greater return elsewhere was not welcomed by ZCCM.
110. The Tribunal then at paragraph 64 bolsters this reasoning yet further by (i) explaining why ZCCM appears to have taken (and hence would have taken) this, on the face of it counterintuitive, position and (ii) saying that in any event KHL's directors could control

this decision and there was nothing so wrong about that decision that it could give rise to a claim for breach of fiduciary duty.

111. Finally, it also notes at paragraph 64 that the evidence of higher rates which ZCCM relies upon was not apposite in the context of what it has (unappealably) found were “*extensive capital requirements which on the face of it made it sensible to keep the monies – or at any rate a large part of them – on short term deposit.*”. It therefore does not (as was submitted) ignore ZCCM's submissions on rate; rather it finds therefore that on the facts ZCCM's evidence is of the “apples and oranges” variety, and that the only evidence it had which was pertinent to the investment decision on the counterfactual was the KPMG report, which suggested that there was no loss.
112. It is fair to say that the Tribunal does not explain this reasoning as clearly as it might have done. Its reasoning jumps straight from ZCCM's case to the counterfactual, without explaining where in the loss analysis ZCCM's problem lies.
113. However, it is on careful reading quite clear what the Tribunal was saying, and that it was dealing with the relevant question. There is therefore no failure to deal with the case as put; nor are the authorities as to inferences from inadequate reasoning apt. The reasoning is robust; the expression of that reasoning is just not very user friendly.
114. It follows that Issues 2, 3 and 4 therefore fail.

Issue 5: The Tribunal wrongly proceeded on the basis that it was undisputed that KMP's monies were repaid as and when required and/or failed to address the issue that KMP's monies were not always readily available

115. As well as being brought under s. 68(2)(d), the challenge on this issue is also brought under s. 68(2)(a) on the basis that it was a failure to comply with section 33 of the Act for the Tribunal to proceed incorrectly on the basis that a matter was undisputed.
116. As to this ZCCM points to *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749; [2007] 2 All ER (Comm) 694:

“[37] From these decisions I derive the following propositions relevant to grounds under section 68(2)(a):...

(1) The underlying principle is that of fairness or, as it is sometimes described, natural justice. ...

(3) It will generally be the duty of a tribunal to determine an arbitration on the basis of the cases which have been advanced by each party, and of which each has notice. To decide a case on the basis of a point which was not raised as an issue or argued, without giving the parties the opportunity to deal with it, will be a procedural irregularity. ...”

117. It contends that by analogy it must be a procedural irregularity under s. 68(2)(a) for the Tribunal wrongly to decide an issue on the basis that a matter is undisputed. This proposition was not disputed.

118. The factual basis for the complaint is that ZCCM says that it did not accept that the monies were “repaid as and when required”; indeed, it expressly denied that the monies were always available for use by KMP – here the “*money can't be in two places at once*” argument was deployed. ZCCM reiterates that the mere fact that the monies were ultimately repaid by the end of 2014 does not mean that they were always available for use between 2007 and 2014.
119. ZCCM points to a report by PwC which said “*While [KMP] has access to these funds and makes drawdowns for working capital purposes, there is a risk that if the amount were called on, [FQML] may not be in a position to immediately settle it*”. That, it contends, gives the lie to the Tribunal's conclusion and represented ZCCM's position. It also points out that in its evidence what was said was that “*there is no evidence that it was sitting there every day*” and in submissions its counsel said “*there is ... no evidence that at any given point the funds were readily available contrary to representations which were made.*”
120. ZCCM contends that, given the significance placed by the Tribunal in their analysis at paragraph 59 of the Ruling on the incorrect premise that it was undisputed that the monies were repaid as and when required, it is at the very least “*realistically possible*” that had the Tribunal not misdirected itself it would have concluded that there was a *prima facie* case that the monies were not always available and therefore, a *prima facie* case that dishonesty was made out.
121. KHL contends that this ground is an illegitimate exercise in semantics and contrary to the approach indicated by Flaux J in *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm). It submits that ZCCM never did dispute the “*always repaid*” proposition but suggested only that the monies were not always available to be paid as and when required. Properly understood, the Tribunal decided on the evidence that there was no dispute the monies were repaid when they were actually required, which was true: further ZCCM was unable to point to any time where, had money been required, it could not have been repaid.
122. As for the PwC report, KHL argues that ZCCM fails to recognise that this was merely setting out the risk that PwC were testing for the purposes of the audit, i.e. simply identifying an “*audit focus area*”. On the same page, they set out the “*procedures performed and results*”, stating that “*as at 31 January 2014 FQML had signed USD2.5 billion facility with Standard Chartered Bank to shore up its financing*”, which, in context, satisfied then that there was no such risk.
123. In any event, whether the issue was contested or not, KHL submits that the Tribunal also found that “*there was no evidence that the value of KMP's funds loaned to FQMF was not available for use if needed*”. This is a primary finding of fact and cannot be disturbed.
124. In those circumstances, it says, there can be no substantial injustice.

Discussion

125. On this point both sides appeared at times to be engaging in a semantic dispute. It seems clear that ZCCM could not and did not actively dispute the “*always repaid*” point. It did however not actively accept it and they did obviously dispute the “*available for*

repayment” proposition, at least insofar as reference was had to the exact monies transferred to FQMF. I will avoid this dispute, which leads nowhere and deal rather with the essence of the complaint – that the Tribunal assumed that there was no dispute as to availability of funds, when there was such a dispute.

126. I am not persuaded that there is anything amiss with the Ruling in this respect. The Tribunal may have slightly overstated the common ground, but not to any material effect. So far as concerns the narrow point (“*repaid*”), what the Tribunal said does not misrepresent the position. Nor is it fair to say that the “*available*” argument, which was ZCCM's focus, was ignored as ZCCM says. It is dealt with at [58(c)]. I do not accept, as Ms Brown attempted to persuade me, that there is anything objectionable in the use of the word “*Value*” in that context (“*the value of KMP's funds loaned to FQMF*” being available or otherwise). There was no reason why repayment had to be made from the exact funds transferred. There was no trust and so long as the value was available to be repaid on demand, this was all that mattered.
127. Further so far as the question of “*realistic possibility*” of a different outcome is concerned in the context of substantial injustice, ZCCM's submission overstates the emphasis on this point within the Ruling. The Tribunal leant on (i) the detailed history of the way the parties described the arrangement (ii) ZCCM's own attempt to get such a loan for itself and (iii) that it was undisputed that it was repayable on demand/repaid when required. That makes this point one half of the third point on which weight was placed. It cannot be said that even if the Tribunal slightly overstated the willingness with which the concession was made, there is a realistic possibility that the fuller iteration of it would have made a difference. One need only read into the Ruling the terms in which the point was actually put to the Tribunal to see how very marginal a difference is in focus here.

Exhaustion of Remedies

128. In relation to Issues 2-5 above KHL also raised the question of exhaustion of remedies. KHL says that if there was any failure to deal with an issue ZCCM's remedy was to apply to the Tribunal for an additional award under Article 39 of the UNCITRAL Rules.
129. It places reliance first on section 70 of the Arbitration Act 1996, which provides:
- “(1) The following provisions apply to an application or appeal under section 67, 68 or 69.
- (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted –
- (a) Any available arbitral process of appeal or review ...”
130. Secondly it points to Article 39 of the UNCITRAL Rules which provides:
- “Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.”

131. The wording of Article 39 is materially similar to section 57(3)(b) of the Act, which provides an alternative in the absence of agreement to make additional awards.
132. Thus in relation to breach of fiduciary duties, KHL contends that the breach of fiduciary duties is a primary head of claim and therefore falls within Article 39. It is not an issue “*which is part of the process by which a decision is arrived at on one of those claims*”: *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787.
133. ZCCM argues that this Article and the section only apply to claims presented and not decided, pointing to *Torch* at paragraph 27 where Cooke J said:
- “In my judgment section 57(3)(b), which uses the word “claim”, only applies to a claim which has been presented to a Tribunal but has not been dealt with, as opposed to an issue which remains undetermined, as part of a claim ... I consider that the terms of section 57(3)(b) are apt to refer to a head of claim for damages or some other remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims.”
134. ZCCM contends that the breach of fiduciary duty argument was not a claim in that sense in the context of this hearing, which was not to decide the merits of the claims, but was only for permission to bring a derivative claim. It was a key issue which should have been addressed; but it was not a claim which was capable of giving rise to a separate Award. It points to KHL's submission in the context of the Award vs Procedural Order debate that the determination left KMP's causes of action unaffected. It also emphasises the point that the decision on no loss was determinative.

Discussion

135. This question is somewhat artificial in the light of the conclusions to which I have already come. The question is by now one of double contingency: if I had decided the Ruling was an award, and if I had decided that there was a failure to decide the particular issue. Had both of those questions gone the other way I would have concluded that there were substantive final determinations of issues and that the Tribunal had failed to deal with one or more of them. It would then follow that the provisions of Article 39 would be applicable and that ZCCM should have and did not seek to invoke Article 39, with the result that any claim under s. 68 is barred by the operation of section 70.

The Fraud Claim

136. By its 1 June 2018 Application, ZCCM seeks permission to amend its Arbitration Claim to include a claim under s.68(2)(g) that there was a “*serious irregularity affecting the tribunal, the proceedings or the award*” “*which has caused or will cause substantial injustice*” to ZCCM by reason of “*the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.*” It also seeks an extension of time to make this amendment, the application having been brought well after the time limit set out in the Act.

137. ZCCM's case is in essence that in the arbitration KHL argued that:
- a) The arrangement between KMP and FQMF was “*a simple loan at interest*” and, accordingly, there were no restrictions on the use to which FQMF could put KMP’s money.
 - b) Use of the word “deposit” to describe the arrangement between KMP and FQMFL did not mislead ZCCM because in a general deposit arrangement there is no restriction on the use to which the monies advanced can be put.
 - c) “*All of the evidence*” supported its case and that there was “*not a shred of evidence*” to support ZCCM’s case.

I was taken to a number of transcript references focussing on this distinction between loan and deposit; and while I have not read the entire transcript it is fair to say that it is apparent from the Ruling that this distinction was the focus of much argument at the hearing.

138. ZCCM say that this was a key point and point to what they say is the acceptance of KHL’s case at paragraph 59 of the Ruling and the finding that KHL’s characterisation of the loan as a “*deposit*” was not dishonest where both parties had also described the same arrangement as a “*loan*”. ZCCM say that it was on the very basis of this distinction that the Tribunal held that ZCCM had failed to establish a *prima facie* case on falsity (and therefore dishonesty).
139. ZCCM says that in stark contrast to this, KMP had argued in correspondence with the Zambian Revenue Authority (“the ZRA”) that the arrangement between KMP and FQMF was not a loan but was rather a deposit with all the funds held on an FQMF account in London at KMP’s disposal. Further in arguing that interest at LIBOR was Arm’s Length, KMP asserted “*deposit and borrowing rates differ*”.
140. The factual basis of this derives from a series of letters, described as “the ZRA Correspondence”.
141. The first is a letter from ZRA dated 27 May 2013. It says this:

“Kansanshi Mining PLC-Audit Findings

Reference is made to our audit that we conducted from 14 June 2012 to 29 June 2012.

Thus, this letter serves as notice of the audit findings emanating from the audit mentioned above.

...

1.3.2 Loan to FQM Finance

The company provided an unsigned loan agreement with FQM Finance dated 1 January 2007. Though the company has argued that the arrangement was not a loan but simply a senior credit obligation.

However, we still feel the loan should have attracted interest at Arm's Length like a loan to any other third party would have attracted. The company recently went to the market to get a loan amounting to one billion dollars at LIBOR plus 3%. This is very unusual especially that as at 26 June 2012 the loan account (money learnt FQM Finance) was about \$2,000,000,000. Why then should a company that has a reserve with as much as \$2,000,000,000 opt to get a loan with interest rates at LIBOR plus 3%? This further explains why we have argued that the money should have been lent at LIBOR plus 6% to reflect what such a transaction would obtain on the market.

Based on our arguments above, we intend to readjust the lending rate so that it is based at LIBOR plus 6%. Thus, the adjusted interest receivable will be as follows:”

142. This was addressed in a 14 June letter:

“Loan to FQM Finance

We reiterate the explanation given earlier that this was not a loan but rather a deposit. This deposit cannot be classified as a loan as it has no features common to a loan.

The following are features you would expect from a loan

- Tenor – you would normally expect a tenor to be in the document;

This is an “*at call*” deposit, so the tenor is at default overnight. This is a common feature with all “*deposits*”.

- Security;
There was no security given by KMP or requested by FQML.
- Financial Covenants;
There were no financial or other covenants attached to the arrangement.
- Repayment;
There is no repayment schedule.
- Material Adverse Change/ Event of default clauses;
There were no MAC or EOD clauses.

The above clearly show that it was not a loan.

Pricing for short dated deposits is generally based off LIBOR adjusted for short term credit risk.

In terms of LIBOR, this is a standard benchmark for pricing of both Deposits and Loans. It is normal to match the LIBOR rate with the tenor, so it is appropriate to use Overnight Libor for pricing....

It is worthwhile to note that the income tax act neither defines a loan nor prescribe any criteria necessary for an advance to be classified as a loan. It is therefore reasonable to assume that the income tax act expects the same features as above from a loan....

Based on the above representations, we expect the assessments to be adjusted accordingly and fairly reflecting a consistent and compliant tax payer. ...”

143. Then there was a letter of 6 August 2013:

“Loan to FQM

..., we indicated to you that the funds you are referring to as a loan to FQMF is not actually a loan but just a deposit account where all proceeds relating to the exports of KMP are deposited. The funds are accessed by KMP as and when need arises. We submit that the advance does not have the features of a loan and hence cannot be treated as such. We argue on the same line below.

The issue of Arm’s Length transacting between KMP and FQM is a matter of fact. KMP has indicated from previous correspondence that there is an arrangement between KMP and FQMF whereby all proceeds of Copper are deposited in the London FQMF account held at Standard Chartered Bank. This is a purely finance/treasury management arrangement to enable the treasury function which is housed in London conveniently manage the funds. There was no loan that KMP advanced to FQMF as found by your audit team. All sale proceeds are deposited into the account in London and the funds are at KMP’s disposal. KMP actually draws money from the same account monthly and as and when the funds are needed based on its monthly cash budget requirements.

...

You have also stated that charging interest at LIBOR was not at Arm’s Length. As indicated above, the depositing of funds into the UK account is actually not a loan but just a deposit into an account where central treasury (based in London) can easily monitor and manage the funds, KMP can only recover the interest that it would ordinarily earn on a deposit account. ... Further note that deposit and borrowing rates differ.”

144. ZCCM says that the divergence between these letters and what was said in the arbitration is such that it is right to conclude that the Ruling was obtained by fraud.

145. KHL opposes the application on the merits but also contends that the application never gets off the ground because the extension of time should not be granted because of:

- a) Delay, for which ZCCM is culpable;
- b) ZCCM's continued participation in the arbitration notwithstanding knowledge of the alleged irregularity;
- c) ZCCM's failure to seek disclosure or an adjournment pending disclosure;
- d) The test for the introduction of new evidence has not been met;
- e) KHL's non-disclosure could not amount to a fraud.

146. Logically the question of extension of time must be considered first.

Amendment/Extension of time

147. In relation to the approach to an application to amend the claim form under section 80(5) of the Act KHL referred me to the judgment of Popplewell J in *Terna Bahrain* at [27-31].

148. However, that judgment refers back to the seminal judgment of Colman J in *Kalmneft v Glencore* [2002] 1 Lloyd's Rep. 128, where he set out the principles which have been substantially undisturbed in the succeeding sixteen years ("the Colman Guidelines"). After considering the policy factors underlying the Arbitration Act regime he said:

“Accordingly, although each case turns on its own facts, the following considerations are, in my judgment, likely to be material:

- (i) the length of the delay;
- (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;
- (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
- (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
- (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have;
- (vi) the strength of the application;
- (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.”

149. I should add that there was a suggestion in a judgment of Eder J in *S v A* [2016] EWHC 846 (Comm) [2016] 1 Lloyd's Rep 604 that this approach might not be consistent with what are now widely referred to as "the Denton principles" set out in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, and *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926. However that suggestion has not gained traction in the subsequent authorities and was not raised by either of the parties. There are, of course, good reasons why applications under this section may require to be dealt with in a slightly different way to CPR defaults – notably the fact that the consideration arises under the Act not the CPR, and the important arbitration specific factors identified within Colman J's judgment are in play.
150. There is some debate in the authorities (see for example *State A v Party B* [2019] EWHC 799 (Comm) at [33]) whether the first three factors are generally to be taken as the most important ones. However in this case it is essentially common ground that the most important factors other than the merits, to which I will come, will be those listed as (i), (ii), and (iii).
151. On the first factor KHL says that this points clearly against an extension of time. It says by reference to *Terna*, at [28] and *Daewoo Shipbuilding & Marine Engineering Company Ltd v. Songa Offshore Equinox Ltd and Songa Offshore Endurance Ltd* [2018] EWHC 538 (Comm) at [78], “the length of delay must be judged against the yardstick of the 28 days provided for in the Act. Therefore, a delay measured even in days is significant; a delay measured in many weeks or in months is substantial”, that even a short delay will often be significant and that on any analysis 71 days late must be so.
152. It notes that in *Terna* it was indicated that the absence of an explanation for a period of delay is likely to be taken as an indication that it was deliberate. As Popplewell J said in that case:
- “Moreover, where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter.”
153. It says that this is all the more serious and the second hurdle is also missed in circumstances where ZCCM was aware of all the facts underlying its amendment not just before the deadline under section 68 but for 3½ years before this and even before the arbitral hearing itself.
154. ZCCM argues that this mischaracterises its position and that there was no material or culpable delay. Further it submits that it is highly significant that at this hearing the Court is asked to decide ZCCM's application to extend time at the same time as determining the merits of the fraud claim. It submits that the authorities indicate that in such a case the merits are a powerful factor in determining whether to extend time. It points in particular to *Terna* at paragraphs 31 to 33:
- “[31] ... the court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. On an application for an extension of

time, the court will not normally conduct a substantial investigation into the merits of the challenge application, Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time....

[32] The position, however, is different where ... the application for an extension of time has been listed for hearing at the same time as the challenge application itself, and the court has heard full argument on the merits of the challenge application. In such circumstances the court is in a position to decide not merely whether the case is “weak” or “strong”, but whether it will or will not succeed if an extension of time were granted. ... If the challenge is a bad one, this should be determinative of the application to extend time....

[33] Conversely, where the court can determine that the challenge will succeed, if allowed to proceed by grant of an extension of time, that may be a powerful factor in favour of the grant of an extension, at least in cases of a challenge pursuant to s 68. In such case the court will be satisfied that there has been a serious irregularity giving rise to substantial injustice in relation to the dispute adjudicated upon in the award ... Where the delay is due to incompetence, laxity or mistake and measured in weeks or a few months, rather than years, the fact that the court has concluded that the s 68 challenge will succeed may well be sufficient to justify an extension of time. The position may be otherwise, however, if the delay is the result of a deliberate decision made because of some perceived advantage.”

155. Further, it says that when, as here, the allegation is one of fraud, the Court should be slow to shut out the challenge on the basis of delay. See *Chantier De L’Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383:

“[66] .. Furthermore, the importance and significance of the allegations raised (whatever the eventual outcome of the application) are such that I would be extremely reluctant to shut out CAT on grounds of delay. ...”

156. On this basis it submits that if the Court is satisfied that ZCCM’s s.68(2)(g) challenge should succeed then it should extend time. The delay was just over 2 months and there is no question of any deliberate decision to delay having been made for tactical reasons.

Discussion

157. I am satisfied that while the position on the merits is not determinative when an application for an extension is heard at the same time as the substantive challenge, it will be a far more significant factor at this stage than it would be if the application were heard earlier.

158. In such a case the authorities indicate that if a claim has merits, something beyond mere delay will usually be required; something akin to a deliberate decision not to pursue the application earlier, which was made because of some perceived advantage.
159. In this case I am not satisfied that the delay which is established is of such significance that I can conclude that this hurdle or a hurdle is reached. In other words this is not a case where, even if I concluded that the Ruling had been obtained by fraud, it would nevertheless have been right to refuse an extension of time.
160. That is not of course to say that I conclude that there was no culpable delay. In my view there was delay. In particular I am persuaded that there was some culpable delay prior to the arbitration and in its early stages. Between July 2014 and June 2017, ZCCM was in active dispute with KHL with both litigation and arbitration in contemplation throughout; and yet it took no steps to obtain permission to use the ZRA Correspondence. On the basis that, as I have been told, these were important documents, ZCCM cannot have been in any doubt it wished to rely on the ZRA Correspondence. Yet there is no explanation of any sort for this default which would entitle me to conclude that delay has been deliberate.
161. There was also a delay after permission had been granted by the ZRA of some 12 days; the explanation given that ZCCM then chose to seek directions from the Commissioner General of the ZRA as to whether the ZRA needed to produce the documents to the Minister is not in my judgment a good reason.
162. Had this matter arisen for decision at an earlier stage, when the merits had to be looked at on a preliminary basis, and delay issues accordingly weighed more heavily it might well have been the case that the balance would have come down in favour of refusing the extension of time based on that delay. However the decision on the extension of time is fact sensitive; and it is highly significant that at this stage I am able to make an informed determination on the merits.
163. Accordingly, in my judgment the result on the extension application in this case would turn on the conclusion which I reach as to the merits of the case.

The Merits of the Fraud Claim

164. That brings me finally to the question to the merits of the fraud case.
165. KHL submits that following *Double K Oil v Neste Oil* [2009] EWHC 3380 (Comm); [2010] 1 Lloyd's Rep. 141 ZCCM must establish that: (i) the award was obtained by fraud (or the way in which it was obtained was contrary to public policy) (ii) the new evidence relied upon to show the fraud could not with reasonable diligence have been adduced in the arbitration and (iii) the new evidence would have an "*important influence on the result*" (i.e. the irregularity has caused/will cause substantial injustice).
166. ZCCM relies on the judgment of Jefford J in *Celtic Bioenergy v Knowles* [2017] EWHC 472 (TCC); [2018] 1 All ER (Comm) 608. In that case (summarising in an extremely skeletal form) the application arose in the context of a Final Award concerning the single issue of whether a previous ad hoc arbitration agreement had been complied with. That agreement included terms that one party, "Knowles", would withdraw and extinguish certain invoices against a local authority, which resulted in a Deed of

Waiver. In the arbitration there was an issue as to the enforceability of the Deed of Waiver. Knowles contended that the Deed was valid and enforceable. While arguing this substantive issue it did not tell the arbitrator that it had corresponded on the basis that the Deed of Waiver was not agreed, and had indeed sought from the local authority payment of the fees which would have been waived by that deed.

167. In particular ZCCM pointed to:

- a) [67] *“There must be some form of dishonest, reprehensible or unconscionable conduct that has contributed in a substantial way to obtaining the award.”*
- b) [70] *“In any event, the applicant must also establish that there has been a substantial injustice. Amongst other things, the applicant must show that the true position or the absence of fraud would probably have affected the outcome of the arbitration in a significant respect.”*
- c) [90] *“... the combination of Mr Rainsberry’s complete lack of engagement with the relevance of correspondence, the failure to provide a meaningful explanation for its non-disclosure and the unwarranted and intemperate attacks on others all indicate that he did not have a good explanation, let alone a perfectly simple one, for the correspondence and his failure to disclose it.”*
- d) [91] *“I should note that I have repeatedly used, for convenience, the verb “disclose” and the noun “disclosure”. There was no order for disclosure in the procedural sense. I do not regard that as relevant on this application and I do not intend this verb/noun to be construed in that way. What I mean is that matters were not disclosed in the sense that matters were not put before the arbitrator which on their face contradicted the version of the facts that was advanced before him.”*
- e) [105] *“I find, therefore, that the award was obtained by fraud in that matters that were completely inconsistent with key issues in Knowles’ case were deliberately withheld from the arbitrator.”*

168. ZCCM contends that on its face, the ZRA Correspondence shows KMP’s understanding of the nature of the arrangement to be in accordance with ZCCM’s understanding and contrary to KHL’s case before the Tribunal. It says that KHL, which was in control of KMP, plainly knew about this correspondence and yet it has served no evidence from anyone at KHL or KMP to explain why it was not misleading for KHL to run the case it did before the Tribunal notwithstanding the contrary case put by KMP in the ZRA Correspondence. In these circumstances ZCCM says the Court’s only conclusion can be that KHL has no good explanation for its conduct.

169. ZCCM says that the explanation which has been provided that the dispute between KMP and the ZRA was as to whether the arrangement satisfied the requirements of a loan for a transfer pricing audit under s.95D Zambian Income Tax Act (“ZITA”) - is wrong. The ZRA correspondence was written in the context of an integrated tax audit and not a transfer pricing audit. The relevant passages in the letters dated 14 June 2013 and 6 August 2013 were written by and on behalf of KMP to persuade ZRA that the terms of the transaction between KMP and FQMF were on an Arm’s Length basis in

circumstances where ZRA had concluded that the arrangement was in the nature of a loan facility, and on this basis, was assessing tax in 2013.

170. On the face of it that must reflect how KMP understood the arrangement. It precisely reflects ZCCM's case in the arbitration and is directly contrary to the case run by KHL.
171. ZCCM says that this case is therefore on all fours with or even *a fortiori Celtic Bioenergy*.
172. KHL's response centred on three points. It said:
 - a) There was no fraud in circumstances where there was no obligation to disclose documents, and ZCCM were in any event well aware of the documents;
 - b) The merits of the loan vs deposit agreement were not material for the purposes of the application for permission to pursue a derivative claim, in which the Tribunal assumed that the arrangement was a loan and that the representations alleged were made;
 - c) The documents could have had no effect.
173. In relation to the second point in particular KHL submitted that there was no dispute before the Tribunal as to the nature of the arrangement (which was assumed in ZCCM's favour) or the existence or content of the ZCCM Representations (assumed in ZCCM's favour). There was also no issue that the First Defendant had used the word "*deposit*" in correspondence with ZCCM. That was an issue which had been fully ventilated both in the skeleton submissions and orally before the Tribunal.
174. KHL submitted that in those circumstances the Tribunal found in KHL's favour on the only issue for determination, whether there was any arguable case in fraudulent misrepresentation that the arrangement described was a deposit (in the sense that FQMF would not use the funds). In so doing, the Tribunal found that the words "*loan*" and "*deposit*" had been used interchangeably by both parties and that ZCCM had been well aware of the real arrangement, asking for similar terms for itself. It contends that the ZRA correspondence is entirely irrelevant to the issues on the permission application.
175. On that basis KHL submits that the documents could not sensibly be considered to have been such as to cause the Tribunal to come to a different decision.

Discussion

176. This is not a case which turns on the question of disclosure. The authorities are clear that even in the absence of an order for disclosure an award or judgment may still be obtained by fraud. So in *Celtic Bioenergy* there was no order for disclosure but it was still misleading to put forward a case which was contrary to the March correspondence and to fail to refer to it.
177. Similarly in *L Brown & Sons Limited v Crosby Homes (North West) Limited* [2008] EWHC 817 (TCC), at paragraph 36(iii) the judge held that the withholding or non-disclosure of documents which have not been agreed to be disclosed "*cannot be described as reprehensible or fraudulent unless such non-disclosure is part of some other fraud or reprehensible conduct on the part of the non-disclosing party*". It is

implicit in that that non-disclosure in the sense of withholding - even where there is no order for disclosure - could be sufficient to be a part of fraudulent or reprehensible conduct.

178. The thing which matters therefore is whether there was some such fraud or reprehensible conduct; and for that it is necessary to reach a conclusion about the relation of the letters to the issues before the Tribunal. Are they, as ZCCM submits, of "*obvious utility*"? If they are, one might well infer that there was something reprehensible about their being withheld.
179. In reaching a conclusion on the utility of the correspondence two things need to be considered. The first is what the letters say, and the second is what the Tribunal decided. As regards the first, the context does require to be borne in mind. One aspect of this is that the correspondence (between the ZRA and KMP) arises in the context of a tax audit. In the letter of 27 May 2013 the ZRA says that it does not find the interest rate credible in the context of a loan and produces an adjusted tax calculation based on this (and other) adjustments.
180. The letter of 14 June is a reply to this. It argues against the classification of a loan (attracting Arm's Length interest) using the word deposit, but flagging facets of the arrangement which were not consistent with a loan attracting the higher rate of interest. These include the tenor of the loan, flagging the fact that the loan/deposit was repayable on demand (or "*at call*", the term actually used), as well as the absence of security. It argues that pricing for "*short term deposits is generally based off LIBOR adjusted for short term credit risk*". It argues for overnight LIBOR as consistent with the on-demand nature of the arrangement. It concludes by saying that, based on the above, it expects the assessment to be "*adjusted accordingly*".
181. On 26 July the ZRA responded, saying that it was operating on the basis that the appearance was of a long term loan, and that KMP had obtained loan finance rather than using money from this source. A similar line to the June letter was taken by KMP in the 6 August letter: referencing the absence of features which would result in a higher interest rate. It reiterates that the funds are at KMP's disposal and states "*KMP actually draws money from the same account monthly and as and when the funds are needed based on its monthly cash budget requirements.*". There are two references which are to some extent inconsistent with the case advanced by KHL. At one point the writer calls the arrangement "*a purely finance/treasury arrangement to enable the treasury function ... to conveniently manage the funds.*" At another point he says "*the depositing of funds into the UK account is actually not a loan but just a deposit into an account where central treasury ... can easily monitor and manage the funds.*"
182. Pausing here, I conclude, following careful examination of the correspondence and looking only at this one piece of context, that there is some conflict between the position taken in the arbitration and the way in which the point was put in correspondence with the ZRA. Certainly, KMP was emphatic in the use of the language of deposit, and there was at least a suggestion that the monies were not used by FQM; the flavour is that of ring-fencing. Ultimately the fact of such limited inconsistency was not really disputed by KHL; what was in issue was its extent and its significance – which are essentially two sides of the same coin.

183. The next question is whether that conflict was such as to be material. That depends on the approach and analysis of the Tribunal.
184. As regards the second issue it is possible to look back at the consideration given to the Tribunal's analysis above, in particular in relation to Issues 1 and 4. When one looks carefully at the Ruling there are two key aspects. One is the finding on loss. The second is the finding on liability, which is based on a rejection of the inference which ZCCM sought to draw because the Tribunal concluded that, looking at all the material which gave the representations their context, there was a proper construction which was not dishonest - and also that it did not mislead KMP.
185. That conclusion was reached against a consideration of much documentation, including documentation in which the terminology of deposit is used and against a background where the context was debated in considerable detail. It is also reached against a background where even if (as ZCCM submit) the making of the representations was disputed by KHL, the Tribunal assumed that the representations alleged (including as to deposit and availability) were made. Those representations included one as to ring fencing.
186. Against this background I cannot accept ZCCM's argument that the ZRA material would have been of obvious utility or that there was any real chance that it would have impacted upon the Tribunal's decision. When one posits the question as to what the ZRA correspondence adds to the material relevant to the issues it is hard to enunciate exactly what it is that it adds.
187. ZCCM placed particular emphasis on *Celtic Bioenergy*. Their reason for so doing is clear; on a reading of the case there do appear to be parallels. But those parallels depend on looking at the case from ZCCM's perspective, and disappear when one looks at it with closer regard to what the Tribunal were doing.
188. The starting point is that *Celtic BioEnergy* was a very different case indeed to this. As I hope is apparent from the summary I have given (and is certainly more than apparent from the detailed and lucid judgment of Jefford J) the documents withheld in that case went to the very heart of the dispute, flatly contradicted the case run and were withheld in the context of a substantive determination. Here – importantly – what was being done was simply a determination of whether ZCCM were entitled to bring a derivative claim. There was no ruling on the merits.
189. ZCCM pointed to the fact that in *Celtic Bioenergy* the Tribunal had considered the issue of whether Knowles had given a waiver as required, it had done so in the absence of the "*March correspondence*" which was completely inconsistent with acceptance by Knowles that the waiver was valid and claimed to be *pari passu* with that situation. But here while it is true that the debate during the arbitral hearing as to what the nature of the arrangement was understood to be and what the parties understood and meant by the use of the term "*deposit*" took place in the absence of the ZRA Correspondence, that was not, properly regarded, correspondence which was completely inconsistent with even the case which KHL advanced, and it certainly was not completely inconsistent with the approach which the Tribunal took. Here the merits were (in essence) assumed in favour of ZCCM by the determination to assume both representation and use.

190. Further the documents do not put a different complexion on matters when compared to those documents which were before the Tribunal. As I have indicated, it is hard to say what they add to the state of affairs which was assumed in ZCCM's favour on the basis of the October memorandum. Even the apparent inconsistencies are when viewed in context very slight – as was perhaps tacitly conceded by ZCCM in submitting that the correspondence "*is not in identical terms*".
191. The rejection of the use of the word "*loan*" in the ZRA correspondence also has to be viewed in context, as pertaining to an argument about whether the arrangement was apt to attract LIBOR only or a higher rate. Indeed on one view it illustrated exactly the ambivalent nature of the arrangement – and of course this was consistent with the Tribunal's conclusion that ZCCM was seeking just such an arrangement for its own benefit. In this respect it had seemed to me that ZCCM's case again hinged too much on the semantics and paid insufficient regard to the substance of the debate – both in the ZRA correspondence and in the arbitration.
192. Nor was the ZRA Correspondence inconsistent with the case advanced by KHL that the funds were indeed repayable on demand and always available to KMP. Again the correspondence in fact provides evidence from KMP that it had sought repayments from time to time and received them.
193. It cannot therefore be said that in this case the correspondence was completely inconsistent with KHL's case or only consistent with ZCCM's case. Even if it did add (as Ms Brown submitted) a further dimension to the question of whether KMP were misled or what they understood, it is dubious whether it would have added much at all to the materials already in play. But certainly it could add nothing to the conclusion regarding dishonesty, which was, as I have earlier noted, essentially one of the two key determinations.
194. Nor is it fair to say that KHL could not realistically have run the argument it did in the arbitration had it disclosed that KMP had itself described the arrangement to ZRA as "*not a loan*" but "*just a deposit account*" where KMP's monies were deposited into FQMF's account in London and were at KMP's disposal. There was nothing more out of step with this correspondence than there was in other correspondence which was before the Tribunal – in particular the 10 October memorandum, which the Tribunal accepted should be taken as giving a *prima facie* case that such representations were made.
195. Nor would the correspondence have impeded KHL in running its case that 30-day LIBOR was an Arm's Length rate of interest. KMP's point in the ZRA Correspondence was that interest at LIBOR was an Arm's Length rate of interest not because the arrangement was not a loan (of some sort) but because the nature of the arrangement, including the repayability on demand meant that its risk profile was more akin to a deposit, than a term loan. The terminology such as: "*Further note deposit and borrowing rates differ.*" as explicitly pegged to repayability on demand.
196. In my judgment it cannot therefore be said that the disclosure of the ZRA Correspondence in the arbitration would "*probably have affected the outcome*" of the arbitration in a significant respect. Accordingly the Extension Application fails.

197. I would add that my conclusion is independent of, but is reinforced by the position on loss. Given the Tribunal's conclusion that the case on loss must fail, even if there had been something significant in the ZRA materials, that could not have affected the outcome. That provides another reason why the fraud claim fails.
198. I note that I do not place any weight on the fact (relied upon by KHL) that the fact of the ZRA audit was in evidence before the Tribunal. That would not preclude the possibility of other materials relevant to the audit being relevant and likely to impact the Tribunal's decision. However on the facts, and looking at both ends – the new material and the exercise performed by the Tribunal, the material not before the Tribunal was not significant.
199. Nor do I place any weight on the KPMG report in this context. I accept the submission that the KPMG report is a different document prepared for FQMF in a different context.

Remaining issues

200. In the circumstances the further very interesting questions which were raised are academic, and I will deal with them briefly only for completeness. These are the questions of reasonable diligence and s.73(1) of the Act.
201. The first of these was that KHL also submits that it becomes relevant to consider at this stage one aspect of the “*new materials*” test which also forms part of the requirement for any application to set aside a judgment as having been obtained by fraud. It points me to *DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] EWHC 1542 (Comm):
- “Unless the plaintiff can produce evidence newly discovered since the trial, which evidence could not have been produced at the trial with reasonable diligence and which is so material that its production at the trial would probably have affected the result and (when the fraud consists of perjury) is so strong that it would reasonably be expected to be decisive at the re-hearing and if unanswered must have that result.”
202. I was also referred in this connection to *Nestor Maritime* at [28] and *Chantiers de L’Atlantique S.A. v Gaztransport & Technigas S.A.S.* [2011] EWHC 3383 at paragraph 59.
203. This argument was met with both a factual denial and reliance on the recent Supreme Court decision in *Takhar v Gracefield Developments* [2019] UKSC 13.
204. On the former factual argument, ZCCM says it was unable to deploy the evidence in the arbitration (or, indeed in the arbitration claim presently before the Court), until 23 May 2018 because under the provisions of 8(1) ZITA, it was obliged to preserve the confidentiality of the documents. Section 8(2) ZITA provides that any individual who, in breach of s. 8(1), uses or reveals any information or document disclosed to him, shall be guilty of an offence punishable with up to two years imprisonment and/or a fine.

205. On the latter, legal issue, ZCCM says the authorities support the proposition that where, as here, there is an allegation of fraud in the conduct of the arbitration, then the *Ladd v Marshall* conditions should be approached with a greater degree of flexibility.

206. I was pointed to paragraphs [54-5] and [66]. In the former Lord Kerr stated:

“For the reasons that I have given, I do not consider that the *Etoile* and *Bracco* cases are authority for the proposition that, in cases where it is alleged that a judgment was obtained by fraud, it may only be set aside where the party who makes that application can demonstrate that the fraud could not have been uncovered with reasonable diligence in advance of the obtaining of the judgment. If, however, they have that effect, I consider that they should not be followed. In my view, it ought now to be recognised that where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment.

55. Two qualifications to that general conclusion should be made. Where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, it seems to me that it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application. The second relates to the possibility that, in some circumstances, a deliberate decision may have been taken not to investigate the possibility of fraud in advance of the first trial, even if that had been suspected. If that could be established, again, I believe that a discretion whether to allow an application to set aside the judgment would be appropriate but, once more, I express no final view on the question.”

207. In the latter Lord Sumption said:

“66. I would leave open the question whether the position as I have summarised it is any different where the fraud was raised in the earlier proceedings but unsuccessfully. My provisional view is that the position is the same, for the same reasons. If decisive new evidence is deployed to establish the fraud, an action to set aside the judgment will lie irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material.”

208. These are said to provide powerful support for the proposition that if an arbitration award has been obtained by fraud it should not be allowed to stand unless there has been a deliberate tactical decision not to put the content in question before the court.

209. Finally, reliance was placed on *Daly v Sheik* [2002] EWCA Civ 1630, Chadwick LJ at paragraph 19:

“... Where the evidence of forgery which it is sought to adduce is credible and cogent, this Court is made aware that there may well have been an attempt by one party to deceive the other and the court; so that a trial which ought to have been a fair trial may well have been rendered an unfair trial by that party’s conduct. In those circumstances the requirements of doing justice are likely to point strongly towards admitting that evidence. It would be a reproach to the administration of justice if a party who had set out to deceive the court and the other side were able to say, once his deception had been found out, that, if only the other side had been more astute, the deception would have been discovered earlier. ...”

210. KHL also relies on another basis for precluding reliance on this ground. It notes that a claim under s. 68(2)(g) of the Act based on new evidence must also overcome the provisions of s. 73(1):

“If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection ...

(d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection ...”

211. It points to the following passage from *Nestor Maritime S.A. v. Sea Anchor Shipping Co. Ltd* [2012] EWHC 996 (Comm) at [9-11].

““[i]t follows that where a party knows of a serious irregularity but takes a deliberate decision to continue to take part in the proceedings without objection and takes the point only after losing the arbitration, such party will generally be precluded from raising such irregularity at that later stage ...

Moreover, the effect of s. 73 is that an objection to a serious irregularity may not be raised by a party after participating in the proceedings without taking objection, unless that party can show that at the time of participation the grounds for the objection were not known to him and he could not with reasonable diligence have discovered them”: *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd’s Rep 14 at 20-21; *Thyssen Canada* at para 18. “If the respondent can show that the applicant took part in or continued to take part in the arbitral proceedings without objection, after the grounds of objection arose (as happened in

the present case since the alleged facts which are the basis for the objection occurred almost 3 years before the hearing of the arbitration), the burden passes to the applicant to show that he did not know and could not with reasonable diligence have discovered those grounds at the time”: *Thyssen Canada* at para 18”: *Nestor Maritime* at [11].

212. In essence KHL submits that ZCCM falls foul of this provision because knowing both KHL's case before the Tribunal and the contents of the ZRA Correspondence, ZCCM continued to participate in the arbitration without objection. It contends that ZCCM could perfectly well have sought disclosure or an adjournment while it obtained evidence that supported that objection. It elected not to do so and is therefore prevented from raising the objection late: section 73(1) of the Act.
213. In response ZCCM has accused KHL of adopting inconsistent positions, and says that these latter arguments are particularly unattractive given that KHL's response to the Extension Application was to assert that the deployment of the ZRA Correspondence in the Extension Application is unlawful and in breach of s. 8 ZITA accusing ZCCM and its officers, of “punishable offences under Zambian law” and are “expose[d]... to civil liability to KMP as well.”
214. ZCCM contends that absent permission from the Minister, ZCCM could not have taken any of the steps suggested by KHL without running the risk of using and/or revealing its knowledge of the content of the ZRA Correspondence in breach of s.8 ZITA. As to this:
215. It points to the authorities on the concept of “use” of documents such as *Tchenguiz v Grant Thornton* [2017] 1 WLR 2809 [21] as indicative that any disclosure request or request for an adjournment would have constituted a breach of the relevant law.

Discussion

216. On the first issue, reasonable diligence, had it arisen, I am not persuaded that ZCCM would have discharged the burden upon it, despite *Takhar*. This is essentially for three reasons.
217. The first is that ZCCM's evidence focussed only on the later period and the difficulties encountered after July 2017. However if (*ex hypothesi*) this material was key, ZCCM should have been taking steps to get clearance to use it from the moment when a claim was contemplated. The arbitration was commenced in 2016, but the length of the Notice of Arbitration makes quite clear that it was a long time in gestation. It received the relevant documents in 2014 in the presence of leading counsel. The possibility of litigation or arbitration was already manifest by this point. There was therefore the best part of 2 years before the Notice of Arbitration in which steps could have been taken to get these documents. Even after the commencement of the arbitration there was then a further eight months allowed to go by before any steps were taken to obtain the documents for use. It is therefore not accurate to say that the need for the material can be said only to have arisen in mid 2017. There was a period of about a year where attempts could have been made to get the documents, and were not. This would not satisfy the requirement of reasonable diligence.

218. Secondly, the account given is somewhat skeletal, is advanced by someone without direct knowledge and fails to deal with the obvious issue of the relationship between GRZ and ZCCM which is an obvious point of relevance given ZCCM's "parastatal" nature. It is incumbent on a party seeking to bring a claim based on new materials to condescend to real particularity. As noted in *Terna* in seeking relief from the Court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. Thus if an applicant does not do this, the court is entitled to count any periods where no good excuse is established as being periods lacking in good reason. So too may it draw an inference when issues go un-dealt with.
219. Thirdly, even if (which is by no means clear) *Takhar* is applicable in this context, this case would either fall into the first exception outlined by Lord Sumption (a case of fraud advanced in the arbitration and fraud is relied on to set aside the award) or, in the circumstances set out above (significant unexplained delay) a deliberate decision not to investigate/procure documents.
220. Accordingly the second issue s. 73, which turns on the possibility of seeking disclosure or an adjournment, would itself not arise. Had the evidence been sufficient to explain the earlier delay I would not have been minded to conclude that ZCCM were disentitled from pursuing their claim on this basis. This is on the primary basis that the Ruling is not an award. However had the substantive claims arisen, I would have found that both arbitration claims failed to meet the test in s. 68.

Conclusion

221. Consequently I conclude that the original Arbitration Claim fails, and that both the Fraud Claim and the application for an extension of time for bringing the Fraud Claim also fail.
222. This is on the primary basis that the Ruling is not an award. However had the substance of the arbitration claims arisen I would have found that both arbitration claims failed to meet the test in s. 68. It follows that the application for extension of time in relation to the Fraud Claim would also have failed.

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if the tribunal had dealt with the issue. In the instant case, the tribunal had had well in mind the concept of continuing or repeated renunciation and the award had dealt with the question of continuing renunciation. Whether it was a continuing renunciation or a repeated renunciation was irrelevant: it was not suggested that a different legal test applied to the former but not the latter. Thereafter, whether there was a renunciation was a question of fact for the tribunal. The real complaint of the claimants in the instant case was not that the tribunal had failed to deal with the issue or argument about continued renunciation, but that it had rejected the argument on the facts. That finding of fact by the tribunal was not susceptible to review by the court (see [6], [7], [10], [17], [22], [36], [41], [42], below); *Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] 2 Lloyd's Rep 691 considered.

(2) Even if the tribunal had overlooked a particular piece of evidence in reaching its findings of fact, that was not susceptible to challenge under s 68 of the Act or otherwise. The application in the instant case was an impermissible attempt to go behind the tribunal's findings or fact. The claimants could not point to any evidence of a firm buyer for the ships. In those circumstances, the tribunal's conclusion on the facts was not only understandable, but correct. Since the tribunal had found that it was the claimants who had repudiated the contract, the quantum issue was academic. It followed that, even if there were anything in the point, the application would be bound to fail, because the claimants could not demonstrate that it would make any difference to the overall decision of the tribunal and, therefore, could not show that any serious irregularity had caused or would cause substantial injustice to the claimant. It followed that the application under s 68 of the Act was misconceived and had to be dismissed (see [43], [48], [49], [51], below); *World Trade Corp'n Ltd v C Czarnikow Sugar Ltd* [2004] 2 All ER (Comm) 813 applied.

Notes

For challenging the award on the ground of serious irregularity, see 2 *Halsbury's Laws* (2008) (5th edn) para 1277.

For the Arbitration Act 1996, s 68, see 11(2) *Halsbury's Statutes* (4th edn) (2010 reissue) 551.

Cases referred to in judgment

ABB AG v Hochtief Airport GmbH [2006] EWHC 388 (Comm), [2006] 1 All ER (Comm) 529.

Abuja International Hotels Ltd v Meridien SAS [2012] EWHC 87 (Comm), [2012] 1 Lloyd's Rep 461.

Ascot Commodities NV v Olam International Ltd [2002] 2 Lloyd's Rep 277.

Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd, The Pamphilos [2002] EWHC 2292 (Comm), [2002] 2 Lloyd's Rep 681.

Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd [2010] EWHC 442 (Comm), [2011] Bus LR D99.

Fidelity Management SA v Myriad International Holdings BV [2005] EWHC 1193 (Comm), [2005] 2 All ER (Comm) 312.

Hussman (Europe) Ltd v Al Ameen Development and Trade Co [2000] 2 Lloyd's Rep 83.

Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43, [2005] 3 All ER 789, [2006] 1 AC 221, [2005] 3 WLR 129.

Margulead v Exide [2004] EWHC 1019 (Comm), [2004] 2 All ER (Comm) 727.

- a* *Pace Shipping Co Ltd v Churchgate Nigeria Ltd, The Pace* [2009] EWHC 1975 (Comm), [2010] 1 Lloyd's Rep 183.
Petrochemical Industries Co (KSC) v Dow Chemical Co [2012] EWHC 2739 (Comm), [2012] 2 Lloyd's Rep 691.
Petroships Pte Ltd of Singapore v Petec Trading and Investment Corp of Vietnam, The Petro Ranger [2001] 2 Lloyd's Rep 348.
- b* *Safehaven Investments Inc v Springbok Ltd* (1995) 71 P&CR 59.
Stocznia Gdanska SA v Latvian Shipping Co (No 3) [2002] EWCA Civ 889, [2002] 2 All ER (Comm) 768.
Weldon Plant Ltd v Commission for the New Towns [2001] 1 All ER (Comm) 264.
White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd; The Fortune Plum [2013] EWHC 1355 (Comm), [2013] 2 All ER (Comm) 449.
- c* *World Trade Corpn Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm), [2004] 2 All ER (Comm) 813.
Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia [1996] 2 Lloyd's Rep 604, CA.
Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 2 EGLR 14.

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Claim

The claimants, Primera Maritime (Hellas) Ltd, Astra Finance Inc and Comet Finance Inc, applied under s 68(2)(d) of the Arbitration Act 1996 to set aside an award made by an arbitration tribunal (David Aikman, Mark Hamsher and Michael Howard QC) in favour of the defendants, Jiangsu Eastern Heavy Industry Co Ltd and Ningbo Ningshing International Inc for serious irregularity. The facts are set out in the judgment.

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Robert Bright QC (instructed by *Reed Smith LLP*) for the claimants.
Graham Dunning QC and *Jern-Fei Ng* (instructed by *DLA Piper UK LLP*) for the defendants.

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Judgment was reserved.

15 October 2013. The following judgment was delivered.

g **FLAUX J.**

INTRODUCTION

[1] The claimants were the buyers under two shipbuilding contracts with the defendants dated 12 July 2007 in relation to two Kamsarmax bulk carriers to be built at the defendants' yard in China. Disputes arising under both contracts were referred to arbitration in London pursuant to the LMAA Terms 2006 before the same tribunal, David Aikman, Mark Hamsher and Michael Howard QC. The basis for the claimants' claim for damages, so far as currently relevant, was that from 19 October 2007, the defendants had been in anticipatory breach of contract by refusing to perform the contracts in accordance with their terms, specifically in relation to delivery by the contractual delivery dates in 2011, and hence renounced the contracts.

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[2] The arbitration hearing took place over two and a half weeks, with eight days of oral evidence, both parties being represented by leading counsel. In all over 700 pages of written submissions in opening and closing were presented to the tribunal which stated at [12] of its reasons that: 'It is because of the thoroughness of those submissions that we have been able to express our

reasons in comparatively concise terms.’ Nonetheless, the tribunal’s third Interim award dated 29 November 2012 was supported by detailed reasons running to 84 pages. By that award, the tribunal dismissed the claims, holding that although the defendants had renounced the contracts in an email of 19 October 2007 and at a meeting on 6 November 2007, the claimants thereafter affirmed the contracts. a

[3] The claimants now apply under s 68(2)(d) of the Arbitration Act 1996 to set aside that award and remit it to the tribunal, on the grounds that the tribunal failed to deal with two issues which the claimants had put before them: (i) that the renunciation by the defendants was continuous; and (ii) in relation to the quantum of the claimants’ claim, that the claimants would have ‘flipped’ the contracts. b

[4] Notwithstanding the elegant and well-reasoned submissions of Mr Robert Bright QC on behalf of the claimants, by the end of the hearing of the application under s 68 I had concluded that the application should be dismissed. I informed the parties that that was my decision and that I would give a judgment setting out my reasons at a later date. This is that judgment. c

LEGAL PRINCIPLES APPLICABLE TO SECTION 68(2)(D) d

[5] Section 68 of the Arbitration Act 1996 provides, inter alia, as follows:

‘68. *Challenging the award: serious irregularity.*

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. e

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant ... f

(d) failure by the tribunal to deal with all the issues that were put to it ...

[6] In order to succeed under s 68 an applicant needs to show three things. First of all, a serious irregularity. Secondly, a serious irregularity which falls within the closed list of categories in s 68(2). Thirdly, that one or more of the irregularities identified caused or will cause the party substantial injustice. As Hamblen J said in *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm) at [48] to [49], [2012] 1 Lloyd’s Rep 461 at [48] to [49], the focus of the inquiry under s 68 is due process, not the correctness of the tribunal’s decision. As the DAC Report states, and numerous cases since have reiterated, the section is designed as a long-stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. This point, that s 68 is about whether there has been due process, not whether the tribunal ‘got it right’, is of particular importance in the present case, where, for the reasons set out below, the claimants’ real complaint is that they consider that the tribunal reached the wrong result, not a matter in relation to which an arbitration award is susceptible to challenge under s 68. g

[7] In cases under s 68(2)(d), there are four questions for the court: (i) whether the relevant point or argument was an ‘issue’ within the meaning of the subsection; (ii) if so, whether the issue was ‘put’ to the tribunal; (iii) if so, h

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a whether the tribunal failed to deal with it; and (iv) if so, whether that failure has caused substantial injustice: see per Andrew Smith J in *Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] EWHC 2739 (Comm) at [15], [2012] 2 Lloyd's Rep 691 at [15].

b [8] Andrew Smith J goes on to discuss what constitutes an 'issue' and summarises the earlier authorities at [16]:

c 'A distinction is drawn in the authorities between, on the one hand "issues" and, on the other hand, what are variously referred to as (for example) "arguments" advanced or "points" made by parties to an arbitration or "lines of reasoning" or "steps" in an argument (see, for example, *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [[2000] 2 Lloyd's Rep 83 at 97] and *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The 'Pamphilos')* [[2002] EWHC 2292 (Comm), [2002] 2 Lloyd's Rep 681 at 686]). These authorities demonstrate a consistent concern to maintain the 'high threshold' that has been said to be required for establishing a serious irregularity (see *Lesotho Highlands Development Authority v Impregilo SpA and ors* [[2005] UKHL 43 at [28], [2005] 3 All ER 789 at [28], [2006] 1 AC 221] and the other judicial observations collected by Tomlinson J in *AAB AG v Hochtief Airport GMBH and anor* [[2006] EWHC 388 (Comm) at [63], [2006] 1 All ER (Comm) 529 at [63]]). The concern has sometimes been emphasised by references to "essential" issues or "key" issues or "crucial" issues (see respectively, for example, *Ascot Commodities NV v Olam International Ltd* [2002] 2 Lloyd's Rep 277, 284; *Weldon Plant v Commission for New Towns* [[2001] 1 All ER (Comm) 264 at 279]; and *Buyuk Camlica Shipping Trading and Industry Co Ltd v Progress Bulk Carriers Ltd* [[2010] EWHC 442 (Comm), [2011] Bus LR D99]), but the adjectives are not, I think, intended to import a definitional gloss upon the statute but simply allude to the requirement that the serious irregularity result in substantial injustice: *Fidelity Management SA v Myriad International Holdings BV* [[2005] EWHC 1193 (Comm) at [10], [2005] 2 All ER (Comm) 312 at [10]]. They do not, to my mind, go further in providing a useful test for applying section 68(2)(d).'

g [9] The learned judge then went on to reject suggested yardsticks for measuring what is an 'issue' by reference to what was or might have been in a list of issues. He went on to conclude that the particular point in that case, whether the defendant had assumed responsibility for the loss was an 'issue' within the meaning of the sub-section rather than simply an argument in the broader issue of foreseeability, at [21]:

h 'The assumption of responsibility question, as it was identified and presented by PIC on this application is, to my mind, an 'issue' within the meaning of sub-section 68(2)(d). It is not simply a way of presenting the question of foreseeability, and not simply an argument in support of a contention that losses were not within the First Limb or the Second Limb of *Hadley v Baxendale*. It can be difficult to decide quite where the line demarking issues from arguments falls, but here almost the whole of Dow's claim could have depended (and on the Tribunal's other conclusions did depend) upon how the assumption of responsibility question was resolved. I accept PIC's submissions about whether it was an issue because this accords with what I consider to be the ordinary and natural meaning

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of the word, and I find support for this conclusion in that, as I see it, fairness demanded that the question be “dealt with” and not ignored or overlooked by the Tribunal, assuming it was put to them.’ a

[10] Having found that that issue had been put to the tribunal, the learned judge went on to deal with the third issue about whether the tribunal had ‘dealt with’ the issue in two paragraphs which are of some assistance in the present case (at [26] and [27]): b

[26] Sub-section 68(2)(d) is about the Tribunal “dealing with” issues. The question whether an issue was dealt with depends upon a consideration of the award: as Mr Gavin Kealey QC said in *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm) at [38]: c

“It is not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section [68(2)(d)] is to ensure that all those issues the determination of which are crucial to the tribunal’s decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or reasons) that those crucial issues have indeed been determined.” d

[27] As Mr Smouha submitted, and Lord Grabiner acknowledged, a tribunal does not have to “set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration”: *Hussman (Europe) Ltd v Al Ameen Development and Trade Co and ors* [2000] 2 Lloyd’s Rep 83, para 56. Nor does a tribunal fail to deal with an issue that it decides without giving reasons (or a fortiori without giving adequate reasons): see *Margulead v Exide* [2004] EWHC 1019 (Comm) at [43], [2004] 2 All ER (Comm) 727 at [43]. No less pertinent in this case, as I see it, are these considerations: e

i) A tribunal does not fail to deal with issues if it does not *answer* every question that qualifies as an “issue”. It can deal with an issue by making clear that it does not arise in view of its decisions on the facts or their legal conclusions. f

ii) By way of amplification of this point, a tribunal may deal with an issue by so deciding a logically anterior point that the issue does not arise. For example, a tribunal that rejects a claim on the basis that the respondent has no liability is not guilty of a serious irregularity if it does come to a conclusion on each issue (or any issue) about quantum: by their decision on liability, the tribunal disposes of (or “deals with”) the quantum issues. g

iii) A tribunal is not required to deal with each issue seriatim: it can sometimes deal with a number of issues in a composite disposal of them. h

iv) In considering an award to decide whether a tribunal has dealt with an issue, the approach of the court (on this as on other questions) is to read it in a “reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it”: *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*. [1985] 2 EGLR 14 at 14 per Bingham J. j

v) This approach may involve taking account of the parties’ submissions when deciding whether, properly understood, an award deals with an issue. Although submissions do not dictate how a tribunal is to structure the

- a disposal of a dispute referred to it, often awards (like judgments) do respond to the parties' submissions and they are not to be interpreted in a vacuum.'

THE CASE PRESENTED TO THE ARBITRATORS ON RENUNCIATION AND AFFIRMATION

- b [11] In his submissions before the court, Mr Bright QC submitted that the claimants' case on affirmation at the arbitration had run a number of quite separate arguments on affirmation, two of which are relevant for present purposes: (i) that the defendants, having renounced the contracts in their email of 19 October 2007, had committed a number of specific repetitions of that renunciation, at the meeting of 6 November 2007 and in the Prospectus issued on 11 December 2007, so that even if there had been an affirmation prior to 11 December 2007, that would not preclude the claimants from relying on the renunciation in the Prospectus; (ii) the defendants' renunciation was continuous and an affirmation at one stage is not an irrevocable affirmation for all time in the future. Therefore, an affirmatory act at an earlier stage did not preclude the claimants from terminating when they did on 22 January 2008. The claimants' case was that the tribunal had dealt with the first of these arguments but not the second. Accordingly, they submitted that was an issue put to the tribunal which it had failed to deal with.

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e [12] I agree with Mr Dunning QC that when one looks at the claimants' written closing submissions where the question of affirmation was dealt with in detail, the clear delineation Mr Bright QC now relies upon is strikingly absent. Thus, this section of their submissions is headed 'Repetition/continued renunciation'. It begins by referring to the specific instances of renunciation relied upon: the email of 19 October 2007, the meeting of 6 November 2007 and the Prospectus dated 11 December 2007 and sets out the first argument referred to in [11], above. In that context, the written submissions refer to one of the principles laid down by Moore-Bick J in *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia* [1996] 2 Lloyd's Rep 604:

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g 'Although the injured party is bound by his election once it has been made, the fact that he has affirmed the contract does not of course preclude him from treating it as discharged on a subsequent occasion if the other party again repudiates it.'

- h [13] The next paragraph of the written submissions begins with the proposition that: 'As well as a right to accept a fresh repudiation/renunciation after an initial affirmation, a party may, after affirmation, treat a continuation of the previous renunciatory/repudiatory stance as a renunciation/repudiation.' There is then citation of the two authorities upon which the claimants relied before the tribunal, the first of which is *Safehaven Investments Inc v Springbok Ltd* (1995) 71 P&CR 59, a decision of Jonathan Sumption QC sitting as a Deputy High Court judge of the Chancery Division and in particular a passage in that judgment where the learned judge stated:

- j 'It does not follow from this analysis that the innocent party may in all cases change his mind after affirming the contract. If for example, after he had affirmed it, the repudiating party's conduct suggested that he proposed to perform after all, then that party's previous repudiation is spent. It had no further legal significance. If on the other hand, the repudiating party persists in his refusal to perform, the innocent party may later treat the

contract as being at an end. The correct analysis in this case is not that the innocent party is terminating on account of the original repudiation and going back on his election to affirm. It is that he is treating the contract as being at an end on account of the continuing repudiation reflected in the other party's behaviour after affirmation.' a

[14] The claimants' written submissions characterised this 'as a case where the subsequent correspondence from the party in breach was properly to be understood as maintaining the position that the contract had been terminated, and thus repeated the renunciation' (my emphasis). The second case relied upon was the decision of the Court of Appeal in *Stocznia Gdanska SA v Latvian Shipping Co (No 3)* [2002] EWCA Civ 889, [2002] 2 All ER (Comm) 768 a shipbuilding case where the buyers had indicated prior to payment of the second instalments that they could not perform the contracts and were thus in anticipatory breach. The yard issued keel-laying notices and then served notices of rescission when the second instalments were not paid. The Court of Appeal held the serving of keel-laying notices was not an unequivocal affirmation. b

[15] The claimants in their written submissions relied particularly on the obiter part of the judgment of Rix LJ which went on to discuss the position if it was wrong that there had not been an affirmation. They referred to [96] of his judgment where he held there was a continuing repudiation after affirmation and approved the analysis of Thomas J at first instance who had cited *Safehaven* and had said: c

'Once the innocent party has affirmed, he must go on performing. He must then be able to point to behaviour that amounts to a repudiation after the affirmation either by way of some fresh conduct amounting to repudiation or by way of the continuing refusal to perform amounting to repudiation ...' d

[16] The claimants then referred to Rix LJ's endorsement of counsel's submission in that case that the buyer's silence was a pregnant silence speaking of maintained recalcitrance, which continued in circumstances where there was a duty on the buyers to make it clear that they were not continuing with their previous repudiatory attitude of not being willing to proceed with the contracts unless they were renegotiated. The claimants relied on that analysis to submit that the defendants' failure to respond to the claimants' solicitors' letter of 14 December 2007 (which ended with an insistence that within seven days the defendants unequivocally confirm that they would deliver the vessels by the original delivery dates) fell into the same category of a pregnant silence, in other words continued renunciation. e

[17] I agree with Mr Dunning that these written submissions, far from making separate arguments about repeated renunciation on the one hand and continuing renunciation on the other, essentially dealt with them as aspects of the same overall issue. It seems to me that the issue was whether, subsequent to the affirmation, the defendants had renounced the contracts, reviving the claimants' right to terminate. Once it is recognised that that was the 'issue' for the purposes of s 68(2)(d), the suggestion that the tribunal did not deal with it in its award is unarguable. However, even if the 'issue' was the narrower one of continuing renunciation, the tribunal did clearly deal with that issue, and it is to that question that I now turn. f

a THE AWARD DEALT WITH THE QUESTION OF CONTINUING RENUNCIATION

[18] In the section of the award dealing with anticipatory breach, the tribunal dealt with the claimants' case of renunciation from [56] onwards. At [61] the tribunal set out the four specific expressions of indifference relied on as constituting renunciation and at [62] it said:

b 'We had to consider the parties' conduct over a period of months, both in relation to renunciation and to waiver. So far as the former is concerned, we think that only these four events require consideration as candidates for the role of renunciatory breach. We have however taken into account the whole history of the parties' acts and communications, because they provide both context for and illumination of these four events.'

c [19] Mr Bright relied upon the second sentence of that paragraph in support of his submission that the tribunal had overlooked his case on continuing breach and had only dealt with specific instances of renunciation. If that sentence were taken in isolation, that submission might have some force, but when one looks both at the paragraph as a whole and at the rest of the reasons

d it is not a fair point. As Mr Dunning pointed out, the last sentence makes it clear that the tribunal had considered whether other matters required consideration as possible renunciatory breaches but considered they did not. Furthermore, that last sentence is an important indicator of the reasoning by which the tribunal ultimately reached the conclusion that other matters (such as the absence of response to the solicitors' letter of 14 December) did not amount to renunciation: looking at all the communications, it did not consider

e this was a case of 'pregnant silence', a matter to which I return below.

[20] The tribunal then went on to look at the four instances of renunciation in turn and concluded at [77] of the reasons that the defendants' email of 19 October 2007 was a renunciation. It then concluded at [78] that a further email of 22 October 2007 was not a fresh breach but constituted 'a

f continuation of the Yard's existing renunciation'. This is a fair indication that the tribunal had the case of continuing renunciation in mind. It went on to conclude at [87] that at the meeting on 6 November 2007, there had been: 'another adamant refusal by the Yard to meet the contractual delivery dates. This would have been a fresh anticipatory repudiation even if there had not already been such a breach on 19 October. As it was, it showed that the Yard

g was persisting in its renunciation of the contract'. Again, that last sentence demonstrates that the tribunal had in mind the concept of persisting or continuing renunciation. Finally, the tribunal considered the Prospectus of 11 December 2007 and concluded at [89] that it could not be considered renunciatory. Accordingly, the tribunal concluded the claimants had made out their case that on 19 October and 6 November 2007, the defendants had

h renounced the contracts.

[21] The tribunal then went on to consider the defendants' counter arguments, one of which was 'repentance', that since anticipatory breach necessarily occurs before the date for actual performance, a contract breaker can cure the default by repentance provided it occurs before the breach is

j accepted by the innocent party. At [96] the tribunal concluded that the defendants had not repented, but went on at [97] to discuss the limits of that point in what is an important passage when considering the claimants' case that the tribunal overlooked the question of continuing renunciation:

'It is important to notice, however, that this point has its limits. All that we are saying here is that the Yard did not satisfy the criteria to justify a

finding that they would have performed the contract. *That is not the same as saying that there was a continuing or repeated renunciation.* This distinction is of some importance, though perhaps not crucial, when it comes to consider whether there or not the Buyers gave up their right to terminate. Our holding is that the Yard did not by its own actions destroy the Buyers' right to terminate. *It does not follow that the Buyers had an endlessly repeated right to terminate,* even if they had waived / the breaches of which they specifically complained. Whether or not they had done so is the topic to which we now turn.' (My emphasis.)

[22] I agree with Mr Dunning that the passages I have underlined in that paragraph indicate that the tribunal had well in mind the concept of continuing or repeated renunciation. Although Mr Bright sought to draw a sharp distinction between two concepts: repetition of a renunciation on the one hand and continuing renunciation on the other, in order to seek to demonstrate that the tribunal had dealt with the former argument but not the latter, in my judgment, as Mr Bright's own written closing submissions before the tribunal demonstrate, there is not always a clear distinction. In a very real sense the supposed distinction between a repeated renunciation and a continuing renunciation through silence is a semantic one, since persisting in a previously expressed renunciation can be characterised as repetition, a point the tribunal itself makes at [99] in the passage quoted at [25], below. This is a matter to which I return below in relation to the critical paragraph of the reasons, [134].

[23] The tribunal then went on in the next section of its reasons headed 'Acceptance/Waiver/Election' to deal with the issue of affirmation. They began at [98] by citing a paragraph on anticipatory breach from *Chitty on Contracts* (at what is now [24–022] of the 31st edition). Of particular relevance to the current debate is this passage:

'On the other hand, where the anticipatory breach takes a continuing form, the fact that the innocent party initially continued to press for performance does not normally preclude him from later electing to terminate the contract provided that the party in breach has persisted in his stance up to the moment of termination.'

[24] In fact, although the tribunal does not set it out, the footnote reference at the end of that passage in *Chitty* is to the passage in the judgment of Rix LJ in the *Latvian Shipping* case where he deals with continuing or renewed anticipatory breach ([94]–[100]). In those circumstances and given the citation of that passage from *Chitty*, it seems to me impossible to contend that, at least at this stage of its reasoning, the tribunal did not have in mind the argument that there was a continuing renunciation.

[25] At [99] of the reasons, the tribunal set out a summary of the legal principles applicable to waiver or affirmation, one of which was: 'A party who has waived one anticipatory breach is not debarred from accepting its subsequent repetition, and repetition may consist in simply persisting in a previously expressed renunciation.' This is both a clear indication that the tribunal had the concept of continuing renunciation well in mind and a demonstration, as I have already said, that any distinction between repetition and continuation of a renunciation is more apparent than real.

[26] The tribunal then went on to discuss in detail the defendants' case on renunciation. It is not necessary to set out any of that detail but it is

- a* noteworthy, in the context of the criticisms levelled by Mr Bright against the tribunal's conclusion at [134], that at [102] the tribunal said that this was not a case of mere silence and inaction in the relevant period between October 2007 and January 2008 but, as the tribunal found: 'here, by contrast, there was constant communication. It was the character of three months of constant dealings between the parties and what that signified in terms of waiver or
- b* acceptance of the breach which concerns us.'

[27] Having quoted extensively from the claimants' solicitors' letter of 14 December 2007 to which I have already referred, the tribunal said at [130] that if the claimants' conduct by that date did not amount to waiver, then that letter confirmed that the claimants' right to terminate for renunciatory breach

c was still alive. However, the tribunal concluded at [132] that the letter was too late and that, by early December 2007, the right to terminate had been lost because the claimants had waived the breach and affirmed the contracts. It then went on to hold at [133] that, even if that were wrong, the effect of the letter would have been that the tribunal would have concluded that there had

d been an affirmation by the end of 2007, because having set a seven day deadline for the defendants to give the unequivocal confirmation the claimants sought, once that deadline expired, the claimants should have terminated promptly thereafter and certainly by the end of the year, if that is what they wanted to do.

[28] The tribunal then turned to the issue of whether there had been further

e renunciation in [134], a paragraph of some importance, so that it merits quotation in full:

'If the Yard had repeated the renunciatory breach in late December or January, the right to terminate would have revived. As Moore Bick J

f observed in *Yukong v Rendsburg*:

"Although the injured party is bound by his election once it has been made, the fact that he has affirmed the contract does not of course preclude him from treating it as discharged on a subsequent occasion if the other party again repudiates it."

g His affirmation does not extend to future renunciatory breaches of the same character. The Buyers said that the Yard had provided no answer to their claim that repeated renunciations revived their right to terminate. That submission was relevant only if the publishing of the Prospectus was a further renunciation. We have held that it was not. From mid-November onwards, the Yard remained silent on the question of what course of

h action they would take. It is overwhelmingly probable that they would never have yielded if the Buyers had insisted on timeous performance. They would never have announced that they would take all possible steps to secure engines in time to perform the contracts. But as events unfolded they did not tell the Buyers again that their position was unchanged. *It would be a strong thing to hold that a fresh anticipatory breach of contract was committed by silence. No doubt, this can be done. In some cases, in the context of*

j *the dealings between the parties, the silence may be taken as an unequivocal re-iteration of a previous express renunciation.* But in the present case, we think that matters had been left in a more fluid state by the Buyers' indications of what their intentions were and by the long period in which they failed to come to a decision. The breach had been waived by early

December, waived again if it had been repeated by late December; and there was nothing in the parties' dealings in January 2008 which could be taken as having revived it.' (My emphasis.) a

[29] Against the first underlined passage there was a footnote reference by the tribunal to *Safehaven* and *Latvian Shipping*. Notwithstanding that reference, which clearly demonstrates that what the tribunal had in mind by 'future renunciatory breaches of the same character' was repeated or continuing renunciation, Mr Bright submitted that the tribunal had overlooked continuing renunciation and was dealing with specific expressions of renunciation in the future. I cannot accept that submission. Given that those cases had been cited by the claimants in their written submissions in support of their case that there had been a continuing renunciation through 'pregnant silence', it seems to me that the phrase 'future renunciatory breaches of the same character' is the tribunal's way of expressing the concept of continuing renunciation. b
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[30] Mr Bright then effectively subjected each sentence of this paragraph to a minute textual analysis with a view to demonstrating that the tribunal had failed to deal with the question of continuing renunciation. That is the wrong approach. A number of cases have emphasised that the court should read the award in a reasonable and commercial way and not by nitpicking and looking for inconsistencies and faults: see *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 per Bingham J cited with approval by Andrew Smith J in [27] of *Petrochemical Industries Co v Dow Chemical*. A similar point was made by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd, The Pace* [2009] EWHC 1975 (Comm) at [20], [2010] 1 Lloyd's Rep 183 at [20] specifically deprecating a minute textual analysis. Quite apart from the fact that this is the wrong approach, it did not assist the claimants' case. Instead it demonstrated that the tribunal had dealt with the argument about continuing renunciation. d
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[31] To begin with, as Mr Dunning QC rightly pointed out, para [134] of the reasons very much tracks the points made in the claimants' written closing submissions, starting with the citation of the same passage from the judgment of Moore-Bick J in *Yukong v Rendsburg*. I have already considered and dismissed Mr Bright's submission that the phrase 'future renunciatory breaches of the same character', with its citation of *Safehaven* and *Latvian Shipping*, was not addressing the question of continuing renunciation. In relation to the next sentence: 'The Buyers said that the Yard had provided no answer to their claim that repeated renunciations revived their right to terminate' Mr Bright submitted that, since the tribunal had gone on to say this was only relevant if the publishing of the Prospectus was a further renunciation, it was clearly only referring to specific utterances of express renunciation, not continuing renunciation through silence. If that sentence stood in isolation, that might be a good point, but it does not. Lower down the paragraph the tribunal addresses clearly the issue of whether silence can amount to a repeated or continuing renunciation. f
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[32] In my judgment, despite Mr Bright's attempts to argue the contrary, the second passage I have underlined in the citation of para [134] of the reasons is dealing with the question of repeated or continued renunciation through silence. The suggestion that the tribunal was not dealing with the issue is frankly hopeless. Mr Bright suggested that the reference to it being a strong thing to hold that a fresh anticipatory breach was committed by silence was an indication that the tribunal did not have the authorities of *Safehaven* and *Latvian Shipping* in mind. Quite apart from the fact that the tribunal had just cited the j

a cases in a footnote, which makes it inherently unlikely that it had forgotten them in a few lines of the reasons, the concept of it being a strong thing to hold that there was renunciation by silence chimes with what Rix LJ said in the latter case at [96]:

b ‘The silence was not mere silence, it was overlaid with all that had gone before. It was a speaking silence. The difficulty with silence is that it is normally equivocal. Where, however, it is part of a course of consistent conduct it may be a silence which not only speaks but does so unequivocally. Where silence speaks, there may be a duty on the silent party in turn to speak to rectify the significance of his silence.’

c [33] Furthermore, Mr Bright’s submission that, because the tribunal referred to a *fresh* anticipatory breach committed by silence, it cannot have had in mind the question of continuing renunciation, is another example of a casuistic semantic distinction. Given that one is focusing on renunciation by pregnant silence, it seems to me one is necessarily dealing with repeated or continuing silence, not strictly speaking a ‘fresh’ renunciation, in the sense of an entirely new renunciation. The word ‘fresh’ is perhaps loose terminology, but the tribunal must be referring to repeated or continuing renunciation. Which it is does not matter: the critical question is whether the silence amounted to a renunciation, which is why the ‘issue’ is really whether there was renunciation by silence after the claimants affirmed the contracts.

e [34] Mr Bright also sought to suggest that the finding of fact which the tribunal then made: ‘But in the present case, we think that matters had been left in a more fluid state by the Buyers’ indications of what their intentions were ... and by the long period in which they failed to come to a decision. The breach had been waived by early December, waived again if it had been repeated by late December; and there was nothing in the parties’ dealings in January 2008 which could be taken as having revived it’, somehow demonstrated that the tribunal had not had the ‘continuing renunciation’ point in mind or had not addressed the right question. In my judgment, there are a number of answers to that criticism.

g [35] First, despite what Mr Bright submitted, it is quite clear that the tribunal was addressing why it was that, on the facts of this case, there was no renunciation after the claimants had affirmed the contracts. The reference to revival is to revival of the right to terminate, so there is nothing in the suggestion that that reference indicates that the tribunal had applied the wrong test in law. Second, taking [134] of the reasons as a whole and applying a broad test of reasonable construction, it seems to me impossible to say that the tribunal has applied the wrong test in law. What the claimants’ submission amounts to is that, because the tribunal reached a conclusion on the facts which the claimants do not like, the tribunal must have applied the wrong legal test.

h [36] In my judgment, that submission is misconceived. As I have said, it is impossible to say that the tribunal applied the wrong test in law as to what constitutes a renunciation. In that context, as I have said, whether it is a continuing renunciation or a repeated renunciation is irrelevant: it is not suggested that a different legal test applies to the former but not the latter. Thereafter, whether there was a renunciation is a question of fact for the tribunal. This is demonstrated by the most recent authority in this area, decided after the award was published, the decision of Teare J in *White Rosebay*

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Shipping SA v Hong Kong Chain Glory Shipping Ltd; The Fortune Plum [2013] EWHC 1355 (Comm), [2013] 2 All ER (Comm) 449 upon which Mr Bright placed particular reliance. a

[37] That was a case of an appeal under s 69 of the Arbitration Act 1996 in which one of the alleged errors of law was that the tribunal had concluded that the owners could not terminate the charterparty because they had affirmed it in circumstances where the charterers were continuing to renounce the charterparty. The owners relied on the principle derived from *Safehaven* and *Latvian Shipping*, both of which the learned judge cited before saying at [50] and [51] of the judgment: b

[50] Accordingly, in a case of renunciation or anticipatory breach of contract (as opposed to a repudiation based upon an actual breach) the tribunal of fact must carefully consider whether there were words or conduct after affirmation which demonstrate that the renunciation of the contract is continuing, so that a later acceptance of the continuing renunciation will be a legitimate termination of the contract. c

[51] Mr Gunning submitted that it was clear that the charterers continued to renounce the charterparty after the affirmation and that therefore the court was able to consider whether the decision of the tribunal was correct in law or not. However, there was no express finding to that effect and I do not consider that I can draw an inference to that effect (assuming the court has power to do so, which is doubtful; see *The Balears* [1993] 1 Lloyd's Reports 215 at 228 per Steyn LJ). Whether the charterers, by words or conduct after the owners' affirmation, continued to renounce the charterparty cannot be said to an inference "truly beyond rational argument" (which Steyn LJ suggested the court might have power to draw). The answer to that question is clearly a matter of fact for the tribunal. If the charterers were silent after the owners' affirmation of the charterparty it is for the tribunal to decide whether such silence was a "speaking silence." d
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[38] The learned judge went on to conclude at [53] that, in that particular case, the tribunal had erred in law in considering that it necessarily followed that a termination following affirmation was a repudiatory breach because they had failed to consider that, if the renunciation continued after affirmation, the owners could lawfully terminate for that continued renunciation. In my judgment, the same criticism cannot be levelled against the tribunal in the present case. As I have held, contrary to Mr Bright's submissions, it has dealt with the issue of continuing renunciation if, contrary to my primary view, it is an issue as opposed to one argument within an issue. There is no basis for any suggestion that the tribunal has committed an error of law, but even if there were that would not avail the claimants, since the contracts expressly excluded the right to appeal from an arbitration award to the courts. g
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[39] Again, contrary to Mr Bright's submissions, I consider that the tribunal has carefully considered in para [134] of the reasons whether there was continued or repeated renunciation by the defendants after the claimants' affirmation and has concluded that there was not, essentially because, in the period of three months from October 2007 to January 2008, there was not 'mere silence' but constant communications, which meant that it was unclear what the claimants' intentions were (hence the reference to the 'more fluid state'), so that there was no duty to speak placed upon the defendants. It may j

a be that that conclusion is not as clearly spelt out by the tribunal as it might be, but reading the whole of the reasons, that is the conclusion which emerges and it is a perfectly reasonable and explicable one.

[40] However, even if it were not and the tribunal's conclusion in para [134] could be said to be surprising or unusual or even wrong, it is a conclusion of fact, which is not susceptible to review by the court whether under s 68 or otherwise. There is no merit in Mr Bright's suggestion that in some way that conclusion is so perverse that the tribunal cannot have dealt with the issue. As I have said, the tribunal clearly has dealt with the issue of continuing or repeated renunciation. Once it is recognised that it has dealt with the issue, there is no scope for the application of s 68(2)(d). As Mr Dunning correctly put it, once it is recognised that the tribunal has 'dealt with' the issue, the sub-section does not involve some qualitative assessment of how the tribunal dealt with it. Provided the tribunal has dealt with it, it does not matter whether it has done so well, badly or indifferently.

[41] It is wrong in principle to look at the quality of the reasoning if the tribunal has dealt with the issue. This emerges clearly from the judgment of Thomas J (as he then was) in *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd's Rep 83 at [56]:

'I do not consider that s.68(2)(d) requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning, but it is no more than that.'

[42] As Mr Dunning pointed out that approach has been followed by other judges of this court on a number of occasions, for example by Cresswell J in *Petroships Pte Ltd of Singapore v Petec Trading and Investment Corp of Vietnam, The Petro Ranger* [2001] 2 Lloyd's Rep 348 who said at 351: 'there is a distinction between criticism of the reasoning and the failure to deal with an issue'. Most recently, Andrew Smith J makes the same point at [27] of *Petrochemical Industries v Dow Chemical* quoted at [8], above. On analysis, the real complaint of the claimants in the present case is not that the tribunal has failed to deal with the issue or argument about continued renunciation, but that it has rejected the argument on the facts. That finding of fact by the tribunal is not susceptible to review by the court.

THE QUANTUM ISSUE

[43] The extent to which this application is an impermissible attempt to go behind the tribunal's findings of fact is highlighted by the second part of the application, which concerns the tribunal's findings that the claimants had not established their case that, but for the defendants' renunciatory breach, the claimants would have 'flipped' the contracts, that is, sold the shipbuilding contracts to third parties at a profit. Of course, since the tribunal found that it was the claimants who had repudiated the contract, this point was academic and, in the light of my conclusion on the first part of the application, it remains academic. It follows that, even if there were anything in the point, the application would be bound to fail, because the claimants cannot demonstrate that it would make any difference to the overall decision of the tribunal and, therefore, cannot show that any serious irregularity has caused or will cause substantial injustice to the claimant.

[44] Nonetheless, since the point was argued, I will deal with it briefly. The relevant part of the tribunal's reasons really begins at [177] where the tribunal sets out an unexceptionable statement as to the need for the claimants to show on a balance of probabilities that they would in fact have flipped the vessels: a

'If a particular resale had been in contemplation at the time of contracting, that would be enough for the Buyers to succeed under this part of their claim. But that certainly was not the case. It does not follow from the fact that possible resales were in contemplation that the loss actually occurred. The burden of proof would still lie on the Buyers to establish that they would in fact have flipped the contracts. To show that they might have done so would not be enough.' b

[45] The tribunal then goes on at [178] to [180] to set out its findings as to the facts in some detail, referring to the evidence given by Mr Paul Coronis of the claimants and then finding at [180]: c

'Mr Coronis is doubtless correct in saying that he would have been more ready to onsell contracts with the Yard than the contracts with New Times; but it by no means follows that he would actively have sought to do this. It is not correct as a matter of chronology to say that the money would not have been spent on New Times ships if the contracts with the Yard had gone ahead, because there was a period of well over a month when the Buyers were committed to both. There is no evidence in that period of their actively trying to sell on the contracts for the Yard's ships. It is not just that there was no evidence of any offers before us, but there was no evidence of the Buyers being involved in any market activity whatsoever.' d

[46] The tribunal then reached its conclusion that this head of claim failed on the basis that the claimants could not satisfy the burden of proof, in these terms at [181]: e

'It may very well be that the contracts would have been sold on. But the evidence was not sufficiently full and convincing for us to hold on the balance of probabilities that they would have been. Still less is it possible to say when that hypothetical transaction would have taken place. Accordingly, we consider that it is after all appropriate to make the relevant comparison as at the contractual date of delivery.' f

[47] Mr Bright complained about the fact that the tribunal had rejected the argument that the claimants would have flipped the ships (which it had accepted in principle) because the claimants had not proved that they would in fact have flipped the ships. He complained in particular about the finding 'there was no evidence of the Buyers being involved in any market activity whatsoever', suggesting this overlooked Mr Coronis's evidence that, if the contracts had proceeded, he would have sold the ships and that he had marketed the ships to various brokers after 7 November 2007, but had been hampered by the inability to give any prospective buyers firm delivery dates because of the defendants' attitude. The claimants also referred to evidence of a broker they had called who confirmed he had been asked to find buyers and had contacted two buyers. In their evidence in support of this application, the claimants suggest that the tribunal has forgotten or overlooked this evidence. g

[48] In fact, as I read the tribunal's finding in [180], the point it was making was not that Mr Coronis did not try to sell the ships or would have done so if he could, but that there were no takers, which is what the tribunal meant by no h

a 'market activity'. The claimants cannot point to any evidence of a firm buyer for the ships. In those circumstances, the tribunal's conclusion on the facts that this head of claim failed is not only understandable, but correct.

[49] However, Mr Dunning correctly points out that it is beside the point whether the tribunal's conclusion on the evidence is correct. The claimants cannot seriously begin to suggest that the tribunal has not dealt with an issue and what this part of the application really is, is a scarcely veiled attempt to challenge the findings of fact of the tribunal which the claimants do not like. Even if the tribunal had overlooked a particular piece of evidence in reaching its findings of fact, that is not susceptible to challenge under s 68 or otherwise: see *World Trade Corpn Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm) at [45], [2004] 2 All ER (Comm) 813 at [45] per Colman J:

c 'On analysis, these criticisms are all directed to asserting that the arbitrators misdirected themselves on the facts or drew from the primary facts unjustified inferences. Those facts are said to be material to an "issue", namely what were the terms of the oral agreement. However, each stage of the evidential analysis directed to the resolution of that issue was not an "issue" within Section 68(2)(d). It was merely a step in the evaluation of the evidence. That the arbitrators failed to take into account evidence or a document said to be relevant to that issue is not properly to be regarded as a failure to deal with an issue. It is, in truth, a criticism which goes no further than asserting that the arbitrators made mistakes in their findings of primary fact or drew from the primary facts unsustainable inferences.'

[50] It is clearly not appropriate to use an application under s 68 to challenge the findings of fact made by the tribunal. If it were otherwise every disappointed party could say it had been treated unfairly by pointing to some piece of evidence in its favour which was not referred to in the reasons or not given the weight it feels it should have been. That is precisely the situation in which the court should not intervene. Matters of fact and evaluation of the evidence are for the arbitrators.

CONCLUSION

[51] It follows that the application under s 68 of the Arbitration Act 1996 is misconceived and must be dismissed. In the circumstances, it is not necessary to consider the defendants' alternative argument that the claimants should be precluded from making the application because they had failed to exhaust all available arbitral processes of appeal or review under s 70(2) of the Act, save to say that in circumstances where a party considers the tribunal has not dealt with an issue, it must make sense to raise the matter with the tribunal first, for the tribunal if appropriate to act pursuant to s 57, before making an application to the court. It may be that, in the particular circumstances of this case, the claimants could justify their failure to raise the matter with the tribunal, but as I say, since the application is dismissed anyway, it is not necessary to explore that question further.

j *Application dismissed.*

Carla Dougan-Bacchus Barrister.

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VI.4.1 Application for Correction or Interpretation of the Award – Introductory Comments

VI.4.1 Authors' Introductory Comments

Despite care and attention given by the arbitral tribunal in its drafting and, where applicable, the scrutiny of the draft award by the arbitral centre, an award can still contain mistakes or ambiguities which call for its correction and/or interpretation.

Although arbitrators are *functus officio* after having rendered the award, most arbitration rules (1) and national legislations (2) make it possible for the arbitrators to correct and interpret their award where necessary in order to make it effective and enforceable. An arbitrator may take the initiative herself or himself (see **Form VI.4.4** below). Or a party may make an application to the arbitrator or to the arbitral institution the rules of which are governing the proceedings.

Terminology

Correction is made where the award contains clerical, computational and/or typographical errors which need to be corrected. They are generally without consequences for the arbitral tribunal's final decision (see **Form VI.4.3**).

Interpretation is required when the award contains a mistake or an ambiguity which might affect a party's rights, or affect a subsequent enforcement of the award, or lead to a non-recognition of the award (see **Forms VI.4.2, VI.4.3 and VI.4.6**).

Supplementation of the award, although rare, can be also requested by a party, e.g., when the arbitral tribunal failed to address one of the party's claims (see **Form VI.4.6**), such as when a tribunal decided *infra petita*. Some rules require that the arbitrators make a new award, an additional award. (3)

An Arbitrator May Reject an Application for Correction or Interpretation

Subject to the timeliness of the party's application (4) and after receipt of the other side's comments, the arbitral tribunal must answer a party's application for correction or interpretation. The tribunal is however free to reject or to accept it, in total or in part. ●

Special ICC Terminology

The ICC Rules use special terminologies: 'addenda' and 'decisions'.

An *addendum* reflects the decision of the arbitral tribunal to correct and/or clarify the award. The interpretation or correction is reasoned and becomes – after the Court's scrutiny – part of the award (see **Forms VI.4.4 and VI.4.5**).

In contrast, a *decision* of the tribunal rejects the party's application to correct or interpret the award. A *decision* is not part of the award as it does not alter its contents (see **Forms VI.4.2 and VI.4.6**). When rejecting a request for interpretation of the award, the tribunal can be brief, stating merely that the award is sufficiently clear.

The Practice

Addenda and decisions are generally clear and concise with reasons, just like awards. They seek to avoid any additional request(s) from a party.

Parties sometimes try to use the correction and interpretation mechanisms offered by arbitration rules and legislation, to obtain a modification of the decision or the reasoning of the arbitrators, on the basis of alleged deficiencies of the award. The aim may also be to delay the enforcement of the recognition of the award. ●

Readers are welcome to send the Authors comments and suggestions, including documents they believe should be included in an updated edition. To do so, please contact arbitrationforms@outlook.com.

References

- 1) See e.g., Art. 36 of the ICC Rules in force from 1 March 2017, Art. 27 of the LCIA Rules 2014, Art. 38 of the DIAC Arbitration Rules 2007, Arts 37 and 38 of the UNCITRAL Arbitration Rules 2010, Art. 47 of the SCC Rules, Arts 35 and 36 Swiss Rules of International Arbitration, Art. 33 SIAC Rules; for further guidance, see for example *ICC Note on Correction and Interpretation of Arbitral Awards*, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/practice-notes,-forms,-c...>; more generally, see M. Hauser-Morel & J. Heiner Nedden, 'Correction and Interpretation of Arbitral Awards and Additional Awards' in *Post Award Issues*, ASA Special Series No. 38 (2011), p. 19.
- 2) See e.g., Art. 1485 French Code of civil procedure; Art. 1058 German ZPO; see also Art. 33(3) UNCITRAL Model Law.
- 3) The DIS Arbitration Rules 98, Art. 37.1 stipulates: 'to make an additional award as to claims presented in the arbitral proceedings but omitted from the award'.
- 4) See for example Art. 35(1) and (2) ICC Rules which provides for a thirty day time limit of the award to make or to proceed with the request for correction and/or interpretation, subject to the payment of an additional advance on costs (see Art. 35(4)).

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'VI.4.2 Arbitral Tribunal's Decision on a Request for Interpretation of the Award (Two Steps Procedure, Admissibility of the Request Before the Merits, Request Denied on the Merits)', in Sigvard Hakan Ludvig Jarvin and Corinne Nguyen, Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents, (© Kluwer Law International; Kluwer Law International 2017) pp. 581 - 586

VI.4.2 Arbitral Tribunal's Decision on a Request for Interpretation of the Award (Two Steps Procedure, Admissibility of the Request Before the Merits, Request Denied on the Merits)

VI.4.2 Arbitral Tribunal's Decision on a Request for Interpretation of the Award

(Two Steps Procedure, Admissibility of the Request Before the Merits, Request Denied on the Merits)

Place of arbitration: Stockholm

Arbitration rules: ICC 2012

Nationality of arbitrators: Swedish, Finnish and French

Nationality of parties: Finnish and French

Nationality of counsel: Finnish and French

Applicable law: CISG and Swedish law

Subject matters:

- avoidance of contract under the CISG;
- admissibility of request for interpretation;
- the arbitral tribunal's decision on the merits.

The arbitral tribunal proceeds in a twofold approach: first they examine the admissibility of the application, then they deal with its merits.

- Admissibility of the request

Against the respondent's argument, the request for interpretation was declared admissible by the arbitrators as it had been submitted within the thirty-day time limit provided by Article 35 of the ICC Rules.

Due consideration was also given to the law of the place of arbitration, i.e., Stockholm.

The Swedish Arbitration Act 1999, section 32, permits arbitrators to interpret an award. As explained by the arbitrators, in absence of any possible appeal before a higher instance, unlike in court proceedings, the arbitral tribunal has the duty to interpret the award when its exact meaning is unclear and is likely to prevent its execution.

- Merits of the request

The dispute related to a purchase of industrial equipment delivered by the respondent and counter-claimant. When the claimant failed to pay the price, respondent terminated the contract. In the arbitration, the tribunal ordered the claimant and counter-defendant to pay certain amounts to the respondent. After the award had been rendered, the claimant and counter-defendant (who had been ordered to pay) applied for an interpretation of the award, wanting to know how to qualify – in legal terms – the payment the arbitrators had ordered it to make. Namely whether the payment gave the claimant the right to obtain the respondent's equipment in exchange (i.e., whether the payment could be qualified as payment for goods sold). ●

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The arbitral tribunal denied the request in absence of any ambiguity in the award. As reminded by the arbitrators, '[i]nterpretation is a purely auxiliary process and may only serve to explain, but not to change what the Arbitral Tribunal has already settled with binding force as *res judicata*'. Claimant had not made the claim during the arbitration and the tribunal had not ruled on the issue. ●

P 583

Form VI.4.2

International Court of Arbitration
of the International Chamber of Commerce

ICC Case N° _____

Company A (France) v.

Company B (Finland)

P 584 INTERPRETATION ON _____ OF THE AWARD RENDERED ON _____ ●

Introduction

On _____, we, the arbitrators, rendered our Award in Stockholm, Sweden (place of arbitration).

By letter dated _____, Claimant and Counter-defendant, Company A, wrote to the ICC International Court of Arbitration requesting that the Arbitral Tribunal give its interpretation of the Award in respect of the following matter: Whether the payment to be made by Company A in relation to the x. line equipment amounts to damages or whether the payment gives Company A the right to obtain the equipment it is condemned to pay for.

It appears from the parties' submission that they disagree as to whether Company A may make its payment conditional on the delivery by Company B of the x. line in its current state.

Defendant and Counterclaimant, Company B, objects to the request for interpretation, arguing in the first place that an interpretation is inadmissible and secondly that the request is unfounded since the Award is not ambiguous and there is no room for an interpretation.

The Arbitral Tribunal has considered the parties' submissions and decides as follows:

Admissibility of the request for interpretation

This case n° _____ is governed by the ICC Rules of Arbitration 2012 (Terms of Reference, Section ____) which provide in Article 35 for the interpretation of an Award.

The place of arbitration in this case is Stockholm, Sweden (Terms of Reference, Section ____). Swedish law has an express statute in respect of the interpretation of Arbitral Awards. The trend in international arbitration is undeniably in favour of permitting arbitrators to interpret awards, both in Sweden and as regards the ICC Rules of Arbitration.

When deciding on the admissibility of the request for interpretation, the Arbitral Tribunal takes into consideration that the Arbitral Award is final and therefore not subject to appeal to a higher instance. The parties cannot therefore, unlike in court of law proceedings, appeal to a higher court in order to obtain clarification on a point which seems unclear. If the exact meaning of the Award is unclear and is likely to prevent its execution, we consider it to be the arbitrators' duty, based on Article 35 of the ICC Rules, to interpret the Award.

The merits of the request for interpretation

Interpretation is a purely auxiliary process and may only serve to explain, but not change what the Arbitral Tribunal has already settled with binding force as *res judicata*. We hold that there is no ambiguity in the Award as regards the amount Company A shall pay to Company B in respect of the x. line equipment. Thus no interpretation is necessary and there is nothing unclear which could prevent the enforcement of the Award in this respect. ●

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When it comes to Company A's request as to whether payment by it of the amount awarded to Company B gives Company A right to get delivery of the equipment, the Arbitral Tribunal declares that no such claim was made by Company A in the arbitration proceedings and we have thus not ruled expressly on the issue. Company B asserted that Company A committed a fundamental breach of the x. line contract by refusing to pay the contract price in proper time (Award, Section __, __ paragraph). Company B further asserted that Company A's breach had led to company B incurring loss and damage (Award, Section ____). As relief Company B sought payment by Company A of damages for the breach of the x. line contract (Award, Section ____).

The Arbitral Tribunal found (Award, Sections ____ and ____) that Company A had breached its contractual obligations under the x. line contract by not making payment. The Tribunal consequently endorsed Company B's termination of the contract ____ (____ of the Award), i.e. before the arbitration proceedings began. It follows from the Vienna Sales Convention that when a party unilaterally terminates a contract (on the grounds of breach of contract by the other party), it is entitled to damages. After the avoidance of a contract both parties are released from their obligations under the contract, subject to damages (Vienna Sales Convention, paragraphs 61, 64, 74 and 81). The Arbitral Tribunal found (Award, Sections ____) that Company B suffered damages for which company A is liable. The calculation of the amount was made in Section ____ of the Award.

Since Company B was released from further obligations under the contract, it is therefore not under an obligation to deliver the x. line or what remains of it to Company A.

Deemed made in Stockholm on _____.

Arbitrator Arbitrator

P 585

▲ Presiding arbitrator ●

Readers are welcome to send the Authors comments and suggestions, including documents they believe should be included in an updated edition. To do so, please

contact arbitrationforms@outlook.com.

Publication

Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents

Bibliographic reference

'VI.4.3 Claimant's Application for Correction and Interpretation of an Award', in Sigvard Hakan Ludvig Jarvin and Corinne Nguyen, Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents, (© Kluwer Law International; Kluwer Law International 2017) pp. 587 - 590

VI.4.3 Claimant's Application for Correction and Interpretation of an Award

VI.4.3 Claimant's Application for Correction and Interpretation of an Award

Place of arbitration: unknown

Arbitration rules: ICC 2012

Nationality of arbitrators: Swiss

Nationality of the parties: Belgian and Brazilian

Nationality of counsel: unknown

Applicable law: Swiss

Subject matters:

- application for correction and interpretation of an award;
- computational error;
- date from which interest should run (date of the award or receipt of the award).

There is no special form required for a party's application for correction or interpretation of the award. The request can be made by a simple but reasoned letter sent to the arbitral centre or to the arbitrators in an ad hoc proceeding.

In the present case, the claimants seek the **correction** of a computational error relating to the reimbursement of the costs for the arbitration. This request does not raise any special comments given that the typographical mistake was obvious.

Second, the claimants request an **interpretation** of the award as regards the starting point for the running of interest. In this respect, the claimants further request that the award be **corrected**.

According to the claimants, interest should only start running on the day on which it received the award and not the day the award was rendered. Claimants argue that the purpose of awarding interest is to encourage the debtor to pay money without delay, and that such function can only be valid after the debtor is made aware of the debt.

Claimants further contend that if the award is corrected or interpreted, such addendum becomes part of the award, and therefore only the receipt of the corrected award can start the running of interest. ●

P 588

Form VI.4.3

Law Firm letterhead

(Date)

Counsel, head of team ____

ICC International Court of Arbitration
 33-43 avenue du Président Wilson
 75116 Paris
 France

Re: A et al ./ B

ICC Arbitration N° _____

CLAIMANTS' APPLICATION FOR CORRECTION AND INTERPRETATION OF THE AWARD

Dear _____,

We hereby submit the Claimants' Application for Correction and Interpretation of the Award ("**Application**"), pursuant to Article 35(2) of the ICC Rules of Arbitration (the "**ICC Rules**").

The Arbitral Tribunal has rendered its Award on the Withdrawal of the Request for Arbitration and Allocation of Arbitral Costs Between the Parties, dated ____ (the "**Award**"). The Award was notified to the Claimants under cover of a letter from the ICC to their counsel, dated _____, a copy of which is enclosed with this Application.

We have noted two points in the Award which require correction and/or interpretation by the Arbitral Tribunal:

1. The Award orders the Claimants to pay the Respondent US\$ 160,000, to reimburse

the latter for its arbitration costs (p. __, ¶ __). This appears to be a typographical or computational error. Taking into account the Parties' respective payments of the advance on costs and the ICC's reimbursement of a portion of the advance on costs, the amount to be paid by the Claimants to the Respondent should be US\$ 80,000.

- P 589 2. The Award orders the Claimants to pay interest upon the amounts owed to the Respondent "from the date of the award ... until full payment" (p. __, ¶¶ __ & __). We submit that this phrase should be corrected with the addition of the ● words "of Claimants' receipt" after the word "date". Finally, it is the receipt of the *corrected* Award that should start interest running.

We explain these points in more detail below:

1. The Reimbursement of Costs

The ICC set the advance on costs in this arbitration at US\$ 245,000. Each Party duly paid its share of the advance on costs: US\$ _____. These payments are mentioned in the ICC's letter dated _____. See also the Award, p. __.

The ICC Court fixed the administrative costs and the fees and expenses of the Arbitral Tribunal at its session of _____. Including the Tribunal's expenses, the total amount of the costs of arbitration was US\$ 160,000. See the ICC letter, dated _____, and the Award, p. __, ¶ __.

The costs of the arbitration were more than covered by the advance on costs. The ICC accordingly informed the Parties, in its letter dated _____, that US\$ 85,000 would be reimbursed to them in equal shares – *i.e.*, US\$ 42,500 to each side.

Thus, the Respondent's net costs of arbitration, taking into account the ICC's reimbursement, were US\$ 80,000, calculated as follows:

Respondent's payment of the advance on costs:	US\$ 122,500
ICC's reimbursement:	US\$ 42,500
Respondent's total costs of arbitration:	US\$ 80,000

Therefore, while the Claimants are to bear the full amount of the administrative costs of the ICC and the fees and expenses of the Arbitral Tribunal fixed by the ICC Court at US\$ 160,000, the amount to be paid to the Respondent is one-half that amount: US\$ 80,000.

It is evident that the order in the Award (p. __, ¶ __) that the Claimants pay the Respondent US\$ 160,000, rather than US\$ 80,000, results from a computational or typographical error. The Claimants accordingly request that this error be corrected.

2. The Running of Interest

The Award orders the Claimants to pay certain amounts to reimburse the Respondent for its costs of arbitration (p. __) and for its legal costs (p. __). In both cases, the Award includes interest thereon, "from the date of the award on costs at the rate of 5% p.a. until full payment" and "from the date of the award on costs until full payment", respectively.

- P 590 The Award is dated 20 September _____. However, the Award was not sent to Claimants' counsel until 26 September _____. It was received by them after the close of ● business that day, so the Claimants' effective receipt of the Award occurred on 27 September _____.

The purpose of awarding interest upon a sum of money owed by one party to another is to encourage the debtor to pay the money without delay. This function of interest cannot operate prior to the debtor becoming aware of the debt. We presume, therefore, that the Arbitrators intended to fix the starting point for the running of interest on the date of the Claimants' receipt of the Award, not the date of the Award itself. The Claimants accordingly request that the Award be interpreted to clarify this point and the paragraphs __ and __ on page __ of the Award each be corrected with the addition of the words "of Claimants' receipt" after the word "date".

Article 35 (3) of the ICC Rules stipulates that the decision to correct or to interpret the Award shall take the form of an addendum and shall constitute part of the Award. Therefore, the Award cannot be deemed to have been received by the Claimants until they receive the *corrected* Award, incorporating the addendum. The Claimants accordingly request that the word "corrected" be added to paragraphs __ and __ on page __, immediately preceding the words "award".

In conclusion, the Claimants respectfully request that paragraphs __ and __ on page __ of the Award be corrected, pursuant Article 35 (2) of the ICC Rules, to read as follows (emphasis added to show corrections):

2. Claimants shall jointly and severally bear the administrative costs of the ICC and the fees and expenses of the Arbitral Tribunal fixed by the International Court of Arbitration at US\$ 160,000 and thus pay to Respondent **US\$ 80,000** plus interest thereon, from the date of

Claimants' receipt of the **corrected** award on costs at the rate of 5% p.a. until full payment.

4. Claimants shall jointly and severally bear Respondent's legal costs and, thus, reimburse to Respondent EUR _____ plus interest thereon from the date **of Claimants' receipt** of the **corrected** award on costs until full payment.

This Application is being submitted to the ICC, in five copies, within 30 days of the Claimants' receipt of the Award, as required by Article 35 (2) of the ICC Rules.

Sincerely yours,

 P 590

Encl. ●

Readers are welcome to send the Authors comments and suggestions, including documents they believe should be included in an updated edition. To do so, please contact arbitrationforms@outlook.com.

Document information

Publication

Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents

Bibliographic reference

'VI.4.4 Correction of the Final Award in the Form of an Addendum Made on the Tribunal's Own Initiative', in Sigvard Hakan Ludvig Jarvin and Corinne Nguyen , Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents, (© Kluwer Law International; Kluwer Law International 2017) pp. 591 - 594

VI.4.4 Correction of the Final Award in the Form of an Addendum Made on the Tribunal's Own Initiative

VI.4.4 Correction of the Final Award in the Form of an Addendum Made on the Tribunal's Own Initiative

Place of arbitration: unknown

Arbitration rules: ICC 2012

Nationality of arbitrator: unknown

Nationality of parties: unknown

Nationality of counsel: Austrian and Swiss

Applicable law: unknown

Subject matters:

- correction of award on the arbitrator's own initiative;
- clerical mistake by the sole arbitrator;
- addendum according to Article 35(1) of the ICC Rules.

This Form reflects the possibility granted by the ICC Rules to the arbitral tribunal to correct, on its own initiative, a clerical mistake within the thirty-day time-limit of the date of the award (Article 35(1) ICC Rules 2012). In the case, the sole arbitrator failed by mistake to include the expert witness' fee amount in the dispositive part of the award. The dispositive section of the award has been amended accordingly to reflect the exact amounts of money to be paid by the respondent to the claimant, i.e., the costs of arbitration including the claimant's legal costs (attorneys' and expert's fees and expenses).

P 592

Form VI.4.4

International Court of Arbitration of the International Chamber of Commerce

ICC Case No. _____

COMPANY A

Claimant

versus

COMPANY B

Respondent

ADDENDUM TO THE FINAL AWARD

Issued by
Ms. x.
Sole Arbitrator

Representing the Claimant Representing the Respondent

(address) (address)

Place of Arbitration: _____

P 593 Date: _____

I. INTRODUCTION

- 1. On _____, the Sole Arbitrator issued the Final Award, which was approved by the ICC Court at its session of _____.
2. By courier dated _____, the ICC Secretariat notified the Final Award to the Parties, who received it on _____.

3. On _____, the Sole Arbitrator informed the Secretariat about his intention to issue an Addendum pursuant to Article 35 (1) of the ICC Rules, whereby the Arbitral Tribunal may “(o)n its own initiative (...) correct a clerical, computational or typographical error, or any errors of similar nature contained in an Award, provided such correction is submitted for approval to the Court within 30 days of the date of such Award.”
4. On _____, the Sole Arbitrator submitted a draft Addendum to the Final Award to the ICC Court, i.e. within the 30-day time limit provided by Article 35 (1) of the Rules.
5. The Court, at its session of _____, decided to approve the draft Addendum, pursuant to Article 35 of the Rules.

II. THE PARTIES TO THE DISPUTE AND THE ARBITRAL TRIBUNAL

II.1 The Claimant

6. The Claimant, Company A, is a limited liability company having its registered offices at _____.
7. In the arbitration, the Claimant was represented by _____.

II.2 The Respondent

8. The Respondent, Company B, is a stock corporation having its registered offices at _____.
9. In the arbitration the Respondent was represented by _____.

II.3 The Arbitral Tribunal

10. Ms. x. of _____, was appointed by the ICC Court as Sole Arbitrator in this arbitration on _____.

III. ADDENDUM TO THE FINAL AWARD

11. In paragraph ___ of the Final Award, the Sole Arbitrator made the following decision on costs: ●

“In accordance with Article 37(1) of the ICC Rules and in line with the established principle that costs follow the outcome of the case, the Tribunal, within the discretion it enjoys when allocating the costs of the arbitration between the Parties, awards the Claimant reimbursement of all its costs of the arbitration. The Tribunal finds that the Claimant’s total costs are reasonable and appropriate for the pursuit of the Claimant’s claims and therefore reimbursable. The total amount of costs which the Respondent must reimburse to the Claimant amounts to USD 16,500.00 (advance on costs paid to the ICC), EUR 12,305.00 (expenses for the Expert’s mission), and EUR 26,232.72 (attorney’s fees and expenses).”

12. The dispositive part of the Final Award (at page ___), however, did not reflect the part of the decision on costs pursuant to which the Respondent must reimburse to the Claimant the expenses related to the Expert’s mission in the amount of EUR 12,305.00. Instead, in item 3, it only mentioned that the Respondent “is ordered to compensate the Claimant for its legal costs and fees in the amounts of USD 16,500.00 and EUR 26,232.72.”
13. Item 3 of the dispositive part of the Final Award must therefore be amended to reflect the Tribunal’s decision in paragraph ___ of the Final Award. It must read as follows:

“The Respondent bears the entire costs of the arbitration, including its own costs. The Respondent is ordered to compensate the Claimant for its legal costs and fees and for the expenses for the expert’s mission in the total amounts of USD 16,500.00 and EUR 38,537.72.”

14. The correct dispositive part of the Final Award therefore reads as follows:

FINAL AWARD

1. (...)
2. (...).
3. **The Respondent bears the entire costs of the arbitration, including its own costs. The Respondent is ordered to compensate the Claimant for its legal costs and fees and for the expenses for the expert’s mission in the total amounts of USD 16,500.00 and EUR 38,537.72.**
4. **All other claims and requests are dismissed.**

Place of arbitration _____, Date, _____

Ms. x.

 Sole Arbitrator ●

Readers are welcome to send the Authors comments and suggestions, including documents they believe should be included in an updated edition. To do so, please

contact arbitrationforms@outlook.com.

Document information

Publication

Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents

Bibliographic reference

'VI.4.5 Correction of the Final Award in the Form of an Addendum Made on a Party's Request', in Sigvard Hakan Ludvig Jarvin and Corinne Nguyen , Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents, (© Kluwer Law International; Kluwer Law International 2017) pp. 595 - 600

VI.4.5 Correction of the Final Award in the Form of an Addendum Made on a Party's Request

VI.4.5 Correction of the Final Award in the Form of an Addendum Made on a Party's Request

Place of arbitration: New York

Arbitration rules: ICC 2012

Nationality of arbitrators: US

Nationality of parties: Argentinian and Mexican

Nationality of counsel: US

Applicable law: unknown

Subject matters:

- correction of final award;
- Article 35(2) of the ICC Rules;
- manifest error regarding the name of the escrow bank called to release the funds.

The present Form reflects an undisputed mistake by the arbitral tribunal which erred in naming the right escrow bank which is called to release the funds to Claimants as ordered in the award.

P 596 The document is clearly organized with a brief introduction, the procedural background, the parties' positions, the arbitrators' decision and their conclusion. ●

Form VI.4.5

IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE RULES OF ARBITRATION
OF THE INTERNATIONAL CHAMBER OF COMMERCE

BETWEEN
COMPANY A (Argentina)
COMPANY B (Mexico)
Claimants
AND
COMPANY C (Mexico)
COMPANY D (Mexico)
Respondents
ICC Ref: _____

ADDENDUM

Counsel for Claimants: Counsel for Respondents:

Law Firm 1 Law Firm
(address) (address)

Law Firm2
(address)

Tribunal:

Mr z., Esq., Chairman
Mr x., Co-arbitrator

P 597 Mr y., Co-arbitrator ●

I. INTRODUCTION

1. This Decision relates to Claimants' request for correction of the Final Award issued

on April 5, _____, (the "Award") made pursuant to Article 35 of the ICC Rules of Arbitration.

II. PROCEDURAL BACKGROUND

2. The Claimants received the Final Award on May 4, _____ and Respondents received it on May 3, _____. Accordingly, any application pursuant to Article 35(2) of the Rules was due by June 3, _____ for Claimants and June 2, _____ for Respondents.
3. On May 16, _____, Claimants timely submitted to the Secretariat (with copies to Respondents and to the Tribunal) a request for correction of the Award rendered in the above referenced arbitration (the "Request"). The Request was made pursuant to Article 35 of the ICC Rules of Arbitration. Claimants' Request was transmitted to the Tribunal on May 23, _____.
4. The Arbitral Tribunal's Addendum with respect to their Application was originally due by July 20, _____. However, the Court, as its session of July 20, _____, extended that time limit for rendering the Addendum until September 30, _____.
5. The law firm that previously represented Respondents during the course of the arbitration, Smith, White, Morse and Schwarzkopf, informed the Tribunal by letter on May 25, _____ that it no longer represented Respondents in these proceedings.
6. Therefore, on May 30, _____, the Tribunal forwarded Claimants' Request directly to Respondents and permitted Respondents until June 20, _____ to submit any comments.

III. POSITIONS OF THE PARTIES

A. Claimants

7. In their Request, Claimants took the position that the Tribunal erred in naming Banco del Norte as the escrow agent and in ordering Banco del Norte to release the funds to the Claimants. Instead, Claimants proffer that the correct escrow is Banque du Sud, and it is Banque du Sud that should be ordered to release the funds in the escrow account to Claimants pursuant to the Tribunal's Award.
8. In the Award, the Tribunal ordered the release of \$4,875,000 plus interest currently being held in an escrow account to Claimants in partial satisfaction of the damages awarded to Claimants. (Award ¶ ____). Paragraph ____ of the Award refers to an escrow account at Banco del Norte, as contemplated by Section ____ of the Stock Purchase Agreement ("SPA"). As set out in Claimants' request for ● correction, at the time of Closing, the parties substituted Banque du Sud for Banco del Norte as the escrow agent. This substitution is evidenced by the Agreement of November 2 _____ (Attachment __ to Claimants' Request for Correction).
9. The escrow agent, Banque du Sud, would not release the funds to Claimants because the Award did not name it as the escrow agent. Therefore, Claimants requested that the Tribunal issue a correction to the Award pursuant to Article 35 of the ICC Rules identifying Banque du Sud as the escrow agent holding the escrow account and ordering Banque du Sud to release the escrow account to Claimants.

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B. Respondents

10. A copy of Claimants' Request was mailed to the Respondents at the above listed address on _____. Respondents were given until June 20, _____ to submit comments on the Request. Respondents did not respond to the letter and have not submitted comments to the Tribunal.

IV. DECISION

11. Having considered Claimants' request and the documents cited therewith, the Tribunal concludes that the Award did in fact erroneously refer to Banco del Norte as the escrow agent. It is clear that at the time of Closing, the parties deposited the \$4,875,000 into an escrow account at Banque du Sud and not at Banco del Norte.
12. Therefore, the Tribunal hereby amends the Award as follows: Paragraph ____ of the Award is amended by replacing "Banco del Norte" with "Banque du Sud". Revised paragraph ____ will now read:
"... The Tribunal also orders the release to Claimants of the balance in the escrow account at Banque du Sud pursuant to Section ____ of the SPA (...)."

V. CONCLUSION

13. For the foregoing reasons, the Claimants' Request is granted and the Award is amended as set forth above.

P 599 ●

Place of arbitration: New York, New York

Dated: August 14, _____

Mr. z.

Chairman, For the Tribunal

Mr. x.
Arbitrator

Mr. y.
Arbitrator ●

[p 599](#)

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Publication

Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents

Bibliographic reference

'VI.4.6 Interpretation of the Award Made on a Party's Request (Decision Not to Reveal the Identity of a Dissenting Arbitrator Nor to Submit His Dissenting Opinion)', in Sigvard Hakan Ludvig Jarvin and Corinne Nguyen, Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents, (© Kluwer Law International; Kluwer Law International 2017) pp. 601 - 608

VI.4.6 Interpretation of the Award Made on a Party's Request (Decision Not to Reveal the Identity of a Dissenting Arbitrator Nor to Submit His Dissenting Opinion)

VI.4.6 Interpretation of the Award Made on a Party's Request

(Decision Not to Reveal the Identity of a Dissenting Arbitrator Nor to Submit His Dissenting Opinion)

Place of arbitration: Istanbul

Arbitration rules: ICC 2012

Nationality of arbitrators: German, Swiss and Turkish

Nationality of parties: Turkish

Nationality of counsel: Turkish

Applicable law: Turkish

Subject matters:

- request for information which arbitrator dissented from the majority and on which issues, disguised as a request for interpretation of the award;
- clarification and completion of a majority award;
- Articles 31 and 35(2) ICC Rules and Article 14/B of the Turkish Arbitration Law 21 June 2001;
- admissibility (yes, submitted within thirty days);
- nature, meaning and legal validity of a majority arbitral award in an international arbitration;
- legal protection of dissenting arbitrator thanks to the principle of collegiality;
- a dissenting arbitrator has no obligation to render a dissenting opinion.

This Form is an example of an arbitral tribunal's refusal to entertain a request disguised as a request for interpretation of an award. The tribunal's reasons involve an analysis of both the ICC Arbitration Rules and the Turkish Law on Arbitration. It includes further an analysis of the protection a dissenting arbitrator should enjoy.

The claimant made two applications.

In the first, claimant requested the tribunal to 'correct, clarify and interpret:

- (i) which arbitrator dissented to which decision ...,
- (ii) whether or not 'certain decisions' were reached with the majority or by unanimous votes of the tribunal'.

In the second application, claimant requested the tribunal to confirm that arbitrator X. dissented on certain issues, and asked the tribunal to 'complete the award and procure that Mr X. presents his reasoning (dissenting opinion) on why he disagreed with the majority decision of the Tribunal' regarding another issue.

P 602 After verification that claimant's request was admissible as being made within the thirty-day time limit of the award, the tribunal examined the two applications. ●

The tribunal denied the request for the identity of the arbitrator, since the claimant did not seek a correction of the award within the meaning of Article 35 of the ICC Rules which article aims to correct typographical, computational or any material error of a similar kind. Instead, claimant sought to know the identity of the dissenting arbitrator and also which of the decisions in the dispositive section of the award were or were not made by the majority.

The tribunal rejected also the request concerning which decisions had been reached by majority or unanimously since it was not a request for interpretation of the award. Requests for interpretation aim to clarify any ambiguities, unclearness or interrogations in the dispositive section of the award. Claimant did not make any argument of this kind in its application.

Finally, claimant's request to obtain arbitrator X's dissenting opinion was not a request to obtain a decision on an issue that had been pleaded but not decided.

Claimant's request goes far beyond the meaning and scope of Article 35(2) ICC Rules. It is in fact irrelevant for a party to know which of the decisions leading to the dispositive orders have or have not been taken by majority. A majority decision, just like a unanimous decision, is a valid and binding decision and does not, 'due to its majority nature present any character of incompleteness'. According to the arbitral tribunal, there is no correlative right for a party to know or to obtain a dissenting opinion from the minority arbitrator who has in addition the faculty to state or not the reasons for his

P 603 dissent in a written dissenting opinion. Claimant's application is in fact the result of a misconception of the nature and implication of a majority award. ●

Form VI.4.6

International Court of Arbitration of the International Chamber of Commerce

ICC N° _____

In the matter of an arbitration pursuant to the 2012 Rules of Arbitration of the International Chamber of Commerce (ICC Rules)

between

COMPANY A (Turkey)

hereinafter "**COMPANY A**" or "**Claimant**"

represented in these arbitration proceedings by its counsel

____, Esq.

(address)

and

COMPANY B (Turkey)

Hereinafter "**COMPANY B**" or "**Respondent**"

Represented in these arbitration proceedings by its counsel

____, Esq.

(address)

both parties hereinafter collectively referred to as the "Parties" or individually as a "Party",

the Arbitral Tribunal, composed of Mr. x, Mr. y, and Mr. z.

- given the application made by COMPANY A on _____ to interpret and complete the Final Award issued by the Arbitral Tribunal on _____;
- given the submission made by COMPANY A, on _____ in support of its application and the comments submitted by COMPANY B on _____ in response to such application;
- considering Article 35 of the ICC Rules and Article 14/B of the Turkish Arbitration Law (N° 4686 of June 21, 2001);

hereby renders the following

P 604 **DECISION** ●

COMPANY A's application for interpretation and completion of the Final Award is rejected.

Reasons

1. COMPANY A's application ("**the Application**") has no basis in the ICC Rules or the Turkish Arbitration Law.
2. Under Article 35 (2) of the ICC Rules (read together with Art. 35 (1) of the ICC Rules), a party may make an application for the correction of a clerical, computational or typographical error or for the interpretation of an award. Likewise, under Article 14/B of the Turkish Arbitration Law, each of the parties may request correction of any calculation, clerical and similar material errors in the arbitral award (Art. 14/B Nr. 1 of the Law) and may request interpretation of all or some sections of the award (Art. 14/B Nr. 2 of the Law). In addition, and beyond what is foreseen under Article 35 (2) of the ICC Rules, each party may ask the arbitral tribunal to make a complementary award "*on issues that have not been decided upon in spite of having been claimed during the arbitral proceedings.*"
3. COMPANY A, submitted the following application to the ICC:
 - "1. *The Claimant requests from the Arbitral Tribunal, as appropriate, to correct, clarify and interpret:*
 - (i) *which arbitrator dissented to which decisions of the Tribunal;*
 - (ii) *whether or not the following decisions were reached with the majority or unanimous votes of the Tribunal;*
 - a. *the decision on jurisdiction*

- b. *the decision in para. 2(a), p. 38 of the Award both in respect of the principal and interest amounts,*
 - c. *the decision in para. 2(b), p. 38 of the Award both in respect of the principal and interest amounts.*
2. *The claimant requests from the Arbitral Tribunal to (i) confirm that Mr. x dissents to the reasoning of the majority of the Tribunal on Company A's relief sought about exchange rate differences, and (ii) complete the Award and procure that Mr. x presents his reasoning (dissenting opinion) on why he disagreed with the majority decision of the Tribunal regarding the Claimant's relief on exchange rate differences."*
 4. Company A submits that some decisions taken by the Arbitral Tribunal present a contradiction between the reasoning and the dispositive order in as it does not become clear whether the decisions were reached by majority or unanimity. In this respect, the Arbitral Tribunal is invited "*as appropriate, to correct, clarify or interpret*" whether the dispositive sections 1., 2 a) and 2 b) of the Final Award were rendered by majority or unanimously. COMPANY A further submits that where the decision has been taken by majority, it does not become clear which arbitrator dissented, and invites the Arbitral Tribunal "*as appropriate, to correct, clarify or interpret which arbitrator dissented to which decision of the Tribunal*". Finally, COMPANY A submits that, while the dissenting opinion of Mr. y has been communicated to the Parties, the dissenting reasoning of Mr. x, "*who presumably dissented to the majority decision of the Tribunal for Company A's relief sought about exchange rate differences*" is not known to the Parties.

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 5. COMPANY B, in its response to the Application, submits that the Final Award does not need any correction, clarification or interpretation because the Final Award is clear enough. In this respect, COMPANY B deems that it becomes clear from the Final Award which decisions were rendered unanimously. Given that there is no written dissenting opinion from Mr. x who signed the Final Award without mentioning any dissent, nothing can be assumed with respect to a possible dissent by Mr. x. Therefore, COMPANY B requests to disregard COMPANY A's Application.
 6. The Arbitral Tribunal is satisfied that the Application was submitted within the 30-day time limit as of the receipt by COMPANY A of the notification of the Final Award through the ICC.
 7. On the face of it, the Application seeks to "*correct*" the Final Award (Nr 1 of the Application), "*to clarify and interpret*" the Final Award (Nr. 1 of the Application) and to "*complete*" the Final Award (Nr. 2 (ii) of the Application). These requests will be examined in turn.
 8. A request to correct an award seeks to rectify any "*clerical, computational or typographical error, or any errors of similar nature contained in an Award*" (Article 35 (1) of the ICC Rules) or "*any calculation, clerical and similar material errors in the arbitral award*" (Art. 14/B Nr. 1 of the Turkish Arbitration Law). However, the Arbitral Tribunal cannot but note that neither the request under Nr. 1 (i) of the Application, *i.e.* to identify which arbitrator dissented to which decision of the Arbitral Tribunal, nor the request under Nr. 2 of the Application, *i.e.* whether certain dispositive orders where or were not made by majority, aims at the correction of any typographical, computational, calculation or any other clerical or material error of such similar kind in the Final Award. The Arbitral Tribunal therefore concludes that it is not confronted with a request for correction of the Final Award.
 9. A request to interpret an award seeks to clarify dispositive orders or "*all or some sections*" (Art. 14/B Nr. 2 of the Turkish Arbitration Law) of the award. The purpose of granting such power to the arbitral tribunal, even after it has rendered the award and thus has become *functus officio* (*cf.* Art. 13/B, para 2 of the Turkish Arbitration Law), is the recognition that the arbitral tribunal is best suited to shed light on the obligations and rights of the parties resulting from the decisions it took in the award in cases of ambiguity and where such obligations and rights reveal to be unclear. In the present case, however, even COMPANY A does not argue that the rights and obligations as determined in the Final Award, and more particularly in the dispositive orders, give rise to any ambiguity, unclearness or interrogations.

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 10. A request to complete an award seeks to obtain a "*complementary award on issues that have not been decided upon in spite of having been claimed during the arbitral proceedings*" (Art. 14/B, para. 3 of the Turkish Arbitration Law). Here again, the Arbitral Tribunal notes that COMPANY A's request to complete the Final Award with Mr. x's reasoning of his "assumed" dissent (dissenting opinion) has not been claimed. All claims, and the related relevant issues for their determination, have been considered and decided upon by the Arbitral Tribunal. Both, the ICC Rules (in Art. 31 (1) 1st sentence) and the Turkish Arbitration Law (in Art. 13/1 para 1) expressly provide, that such arbitral tribunal decisions shall be made by majority. Thus, a decisions adopted by majority is fully valid and does not, due to its majority nature, present any character of incompleteness. Therefore, the Arbitral Tribunal does not find any issue in the Final Award that has not been decided in spite of having been

claimed during the arbitral proceedings.

- 11.** On a more general level, the Arbitral Tribunal notes that COMPANY A's Application, far from obtaining a correction, interpretation or completion of the Final Award, seems to be driven by a certain misconception of the nature and implications of a majority decision in an international arbitration award. Neither the Turkish Arbitration Law, nor the ICC Rules, nor general principles of international arbitration for that matter, establish a difference in nature between a decision taken by majority and a decision taken by unanimity. A majority decision is just as valid, as binding and as enforceable as a unanimous decision. Therefore, a party does not have an interest worth of protection to be informed whether a decision, or which of several decisions, has been taken by unanimity or by majority. It is therefore irrelevant to clarify whether one or the other dispositive order has or has not been taken by majority, and it is irrelevant to know which of the numerous determinations leading to the dispositive orders have or have not been taken by majority. Likewise, the principle of collegiality of the decision protects the minority arbitrator from revealing his or her dissent, and there is therefore no obligation for a minority arbitrator to state the fact that he or she is dissenting. Consequently, there is no correlative right of a party to be informed of the identity of the dissenting arbitrator. And finally, even if an arbitrator stated the fact of his or her dissent, he or she has the faculty to state the reasons for such dissent in a written dissenting opinion. However, this is only a faculty, and there is no corresponding right of the parties to obtain such a dissenting opinion. As much as, in the case at hand, the Parties are entitled to know the reasons upon which a decision is based (*cf.* Article 31 (2) of the ICC Rules and Art. 14/A Nr. 2 of the Turkish Arbitration Law), the Parties are not entitled to obtain the reasons upon which that decision is *not* based.

- 12.** For all the foregoing, COMPANY A's Application had to be rejected.

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Signed in seven (7) copies (COMPANY A, COMPANY, Mr. x, Mr. y, Mr. z, ICC (2))

Place of arbitration: Istanbul, Turkey

Date _____

Mr. x Mr. y

Co-arbitrator Co-arbitrator

Mr. z

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Chairman ●

Readers are welcome to send the Authors comments and suggestions, including documents they believe should be included in an updated edition. To do so, please contact arbitrationforms@outlook.com.

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Chapter 9. Award

A Introduction

(a) Destination of an international arbitration—the award

9.01 Parties to transborder transactions who go to the trouble and expense of taking their disputes to international arbitration do so in the expectation that, unless a settlement is reached along the way, the process will lead to an award. They also expect that, subject to any right of appeal or recourse, the award will be final and binding upon them. Both international and institutional rules of arbitration reflect this expectation. Article 34(2) of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) states simply: 'All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.' The Rules of the International Chamber of Commerce (ICC), recognising the possibility of some form of challenge to an award at the place of arbitration under the *lex arbitri*, are more circumspect:

Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. (1)

9.02 As the UNCITRAL Rules suggest, there may be more than one award in any given dispute. An arbitral tribunal may be called upon to decide procedural issues, or to make partial awards that decide certain issues between the parties on a partial ● or final basis. (2) For example, the tribunal may make a preliminary decision on its jurisdiction, rather than take the risk of proceeding to the merits of the case and then, perhaps, deciding later that it lacks jurisdiction. Alternatively, it may make a partial award of a sum of money that it considers to be indisputably due and payable by one party to the other. (3)

9.03 All 'awards' are 'final' in the sense that they dispose 'finally' of the issues decided in them (subject to any challenge or procedure for correction or interpretation), and they are 'binding' on the parties. (4) The award that disposes 'finally' of all outstanding issues is known as the 'final award'. A final award, in this sense, is usually the outcome of arbitral proceedings that have been contested throughout. However, it may embody an agreed settlement between the parties, in which case it is generally known as a 'consent award', or an 'award on agreed terms'. Another category is an award in proceedings in which a party has failed or refused to participate, in which case it is usually described as a 'default award'.

9.04 Each of these different types of award are considered in this chapter. Since all awards are dispositive of the issues that they determine, it is important that the arbitral tribunal does its best to ensure not only that the award is correct, but also that it is enforceable across international frontiers. (5)

(b) Definition of an award

9.05 There is no internationally accepted definition of the term 'award'. Indeed, no definition is to be found in the main international conventions dealing with arbitration, including the Geneva treaties, the New York Convention, and the Model Law. Although the ● New York Convention is directed to the recognition ● and enforcement of arbitral awards, (6) the nearest that it comes to a definition is in Article I(2): 'The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.'

9.06 At one stage, it was proposed that there should be a definition of the term 'award' in the Model Law, but ultimately none was adopted. One suggested solution illustrates the difficulty of finding a definition that encompasses not only final awards, but also partial awards, which dispose of only some issues. The proposed definition was as follows:

'Award' means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award. (7)

As this proposed definition shows, the need to distinguish between awards that are final and other decisions of a tribunal that are not is a complicating factor. The possible solution of defining each separately was not adopted. The Model Law also plainly contemplates that there may be more than one award during the course of an arbitration.

For example, a plea that the arbitral tribunal does not have jurisdiction may be dealt with either in the final award or as a 'preliminary question'; thus, in a 'Model Law country', if the tribunal takes the second course, its partial award may be challenged in the competent court within thirty days of its notification to the parties. (8)

9.07 The time limit for challenge of an award begins to run from the date on which the award was issued. Once the final award has been made, it may be impossible for a party to challenge any element in it that flows from a previously unchallenged partial award. Moreover, only an 'award' will qualify for recognition and enforcement under the relevant international conventions, including the New York Convention. Thus important consequences flow from a ruling or decision of the arbitral tribunal that has the status of an award.

9.08 The term 'award' should generally be reserved for decisions that finally determine the substantive issues with which they deal. (9) This involves distinguishing between awards, which are concerned with substantive issues, and procedural orders and directions, which are concerned with the conduct of the arbitration. Procedural orders and directions help to move the arbitration forward; they deal with such matters as the exchange of written evidence, the production of documents, and the arrangements for the conduct of the hearing. They do not have the status of awards and they may perhaps be called into question after the final award has been made (for example as evidence of 'bias', or 'lack of due process'). (10)

(c) Which rulings/orders have the status of an award?

9.09 Distinguishing between an 'award' and an 'order' may not be as easy as simply reading the title that an arbitral tribunal chooses to give to its ruling. Both the Paris Cour d'Appel and a US Federal Court of Appeals have classified certain arbitral decisions entitled 'orders' by tribunals as 'awards'. This makes them susceptible to annulment and/or recognition and enforcement proceedings in national courts.

9.10 The Paris Cour d'Appel decision in *Brasoil* (11) arose from an ICC arbitration under a contract whereby Brasoil agreed to drill a number of wells in the Libyan desert for the Management and Implementation Authority of the 'Great Man-Made River Project'. Brasoil started an ICC arbitration following termination of the contract by the Authority in 1990. In 1995, the arbitral tribunal issued a partial award in which it held Brasoil liable for the malfunctioning of the wells that it had constructed. In 1997, during the damages phase of the proceedings, the Authority submitted certain documents that Brasoil alleged had been fraudulently withheld during the liability phase. Brasoil requested that the tribunal review its partial award on liability. In May 1998, the tribunal denied Brasoil's request in what it described as an 'order'. Brasoil sought to have the 'order' set aside and the Paris Cour d'Appel granted its request on the grounds that, although described as an 'order', the tribunal's decision was, in fact, an 'award', because it purported to make a final determination of a substantive issue between the parties. (12) In so finding, the Cour d'Appel reasoned as follows:

The qualification of [a decision as an] award does not depend on the terms used by the arbitrators or by the parties ... after a five-month deliberation, the arbitral tribunal rendered the 'order' of 14 May 1998, by which, after a lengthy examination of the parties' positions, it declared that the request could not be granted because Brasoil had not proven that there had been fraud as alleged. This reasoned decision—by which the arbitrators considered the contradictory theories of the parties and examined in detail whether they were founded, and solved, in a final manner, the dispute between the parties concerning the admissibility of Brasoil's request for a review, by denying it and thereby ending the dispute submitted to them—appears to be an exercise of its jurisdictional power by the arbitral tribunal ... Notwithstanding its qualification as an 'order', the decision of 14 May 1998 ... is thus indeed an award. (13)

9.11 Some years later, the French Supreme Court provided a definition of an arbitral award that supported this interpretation. Addressing a challenge to an award on the basis of an alleged professional relationship between the chairman of the arbitral tribunal and the parent company of the guarantor of debts owed by the respondent, the Cour de Cassation held that 'only proper arbitral awards may be challenged through an action to set aside' and went on to define awards as:

... decisions made by the arbitrators which resolve in a definitive manner all or part of the dispute that is submitted to them on the merits, jurisdiction or a procedural matter which leads them to put an end to the proceedings. (14)

9.12 The decision of the Seventh Circuit Federal Court of Appeal in *True North* (15) addressed similar issues. True North, a US advertising company, and Publicis Communications, an affiliate of the Publicis global communications group, entered into a joint venture in 1989, which eventually led the parties to arbitration in London. As one of its requests for relief in the arbitration, True North requested that Publicis disclose tax records filed with the US Internal Revenue Service and the Securities and Exchange

Commission (SEC). In October 1998, the chairman of the arbitral tribunal, 'for and on behalf of the arbitrators', signed an unreasoned 'order' directing Publicis to disclose the requested tax records to True North. Publicis failed to comply and True North applied to the court to confirm the arbitral decision. Publicis argued that the tribunal's decision constituted no more than a procedural order and that only finally determinative 'awards' are subject to confirmation or enforcement. The issue ultimately came before the Seventh Circuit Federal Court of Appeals, which disagreed, reasoning that the finality of a decision was the key to its recognition or enforcement under the New York Convention. In so doing, it described Publicis's approach as 'extreme and untenable formalism', and observed:

P 506 Although Publicis suggests that our ruling will cause the international arbitration earth to quake and mountains to crumble, resolving this case actually requires determining only whether or not this particular order by this particular arbitration tribunal regarding these particular tax records was final. If the arbitration tribunal's 30 October 1998 decision was final, then [the district court judge] had the ● authority to confirm it. If the arbitrators' decision was not final, then the district court jumped the gun. (16)

9.13 Referring to an earlier edition of this volume, the Federal Court of Appeals noted that the arbitral tribunal's decision on the tax records was intended to be final and stated that the fact that the 'order' was issued prior to the conclusion of the arbitration was no bar to its enforceability or finality:

The tribunal's order resolved the dispute, or was supposed to, at any rate. Producing the documents wasn't just some procedural matter—it was the very issue True North wanted arbitrated ... The tribunal explicitly carved out the tax records issue for immediate action from the bulk of the matter still pending, stating that 'the delivery of the documents should not await final confirmation in the Final Award'. Requiring the unrelated issues to be arbitrated to finality before allowing True North to enforce a decision the tribunal called urgent would defeat the purpose of the tribunal's order. A ruling on a discreet, time-sensitive issue may be final and ripe for confirmation even though other claims remain to be addressed by arbitrators. (17)

(d) Rendering an internationally enforceable award

9.14 No arbitral tribunal can be expected to *guarantee* that its award will be enforceable in whatever country the winner chooses to enforce it. However, every arbitral tribunal must do its best. As Article 41 of the ICC Rules provides: 'In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law.' (18) Phrases such as 'make every effort' imply an 'obligation to perform', rather than an 'obligation to achieve a defined result'. Nonetheless, the message is clear: in principle, the eventual outcome of every arbitration is intended to be a final, enforceable, award—as opposed to the outcome of a mediation, which is intended to be an agreement between the parties.

P 507 9.15 For an arbitral tribunal to achieve the standard of performance required to make an internationally enforceable award, it must first ensure that it has jurisdiction to decide all of the issues before it. The arbitral tribunal must also comply with any procedural rules governing the arbitration. Such rules commonly include, for ● example, allocation of the costs of the arbitration, (19) identifying the seat of the arbitration, and having the award formally approved by an arbitral institution (as with an ICC award). (20) The arbitral tribunal must also sign and date the award, and arrange for it to be delivered to the parties in the manner laid down in the relevant law or by the rules that apply to the arbitration. If the arbitral tribunal has carried out its work adequately, it should not be called upon to 'correct', or 'interpret', its award, although this does sometimes happen. (21)

9.16 Moreover, Article V(2)(b) of the New York Convention provides that, even when these conditions have been met, an award need not be enforced if it violates the public policy of the place of enforcement:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that ... the recognition or enforcement of the award would be contrary to the public policy of that country.

This provision gives discretion to the judicial authority at the recognition and enforcement stage, highlighting the impossibility of ensuring international enforceability at the time of issuing the award.

9.17 Given the complexity of the task facing an arbitral tribunal, the arbitrators should be adequately trained and experienced. (22) An award may comply meticulously with the agreed rules of procedure and with the law governing the arbitration, but may fail to comply with some special requirement of the law of the place of enforcement, so that the

award may be unenforceable in that jurisdiction.

B Categories of Award

9.18 All awards are final and binding, subject to any available challenges. (23) However, the term ‘final award’ is customarily reserved for an award that completes the mission of the arbitral tribunal. Subject to certain exceptions, the delivery of a final award renders the arbitral tribunal *functus officio*: it ceases to have any further jurisdiction in respect of the dispute, and the special relationship that exists between the arbitral tribunal and the parties during the currency of the arbitration ends. This has significant consequences. An arbitral tribunal should not issue a final award until it is satisfied that its mission has actually been completed. If there are outstanding matters to be determined, such as questions relating to costs ● (including the arbitral tribunal's own costs), the arbitral tribunal should issue an award expressly designated as a partial award.

(a) Partial awards

9.19 The power to issue a partial award is a useful weapon in the armoury of an arbitral tribunal. A partial award is an effective way of determining matters that are susceptible to determination during the course of the proceedings, and which, once determined, may save considerable time and money for all involved. (24) One obvious example that has already been given is where an issue of jurisdiction is involved: a partial award on such an issue may shorten, or at least simplify, the proceedings considerably. An arbitral tribunal that spent months hearing a dispute, only to rule in its final award that it had no jurisdiction, would (to put it mildly) appear inefficient (unless the issue of jurisdiction were inseparably bound up with the merits of the case).

9.20 The power of an arbitral tribunal to issue partial awards may derive from the arbitration agreement or from the applicable law. Where the arbitration agreement incorporates international or institutional rules of arbitration, these rules generally contain provisions for the making of such awards. (25)

9.21 The ICC Rules, for instance, define the term ‘award’ to include ‘an interim, partial, or final award’. (26) In practice, partial awards are frequently made in ICC arbitrations, particularly where jurisdiction is challenged or the proper law has to be determined by the arbitral tribunal. (27) The Rules of the London Court of International ● Arbitration (LCIA) follow the same approach: ‘The Arbitral Tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the Arbitral Tribunal.’ (28)

9.22 In an ad hoc arbitration, it is usual to make express provision in the submission agreement for the arbitral tribunal to issue partial awards, if it sees fit to do so. Where the power is not conferred expressly upon the arbitral tribunal by the agreement of the parties, it may nevertheless be conferred by operation of law. For example, section 47 of the English Arbitration Act 1996 provides:

- (1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.
- (2) The tribunal may, in particular, make an award relating to:
 - (a) an issue affecting the whole claim, or
 - (b) a part only of the claims or cross-claims submitted to it for decision.
- (3) If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, that is the subject-matter of the award.

9.23 Other modern arbitration laws contain similar provisions. Although the Model Law itself does not otherwise expressly refer to partial awards, it is clear from the context in which the expression ‘final award’ is used, and from the *travaux préparatoires*, that the draftsmen intended that the arbitral tribunal should have such a power. (29) However, if there is no express or implied provision for an arbitral tribunal to make a partial award—either in the arbitration agreement, the applicable arbitration rules, or the applicable law—it is doubtful that the tribunal has power to do so. (30) It is usually apparent from its content that a partial award is not the ‘last’ award; nevertheless, the award should state clearly that it is a partial award. As mentioned earlier, (31) the issuance of a final award renders the arbitral tribunal *functus officio*, except for the purpose of correcting minor or clerical errors. It is important not to allow either party an opportunity to claim that the arbitral tribunal has no further jurisdiction on the grounds that it has issued a final award, when it intended to issue only a partial award.

9.24 The main disadvantage of a partial award is that a further avenue for judicial review (and consequent delay) is created. Judicial intervention during the course of the arbitration may occur on an application by one of the parties to annul (or set aside) ● the partial award, or on an application to confirm it. (32) The Model Law limits the potential for delay by specifying that an application to review a partial award on jurisdiction must be lodged within thirty days of receipt of notice of the ruling, with no appeal beyond the first level of court in which the decision is made. (33) As noted above, the relevant decision need not have the title ‘award’ to be subject to judicial review or confirmation. (34)

(i) Issues concerning the applicable law

9.25 An example of a situation in which a partial award is likely to prove useful is where there is a dispute between the parties as to the law(s) applicable to the merits of the case. If this is not resolved at an early stage, the parties must argue their respective cases by reference to different systems of law. They may even need to introduce evidence from lawyers experienced in each of these different systems. In such circumstances, it may be sensible for the arbitral tribunal to issue a preliminary decision on the question of the applicable law.

(ii) Separation of issues (jurisdiction, liability, quantum)

9.26 A further example of the type of case in which it may be convenient to issue a partial award is where issues of liability may be separated from those of quantum, which is often worth doing if it is possible to disentangle these issues. Most obviously, the determination of a particular issue of liability in favour of the respondent may make it unnecessary for the arbitral tribunal to investigate questions of *quantum*. (35) Even if it is not determinative, a decision by an arbitral tribunal on certain issues of principle in a dispute may well encourage the parties to reach a settlement on quantum. They are usually well aware of the costs likely to be involved if the arbitral tribunal itself has to go into the detailed quantification of a claim—a process that often involves taking evidence from accountants, technical experts, and others.

P 511 9.27 However, there are real dangers in attempting to isolate determinative issues at an early stage of the proceedings. The nature of the dispute and the way in which the ● parties present their cases may change during the course of the proceedings, and it is not unknown for parties to amend their cases radically in order to take advantage of a preliminary award on liability. Where this happens, savings of time and cost will not be achieved, and the result will be the opposite of that intended. Moreover, the process of rendering a preliminary award can itself be a time-consuming and expensive one. It is suggested that an arbitral tribunal should not normally decide to issue a partial award on its own initiative, (36) but should do so only following a request by one of the parties. Where both parties agree that a partial award should be made, the arbitral tribunal must follow the agreement of the parties. Where only one party requests a partial award, a tribunal with the power to make such an award should reach its decision as to whether or not to comply with the request only after receiving the submissions of both parties and giving each party a reasonable opportunity to explain its position.

(iii) Limitation clauses in a contract

9.28 Major commercial contracts—for example for the supply of a process plant or for a construction project—often contain a clause that limits, or purports to limit, the type or amount of damages payable in the event of breach. A typical example is a clause providing that in no event will loss of profits be payable. There may be occasions on which a partial award on the meaning and effect of such clauses will help to define the amount of the claim, and may make the prospect of settlement more likely.

(b) Foreign and domestic awards

9.29 The distinction between foreign and domestic awards is especially significant in the context of challenging and enforcement of awards in national courts, which is addressed in Chapter 10. In India, the Foreign Awards (Recognition & Enforcement) Act 1961 defines a foreign award as an award made in another country on differences between persons arising out of legal relationships, whether contractual or not, considered to be commercial under the law in force in India. (37) The Indian Supreme Court considered the expression 'foreign awards', and held that a lawsuit could be stayed only upon the Court being satisfied that the relationship of the parties to the arbitration agreement is one that should be considered 'commercial' and that this term should be given a broad P 512 meaning. (38) Conversely, the ● Indian Supreme Court has held that the term 'domestic award' means an award made in India whether or not this is in a purely domestic context; thus the definition will include a 'domestically rendered' award in a domestic arbitration or in an international arbitration.

(c) Default awards

9.30 Occasionally, international arbitrations are commenced in which one party (usually the respondent) fails or refuses to take part. This failure or refusal may be complete—that is, it occurs from the outset of the proceedings—or it may happen during the proceedings as a result of a change of mind or strategy. The arbitral tribunal is compelled to take a more positive role in these circumstances, making its task more difficult. The task of an arbitral tribunal is not to 'rubber stamp' claims that are presented to it; rather, it must make a *determination* of these claims, so the tribunal must take upon itself the burden of testing the assertions made by the active party, and it must call for such evidence and legal argument as it may require for this purpose. (39)

9.31 If the arbitral tribunal makes an award in favour of the active party in the proceedings, it will wish to ensure that the award is effective. To this end, it should ensure, in particular, that the award recites in considerable detail the procedure

followed by the arbitral tribunal and the efforts made by the arbitral tribunal to communicate the active party's case to the defaulting party, so as to give that party every opportunity to present its own arguments and evidence. Further, the motivation, or reasons, given in the award should (without necessarily being lengthy) reflect the fact that the arbitral tribunal has genuinely addressed the merits of the case, in order to show that a reasoned determination has been made.

9.32 The award should also deal with any questions of jurisdiction that appear to the arbitral tribunal to be relevant, whether or not such issues have been raised by one or other of the parties. In this context, the Arbitration Rules of the International Centre for the Settlement of Investment Disputes (ICSID), which contain detailed provisions for default proceedings, expressly stipulate, at Rule 42(4), that '[t]he Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law'. If the arbitral tribunal follows these guidelines, there is less risk of the money spent by the active party in obtaining the award being wasted as a result of a subsequent decision by national courts that the award is unenforceable.

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(d) Additional awards

9.33 When the tribunal renders an award that does not address all of the issues presented, the parties may, within a limited time frame, request an additional award to remedy this gap. Many arbitration rules expressly provide for additional awards, (40) and even where they are not expressly provided for, there is generally a procedural tool by which they can, in essence, be accomplished. (41) The ICC Rules are an exception. They provide for the correction of clerical or typographical errors, as well as the interpretation of awards, (42) but they do not provide for the rendering of an award based on a party's objection that the tribunal failed to consider an issue presented. This is no doubt the result of the scrutiny process of the ICC Court.

(e) Consent awards and termination of proceedings without an award

9.34 As in litigation in national courts, parties to an international arbitration often arrive at a settlement during the proceedings. Where this occurs, the parties may simply implement the settlement agreement and thus revoke the mandate of the arbitral tribunal. This means that the jurisdiction and powers conferred on the arbitral tribunal by the parties are terminated. (43)

9.35 In many cases, however, the parties find it desirable for the terms of settlement to be embodied in an award. There are many reasons for this. The most important is that it is usually easier for a party to enforce performance by the other party of a future obligation if that obligation is contained in an award (in respect of which the assistance of the New York Convention may be available), rather than to take further steps to enforce a settlement agreement. Other reasons for obtaining a consent award include the desirability (particularly where a state or state agency is involved) of having a definite and identifiable 'result' of the arbitral proceedings, in the form of an award, which may be passed to the appropriate paying authority for implementation. In this context, the signatures of the arbitrators on the consent award indicate a measure of approval by the arbitral tribunal to the agreement reached by the parties. This may help to meet politically motivated criticism of those responsible for taking the decision to reach a compromise settlement.

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9.36 There should be little or no problem as far as capacity to compromise is concerned. Many countries adopt as their definition of matters that are capable of resolution by arbitration (that is, matters that are 'arbitrable') the concept that parties may refer to arbitration any disputes in respect of which they are entitled ● to reach a compromise. The reverse holds good: if parties are entitled to refer a dispute to arbitration, they are entitled to reach a compromise in respect of that dispute.

9.37 No restrictions are imposed by national law, or international or institutional rules of arbitration, to the effect that, once arbitral proceedings have been commenced, the parties cannot terminate them by agreement. On the contrary, a settlement is invariably welcomed, and it may be possible to have it recorded in an agreed award. Article 30 of the Model Law provides for such an agreed award; Article 36(1) of the UNCITRAL Rules provides for a settlement to be recorded by an order or by an award:

If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

The ICC Rules contain a similar provision, at Article 32: if the parties reach a settlement, after the file has been transmitted to the arbitral tribunal in accordance with Article 13, then 'the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so'. (44)

The word 'shall' is mandatory and suggests an obligation to record any settlement in a consent award. However, it is qualified by the requirements that the parties must request such an award and the tribunal must agree to it. This indicates that, under the UNCITRAL and ICC Rules, there is no obligation for either the parties or the tribunal to make a consent award.

9.38 Under whatever rules the parties are proceeding, however, it would be a normal act of courtesy to inform the arbitral tribunal (and the appropriate arbitral institution, if one is involved) of any settlement agreement reached between the parties, particularly if meetings or hearings have already been held. There may also be sound financial reasons for doing what normal courtesy demands. First, notifying the arbitral tribunal of a settlement will ensure that it does not incur further fees and expenses (other than any cancellation fees that may have been agreed). Secondly, such notification might lead to a refund of advance payments made to cover fees and expenses, since the actual costs incurred may well be less than expected if the case has been settled without a hearing. Thirdly, as already indicated, it is desirable to put the terms of settlement into an enforceable form when there is an element of future performance. Although most settlements involve immediate implementation of the agreed terms, it is nevertheless not unusual for there to be provision for payment by instalments, or for some future transaction between the parties to be carried out.

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9.39 A question occasionally arises as to the role of an arbitral tribunal that is requested by the parties to make a consent award ordering the performance of an unlawful act. Examples might be the manufacture of an internationally banned drug, or the smuggling of contraband or—perhaps more realistically—an agreement that manifestly contravenes relevant competition or antitrust laws. At one time, various sets of rules (including the ICC Rules prior to 1998) seemed to leave the tribunal with no discretion, but modern rules and legislation permit the arbitral tribunal to refuse to make a consent award. (45)

C Remedies

9.40 The arbitral tribunal's power to grant appropriate relief is based on the arbitration agreement and the applicable arbitration law. The basis on which an arbitral tribunal orders a remedial measure flows from the arbitration agreement and subsequent submission of the dispute to arbitration. While an arbitration agreement could specify the remedial measures to be conferred upon the tribunal, the common practice is that the tribunal will be silent on that point. In such circumstances, the tribunal must look into the relevant arbitration rules or applicable national law on arbitration to determine the types of relief available to it. Arbitration awards may cover a range of remedies, including:

- monetary compensation;
- punitive damages and other penalties;
- specific performance and restitution;
- injunctions;
- declaratory relief;
- rectification;
- filling gaps and adaptation of contracts;
- interest; and
- costs.

(a) Monetary compensation

9.41 The type of award most often made by an international arbitral tribunal is one that directs the payment of a sum of money by one party to the other. This payment may represent money due under a contract (debt), or compensation (damages) for loss suffered, or both. The sum of money awarded is usually expressed in the currency of the contract or the currency of the loss. In large transnational projects, however, it is not unusual for reference to be made to several different currencies—so that, for example, plant and equipment manufactured or purchased overseas may be paid for in US dollars, whilst labour, plant, and equipment made or purchased locally may be paid for in the local currency. In such cases, unless the parties agree, the arbitral tribunal must receive written or oral submissions as to the currency or currencies in which the award is to be made.

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9.42 Under many national arbitration laws, arbitral tribunals have discretion to make awards in any currency deemed appropriate. The *Lesotho Highlands* case is illustrative of both the exercise of such discretion and the potential consequences of doing so. The case concerned the construction of a dam in Lesotho by a consortium of foreign companies. The consortium claimed amounts that, had they been paid when due, would have been payable in Lesotho loti, as owed under the relevant contract. However, by the time the award was made, the value of the loti had diminished against international currency values. The consortium therefore claimed payment of the award in four European currencies contractually designated as currencies for non-loti payments. In rendering the

award in the currencies requested, the arbitral tribunal invoked section 48 of the English Arbitration Act 1996, which allows a tribunal to order payment of an award in any currency (unless agreed otherwise by the parties).

9.43 Once the right of appeal on a point of law was excluded under section 69 of the English Arbitration Act 1996, the employer challenged the award in the English courts, under section 68(2)(b), for excess of power. (46) The employer claimed that the provisions in the contract on currencies effectively excluded the tribunal's power to select the currency of the award. On appeal to the House of Lords, the employer's challenge was dismissed by a majority of four to one. (47)

(b) Punitive damages and other penalties

9.44 Punitive damages are not awarded to compensate the wronged party, but instead to punish and deter the wrongdoer. In general, punitive damages are an exceptional and extreme measure permitted only, for example, in cases of fraud and substantial malice. (48) In the context of awarding punitive damages, it is tempting to think that an arbitral tribunal has precisely parallel jurisdiction to that of a national court to award damages in accordance with the law applicable to the substantive merits of the dispute. However, the powers of an arbitral tribunal are not necessarily the same as those of a court.

9.45 An arbitral tribunal may, in certain respects, have *wider* powers than those of a judge, because the tribunal's powers flow from, inter alia, the arbitration agreement. Thus, in England, a court applying US law has no power to order the payment of triple damages—a power provided under US antitrust legislation. (49) ● But an arbitral tribunal sitting in England *does* have the power to award triple damages provided that the parties' arbitration agreement was sufficiently wide to encompass the determination of US antitrust law claims—although, for public policy reasons, there may be problems of enforcement, as will be discussed later. (50) It is necessary to look at the law applicable to the substance of the dispute, as well as the law of the seat of the arbitration. In civil law countries, the concept of punitive damages is almost unknown, whether in breach-of-contract cases or otherwise, with a limited exception in some countries where there has been a wilful intention to harm the claimant amounting, in effect, to fraud. (51) Under French and German law, punitive damages are not recoverable. Under English law, punitive damages may be awarded only in actions in tort—and even then only in three categories of case. (52) Punitive damages may not be awarded in an action for breach of contract. (53) However, such claims are permissible in the United States, where statutes may provide expressly for the payment of multiple damages by one party to the other. (54)

9.46 Thus there may be occasional circumstances in which claims for damages in civil lawsuits go beyond the concept of compensating the winning party for its losses. But two other matters arise in the context of claims for punitive damages in arbitrations: the first concerns the threshold question of the power of an arbitral tribunal to impose penal sanctions; the second relates to enforceability.

9.47 The question of whether an arbitral tribunal has the power to impose penal sanctions depends on the law of the place of arbitration (the *lex arbitri*) and the provisions of the arbitration agreement. The *lex arbitri* may be unsympathetic. In one case in the United States, the court stated that 'the prohibition against an arbitrator ● awarding punitive damages is based on strong public policy indeed'. (55) However, there are also US cases in which the arbitration clause was held to be wide enough to confer an express or implied power to award punitive damages, for example where the context of the underlying transaction manifestly implied that any dispute would be likely to incorporate a claim for multiple damages. (56)

9.48 The same principles apply in the context of an ad hoc submission agreement. Little has been disclosed publicly about the *Greenpeace* arbitration. (57) This case arose from the sinking of the ship *Rainbow Warrior* by agents apparently working for the French government. It is widely assumed that the damages awarded to Greenpeace were not restricted to the cost of refloating and repairing the vessel, and other direct damages, and that the submission agreement was drawn widely enough to justify an award of punitive damages. But this case, even if published, would be of limited general interest in the present context, since it was not a case arising out of a breach of contract.

9.49 With regard to enforcement, the key question is whether an award of punitive damages would be enforceable under the New York Convention in a country that does not itself recognise such a remedy. The ground for refusal of enforcement would be Article V(2) of the Convention, which allows refusal of recognition or enforcement of an award if recognition or enforcement would be contrary to public policy. For example, in a leading judgment rendered in Germany in 1992, the Federal Supreme Court (*Bundesgerichtshof*) refused to enforce part of a US court decision that provided for the recovery of punitive damages, on the grounds that such recovery was contrary to German public policy. (58) The authors are not aware of any German court decisions relating to attempts to enforce a foreign arbitral award providing for the recovery of punitive damages, but the same result is likely. (59)

9.50 In summary, it is suggested that arbitral tribunals should treat claims for punitive damages and other penalties with considerable caution. They should examine the

question of whether or not such damages may be awarded under the law applicable to the substance of the dispute. They should also address themselves to the threshold question as to whether or not they have power to make such an award, even if a claim for punitive damages is admissible under the law applicable to the substance of the dispute, by examining both the *lex arbitri* and the scope of the arbitration agreement. (60)

9.51 Problems concerning enforceability should be left for the courts at the place of enforcement. However, it is preferable for arbitral tribunals to treat any award in respect of punitive damages or any other penalties as an entirely separate claim, in order to ensure that the punitive portion of the award is severable in the event of a successful challenge in the courts at the place of enforcement.

(c) Specific performance

9.52 An arbitral tribunal may be authorised by the parties or by the applicable law (either the substantive law or the *lex arbitri*, depending on the conflict-of-laws rule applicable) to order specific performance of a contract. An international arbitral tribunal sitting in the United States will have the power to award specific performance, (61) and English law empowers an arbitral tribunal sitting in England 'to order specific performance of a contract (other than a contract relating to land)' unless a contrary intention is expressed in the arbitration agreement. (62) In civil law jurisdictions, specific performance is a recognised remedy for breach of contract, but less so in common law systems. In international arbitration, various tribunals have ordered specific performance, and their decisions have been upheld by state courts. (63) The question of whether an arbitral tribunal is empowered to order specific performance is thus rarely an issue in international arbitration. However, the question of whether it is an appropriate remedy, and whether it can be effectively granted in the circumstances of any particular case, was not definitively established at the time of writing.

(d) Restitution

9.53 Restitution seeks to put the aggrieved party in the same position as that in which it would have been had the wrongful act not taken place. In common law terminology, it is a form of specific performance. In the field of commercial arbitration, it is a remedy that is hardly ever used in practice—perhaps because international tribunals rightly tend to avoid making awards that are difficult to enforce. There have also been doubts as to whether an arbitral tribunal has power to award restitution. In England, at least, the question was resolved by the Arbitration Act 1996: unless the parties otherwise agree, an arbitral tribunal has the same powers as an English court 'to order a party to do or refrain from doing anything'. (64)

9.54 An example of the use of this remedy in public international law is provided by the *Temple of Preah-Vihear* case, (65) in which the International Court of Justice (ICJ) ordered the Government of Thailand to restore to Cambodia certain sculptures and other objects that it had removed from the temple on the border between the two countries. Even in the field of public international law, however, the remedy is little used. It seems rather to set a standard for the assessment of monetary compensation:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, *payment of a sum corresponding to the value which a restitution in kind would bear*; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. (66)

9.55 In practice, restitution is rarely ordered, since it is usually impracticable to undo the effects of the relevant breach(es) and to place the claimant in the position in which it would have been but for such breach(es). An award of monetary compensation is generally the appropriate remedy, particularly in commercial disputes. An apparent exception is the award of the sole arbitrator in the *Texaco* arbitration. (67) On examination, however, it is difficult to accept this award as a precedent for the effective granting of restitution in international arbitration. The sole arbitrator found that the Libyan government had acted in breach of its obligations by nationalising the company's property and other assets in Libya. He held that *restitutio in integrum* was, 'both under the principles of Libyan law and under the principles of international law, the normal sanction for non-performance of contractual obligations'. (68) Although this award reads well at a scholarly level, it has been severely criticised and, on the same facts, a different conclusion was reached in the *BP* arbitration. (69) The arbitrator's decision in the *Texaco* arbitration in favour of restitution is, indeed, hard to accept. First, whilst it may be practicable for a state to hand back objects taken from a temple, it seems wholly impracticable for a state to hand back to a foreign company oil fields and installations

that have been taken over by the state and which are in that state's own territory. (70) Secondly, it must be doubted whether the award was intended to be enforceable. At a preliminary meeting with the sole arbitrator at which only the agents and counsel of the company appeared, (71) and in a subsequent memorial, the claimants stated (according to the arbitrator) that 'they intended that the present arbitration should be an arbitration on matters of principle, a fact which the Sole Arbitrator did not fail to note on the occasion of the oral hearings'. (72)

9.56 It seems that the claimants themselves were seeking an authoritative legal opinion on the merits of the case, rather than an enforceable award. There is no objection in principle to the use of the arbitral process in this way; indeed, this was done, by agreement of the parties, in the *Aramco* arbitration. (73) However, such cases cannot serve as a reliable precedent for most commercial arbitrations, in which what is sought is not a legal opinion, but an award that is capable of enforcement.

9.57 The relief sought and granted in the growing number of investor–state arbitrations confirms that, in practice, monetary compensation, rather than restitution, is the principal remedy sought and granted in international arbitration. By way of example, Article 1135 of Chapter 11 of the North American Free Trade Agreement (NAFTA) provides that although a tribunal may award 'restitution of property', such awards 'shall provide that the disputing party may pay monetary damages and any applicable interest in lieu of restitution'. Thus the host state of an investment that is condemned under a Chapter 11 arbitral award will always have the right to pay damages in place of restitution. And so it has proved more generally in practice: a review of the ICSID Reports over the last two decades confirms that restitution has been sought in only a handful of ICSID arbitrations and has (at the time of writing) never been awarded.

P 522 9.58 In *Occidental Petroleum Corporation and Occidental Exploration and Production Co. v Ecuador*, (74) the claimants sought an order from the tribunal that Ecuador fully reinstate the claimants' rights under the relevant contracts. In an interim award ● dated 17 August 2007, (75) the tribunal refused to grant interim protection of the claimants' rights under the relevant contracts partly on the basis that the claimants could not establish a right to an award of specific performance of the contracts. The tribunal held that an order reinstating the claimants' contract could be made only if (a) it was not legally impossible to revive the contract, (b) such a remedy would not involve a disproportionate interference with state sovereignty, as compared to an award of damages, and (c) damages could not otherwise make the claimants whole for their losses. Indeed, of growing relevance in investor–state arbitration is the opposite question of whether a victorious investor must relinquish title to property that it has claimed—successfully—has been expropriated. (76)

(e) Injunctions

9.59 There is no objection in principle to an arbitral tribunal granting relief by way of injunction, if requested to do so, either on an interim basis or as final relief. Injunctive relief is addressed in detail in Chapter 7. For present purposes, it is sufficient to state that an arbitral tribunal is not usually empowered to make effective orders against third parties, and if injunctive relief against third parties is required, it is generally quicker and more effective to seek it directly from a national court. Most sets of international and institutional rules make it clear that an arbitration clause is not to be taken as excluding the jurisdiction of the relevant national court to make orders for interim measures of protection. (77) However, Article 26(3) of the UNCITRAL Rules, for example, contains the qualification requiring that an applicant must satisfy the tribunal that:

[...]

- (i) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (ii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

P 523 Some national courts have also chosen to limit their ability to grant interim relief to cases involving arbitration proceedings with a domestic seat. In India, for example, the Supreme Court in *Bhatia International* (78) apparently intended to make interim relief available to parties in foreign arbitration proceedings; however, the application of the decision in subsequent cases has resulted in a distortion of Indian arbitration law. The Court in *Bhatia* concluded that Part I of the Indian Arbitration ● and Conciliation Act 1996 was applicable to all arbitrations, including foreign arbitrations, unless expressly or impliedly excluded by agreement of the parties. Subsequently, in *Venture Global Engineering v Satyan Computer Services Ltd*, (79) the Supreme Court held that Indian courts could set aside awards made outside India, by applying section 34 (under Part I) of the 1996 Act. However, in 2012, the Supreme Court in *Balco* (80) categorically overruled *Bhatia* and *Venture Global*, holding that Part I of the Arbitration and Conciliation Act 1996 are not applicable to an international arbitration in which the seat of the arbitration is not India. As a result, where an international arbitration is seated in a country other than India, no application under section 9 of the 1996 Act for interim relief is available.

(f) Declaratory relief

9.60 An arbitral tribunal may be asked to make an award that is simply declaratory of the rights of the parties. Modern arbitration legislation (81) often makes express provision for the granting of declaratory relief. Even when there is no such provision, however, there is no reason in principle why an arbitral tribunal should not grant such relief. Indeed, declaratory relief has become a common remedy in international arbitration, with requests for contractual damages usually coupled with a request for a declaration that there has been a breach of contract.

9.61 The *Aramco* arbitration provides an example of an arbitration in which the parties only claimed declaratory relief. (82) *Aramco* claimed that its exclusive right to transport oil from its concession area in Saudi Arabia had been infringed by the agreement made between the Saudi Arabian government and the late Aristotle Onassis, the Greek shipping magnate, and his company, *Aramco*. The dispute was significant—but neither party wished it to jeopardise their trading relationship, which was a continuing relationship dating back many years. (83) Accordingly, it was agreed that the dispute should be referred to an ad hoc tribunal of three arbitrators based in Geneva. It was further agreed that the award should be of declaratory effect only, with neither of the parties claiming damages for any alleged injury. The arbitral tribunal said:

There is no objection whatsoever to Parties limiting the scope of the arbitration agreement to the question of what exactly is their legal position. When the competence of the arbitrators is limited to such a statement of the law and does not allow them to impose the execution of an obligation on either of the Parties, the Arbitration Tribunal can only give a declaratory award. (84) ●

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9.62 A declaratory award establishes the legal position definitively and has a binding effect as between the parties. It is a useful device, particularly where the parties have a continuing relationship and want to resolve a dispute without the risk of damaging that relationship by a demand for monetary compensation. It is capable of recognition, but it is not itself capable of enforcement; for the purposes of enforcement, an award must also involve an obligation to pay compensation or to take, or refrain from taking, a particular course of action.

(g) Rectification

9.63 Rectification essentially is a common law equitable remedy. Rectification of a contract is a remedy virtually unknown in civil law countries, where it tends to be treated in the same sense as adaptation of contracts and ‘filling gaps’. In common law countries, these concepts are considered separately. However, in general, an arbitral tribunal may make an order for rectification of a contract if empowered to do so by the parties.

9.64 If no express power is conferred by the arbitration agreement, the question of the arbitral tribunal's jurisdiction to order rectification requires closer examination. For example, a standard-form arbitration clause that refers to ‘disputes arising under the contract’ is probably not wide enough to include a claim for rectification, since what is sought by rectification is a rewriting of the contract to reflect what one party claims to have been the agreement actually made. The phrase ‘in connection with’ in the arbitration clause may, however, be considered to give the arbitral tribunal a wider power. In England, any doubt about the position was resolved by the Arbitration Act 1996: an arbitral tribunal has the power ‘to order the rectification, setting aside or cancellation of a deed or other document’, unless the parties agree otherwise. (85) This express power to rectify is also reflected in the LCIA Rules, Article 22(1)(g) of which gives arbitral tribunals the ‘additional’ power:

... to order the correction of any contract between the parties or the arbitration agreement, but only to the extent required to rectify any mistake which the Arbitral Tribunal determines to be common to the parties and then only if and to the extent to which the law(s) or rules of law applicable to the contract or arbitration agreement permit such correction.

(h) Filling gaps and adaptation of contracts

9.65 An arbitral tribunal does not, in general, have power to create, or write, a contract between the parties. Its role in a contractual dispute is usually to interpret the contract as signed by the parties. However, almost anything is possible by clear consent of the parties. (86) In particular, it is generally accepted in modern times that ● an arbitral tribunal has implied consent to ‘fill gaps’ by making a determination as to the presumed intention of the parties in order to make a contract operable. In England, a relatively mature authority for this proposition may be found in the famous ‘chickens’ case, (87) to which reference is still made from time to time by the English courts.

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9.66 The principle was clarified and expanded in the later *Mamidoil* line of cases. In *Mamidoil*, (88) the English Court of Appeal stated:

[...]

- (vi) Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. *Certum est quod certum reddi potest.*
[...]
- (viii) For these purposes, an express stipulation for a reasonable fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the courts are prepared to imply an obligation in terms of what is reasonable.
[...]
- (x) The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, as indicating a commercial and contractual mechanism which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute.

9.67 A similar position exists in civil law countries, where the courts appear to go directly to what they call the 'intention of the parties', rather than use the 'implied term' device that is a feature of English contractual interpretation. In a note on '*L'Interprétation Arbitrale*', (89) a distinguished Swiss commentator suggested that, in French law, the arbitrator takes account of the commercial context in which an agreement is made—but if the parties have omitted an important provision from their contract on a particular point, it is perhaps because they prefer to leave it open, rather than not to agree upon a contract at all.

9.68 A more difficult question is whether or not an arbitral tribunal has power to change the unambiguous terms of a contract. This is certainly possible where the relevant contract contains a provision authorising the arbitral tribunal to do so. Such provisions are commonly found in long-term supply contracts concerned with hydrocarbons such as oil and gas, and minerals such as copper and bauxite, as well as ● pharmaceutical products. Many such contracts contain clauses that provide for price adjustments or other adaptations by means of direct negotiation between the parties and/or by 'third-party-assisted negotiation' (mediation). However, in modern times, the increasingly competitive scenarios in which international business transactions are concluded, and subsequently implemented, sometimes make it difficult for corporate entities with powerful investors standing behind them to agree to the adaptation of clear contractual terms. This is especially so when one party stands to make a substantial financial gain by holding the other party to an unambiguous contractual commitment. The concept of fairness sometimes appears to take second place behind the prospect of profit. Direct or third-party-assisted negotiation may hold out little prospect of leading to a solution in this kind of scenario. Nevertheless, the concept of an award made by an international arbitration tribunal imposing upon the parties material changes to an unambiguous and freely negotiated contract remains controversial.

9.69 A device used for the adaptation of contracts during the latter part of the twentieth century was the so-called hardship clause. Attempts to create a workable solution may be seen in the 1978 ICC Rules for the Adaptation of Contracts and the Model Exploration and Production Sharing Agreement of Qatar of 1994. In the twenty-first century, Principles 6.2.2 and 6.2.3 of the 2004 UNIDROIT Principles of International Commercial Contracts (90) served as a 'blueprint' for many such provisions. However, none of these has gained widespread acceptance. In any event, most of these solutions require an express provision in the relevant contract to bring them into operation. In practice, such standard form clauses are rarely seen in modern contracts, and commercial parties (and their lawyers) tend to insert tailor-made 'balancing' provisions in long-term supply contracts to enable mediators and/or arbitral tribunals to help the parties to adapt their contracts when circumstances change in a manner that was unforeseen at the time that the contract was signed.

9.70 Professional mediators are well placed to operate in this way, even if there is no express provision in the relevant contract for adjustments in changed circumstances, because their function is designed specifically to assist the parties to look for possible solutions that may be acceptable to all of them. This is different from the function of an arbitral tribunal, which is to impose an 'award' that is designed to be binding on the disputing parties even if they (or one of them) may find it unacceptable. Some sets of international arbitration rules make it clear that the arbitral tribunal must decide 'according to law'. This is generally interpreted to mean that while they may (and indeed should) *interpret* the underlying contract, they must not alter its express and unambiguous terms without express authorisation from the disputing parties. Article 35 of the UNCITRAL Arbitration Rules ● provides a classic example of this approach, while most of the major sets of institutional arbitration rules remain silent on the issue.

9.71 Occasionally, arbitral tribunals issue awards that have the effect of changing the express terms of a contract in which there is no clear provision authorising them to do so. Where the applicable substantive law is that of a civil law jurisdiction, the justification

usually given is the application of the doctrine of *rebus sic stantibus*. In the common law world, the parties' legal representatives and arbitrators tend to place reliance on 'implied terms'. However, parties to long-term contracts rarely take this kind of dispute to arbitration; they usually adopt modern direct negotiation techniques, (91) or third-party-assisted negotiation (mediation) processes.

(i) Interest

9.72 The payment of interest on a loan, or in respect of money that is paid later than it should have been, is a common feature of modern business relationships, and the award of interest in international arbitration has likewise become routine. (92) Indeed, it has become rare for interest not to be awarded where an award provides for the payment of monies due. As one international arbitrator has said:

In all international commercial arbitrations where a claim for the payment of money is advanced, whether debt or damages, it is highly probable that the claimant has also suffered a financial loss resulting from late payment of the principal amount. That loss can amount to a significant proportion of the total claim; and in certain cases, it can exceed the principal amount. In a modern arbitration régime, it is unthinkable that a claimant should not have the right to recover that loss in the form of interest. (93)

However, the situation is different in Muslim countries—such as Saudi Arabia—in which the law against usury (*riba*) prevents the levying of interest:

The proposition of interest, strictly applied in Hanbali law (Saudi Arabia, Qatar) and Zayyidi law (North Yemen) is linked in the minds of Muslim lawyers and economists with the rejection of the idea of the *homo economicus* as devised by the West, and with the integration of religious principles into the commercial life of the Muslim businessman, while the businessman should be solvent he should also conform to Qur'anic teaching, for although the Prophet did not condemn profit arising from sale or from a partnership he did prohibit the charging of interest on a loan ... (94)

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(i) Basis upon which interest can be awarded

9.73 The basis upon which interest is awarded in international arbitration does, however, vary. Most institutional rules of arbitration do not contain express provisions for the payment of interest, largely because their drafters assumed that an arbitral tribunal has the power to make an award in respect of interest in just the same way as it has the power to make an award in respect of any other claims submitted to it. (95) The right to interest will therefore flow from the parties' underlying contract (that is, from a contractual provision for the levying of late payment interest), or by virtue of the applicable law. (96) The laws that govern the power of a tribunal to award interest also vary. In some jurisdictions, for example Bermuda, Hong Kong, England, and Scotland, the power to award interest is governed by the law of the place of arbitration. (97) In others, for example under German conflict-of-laws rules, the liability to pay interest is a question of substantive law and thus governed by the law of the contract. (98)

(ii) How much interest to award

9.74 More problematic in practice than the question of whether an arbitral tribunal can award interest in principle are the more practical questions of the rate of interest to be awarded, from which start date, and in which currency. Most applicable laws leave these questions to the tribunal's discretion. Thus the English Arbitration Act 1996 empowers a tribunal seated in England to award interest 'from such dates, at such rates and with such rests as it considers meets the justice of the case'. (99) Similarly, the law of Australia permits a tribunal to award interest 'at such reasonable rate as the tribunal determines for the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made', and thereafter 'from the day of the making of the award or such later day as the tribunal specifies, on so much of the money as is from time to time unpaid'. (100) Other jurisdictions, such as Hong Kong, India, and Singapore, have also enacted laws that give arbitrators similar discretion in the award of interest. (101)

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9.75 In exercising this discretion, the tribunal will typically invite submissions and evidence from the parties on these issues in the same way as it would in respect of any other request for relief. Thus parties will usually have an opportunity to set out their respective positions on the rate of interest to be applied, the period for which it should be applied, and whether a different rate (such as a statutory legal interest rate) should be applied for the period following the rendering of an award up until payment. In making such submissions, parties would do well to make an award of interest as easy for a tribunal as possible by providing the calculations upon which such an award would be based. (102)

(iii) Compound interest

9.76 Most systems of national law expressly permit arbitral tribunals to award some form

of interest on an amount awarded in respect of a claim or counterclaim, whether the principal amount awarded is due under a contract or as compensation or as restitution. However, the award of compound—as opposed to simple—interest remains less clear. (103) Although the Model Law does not contain any express provisions concerning interest, recent arbitration legislation in common law jurisdictions such as England, Ireland, Hong Kong, and Bermuda give arbitral tribunals express power to award compound interest. Thus section 49 of the English Arbitration Act 1996 provides that, unless otherwise agreed by the parties, the tribunal may award simple or compound interest. This is, however, by no means a feature of all common law jurisdictions: in Canada and the United States, the power to award compound interest varies from state to state and province to province; in Australia and New Zealand, the power to award compound interest is strictly limited.

P 530 9.77 In civil law jurisdictions, arbitral tribunals typically have the power to award a statutory (or legal) rate of interest, which is simple interest at a rate defined by statute. Like the common law, however, there are once again exceptions to the rule: the Dutch and Japanese civil codes provide, for example, that statutory interest is automatically capitalised at the end of each year. Moreover, an ICC arbitral tribunal in Geneva awarded compound interest in a dispute between a state and a French entity on the application of trade usage under Article 13 of the ICC Rules. (104) Sources of international law are no clearer. Article 38 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (105) provides simply that 'interest shall be payable on any principal sum when necessary in order to ensure full reparation'.

9.78 Although the law on this issue varies from jurisdiction to jurisdiction, awards of compound interest are becoming more common. In the *Santa Elena* arbitration, (106) an international tribunal found that although simple interest seemed, at that time, to be awarded more frequently than compound interest, 'no uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case'. In *Wena Hotels*, (107) an ICSID tribunal went further and found that an award of compound interest is generally appropriate in modern arbitration. In recent years, the approach in the *Santa Elena* and *Wena Hotels* arbitrations has been followed by a large number of arbitral tribunals, such that the award of compound interest is no longer an exception. (108)

9.79 The reason for this shift has been that, where the applicable law allows, international arbitral tribunals appear to be reaching the same view as that reached over thirty years ago by Judge Howard Holtzmann in his dissenting opinion in *Starrett Housing Corporation v Iran* (109)—namely, that simple interest may not always, in the language of Article 38 of the Draft Articles on Responsibility of States, 'ensure full reparation of loss suffered'. As a leading academic in this field has observed:

P 531 [A]most all financing and investment vehicles involve compound interest ... if the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest. (110)

(iv) Enforcing awards that carry interest

9.80 It has already been seen that an award of interest (whether simple or compound) may be prohibited by a relevant national law. If this is the law of the arbitration agreement, or of the contract under which the dispute arises, it seems that an arbitral tribunal has no option but to apply it. Where parties to a contract have chosen (or are deemed to have chosen) as the substantive law of their agreement a law that prohibits the payment of interest, they can scarcely complain if interest is not payable.

9.81 If the law of the place of arbitration (the *lex arbitri*) forbids the payment of interest, it may theoretically be possible for the arbitral tribunal to disregard this local law and apply the substantive law of the contract. But if the provisions of the local law are mandatory, there is a risk that the award could be attacked and rendered invalid under the law of the place where it was made. It follows that an arbitral tribunal sitting in Saudi Arabia, but applying French law as the substantive law of the contract, should be cautious when considering an award in respect of interest, even though this is permitted by the substantive law of the contract; certainly, any award of interest should be clearly separated from the other parts of the award.

9.82 What of the law of the place of enforcement? If an award cannot be enforced, it is worth no more than a bargaining chip. However, at the time of the arbitration, it is hardly possible for an arbitral tribunal to do more than make an informed guess as to the likely place of enforcement of its eventual award—and even this will be difficult until the arbitral tribunal has formed a view as to which party is likely to win the arbitration. It is suggested that, in deciding whether or not to award interest, an arbitral tribunal cannot be expected to take into account the likely consequences of such an award in a potential place of enforcement unless the point is expressly brought to its attention by one or both of the parties, in which case the point would no doubt have to be considered.

(v) Post-award interest

9.83 In general, it is also open to arbitrators to set a rate of post-award interest in any amount that they deem appropriate. (111) This is often the rate that would apply to a judgment in the country in which the award is made. But, in modern practice, arbitral tribunals often decline to distinguish between pre- and post-award interest; instead, arbitral tribunals often award a single rate of interest to run for the whole period from a certain date (which may include the date of the breach, or ● the date on which the loss was suffered, or the date of the request for arbitration, depending on the applicable law and on the way in which the arbitral tribunal decides to exercise any discretion available to it) up to the date of payment of the award. (112)

9.84 In some instances, once an arbitral award is enforced in a particular country as a judgment of a court, the post-award interest rate may be replaced by the rate applicable to civil judgments. In England, however, section 49(3) of the English Arbitration Act 1996 permits the arbitral tribunal to exercise its discretion to award interest up to the date of payment.

(j) Costs

9.85 A claim in respect of the costs incurred by a party in connection with an international arbitration is, in principle, no different from any other claim, except that it usually cannot be quantified until the end of the arbitral proceedings. However, while no significant changes have been made to most national laws since the previous edition of this volume, there have been considerable changes to the rules and practices of some of the major international arbitration institutions during that period, as well as to the practices adopted by tribunals.

9.86 These changes appear to have been driven by a number of factors, including pressure on corporate executives, and the in-house counsel who advise and report to them, to reduce the levels of expenditure incurred on pursuing international arbitrations. Governments have also been subjected to the same kind of budgetary pressures. This, in turn, seems to have led some of the world's major institutions to amend the terminology traditionally used in connection with costs. The institutions presumably wish to draw a clear distinction between their own administration charges, and the tribunal's fees and expenses, and the expenses over which they have no real control, such as the hiring of hearing rooms, and transcription and translation services, among other things.

9.87 In previous editions, costs claims were considered under two headings—namely, 'costs of the arbitration' and 'costs of the parties'. These are broad summaries of the terminology used in the UNCITRAL Rules, (113) the ICC Rules, (114) the ICDR Rules, (115) the Rules of the Stockholm Chamber of Commerce (SCC), (116) the Rules of the Singapore International Arbitration Centre (SIAC), (117) and the LCIA Rules. (118) ● However, in light of the changes in approach since the previous edition, it is proposed in this edition to adopt three separate categories for the purpose of discussing claims in respect of costs:

- 'costs of the tribunal' (including the charges for administration of the arbitration by any arbitral institution);
- 'costs of the arbitration' (including hiring the hearing rooms, interpreters, transcript preparation, among other things); and
- 'costs of the parties' (including the costs of legal representation, expert witnesses, witness and other travel-related expenditure, among other things).

Each of these categories is now considered in turn.

(i) Costs of the tribunal

9.88 The costs of the tribunal usually include not only the fees, and travel-related and other expenses, payable to the individual members of the arbitral tribunal itself, but also any directly related expenses, such as the fees and expenses of any experts appointed by the arbitral tribunal. Also included in the tribunal costs are the fees and expenses of any administrative secretary or registrar, and any other incidental expenses incurred by the arbitral tribunal for the account of the case. In institutional arbitration, the tribunal costs are usually fixed or approved by the institution.

(ii) Costs of the arbitration

9.89 The costs of (the) arbitration include hiring rooms for hearings, and other meetings, between the parties and the tribunal, as well as the fees and expenses of the reporters who prepare the transcripts. These are usually organised and paid directly by the parties, and are disbursed by the parties in equal shares pending the tribunal's final award. Occasionally, where the arrangements are made by the chairman of the tribunal, or by an administering institution, such costs are paid from the deposits held by the arbitral tribunal or the institution. In general, however, the parties usually prefer to control these costs themselves rather than give the tribunal what may amount to a 'blank cheque' to buy in such services. The UNCITRAL Rules avoid this issue by requiring the tribunal to inform the parties of the methodology that it proposes to use in determining its costs and expenses. This methodology is then subject to challenge by the parties. Thereafter, in any award rendered, the tribunal must fix its costs and expenses consistently with this methodology, and any party may request the appointing authority or the secretary-general of the Permanent Court of Arbitration (PCA) to review the calculations. (119)

(iii) Costs of the parties

9.90 The costs of the parties include not only the fees and expenses of the legal representatives engaged to represent the parties at the arbitration hearing, but also the costs incurred in the preparation of the case. There will also be other professional fees and expenses, such as those of accountants or expert witnesses, as well as the hotel and travelling expenses of the lawyers, witnesses, and others concerned, and copying and printing charges, as well as telephone, fax, and email expenses. All of these costs are likely to be substantial in a major case.

9.91 Nevertheless, these costs rarely include any allowance for the time spent on the case by senior officials, directors, or employees of the parties themselves, or the indirect costs of disruption to their ordinary business. The hidden cost of such 'executive', or 'management', time may be high. It may occasionally even exceed the direct costs. In general, the larger the case, the more executive time is spent on it. If it is possible to recover the legal costs and expenses of bringing or defending a claim in arbitration, should it be unusual to recover the cost of executive time, particularly if this includes—as it often does—the cost of in-house counsel?

9.92 Traditionally, such costs have been regarded as part of the normal cost of running a business enterprise or a government department, rather than the recoverable costs of the winning party. (120) The UNCITRAL Rules, for example, do not include such costs in the definition of what constitutes the 'costs of the arbitration', although, for instance, the 'travel and other expenses of witnesses' and 'the costs for legal representation and assistance' are included. (121)

9.93 The ICC Rules not only refer to 'the reasonable legal and other costs incurred by the parties', but also indicate that the tribunal may consider such circumstances as it considers relevant (including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner) before making a decision on the amount of costs to be awarded. (122) A similar provision has been introduced in the 2014 version of the LCIA Rules. (123) The UNCITRAL Rules adopt a more conservative approach: while recognising that the arbitral tribunal may take into account the circumstances of the case when allocating costs between the parties, they do not explicitly mention cooperative or disruptive behaviour of the parties as a factor.

9.94 However, there is no necessary correlation between the time spent on a particular line of research or argument and the value of that time, in terms of the end result. Even if it is assumed that every minute spent on the case was of value—a somewhat brave assumption—the relevant hourly charging rate may vary from one country to another, and even from place to place within the same country. (124) ●

9.95 Another problem is that of deciding when the assessment of costs should be made. Arbitration rules, such as those of UNCITRAL (125) and the SCC, (126) provide for the costs of the arbitration to be fixed in the award. The ICC Rules (127) provide differently, permitting the tribunal to fix costs at any time during the arbitration. The arbitral tribunal then has a choice: it can either ask each of the parties for details of their costs and expenses before making its award, so as to deal with them in that award; or it can deal with costs in a separate final award, which will then reduce what was intended to be a 'final' award on the merits of the case to the status of a partial award.

9.96 Practical problems of this kind have led many international arbitral tribunals to refrain from ordering the unsuccessful party to pay the legal costs of the winning party, or simply to order the losing party to pay an arbitrarily chosen fixed sum towards the winner's legal costs. This practice may well change, as more attention is directed by lawyers and their clients to the costs of the arbitration, including the cost of executive time. Indeed, a costs order is one of the few means at a tribunal's disposal to discourage—and, in appropriate circumstances, to punish—a party's wasteful procedural tactics during an arbitration. At the time of writing, however, most international arbitral tribunals that decide to make an award of costs in favour of the winning party tend to adopt a broad approach in assessing the amount to be paid. In doing so, they tend to adopt the approach of an arbitrator in a case in the Iran–United States Claims Tribunal, who, in a separate opinion, proposed criteria along the following lines.

- Were costs claimed in the arbitration?
- Was it necessary to employ lawyers in the case in question?
- Is the amount of the costs reasonable?
- Are the circumstances of the particular case such as to make it reasonable to apportion such costs?

9.97 After asserting that the first two tests are normally satisfied in complex arbitrations, he commented on the reasonableness criterion as follows:

The classic test of reasonableness is not, however, an invitation to mere subjectivity. Objective tests of reasonableness of lawyers' fees are well known. Such tests typically assign weight primarily to the time spent and complexity of the case. In modern practice, the amount of time required to be spent is often a gauge of the extent of the complexities involved. Where the Tribunal is presented with copies of bills for services, or other appropriate evidence,

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indicating the time spent, the hourly billing rate, and a general description of the professional services rendered, its task need be neither onerous nor mysterious. The range of typical hourly billing rates is generally known and, as evidence before the Tribunal in various cases including this one indicates, it does not greatly differ between the US and ● countries of Western Europe, where both claimants and respondents before the Tribunal typically hire their outside counsel. Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and presentation. While legal fees are not to be calculated on the basis of the pounds of paper involved, the Tribunal by the end of a case is able to have a fair idea, on the basis of the submissions made by both sides, of the approximate extent of the effort that was reasonably required. Nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. (128)

9.98 A number of subsequent Iran–United States Claims Tribunal awards have referred to, and adopted, this test as a guide. (129) Furthermore, in the more recent, much publicised, very substantial *Yukos* cases, (130) a highly distinguished tribunal, also applying the UNCITRAL Rules, adopted a similar approach. These cases may provide a practical, common-sense, guide to the practice that international tribunals may adopt when they are required to exercise their discretion in relation to an award in respect of costs.

(k) Requirements imposed by national law

9.99 Most national legislation is silent concerning awards of costs in international arbitrations. The Model Law also does not address this question. Some states that have adopted the Model Law have added provisions regarding awards of the costs of arbitration, but not many. (131) As with interest, and indeed all other matters concerning the powers of the tribunal, any specific provisions of the *lex arbitri* concerning costs must be respected. However, the practices of national courts in following their own rules in relation to awarding costs do not appear to be an appropriate guide for the way in which an international tribunal should exercise the discretion granted to it under either the relevant set of rules or the *lex arbitri*. (132) It is suggested that international tribunals, wherever the seat of arbitration, should be guided by the *lex arbitri* and by the applicable substantive law as to the scope of its discretion, and by the applicable arbitration rules (if any) as to the exercise of that discretion.

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D Deliberations and Decisions of the Tribunal

(a) Introduction

9.100 So the purpose of an arbitration is to arrive at a binding and enforceable decision. For the parties and their lawyers, it is the dispositive section of an award that is most important. Yet there is more to an award, including how a tribunal of arbitrators goes about reaching its decision, which is largely neglected in the literature concerning international arbitration.

9.101 The task that faces arbitral tribunals is not easy. A leading English judge described judicial decision making as follows:

The judge's role in determining what happened at some time in the past is not of course peculiar to him. Historians, auditors, accident investigators of all kinds, loss adjusters and doctors are among those who, to a greater or lesser extent, may be called upon to perform a similar function. But there are three features of the judge's role which will not apply to all these other investigations. First, he is always presented with conflicting versions of the events in question: if there is no effective dispute, there is nothing for him to decide. Secondly, his determination necessarily takes place subject to formality and restraints (evidential or otherwise) attendant upon proceedings in court. Thirdly, his determination has a direct practical effect upon people's lives in terms of their pockets, activities or reputations. (133)

9.102 The same task faces an arbitral tribunal, but with a difference: in a tribunal of judges—a court of appeal, for instance—the judges are likely to have a shared legal background and, for the most part, to be of the same nationality; this is not usually so in major international commercial disputes, which usually involve a tribunal of three arbitrators, rather than a sole arbitrator.

9.103 First, such an arbitral tribunal is not a permanent court or tribunal except in special cases such as the Iran–US Claims Tribunal. Secondly, the tribunal may be composed of arbitrators of different professions: accountants, engineers, or whatever the case may

require. Thirdly, even if all of the members of the tribunal are lawyers, they will often be of different nationalities, with different languages and different legal backgrounds—common law, civil law, Shari'ah, and so forth. They may know each other personally or professionally, or they may (as is often the case) meet for the first time when they come together as a tribunal chosen to resolve a dispute.

P 538 9.104 How will this disparate, ad hoc group of people set about trying to reach their decision? They will read the parties' submissions, the witness statements, and the lever arch files full of photocopied documents; they will listen to evidence and argument. After this, although (as the saying goes) they may not be any wiser, they should certainly be better informed. As a case proceeds, each arbitrator will ● no doubt begin to form his or her own view as to how the various issues that have arisen ought to be determined, but the tribunal should arrive at a decision together. If the tribunal consists of three arbitrators, there must be some exchange of views, some dialogue between them, if they are to do so.

9.105 There are no set rules as to how a decision should be made. Each arbitration is different and each arbitral tribunal is different. What works well with one tribunal may not work at all with another. However, the advice written by a former president of the LCIA may serve as a useful guideline:

While it is important for the chairman not to rush his fellow arbitrators into reaching a definitive decision on all outstanding issues—indeed, it is incumbent on the chairman to remind the members of the tribunal that their work is only just beginning and that any opinions expressed will be considered to be provisional—it is, however, crucial to ascertain whether or not a consensus seems likely to emerge on one or more of the issues to be decided. If there is disagreement between the two party-appointed arbitrators, the chairman will begin to earn his extra stipend. In the event a consensus on certain issues is clear, the chairman will generally offer to prepare a first draft of an eventual award, for discussion at a later date.

No member of the tribunal must exert any pressure on his colleagues during this first session. This initial session should provide an opportunity for all arbitrators to engage in a relaxed dialogue with one another.

Each arbitrator must feel that he is allowed to 'think out loud' in this informal setting. Personally, whether I serve as chairman or party-designated arbitrator, I tend to listen at least as much as to speak during such a first encounter. I wish my colleagues to know what my initial views are, but I also want to know how my colleagues believe they can inform the decision-making process which has begun. (134)

P 539 9.106 This passage raises an interesting question as to whether there is any difference between, on the one hand, informal discussions among members of the tribunal (for example over a meal or during a coffee break) and, on the other, formal deliberations (in the French sense). Among the reasons why deliberations are infrequently addressed is undoubtedly the fact that some systems encourage secrecy in the deliberative process. For example, in French law, as in some other civil law countries, the deliberations of the arbitrators are 'secret'. (135) In French law, the interchange of views between arbitrators is formalised as a '*deliberation*'. The Civil Code that governs French internal (or domestic) arbitrations requires the arbitrators to fix the date at which their deliberations will start (*le délibéré sera prononcé*), (136) after which no further submissions by the parties are allowed. One distinguished French academician and author considers the rule that there must be a '*deliberation*' before ● there is any award by the tribunal to be a rule of international public order. (137) Although it does not necessarily follow that the deliberations should be secret, for another French commentator the rule that such a '*deliberation*' should be, and should remain, so is a 'fundamental principle, which constitutes one of the mainsprings of arbitration, as it does of all judicial decisions'. (138) However, this is not solely a French position. Rule 15 of the ICSID Arbitration Rules states:

- (1) The deliberations of the Tribunal shall take place in private and remain secret.
- (2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

9.107 In a well-known case, (139) the Swedish Court of Appeal discussed what is necessary for a proper deliberation when considering a request by the Czech Republic to set aside an arbitral award. One of the grounds put forward was that the arbitrator nominated by the Czech Republic had, as he alleged in his dissenting opinion, been deliberately excluded by his fellow arbitrators from the deliberations of the tribunal. The Court referred to a seemingly conflicting balance of considerations: the equality of the arbitrators, balanced against the need for the tribunal to reach a conclusion without undue delay. The Court said, in summary, that the arbitrators should be treated equally, but that the procedures adopted should also be cost-effective and flexible. There were no formal rules, and so the deliberations might be oral or written, or both; deadlines could be set, but could also be changed as required, and so forth. The Swedish Court of Appeal added that whilst due process must be guaranteed:

[W]hen two arbitrators have agreed upon the outcome of the dispute, the third arbitrator cannot prolong the deliberations by demanding continued discussions in an attempt to persuade the others as to the correctness of his opinion. The dissenting arbitrator is thus not afforded any opportunity to delay the writing of the award. (140)

P 540 9.108 The rule as to the secrecy, or confidentiality, of the tribunal's discussions has significant consequences. (141) It was considered by a former president of the ICJ, in ● considering a challenge to one of the members of the Iran–United States Claims Tribunal, whose impartiality had been questioned on the basis of a dissenting opinion that he had issued. In the course of the decision on the challenge, it was held that:

A rule of the confidentiality of the deliberations must, if it is to be effective, apply generally to the deliberation stage of a tribunal's proceedings and cannot realistically be confined to what is said in a formal meeting of all the members in the deliberation room. The form or forms the deliberation takes varies greatly from one tribunal to another. Anybody who has had experience of courts and tribunals knows perfectly well that much of the deliberation work, even in courts like the ICJ which have formal rules governing the deliberation, is done less formally. In particular the task of drafting is better done in small groups rather than by the whole court attempting to draft round the table. Revelations of such informal discussion and of suggestions made could be very damaging and seriously threaten the whole deliberation process. (142)

9.109 As noted, there must obviously be some interchange of views between the members of the tribunal as they try to arrive at a decision that can be expressed in their award. This interchange of views may be characterised, as it is in the ICSID Arbitration Rules and in the French Civil Code, as a '*deliberation*', but this does not mean that the members of the tribunal have to sit together in solemn conclave, like cardinals electing a pope, until a decision is reached.

9.110 What is likely to happen in practice is that the arbitrators exchange views informally, as the case progresses—particularly in the course of the hearing—and then decide how to proceed with the formulation of their award. The chairman of the tribunal often prepares a list of the issues that he or she considers critical, then asks the co-arbitrators to amend, or add to, this list and perhaps express a preliminary view on the issues raised—either orally or, more commonly, in writing—with each arbitrator being given the opportunity to comment upon what the others have written.

9.111 Where the arbitral tribunal consists of a sole arbitrator, the need to consult with other members of the tribunal and to try to reconcile possibly differing opinions does not arise. However, the sole arbitrator will still need to consider the evidence and arguments of the parties, work through a list of the significant issues, and generally come to a conclusion on the matters in dispute as part of the process of drafting an award.

P 541 9.112 For a sole arbitrator, it is only his or her decision that counts. But what happens when there is a tribunal of three arbitrators and, despite their best efforts, they find themselves unable to agree? Ideally, decisions are made unanimously; but there must be a 'fall-back' position, and, on this, the international and institutional rules ● of arbitration differ. Some favour majority voting; others give the presiding arbitrator a decisive role.

(b) Tribunal psychology

9.113 Most international arbitrations are determined by an arbitral tribunal composed of three arbitrators. The aim of their deliberations must be to achieve a unanimous award, since this will be seen as both authoritative and conclusive. If unanimity cannot be achieved, however, the next best thing is to have a majority award, rather than an award by the chairman alone—or no award at all. In one of the Iran–United States arbitrations, a US-appointed arbitrator concurred in a majority award, although he thought that the damages awarded were half what they should have been. 'Why then do I concur in this inadequate award?' he asked rhetorically; 'Because', he answered, 'there are circumstances in which "something is better than nothing".' (143)

9.114 There may be concern over the way in which arbitrators will conduct themselves in deliberations when they have been directly appointed by one of the parties to a dispute. However, parties rarely abuse the arbitral process to the extent of nominating an arbitrator whose specific function is to vote for the party who nominated him or her, although they do appoint arbitrators whom they believe are likely to be sympathetic to the case that they wish to advance during the proceedings. As has been said:

It should not be surprising if party appointed arbitrators tend to view the facts and law in a light similar to their appointing parties. After all, the parties are careful to select arbitrators with views similar to theirs. But this does not mean that arbitrators will violate their duty of impartiality and independence. (144)

9.115 In an international arbitration, each arbitrator, however appointed, is under a duty to act impartially and to reach a determination of the issues in a fair and unbiased manner. (145) It follows that it would be improper if a party-nominated arbitrator were to hold private discussions with the party who nominated that arbitrator about the substance of the dispute. However, it is not improper for a party-nominated arbitrator to ensure that the arbitral tribunal properly understands the case being advanced by that party, (146) and a party-nominated arbitrator who is convinced of the merits of the case being put forward by the appointing party can have a significant impact on the private deliberations of the arbitral tribunal when the award is discussed. Interestingly, the UNCITRAL Rules extend the duty of the arbitrator in relation to disclosing circumstances giving rise to a potential conflict of interest so that it is owed not only to the parties, but also to the other members of the tribunal. (147)

9.116 The behaviour of the party-appointed arbitrators affects the dynamics of deliberations for the presiding arbitrator, although the presiding arbitrator will form his or her own view of the case. If it is difficult to achieve a majority award, inevitably the presiding arbitrator leans towards a compromise with a party-nominated arbitrator who follows the proceedings intelligently, asks good questions of each party, and puts forward well-reasoned arguments, rather than with someone who shows little interest in the proceedings and gives the impression of being there simply as the advocate nominee of the appointing party.

(c) Bargaining process

9.117 An award of monetary compensation arrived at by a majority vote is sometimes the result of a bargaining process in the deliberations that might be more common in a marketplace than in a judicial, or quasi-judicial, proceeding. To describe it as a process of eliminating alternatives by 'a proper sequence of votes' is an attractive euphemism. However, particularly when carried out in a structured manner and in relation to predefined issues, 'bargaining' may be a sensible way in which to proceed. Such a procedure is envisaged in the 1966 European Convention providing a Uniform Law on Arbitration (known as the 'Strasbourg Uniform Law'), which provides that:

Except where otherwise stipulated, if the arbitrators are to award a sum of money, and a majority cannot be obtained for any particular sum, the votes for the highest sum shall be counted as votes for the next highest sum until a majority is obtained. (148)

9.118 Where there are a number of different issues, it is theoretically possible for the members of the arbitral tribunal to be split on some issues and unanimous on others. In such cases, the question arises as to whether all of the issues should be decided by the presiding arbitrator alone (if this is permitted under the relevant rules of arbitration) or whether the award may be divided into various parts. If there is lack of unanimity in relation to one of many issues, the award as a whole will usually be issued by a majority. If there is no majority in relation to a number of issues, the award as a whole should be that of the presiding arbitrator if the relevant rules permit; otherwise, the arbitrators will have to continue, in one way or another, to try to reach a majority decision. It is unusual for an arbitral tribunal to split its award into a number of different parts in which the operative directions in the award have been reached by different processes.

(d) Majority voting

9.119 As an example of majority voting, Article 33(1) of the UNCITRAL Rules provides: 'When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.' However, Article 33(2) makes an exception to this rule in relation to questions of procedure and allows the presiding arbitrator to decide such questions on his or her own, subject to revision by the tribunal. This provision gives rise to two potential problems.

9.120 The first is how to identify procedural issues: for example, is a determination of the place of arbitration under Article 18 of the Rules a question of procedure? If it is, then, in the absence of a majority, the presiding arbitrator may decide. However, Professor Pieter Sanders, as special consultant to the UNCITRAL Secretariat, played a major role in drafting the UNCITRAL Rules. He expressed the view that the determination of the place of arbitration should *not* be considered a procedural question; and should therefore not be a function of the presiding arbitrator alone. (149)

9.121 The second problem is that, in order to achieve an award, a majority must be reached, because there is no fall-back position. Professor Sanders stated that 'the arbitrators are ... forced to continue their deliberations until a majority, and probably a compromise solution, has been reached'. (150)

9.122 This is a potentially serious defect in the UNCITRAL Rules, since there may be cases in which it is genuinely impossible to achieve a majority. In construction industry arbitrations, for example, there are often many different issues in relation to separate claims and it is possible for each individual arbitrator to have a different view on these different issues. Furthermore, the arbitrators may have widely differing views on questions of quantum in such cases, with no real possibility of a compromise solution

being achieved in order to obtain a majority award. (151) The Model Law, Article 29 of which adopts the same position as the UNCITRAL Rules, is open to the same criticism.

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9.123 The approach in the ICC Rules is different. These rules provide that where the arbitral tribunal is composed of more than one arbitrator, the award, if not unanimous, may be made by a majority of the tribunal; if there is no majority, the chairman of the arbitral tribunal makes the decision alone. (152) The same approach is adopted in the Swiss Private International Law Act 1987 (Swiss PIL), the Swiss Rules of International Arbitration, the English Arbitration Act 1996, and the LCIA Rules. (153)

9.124 In contrast to the UNCITRAL Rules, under the ICC Rules, the Swiss Rules, and the LCIA Rules, the pressure is on the other arbitrators to join the presiding arbitrator in forming a majority. This is because of the presiding arbitrator's power to make an award alone. However, if this happens, the party-chosen arbitrators will not participate in the award; (154) instead, the award will have been made by a person who has often been chosen for the parties by an arbitral institution or by some other appointing authority.

9.125 In ICSID arbitrations, majority rule also prevails. The ICSID Convention provides that '[t]he Tribunal shall decide questions by a majority of the votes of all its members', (155) and this provision is carried into effect by the ICSID Arbitration Rules, Rule 16(1) of which states: 'Decisions of the Commission shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.' In this context, 'majority rule' means that at least two of the three members of the arbitral tribunal must be prepared to agree with each other, whatever element of bargaining or compromise this might involve. An arbitral tribunal is bound to render a decision. It is not permitted to say that it is undecided and unable to make an award. It may not bring in a finding of *non liquet* (on the ground of silence, or obscurity of the law, or otherwise). (156)

9.126 It may well be difficult for individual members of an arbitral tribunal to alter their respective positions so as to achieve the necessary majority. The notes to the ICSID Arbitration Rules record that, when the Rules were originally formulated, consideration was given to providing for the possibility of the arbitral tribunal being unable to reach a majority decision. It was concluded, however, that no problem would arise with questions that admitted only a positive or a negative answer. If a positive proposition, such as a submission, were to fail to achieve a majority, it ● would automatically fail since, under the ICSID Rules, an abstention is counted as a negative vote. Where the question could not be answered by a simple 'yes' or 'no', as in the determination of the amount of compensation to be awarded, it was concluded that 'a decision can normally be reached by a proper sequence of votes by which alternatives are successively eliminated'. (157)

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9.127 Thus there are various ways in which the awards of three-member arbitral tribunals may be made. They may be made unanimously, or by a majority, or by the presiding arbitrator alone if he or she is empowered to decide alone under the rules governing the proceedings.

(e) Concurring and dissenting opinions

(i) Concurring opinions

9.128 A 'separate', or 'concurring', opinion is one that is given by an arbitrator who agrees with the result of the arbitration, but who either does not agree with the reasoning or does not agree with the way in which the award is formulated. These opinions are rarely given in commercial arbitrations. They are more frequently found in public law arbitrations, in which the practice of the ICJ tends to be followed. (158)

(ii) Dissenting opinions

9.129 Dissenting opinions pose greater problems and are less frequently delivered. There is a broad division of philosophy and practice as to whether the giving of dissenting opinions should be permitted. In arbitrations between states, the right to submit a dissenting opinion was asserted as long ago as the middle of the nineteenth century, in the *Alabama Claims* arbitration (159) between the United Kingdom and the United States. The Statute of the ICJ expressly entitles judges in the minority to deliver dissenting opinions, (160) and this right has been exercised frequently not only in judgments, but also in connection with procedural orders, advisory opinions, and interim proceedings.

9.130 When arbitrators dissent in international arbitrations, they often simply refuse to sign the award. Where this is done, the dissenting opinion may be annexed to the award if the other arbitrators agree, or it may be delivered to the parties separately. ● In either case, the dissenting opinion does not form part of the award itself: it is not an 'award', but an *opinion*. (161)

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(iii) Position in national laws

9.131 Modern arbitration legislation tends not to refer expressly to dissenting opinions. For example, there is no mention of dissenting opinions in the Swiss PIL, although a commentator states that an arbitrator has the right to give reasons for his dissent. (162) The Netherlands Arbitration Act 1986 (163) similarly contains no express provision, but

the authoritative commentary notes state that whilst dissenting opinions are not customary in the Netherlands, they are not excluded. (164) In France, it is sometimes said that the principle of the secrecy of the deliberations is such that even to disclose that the decision was unanimous is a breach thereof. (165) This is not an approach that is favourable to the concept of a dissenting opinion, yet such opinions are given in international arbitrations— even in France. No prohibition against dissenting opinions is known in the common law countries. Indeed, it is not unusual for common law arbitrators to consider themselves under a duty to inform the parties of their reasons for any dissent.

(iv) Position under institutional rules

P 547 9.132 Of the world's arbitral institutions, ICSID is alone in expressly recognising in its Rules the right of an arbitrator to issue an individual opinion and, in particular, a dissenting opinion: 'Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.' (166) The LCIA Rules do not mention dissenting opinions, although the right of an arbitrator to issue a dissenting opinion is recognised in England (167) ● and it may be assumed that the draftsmen considered that no express provision was necessary. Nor do the ICDR or ICC Rules contain any provision relating to dissenting opinions.

9.133 The way in which dissenting opinions are to be handled in ICC arbitrations is unique because of the provisions of the ICC Rules relating to scrutiny of awards. (168) Should the ICC Court 'scrutinise' the dissenting opinion—or, indeed, take any notice of it at all? At one time, the ICC discouraged the submission of dissenting opinions, but in 1985 a working party was set up to consider dissenting opinions, the final report of which was adopted in 1988. (169) The report did not attempt to rule out dissenting opinions; rather, it suggested that the only circumstances in which a dissenting opinion should not be sent to the parties with the award was where it is prohibited by law, or where the validity of the award might be imperilled, either in the place of arbitration or (to the extent that this could be foreseen) in the country of enforcement. The ICC has issued guidelines to its staff that reflect the conclusions of the working group and, in practice, dissenting opinions are sent out by the ICC with the majority award.

(v) Practice at the Iran–United States Claims Tribunal

9.134 Separate and dissenting opinions were submitted by both the Iranian and US arbitrators in many reported cases. In one of these, the dissenting arbitrator went too far, when the dissenting judge indicated that the other two arbitrators had agreed with one of his views in deliberations. (170) In another case, problems were also caused when the dissenting opinion was issued after the majority decision was published and contained allegations of procedural misconduct on the part of the majority arbitrators. (171) The majority arbitrators felt compelled to file an additional opinion, whereupon the dissenting arbitrator continued the process by issuing yet another opinion. This was, in turn, followed by a second additional opinion by the chairman, who, whilst stating that he would make no further response, indicated that he considered this exceptional procedure to be necessary to vindicate the integrity of the tribunal and its staff, and to answer allegations that were factually incorrect. Acrimonious trading of allegations and insults could go on indefinitely, and it is clearly desirable that the arbitrators should disclose their concerns to each other in an exchange of draft opinions *before* the formal issue of the majority award and the dissenting opinion.

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(vi) When and how should dissenting opinions be given in international arbitrations?

9.135 As already indicated, there is no tradition of dissenting opinions in civil law systems. (172) Dissenting opinions have come to international arbitration from the common law tradition and it is a disputed question whether they have added value to the arbitral process. (173) The traditional justification for dissenting opinions in common law judicial systems is that they may contribute to the development of the law. Although rare, there are examples of higher courts adopting dissenting opinions rather than the judgment of the majority. It might well be said—particularly by common lawyers—that if dissenting opinions can contribute in this way to a national judicial system of justice, why might they not also contribute to the system of international arbitration? To this, there are at least three responses.

9.136 First, in most cases, there is no appeal from the award of an arbitral tribunal and, moreover, there exists no system of *stare decisis* in international arbitration. A dissenting opinion cannot therefore inform an appellate arbitral jurisdiction nor will it guide future arbitral tribunals searching for the wisdom of precedent. Dissenting opinions therefore have far less to contribute to the arbitral process than to a common law judicial system. An exception to this may be in the context of ICSID arbitrations, in which the award is expressly defined to include any individual or dissenting opinions. (174)

9.137 Secondly, rather than contribute to the arbitral process, dissenting opinions may endanger the efficacy of the process by threatening the validity and enforceability of the award. One might imagine an argument in response to this concern along the following lines: if an award is flawed, then a dissenting arbitrator has a right—indeed perhaps even a duty—to provide ammunition that may assist the losing party in challenging the award.

However, such an argument ignores the very purpose of an arbitration: to arrive at a determinative decision. Depending on the rules of arbitration agreed by the parties, that decision can be a majority decision or the decision of the presiding arbitrator alone. It is the *decision* that matters, and it matters not as a guide to the opinions of a particular arbitrator or as an indication of the future development of the law, but because it resolves the particular dispute that divides the parties, in the manner chosen by the parties, even if one of the arbitrators believes that decision to be wrong.

P 549 9.138 The third and final reason is more sensitive, and follows from the different way in which arbitrators—as opposed to judges—are appointed. Judges are appointed by the state. They do not depend in any way on the parties who appear before ● them. In an international arbitration, by contrast, two of the three members of the tribunal will usually have been appointed (or nominated) by the parties. When a dissenting arbitrator disagrees with the majority, and does so in terms that favour the party that appointed him or her, it may cause some concern: does the dissent arise from an honest difference of opinion, or is it influenced by a desire to keep favour with the party that appointed the dissenting arbitrator? As one commentator has said:

Certain arbitrators, so as not to lose the confidence of the company or the state which appointed them, will be tempted, if they have not put their point of view successfully in the course of the tribunal's deliberation, systematically to draw up a dissenting opinion and to insist that it be communicated to the parties. (175)

Other authors concur:

Although party-appointed arbitrators are supposed to be impartial and independent in international arbitrations, some believe that with the availability of dissent, arbitrators may feel pressure to support the party that appointed them and to disclose that support. (176)

E Form and Content of Awards

(a) Generally

9.139 The best awards are short, reasoned, and simply written in clear, unambiguous language. An arbitral tribunal should aim at rendering a correct, valid, and enforceable award. It may have to do so as a matter of legal duty to the parties, under some systems of law, (177) or it may be under an obligation to do so under rules of arbitration, such as those of the ICC, which state at Article 35 that an arbitral tribunal 'shall make every effort to make sure that the Award is enforceable at law'. Whether or not there is a legal obligation, the arbitral tribunal will want to do its best, as a matter of professional pride, to ensure that the award is enforceable: having been entrusted with the duty of determining a dispute for the parties, it will naturally wish to ensure that its duty is properly and effectively discharged.

9.140 A distinguished arbitrator has suggested that:

P 550 A valid yardstick for assessing the diligence shown by the arbitrators in drawing up an arbitral award that is enforceable and likely to be recognised, is to apply the criteria established under the New York Convention, since compliance therewith will enable recognition and enforcement of the arbitral award in all the signatory countries. Consequently, no arbitral tribunal could be held responsible in a case ● where its decision was not recognised in a given country for failing to fulfil some mandatory requirement imposed by that country's domestic law, unless the parties had expressly advised the tribunal of this circumstance, which should rightly have been taken into account when the arbitral award was drawn up. (178)

9.141 The award of an international arbitral tribunal may be challenged in the courts of the juridical seat of arbitration. (179) In other circumstances, recognition and enforcement of the award may be refused by a competent court in the place(s) in which such recognition or enforcement is sought. This subject is discussed in detail later. (180) The point to be made here is that an arbitral tribunal should bear the possibilities of challenge and recourse in mind when drawing up its award. In the English procedure, the term 'reasoned award' is used to describe a form in which the arbitrator's reasons are set out in the award and form part of it. (181) Against this background, the validity of an award must be considered under two headings: form and content.

(b) Form of the award

9.142 In general, the requirements of form are dictated by the arbitration agreement (including the rules of any arbitral institution chosen by the parties) and the law governing the arbitration (the *lex arbitri*).

(i) Arbitration agreement

9.143 It is necessary to check whether the arbitration agreement specifies any particular

formalities for the award. In practice, this means examining any set of rules that the parties have adopted. The UNCITRAL Rules, for example, lay down the following requirements:

- the award shall be made in writing;
- the reasons upon which the award is based shall be stated;
- the award shall be signed by the arbitrators, and shall contain the date on which and the place where it was made; and
- where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature. (182)

9.144 The only arbitral institution that sets out the detailed obligations for an arbitrator when writing an award is ICSID. Rule 47 of the ICSID Rules states:

- (1) The award shall be in writing and shall contain:
 - (a) a precise designation of each party;
 - (b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;
 - P 551 ● (c) the name of each member of the Tribunal, and an identification of the appointing authority of each;
 - (d) the names of the agents, counsel and advocates of the parties;
 - (e) the dates and place of the sittings of the Tribunal;
 - (f) a summary of the proceeding;
 - (g) a statement of the facts as found by the Tribunal;
 - (h) the submissions of the parties;
 - (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
 - (j) any decision of the Tribunal regarding the cost of the proceeding.
- (2) The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated.
- (3) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

9.145 These two examples, drawn from institutional rules of arbitration, indicate the importance for the arbitral tribunal of checking the form (and contents) of its award against the relevant rules.

(ii) Law governing the arbitration

9.146 The requirements of form imposed by national systems of law vary from the comprehensive to the virtually non-existent. The Swiss Code of Civil Procedure, under Part III, which govern domestic arbitrations in Switzerland, lays down detailed requirements, (183) but for international cases, these are narrowed to just four—namely, that the award be in writing, reasoned, dated, and signed. (184) Section 52 of the English Arbitration Act 1996 follows the same lines:

- (1) The parties are free to agree on the form of an award.
- (2) If or to the extent that there is no such agreement, the following provisions apply.
- (3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.
- (4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.
- (5) The award shall state the seat of the arbitration and the date when the award is made.

(iii) Introductory section of an award

9.147 Awards will often begin by setting out the names and addresses of the parties, and the names and contact details of their representatives. The award will then usually contain a brief narrative setting out a number of facts relating to the arbitration. These may include an identification of the arbitration agreement or document containing the arbitration clause, a brief description of the disputes that have arisen between the parties, the relief claimed, and the way in which the arbitral tribunal ● was established, with dates, and any specific procedural agreement of the parties or rulings of the arbitral tribunal. (185)

(iv) Signatures

9.148 Some national systems of law require that all arbitrators should sign the award in order for it to be valid. (186) This is highly unsatisfactory, since, in such cases, a dissenting arbitrator may frustrate an arbitration simply by refusing to sign the award. Any country the law of which contains such a mandatory rule without any means of 'rescue' is unsuitable for international arbitration. (187) Formalities with regards to signature have

survived in the United Arab Emirates (UAE), for example, and are important to follow. A 2009 decision by the Dubai Court of Cassation (188) distinguished between awards in which the grounds were included in the same document as the award itself and awards in which the grounds and the award were in separate documents. It was held that arbitrators can sign the final page on which the award appears if it is attached to the grounds; if they are in separate documents, then the Court held that the award must be signed as well as *each* page of the award by all of the arbitrators. In practice, arbitrators sitting in arbitration proceedings in the UAE normally sign every page of the award.

9.149 The rules of arbitration of the major international arbitral institutions all deal expressly or impliedly with signature of the award. The ICC Rules make it clear that the award must be signed, but that the award of a majority of the arbitrators or, if there is no majority, the award of the presiding arbitrator alone is effective. (189) A similar provision is found in the LCIA Rules. (190)

(v) Language of the award

9.150 The award will normally be rendered in the language of the arbitration, although occasionally it may be made either in the language that is the *de facto* working language of the arbitral tribunal or in the language that is most convenient for the parties. (191) Any mandatory rule of law of the place of arbitration concerning the language of the award must be respected. It is a condition of recognition and enforcement under the New York Convention that a foreign arbitral award must be accompanied by an officially certified translation into the language of the place in which recognition or enforcement of the award is sought, when this is not the language of the award. (192)

(c) Contents of the award

9.151 The contents of an award, like its form, are dictated primarily by the arbitration agreement and the law governing the arbitration (the *lex arbitri*).

(i) Arbitration agreement

9.152 Arbitration agreements usually provide that the award is to be final and binding upon the parties. It follows that the award should deal with all matters referred to arbitration, in so far as they have not been dealt with by any interim or partial awards. However, arbitration agreements rarely go on to describe the content of the award; the nearest they get is to incorporate a set of arbitration rules. Such rules invariably also provide that the award should deal with such matters as the costs of the arbitration (193) and the payment of interest. The rules may also provide that the award shall state the reasons upon which it is based. (194) Even if not specifically required, the giving of reasons is a practice that should be followed unless there is some very good reason why it should not be. (195)

(ii) Unambiguous

9.153 Most national systems of law require an award to be unambiguous and dispositive. Ambiguity is often capable of being cured, either by the arbitral tribunal interpreting the award at the request of the parties (or occasionally at the request of only one of them), (196) or by an application to the relevant national court for an order that the award should be remitted to the arbitral tribunal for clarification. The position is similar where the award contains provisions that are inconsistent.

(iii) Determination of the issues

9.154 An award must also be *dispositive*, in that it must constitute an effective determination of the issues in dispute. It is not sufficient for the arbitral tribunal to issue a vague expression of opinion. The award must be formulated in an imperative tone: 'we award', 'we direct', 'we order', or the equivalent. (197) ●

9.155 Equally, if there is more than one respondent and a monetary award is made in favour of the claimant, it is essential for the arbitral tribunal to make it clear whether one of the respondents, and if so, which one, has the obligation to make the payment, or whether the obligation is joint and several.

9.156 An award should not direct the parties to perform an illegal act or require the parties to do anything that may be considered contrary to public policy, (198) nor may the award contain any directions that are outside the scope of authority of the arbitral tribunal.

(iv) Reasons

9.157 The way in which reasons are given in arbitral awards varies considerably. Sometimes, the reasoning, or 'motivation', is set out with extreme brevity. However, a mere statement that the arbitral tribunal accepted the evidence of one party and rejected the evidence of the other, which was common practice for some arbitrators, had rightly fallen into disrepute by the end of the twentieth century. Certainly, such a practice would be regarded as being defective as a matter of form by the ICC Court. In other cases, awards may run into hundreds of pages, including a detailed review of the evidence and arguments put forward by the parties, followed by a closely reasoned

conclusion.

9.158 Even in modern times, there are arbitrations in which providing reasons is likely to seem superfluous. An arbitrator in a quality arbitration, for example, who is asked to decide whether goods supplied do or do not correspond to sample, can hardly do more than answer 'yes' or 'no'.

9.159 The ICSID Convention calls for a reasoned award, without any exceptions, (199) and in practice the ICC Court deems awards that are insufficiently reasoned to be defective as to form. They are therefore remitted to the arbitral tribunal for amendment before they can be approved in accordance with Article 33 of the ICC Rules. The UNCITRAL Rules take the same approach as the Model Law: reasons should be given, unless the parties agree otherwise. (200)

9.160 The general consensus in favour of a reasoned, or 'motivated', award is reflected in the European Convention on International Commercial Arbitration of 1961, Article VIII of which states:

The parties shall be presumed to have agreed that reasons shall be given for the award unless they

(a) either expressly declare that reasons shall not be given; or

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(b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.

(v) Different ways of giving reasons

9.161 The general practice of arbitral tribunals in international cases is to devote more time and space in the award to giving the reasons for its determination of the legal arguments than to a review of the factual issues. This is not surprising, since most arbitral tribunals in international cases are composed of lawyers. (201) However, it should be borne in mind by such tribunals that what is needed is an intelligible decision, rather than a legal dissertation. The object should be to keep the reasons for a decision as concise as possible, according to the nature of the dispute. The parties want to read the essential *reasoning* underlying the decision, not a lesson in the law. (202)

(d) Time limits

9.162 A limit may be imposed as to the time within which the arbitral tribunal must make its award. When this limit is reached, the authority or mandate of the arbitral tribunal is at an end and it no longer has jurisdiction to make a valid award. This means that, where a time limit exists, care must be taken to see that either the time limit is observed, or the time limit is extended before it expires. The purpose of time limits is to ensure that the case is dealt with speedily. Such limits may be imposed on the arbitral tribunal by the rules of an arbitral institution, by the relevant law, or by agreement of the parties.

9.163 The laws of a number of countries provide for time limits within which an award must be made, sometimes starting from the date upon which the arbitration itself commenced. In India, the Arbitration and Conciliation Act 1996 has dispensed with the time limit that was imposed by the previous law. In the United States, the position varies from state to state. In some states, the limit is thirty days from the date on which the hearings are closed. However, time limits in the United States may also be extended by mutual agreement of the parties or by court order.

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9.164 It is important that a fixed time limit for rendering the award should not enable one of the parties to frustrate the arbitration. This might happen if a fixed limit were to run from the date of the appointment of the arbitral tribunal, rather than, for example, that of the end of the hearings. If a court has no power to intervene on the ● application of one party alone and the time limit can be extended only by agreement of the parties, a party might frustrate the proceedings simply by refusing to agree to any extension of time. However, the courts of many countries would be reluctant to invalidate a late award in such a case. For example, in New York, it was held that an untimely award was not a nullity, even though the issue of timeliness was properly raised: the court stated that, without a finding of prejudice, there was no justification for denying confirmation of the award. (203)

(i) Disadvantages of mandatory time limits

9.165 It is rare to find time limits for delivery of the award in non-institutional rules. Where such limits are imposed, it is usually by an express agreement between the parties, contained in the arbitration clause or the submission agreement. Undoubtedly, such a provision is inserted with the intention of putting pressure on the arbitral tribunal to complete its work with due despatch and in order to minimise the opportunities for delaying the resolution of disputes by the parties themselves. However, it is a strategy that may well prove to be counterproductive. In most substantial international cases before an arbitral tribunal consisting of three arbitrators, it is usually impracticable to

complete the arbitration within such a short period of time as three or six months. The result is that the arbitral tribunal may be forced into a situation in which, in order to comply with the time limit, it must issue its award without giving the respondent a proper opportunity to present its case. Such an award is vulnerable to an action for nullity or to a successful defence to enforcement proceedings. Thus the successful party finds that, far from the time limit having assisted in a speedy resolution of the dispute, it contributes to overall delay and ineffectiveness in the arbitral process. (204) In addition, certain arbitral institutions have introduced simplified or expedited procedures for the conduct of an international arbitration, and a standard feature of these procedures is a provision for the award to be made within a relatively short time. (205)

P 557 9.166 In general, it is preferable that no time limit should be prescribed for the making of the award in an arbitration clause or submission agreement. However, if the parties consider it desirable to set a limit, or if it is necessary to do so under the applicable law, the time limit should, if possible, be related to the closure of the hearings and not to the appointment of the arbitral tribunal, or to some other stage in the arbitration at which the respondent will have opportunities to create ● delay. A provision that the award must be issued within a certain time after the closure of the hearings helps to ensure that the arbitral tribunal proceeds diligently with its task. It is frustrating for the parties if the arbitral tribunal takes many months to deliberate and to issue its award. However, any time limit should be realistic and not merely one that incites the arbitral tribunal to make the award in too great a hurry, thus potentially exposing the award to a successful challenge.

(ii) Non-mandatory provisions

9.167 Perhaps the best way in which the parties can put time pressure on an arbitral tribunal, without placing the effectiveness of the proceedings at risk, is to insert some form of non-mandatory provision. In one ICC case, (206) the arbitration clause contained a provision to the effect that ‘the parties wish that the award shall be issued within five months of the date of the appointment of the third arbitrator’.

9.168 The arbitral tribunal considered it necessary to clarify the position and, at its request, the parties confirmed that this provision:

- superseded the provision of Article 18(1) of the then applicable 1998 ICC Rules, which provided that the award was to be made within six months of the signing of the terms of reference; and
- did not affect the power of the ICC Court to extend the time limit provided for by the parties, in accordance with Article 18(2) of the then applicable 1998 ICC Rules.

In effect, therefore, the parties set a *target* for the arbitral tribunal in their arbitration agreement, without imposing any mandatory provision that might have placed at risk the effectiveness of that agreement.

(e) Notification of awards

9.169 International and institutional rules of arbitration generally make provision for the notification of the award to the parties. The UNCITRAL Rules provide, at Article 34(6), that ‘[c]opies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal’. However, no time limit is imposed within which this must be done. The position is similar under the ICSID Arbitration Rules, Rule 48(1) of which merely states that a certified copy of the award (including individual opinions and statements of dissent) will be sent to the parties ‘promptly’ when the last arbitrator has signed it. Article 34(1) of the ICC Rules provides that the Secretariat will notify the parties once an award has been made, provided that the costs have been fully paid.

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9.170 That party which expects to have won the case will invariably make it its business to obtain a copy of the award as soon as practicable, either directly from the arbitral tribunal or from the relevant arbitral institution. If that party has won, it will immediately communicate the award to the unsuccessful party. The time limit within which a party may apply to the appropriate court for recourse against the award often runs from the date of communication of the award and not from the making of the award itself. (207) If this were not so, the possibility of injustice would arise: the arbitral tribunal might make its award and then fail to communicate it to the unsuccessful party until after the time limit for recourse had expired. However, the position should be checked under the law of the place in which recourse may be sought, which is normally the place of arbitration.

(f) Registration or deposit of awards

9.171 In some countries, it may be necessary to register or deposit the award with the national court, generally on payment of an appropriate fee. (208) In other countries, registration for the purposes of recognition by the courts is optional. In some, it may be a necessary prelude to enforcement of a foreign award. In such cases, there may be an element of ‘double *exequatur*’, which has been strongly criticised by the ICC and by the draftsmen of the New York Convention, amongst others. (209) The principle on which the New York Convention is based is that the award needs only to be binding on the parties in

order for it to be enforceable. Nonetheless, registration is a matter that may affect the validity of the award if the mandatory provisions of the place in which the arbitration is held require it. (210) Where the requirement is mandatory, it *must* be deposited in order to protect the validity of the award.

9.172 Even when it is not mandatory, registration or deposit of an award may be desirable in order to put pressure on the unsuccessful party. In some cases, registration of the award is relevant for the purposes of the time limit within which any application for nullification of the award must be made. Although registration will not necessarily assist the successful party in relation to enforcement actions in other countries, it may protect the award from any further challenge in the country in which the arbitration took place.

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F Effect of Awards

(a) Res judicata

9.173 The basic principle of *res judicata* is that a legal right or obligation, or any facts, specifically put in issue and determined by a court or tribunal of competent jurisdiction cannot later be put back into question as between the same parties. (211)

9.174 Despite general recognition, the application of the principle of *res judicata* varies as between jurisdictions. In common law jurisdictions, the estoppel of *res judicata* broadly falls into two categories: cause-of-action estoppel, which prevents either party from relitigating the same action against the other; and issue estoppel, which prevents a party from questioning or denying an issue already decided in previous proceedings between the parties. Many civil law jurisdictions apply *res judicata* only as a cause-of-action estoppel, and the estoppel is said to attach only to the dispositive part of the judgment/award, not to the reasons. This is strictly applied in Switzerland, Germany, and Sweden, but less so in France, Belgium, the Netherlands, and Italy. (212)

9.175 Given the difficulties that can arise as a result of the varying interpretations of the principle of *res judicata*, the International Commercial Arbitration Committee of the International Law Association (ILA) set about creating a transnational body of rules that could be referred to as guidance, or adopted by the parties if they so choose, in international arbitrations. Since 2004, the Committee has published interim and final reports on *res judicata* and *lis pendens*, and, at the same time as its final report, the Committee adopted its Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration. (213) In setting forth a transnational approach, the Committee commented in its final report that:

Res judicata regarding international arbitral awards should not necessarily be equated to *res judicata* effects of judgments of state courts and, thus, may be treated differently than *res judicata* under domestic law. International arbitral awards in accordance with the Recommendations are to be treated differently than judgments. This is due to the differences between international arbitration and domestic court dispute settlement, as well as to the international character of arbitration, which should not be reduced to domestic notions regarding *res judicata* that are valid in a domestic setting but are hardly appropriate in an international context. (214)

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9.176 The doctrine of *res judicata* can be applicable in international arbitration in a variety of ways. Broadly, there are three different aspects of *res judicata*: first, the effect of an award on existing disputes between the parties; secondly, its effect on subsequent disputes between the parties; and thirdly, its effect on third parties.

(b) Existing disputes

9.177 As far as the parties themselves are concerned, it is clear that (subject to challenge before a competent court) the award disposes of those disputes between the parties that were submitted to arbitration. (215) This even extends to cases in which the arbitrators acted as *amiabiles compositeurs*. (216) If one party were to bring a court or arbitral action against the other in relation to the subject matter of the arbitration, based on the same cause of action between the same parties, the court or tribunal would dismiss the action on the ground that the issues had been disposed of and were *res judicata*. (217) In the United States, courts have often applied *res judicata* (also referred to as 'claim preclusion') to bar claims that could have been, but were not, asserted in a prior arbitral proceeding. However, if the award is deemed invalid and is set aside by a court of competent jurisdiction, the nullified award does not operate as *res judicata* in any subsequent proceedings. An example of this is the *Pyramids* arbitration, in which the claimant started an ICSID arbitration after the award in the ICC arbitration was nullified in the French courts. (218)

9.178 The ILA's Committee has endorsed this basic application of *res judicata*, which depends on the 'triple identity test' (the same parties, the same subject matter, and same claim for relief). In particular, Recommendation 3 of Part II of the ILA Recommendations provides as follows:

3. An arbitral award has conclusive and preclusive effects in further arbitral proceedings if:

- it has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of subsequent arbitration;

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- it has decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings;
- it is based upon a cause of action which is invoked in the further arbitration proceedings or which forms the basis for the subsequent arbitration proceedings; and
- it has been rendered between the same parties.

(c) Subsequent disputes

9.179 Where there are subsequent disputes between the same parties, more difficult questions arise. Because there is no doctrine of *stare decisis* in arbitration, the previous decision of an arbitral tribunal will not be binding on any subsequent disputes that arise between the same parties over different subject matter or a different cause of action (even if related). But it does not follow that a previous decision will necessarily be irrelevant to the resolution of a subsequent dispute between the same parties. It is necessary to consider the principle of issue estoppel. This precludes a party in subsequent proceedings from contradicting an issue of fact or the legal consequences of a fact that has already been raised and decided in earlier proceedings between the same parties, even if the causes of action in both proceedings are not identical. (219)

9.180 By way of example, the English Privy Council decided that, notwithstanding a confidentiality agreement concluded by the parties to an arbitration not to disclose material generated therein to third parties, an award rendered in that arbitration could be relied upon by one of the parties in a subsequent arbitration to found a plea of issue estoppel. The second arbitration took place between the same parties and concerned the same clause under the same reinsurance agreement as the first arbitration. In so finding, the Privy Council reasoned that relying on an issue estoppel in a subsequent arbitration was 'a species of the enforcement of the rights given by the [previous] award' and that this legitimate use of the earlier award was not a breach of the confidentiality agreement. (220) In the same way, US courts have also invoked principles of collateral estoppel, or 'issue preclusion', to exclude issues raised in litigation that were previously adjudicated fully and fairly during an arbitration, and vice versa. (221) ●

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9.181 The ILA Committee has endorsed the application of 'issue estoppel' in international arbitration, (222) including as Recommendations 4 and 5 of Part II of the ILA Recommendations as follows:

4. An arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to:

- Determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto;
- Issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.

5. An arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.

(d) Effect of award on third parties

9.182 An arbitral tribunal has no power to make orders or to give directions against someone who is not a party to the arbitration agreement, unless that party has in some way acquiesced in a manner that, without actually making him or her a party to the arbitration agreement, indicates an intention on his or her part to be bound by the award.

9.183 It follows that an award can neither directly confer rights nor impose obligations upon a person who is not a party to the arbitration agreement. For example, the award of an arbitral tribunal in the main arbitration between an employer and a contractor under a building contract does not have the effect of *res judicata* in respect of a claim for an indemnity by the contractor against its subcontractor in a subsequent arbitration. Although the facts in both arbitrations may be substantially the same, the second arbitral tribunal may come to a different conclusion from the first—and there is very little that the subcontractor can do apart from agreeing (with the consent of both parties to the main arbitration) to be joined as an additional party in the main arbitration. This gives the subcontractor the right to present evidence and argument in relation to any claims that affected it. (223)

9.184 Nonetheless, an award may often have a significant *indirect* effect on persons who were not parties to the arbitration. For example, a third party may be affected by an award where one person is jointly liable with another who is a party to the arbitration. The award would not be *res judicata* in any subsequent claim against that third party, but it should be of persuasive significance in that a tribunal is likely to consider the findings of the earlier award to inform its own findings. Conversely, it is possible that an award (even if unsatisfied) against one of the persons who was jointly liable would have the effect of discharging the third party's liability. Finally, where an award orders performance (for example in relation to the delivery of property by one of the parties), it is doubtful whether it is effective if the property concerned is temporarily in the hands of a third party under a licence.

9.185 In the United States, issue estoppel can, in certain circumstances, be relied upon in subsequent litigation involving a different party. (224) Further, in both the United States and England, certain parties that are closely linked to the original parties might be bound by an earlier award where the connection is close enough to establish privity between such parties. In an English case, the court held that a director of the claimant company was a privy of the company and therefore had an interest in the arbitration. (225) It has been argued in the international sphere that 'sister companies' constituting a single 'economic entity' should all be bound by the *res judicata* effect of an award involving one of those companies. (226) The ILC Committee noted, in its interim report, that ICSID tribunals have followed this 'single economic entity' analysis in relation to questions of jurisdiction, and asked whether it might also usefully be relied upon in relation to *res judicata* in order to prevent companies from a corporate group 'endlessly re-litigat[ing] the same dispute under the disguise of formally separate legal identities'. (227) However, for the time being, this approach has not been adopted and the ILC has made no recommendation in this regard.

G Proceedings after the Award

9.186 Exceptions to the general rule that an arbitral tribunal becomes *functus officio* on the issue of a final award arise from specific provisions of the national system of law governing the arbitration, from the parties' arbitration agreement, or from any rules of arbitration adopted by them. (228)

9.187 The 'interpretation', or 'clarification', of a final award is a different matter. The Model Law provides for interpretation of a specific point or a part of the award *only* when the parties agree that such a request should be made to the tribunal. (229) The problem with 'interpretation', as opposed to 'correction', of an award is that it risks giving the aggrieved party an opportunity to reopen the case.

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(a) Under national law

9.188 Many systems of national law with developed arbitral rules permit the correction of minor clerical or typographical errors in awards, either at the request of one or both of the parties, or by the arbitral tribunal on its own initiative. For example, in England, this power is conferred expressly by statute. Section 57 of the Arbitration Act 1996 provides:

- (1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.
- (2) If or to the extent there is no such agreement, the following provisions apply.
- (3) The tribunal may on its own initiative or on the application of a party:
 - (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
 - (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal. (230)

[...]

9.189 The US Federal Arbitration Act of 1925 (FAA) provides that the relevant district court may make an order modifying or correcting errors. (231) The grounds for modifying or correcting an award include 'evident material miscalculation', 'evident material mistake', and 'imperfect[ions] in a manner of form not affecting the merits'. (232) Similar provisions are contained in the arbitration statutes of many individual states in the United States, some of which also permit corrections and modifications on the initiative of the arbitral tribunal. Additionally, in some countries, the arbitral tribunal may complete the award where a determination of a claim, or ruling as to costs, has been omitted. (233)

(b) Under rules of arbitration

9.190 Exceptions to the general rule of *functus officio* vary considerably under different

sets of arbitration rules. The LCIA Rules contain an express power for the arbitral tribunal to correct accidental mistakes or omissions, but not to make interpretations of awards. (234) Prior to 1998, the ICC Rules did not mention either correction or interpretation. This was presumably on the basis that the process of scrutiny under ● Article 21 of the previous version of the Rules should be sufficient to ensure that all mistakes would be identified. However, the 2012 Rules contain the following provision:

On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award. (235)

9.191 Similarly, the SCC Rules contain an explicit provision granting the arbitral tribunal power to give a written interpretation of its award at the request of a party, in addition to the power to correct clerical errors:

Within 30 days of receiving an award, a party may, upon notice to the other party, request that the Arbitral Tribunal correct any clerical, typographical or computational errors in the award, or provide an interpretation of a specific point or part of the award. If the Arbitral Tribunal considers the request justified, it shall make the correction or provide the interpretation within 30 days of receiving the request. (236)

9.192 The UNCITRAL Rules contain powers for the arbitral tribunal to correct its award, issue additional awards, and interpret its award (if so requested) within narrow time limits. The *correction* of an award (normally in relation to clerical or typographical errors) may take place either at the request of the party or on the initiative of the arbitral tribunal itself. (237) Yet the arbitral tribunal may issue an interpretation only at the request of a party, not on its own initiative. (238) Similarly, the arbitral tribunal may issue an additional award only at the request of a party. (239) The purpose of the provision relating to additional awards is to ensure that the arbitrators may complete their mission if they have omitted from their award decisions in relation to any of the claims presented in the proceedings. Time limits for complying with each of these provisions are set out in the relevant Articles. In each case, the provisions of Article 34, relating to the formalities required in making an award, must be observed.

9.193 Where the arbitral tribunal is asked to issue an interpretation of its award, (240) whether under the UNCITRAL Rules or otherwise, (241) this may pose difficulties ● for the tribunal. Its members will have to recapitulate their thinking as best they can and clarify what is unclear—unless they take the view that the request is without substance and may be dealt with in a summary manner.

9.194 The ICSID Arbitration Rules go further than those of other arbitral institutions. They permit applications for the award to be interpreted and revised not only by the original arbitral tribunal, (242) but also, if that arbitral tribunal cannot be reconstituted, by a new one specially appointed for the purpose. (243) This is a cumbersome procedure, but it appears to be part of the price to be paid for the self-contained and autonomous nature of ICSID arbitrations, which means that even obvious errors may be corrected only within the system and not by an outside authority such as a national court. (244)

(c) Review procedures other than by national courts

9.195 Challenging awards in national courts is considered in Chapter 10. However, in a limited number of cases, there may be a prior review of awards by some other authority. The main instances in which this arises are as follows. First, in certain specialised types of arbitration, particularly in the commodity trades, there is usually provision for either party to appeal to a specially constituted arbitral appeals tribunal. (245) Secondly, in a small number of countries, parties may raise an objection to an award before a body other than a national court. One example is Saudi Arabia, where a party can submit an objection to the Committee for the Settlement of Commercial Disputes. Thirdly, in the ICC system, the award must not be signed by the arbitral tribunal until it has been scrutinised by the ICC Court. This provision, which has provoked some controversy, states:

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form. (246)

It calls for two different standards of review: the first is as to *form*, with respect to which the ICC Court may 'lay down' modifications; the second is as to points of *substance*, which the ICC Court may only 'draw to the attention' of the arbitrator.

9.196 The review of awards by the ICC Court causes concern to some arbitrators, who consider it unnecessary and time-consuming. It also arouses suspicion on the part of some parties, who fear that the case will be reviewed by a 'court' before which ● they have had no opportunity of presenting their cases. However, the Swiss Federal Court has ruled that this particular provision of the ICC Rules does not contravene Swiss law. By

adopting the Rules, the parties have agreed that the ICC Court should act as the auxiliary of the arbitral tribunal in relation to the form of the award and as adviser to the tribunal in relation to the substance of the award. (247)

9.197 The advantages and disadvantages of the ICC's scrutiny process were subject to extensive consultation and debate in the period preceding the formulation of the 2012 version of the ICC Rules. Overall, it was found that a substantial majority of arbitrators and other arbitral practitioners considered the scrutiny process to be valuable, and that the advantages outweighed the disadvantages. The ICC prides itself on the overall quality of ICC awards and the scrutiny process acts as a measure of quality control, (248) ensuring, amongst other things, that the arbitrators deal with all of the claims. These include interest and costs, with which the arbitrators are called upon to deal.

(d) Review of the award by way of settlement

9.198 After the award has been made, parties can also settle a dispute by voluntarily agreeing to vary the terms of the award themselves. In a study of the record of compliance with, and variation of, awards once rendered, it was found that more than 18 per cent had been renegotiated post-award to establish final settlement claims. (249) Citing even higher figures, another study found that 40 per cent of corporations negotiated a settlement after the arbitral award was rendered. (250) Accordingly, it seems that parties commonly conclude the matter by entering into a negotiation either to establish terms of payment or to establish a new settlement, using the award as a bargaining tool.

(e) Publication of awards

9.199 A conflict emerged during the 1990s between the 'inherent confidentiality' of the arbitral process and the desire for publication of awards in the interests of establishing a body of precedent that might guide—if not bind—other arbitrators. The prevailing trend appears to favour publication. Awards of the Iran–United States Claims Tribunal have been comprehensively reported and have been used for guidance in other arbitrations. P 568 The ICDR Rules provide that, unless otherwise agreed ● by the parties, selected awards may be made publicly available, with the names of the parties and other identifying features removed. There are other circumstances in which, even without the consent of the parties, an award may find its way into the public domain. This may occur, for example, during court proceedings to challenge or enforce an award, (251) or when a publicly quoted corporation is obliged to disclose in its published accounts material information relating to its liabilities. (252)

9.200 In a less official context, in a form of post-Soviet legal *samizdat*, (253) it is becoming increasingly common for awards rendered in investment treaty arbitrations to be circulated via email and the Internet between practitioners and academics active in the field. During the second decade of the twenty-first century, online communities sprung up to exchange information and views on matters related to arbitration and international law. One of the most prominent among these is the Oil Gas Energy Mining Infrastructure Dispute Management (OGEMID) email list. (254)

9.201 Together with other similar forums, (255) OGEMID informally introduced an era of greater (although haphazard) transparency within the world of international arbitration. The advantages and disadvantages of transparency versus confidentiality continue to be debated within the international arbitration community, with many drawing a distinction between investment treaty arbitration and commercial arbitration arising between parties to private contracts.

9.202 Further, after several years of debate, UNCITRAL completed its deliberations on transparency in 'treaty-based investor-state arbitrations' in July 2014. This should herald a new—and significantly changed—era concerning not only the awards in such arbitrations, but also the written memorials and evidence submitted to international arbitral tribunals. At the time of writing, it is too early to predict the extent to which this will result in a new level of transparency in treaty-based investor-state arbitrations; and whether, in the medium or long term, the trend towards greater transparency will be extended to international arbitrations between private commercial parties.

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References

- 1) ICC Rules, Art. 34(6).
- 2) The authors recommend use of the term 'partial awards', rather than 'interim', or 'provisional', awards. The latter terms, particularly in the civil law context, can be interpreted to mean that such awards are not final, when they are indeed final; there is nothing 'provisional' about an award rendered before the conclusion of the arbitration.

- 3) Some modern arbitration statutes make a specific distinction between interim, partial, and final awards. The Netherlands Arbitration Act 1986, s. 1049, provides that: 'The arbitral tribunal may render a final award, a partial award, or an interim award.' The commentary on this article by Sanders and van den Berg, *The Netherlands Arbitration Act 1986* (Kluwer International Law, 1987) suggests that: partial awards are given in respect of substantive issues that are separated, such as liability and quantum; interim awards are given on jurisdictional issues; and simple orders are made in respect of procedural issues. The Swiss Private International Law Act 1987 (Swiss PIL), Ch. 12, provides for 'preliminary awards' in relation to jurisdictional issues in s. 186(3), while 'partial awards' that finally determine the issue are provided for in s. 188: see Geisinger, *International Arbitration in Switzerland: A Handbook for Practitioners* (2nd edn, Wolters Kluwer, 2013), pp. 226–227.
- 4) The English Arbitration Act 1996, s. 39, is an exception to this general rule in granting a power to make 'provisional awards' if the parties agree that the arbitral tribunal shall have such power. Interestingly, s. 39 mentions the word 'award' only in the marginal note and the body of the section refers to 'orders'. Whether such orders are enforceable under the New York Convention is questionable and would be a matter for the courts of the country in which enforcement is sought: see Hunter and Landau, *The English Arbitration Act 1996: Text and Notes* (Wolters Kluwer, 1998), p. 35.
- 5) See, e.g., ICC Rules, Art. 41.
- 6) And of arbitration agreements: see [Chapter 2](#).
- 7) Broches, 'Recourse against the award; Enforcement of the award: UNCITRAL's Project for a Model Law on International Commercial Arbitration' (1984) 2 ICCA Congress Series 201, at 208.
- 8) Model Law, Art. 16(3).
- 9) Some commentators have suggested that a 'preliminary award' may be treated as 'provisional'. However, this concept seems to be fraught with peril; the authors suggest that any decision that is *not* finally determinative of the issues with which it deals should not be described as an 'award'.
- 10) If a party is aggrieved by a procedural order or direction, it is sensible for that party to make a formal protest. In this way, it will reserve the position in case it emerges, at a later stage, that the ruling in question has, e.g., denied that party a proper opportunity to present its case or to respond to the case submitted by the opposing party.
- 11) *Braspetro Oil Services Co. v The Management and Implementation Authority of the Great Man-Made River Project*, Paris Cour d'Appel, 1 July 1999, (1999) 14 Mealey's Intl Arb Rep 8, at [G-1]–[G-7].
- 12) For a commentary on this decision, see Gill, 'The definition of award under the New York Convention' (2008) 2 Disp Res Intl 114, at 119, in which the author writes that 'the court found that the "procedural order" was effectively an award because it settled a substantive issue between the parties. The tribunal was exercising its jurisdictional power and its decision was therefore an award'.
- 13) *Braspetro Oil Services Co. v The Management and Implementation Authority of the Great Man-Made River Project*, Paris Cour d'Appel, 1 July 1999, (1999) XXIVa YBCA 297, at [1]–[4].
- 14) *Groupe Antoine Tabet v République du Congo*, Case No. 09-72.439, Cass. Civ. 1ere, 12 October 2011, n.p.
- 15) *Publicis Communications and Publicis SA v True North Communications Inc.* (2000) XXV YBCA 1152.
- 16) *Ibid.*, at [4].
- 17) *Ibid.*, at [9]. For a commentary on this decision, see Murphy, 'Enforceability of foreign arbitral decisions' (2001) 67 Arbitration 369, at 371, in which the author concludes that:

[T]his decision has clearly announced that all orders or awards made in the arbitral process are capable of recognition and enforcement abroad by means of the New York Convention, so long as the finality test is satisfied ... when rendering any decision, it may be prudent to determine whether or not the issue is being dealt with finally, to recite that in the decision and, despite the approach of the Seventh Circuit, to label the decision or order as an award to ensure that no argument of form over substance can take place.
- 18) See also LCIA Rules, Art. 32.2.
- 19) For example, ICC Rules, Art. 37(3); UNCITRAL Rules, Art. 40.
- 20) ICC Rules, Art. 33.
- 21) For further discussion of interpretation, correction, and revision of awards, see paragraphs 9.200ff.
- 22) See [Chapter 10](#), paragraphs 10.02, 10.08 and 10.64.
- 23) See, e.g., UNCITRAL Rules, Art. 34(2).

- 24) See the discussion of enforceability of partial awards in the United States in von Mehren, 'The enforcement of arbitral awards under conventions and United States law' (1985) 9 *Yale Journal of World Public Order* 343, at 362. The approach of the case that von Mehren cites, *Sperry International Trade, Inc. v Government of Israel* 532 F.Supp. 901 (SDNY 1982), continues to be followed for its proposition that partial awards disposing of issues separable from those that continue to be disputed are final for the purposes of judicial review and enforcement:

The New York Convention, the United Nations arbitration rules, and the commentators' consistent use of the label 'award' when discussing final arbitral decisions does not bestow transcendental significance on the term. Their treatment of 'award' as interchangeable with final does not necessarily mean that synonyms such as decision, opinion, order, or ruling could not also be final. The content of a decision—not its nomenclature—determines finality.

See also, e.g., *Santos v GE Co. No. 10 Civ. 6948*, 2011 US Dist. LEXIS 131925 (SDNY 2011), at [14]–[15]; *Yonir Techs, Inc. v Duration System (1992) Ltd* 244 F.Supp.2d 195, 204 (SDNY 2002). '[T]hese authorities suggest that, regardless of whether the form of the arbitral measure (e.g., an award or order) resembles a final award, if the substance of the measure serves a discrete function and effects a final disposition of a particular issue, the interim measure is confirmable and enforceable': Sherwin and Rennie, 'Interim relief under international arbitration rules and guidelines: A comparative analysis' (2009) 20 *Am Rev Int'l Arb* 318, at 326.

- 25) See, e.g., UNCITRAL Rules, Art. 26 ('Interim measures').
- 26) ICC Rules, Art. 2(v).
- 27) For further discussion of partial awards in ICC arbitrations, see ICC, *Final Report on Interim and Partial Awards of a Working Party of the ICC's Commission on International Arbitration* (1990) 2 *ICC International Court of Arbitration Bulletin* 26, at 30, in particular the discussion about terminology. The term 'interlocutory award' should never be used, because it leads to confusion with procedural directions, which are not given in the form of an award.
- 28) LCIA Rules, Art. 26(7).
- 29) Model Law, Art. 32(1). See Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law, 1989), p. 868. The Model Law, Ch. IVA, does, however, expressly refer to interim measures and preliminary orders.
- 30) It was perhaps to avoid uncertainty in this respect that some jurisdictions amended the Model Law to provide specifically so that the arbitral tribunal may make a partial award on any matter on which it may make a final award: see, e.g., the British Columbia International Commercial Arbitration Act, s. 31(6).
- 31) See paragraph 9.18.
- 32) In the United States, a partial award for the payment of freight was 'confirmed' by a court while there were still outstanding matters in dispute in the arbitration: *Metallgesellschaft AG v M/V Capitan Constante and Yacimientos Petroliferos Fiscales* 790 F.2d 280 (2nd Cir. 1986). The majority judgment lists cases endorsing the 'proposition that an award which finally and definitely disposes of a separate independent claim may be confirmed although it does not dispose of all the claims that were submitted to arbitration': *ibid.*, at [3]. However, the dissent of Feinberg CJ noted the dangers of piecemeal review of arbitral awards. Since then, case law has followed the separability rule of the majority: see, e.g., *In re Chevron USA, Inc.* Case No. 08-08-00082-CV, 2010 Tex. App. LEXIS 459 (8th Cir. 2010), at [19]–[20]; *Zeiler v Deutsch* 500 F.3d 157, 168 (2nd Cir. 2007); *Hart Surgical, Inc. v Ultracision Inc.* 244 F.3d 231 (1st Cir. 2001); *Publicis Communication v True North Communications Inc.* 206 F.3d 725, 727 (7th Cir. 2000).
- 33) Model Law, Art. 16(3).
- 34) See paragraphs 9.11–9.15.
- 35) See Chapter 6, paragraphs 6.54ff.
- 36) Except in relation to issues of jurisdiction, where the respondent has not raised them, or has elected not to participate, as in *Liberian Eastern Timber Corporation v Government of the Republic of Liberia* (1987) 26 *ILM* 647, in which the government nominated one of the authors as an arbitrator, but then refused to take part in the proceedings, and the arbitral tribunal examined its jurisdiction—as required by the ICSID Arbitration Rules, r. 42(4)—and issued a partial award.
- 37) Indian Foreign Awards (Recognition & Enforcement) Act 1961, s. 2.
- 38) *RM Investment & Trading Company v Boeing Company*, 1994 (4) *SCC* 541, (1997) *XXII Ybk Comm Arb* 711.
- 39) For a discussion of the procedure to be followed where one party fails or refuses to participate in an arbitration, see Chapter 6.
- 40) See UNCITRAL Rules, Art. 39; LCIA Rules, Art. 27; International Dispute Resolution Procedures (International Arbitration), Art. 30; Stockholm Chamber of Commerce (SCC) Rules, Art. 42; English Arbitration Act 1996, s. 57(3)(b); Model Law, Art. 33(1)(b).
- 41) See, e.g., ICSID Rules, r. 49(2).
- 42) ICC Rules, Art. 35.

- 43) This follows from the consensual nature of arbitration: see [Chapter 5](#), paragraph 5.33.
- 44) Emphasis added.
- 45) See, e.g., ICC Rules, Art. 32.
- 46) *Lesotho Highlands Development Authority v Impregilo SpA and ors* [2003] EWCA Civ 1159.
- 47) *Lesotho Highlands Development Authority v Impregilo SpA and ors* [2005] UKHL 43.
- 48) Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), p. 651.
- 49) *British Airways Board v Laker Airways Ltd* [1985] AC 58 (HL).
- 50) See paragraphs 9.49ff. It would lead to an absurd result if an arbitral tribunal applying US antitrust law could determine the issue of liability under that law, but not award the mandatory remedy provided for in that law. The point was considered by a US court in *PPG Inc v Pilkington Plc* (1995) XX YBCA 885.
- 51) In ICC Case No. 5946 (1991) XVI YBCA 97, at 113, an ICC arbitration held in Geneva, a claim was made for exemplary damages, but this claim was refused on the basis that:
- ... damages that go beyond compensatory damages to constitute a punishment of the wrongdoer ... [punitive or exemplary damages], are considered contrary to Swiss public policy, which must be respected by an arbitral tribunal sitting in Switzerland even if the arbitral tribunal must decide a dispute according to a law that may allow punitive or exemplary damages as such: see Art 135(2) Switzerland's Federal Code on Private International Law of December 1987, which refuses to allow enforcement of a judgment awarding damages that cannot be awarded in Switzerland ...
- 52) See *Rookes v Barnard* [1964] AC 1129. The three categories are: (a) abuse of power by servants of the government; (b) conduct that was motivated by the pursuit of profits; and (c) where punitive, or 'exemplary', damages expressly authorised by statute.
- 53) For contract cases, see *Addis v Gramophone Co. Ltd* [1909] AC 488, with exceptions to the general rule at 495. For actions in tort, see *Rookes v Barnard* [1964] AC 1129, [1967] 1 Lloyd's Rep 28 (HL).
- 54) Examples of statutes that provide for multiple damages in the United States are the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO) and antitrust laws that provide for triple damages.
- 55) *Garrity v Lyle Stuart Inc.* 40 NY 2d 354, 353 NE 2d 793 (1976).
- 56) *Willoughby Roofing Supply Co. v Kajima International Inc.* 776 F.2d 269 (11th Cir. 1985), in which an arbitral award of punitive damages for wilful fraud in the inducement of a contract was upheld; *Mitsubishi v Soler Chrysler-Plymouth Inc.* 473 US 614 (1985), in which arbitral awards of statutory treble damages were approved for antitrust violations.
- 57) Reymond, 'The *Rainbow Warrior* arbitration between Greenpeace and France' (1992) 9 J Intl Arb 92, at 93.
- 58) *Bundesgerichtshof* (Neue Juristische Wochenschrift, 1992), at 3096ff. The Court has affirmed it in two more recent decisions: BVerfG, Beschluß vom 24.01.2007—2 BvR 1133/04; BVerfG, Beschluß vom 14.06.2007—2 BvR 2247/06.
- 59) Similarly, Dutch courts have held that a judgment to pay punitive damages cannot be recognised and enforced in the Netherlands without further enquiry: see the decision of the District Court of Rotterdam, 17 February 1995, [1996] NIPR 205, at 207.
- 60) For a comprehensive review of the powers of arbitrators to award punitive damages, see Gotanda, *Supplemental Damages in Private International Law* (Kluwer Law International, 1998), pp. 226–229.
- 61) While neither the US Federal Arbitration Act of 1925 (FAA) nor the Uniform Arbitration Act of 1955, as amended (UAA), expressly specifies the remedies available in international arbitrations taking place in the United States (e.g. the UAA, § 21, empowers arbitrators to 'order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding'), courts have confirmed that arbitrators have the power to award specific performance even if the arbitration agreement does not specify this remedy: see, e.g., *Brandon v MedPartners Inc.* 203 FRD 677, 686 (SD Fla. 2001).
- 62) English Arbitration Act 1996, s. 48(5)(b).
- 63) Lew, Mistelis, and Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), p. 650.
- 64) English Arbitration Act 1996, s. 48(5)(a).
- 65) *Cambodia v Thailand* [1962] ICJ Rep 6.
- 66) *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v Poland)* (the Chorzów Factory case) [1928] PCIJ Series A No. 17, at 47 (emphasis added).
- 67) *Texas Overseas Petroleum Co. and California Asiatic Oil Co. (Texaco) v Government of the Libyan Arab Republic* (1978) 17 ILM 3.
- 68) *Ibid.*, at 36.
- 69) *British Petroleum Co. (Libya) Ltd v Government of the Libyan Arab Republic* (1979) 53 ILR 297.

- 70) This impracticability was recognised by the parties in the *Aminoil* arbitration: *Government of the State of Kuwait v American Independent Oil Co. (Aminoil)* (1982) 21 ILM 976. To avoid any doubt, it was specifically agreed in that case that restitution was not sought.
- 71) The Libyan government boycotted the proceedings throughout, after claiming that the dispute was not arbitrable because the acts of nationalisation were acts of sovereignty.
- 72) *Texas Overseas Petroleum Co. and California Asiatic Oil Co. (Texaco) v Government of the Libyan Arab Republic* (1978) 17 ILM 3, at 8.
- 73) *Saudi Arabia v Arabian American Oil Co. (Aramco)* (1963) 27 ILR 117.
- 74) Decision on Provisional Measures, ICSID Case No. ARB/06/11, 17 August 2007, IIC 305 (2007).
- 75) IIC 305 (2007).
- 76) In this regard, see Rubins, 'Must the victorious investor-claimant relinquish title to expropriated property?' (2003) 4 JWIT 3, at 481; *CMS Gas Transmission Co. v Argentine Republic*, Award, ICSID Case No. ARB/01/08, 12 May 2005, IIC 65 (2005).
- 77) See, e.g., ICC Rules, Art. 28; UNCITRAL Rules, Art. 26. See paragraphs 7.22ff.
- 78) *Bhatia International v Bulk Trading S.A.* (2002) 4 SCC 105.
- 79) [2008] INSC 40.
- 80) *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552.
- 81) See, e.g., the English Arbitration Act 1996, s. 48(3); LCIA Rules, Art. 22(1)(g) (granting tribunals the express power to rectify).
- 82) For further discussion of this arbitration, see [Chapter 3](#).
- 83) The original concession was granted by King Saud of Saudi Arabia in 1933, for a period of sixty years.
- 84) *Saudi Arabia v Arabian American Oil Co. (Aramco)* (1963) 27 ILR 117, at 145.
- 85) English Arbitration Act 1996, s. 48(5)(c). See also the discussion of the scope of the arbitration clause and adaptation and filling gaps in Chapter 2, paragraphs 2.63ff.
- 86) Provided that it is not unlawful or contrary to public policy.
- 87) *F & G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep 53. See also Veeder, 'England', in Paulsson and Bosman (eds) *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International, 1984).
- 88) *Mamidoil-Jetoil Greek Petroleum Co. SA v Okta Crude Oil Refinery AD* [2001] 2 All ER (Comm) 193, at 215.
- 89) Levy, 'L'interprétation arbitrale' (2013–14) 4 Rev Arb 861.
- 90) Available online at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>.
- 91) Such as those taught by the Program on Negotiation at Harvard Law School.
- 92) The exceptions to this are arbitrations in which Islamic law may be applicable and in respect of which the law against usury (*riba*) may prevent the levying of interest: see Saleh, 'The recognition and enforcement of foreign arbitral awards in the states of the Arab Middle East', in Lew (ed.) *Contemporary Problems in International Arbitration* (CCLS/Kluwer, 1986), pp. 348–349. See, however, the decision of the English courts in *Sanghi Polyesters Ltd (India) v The International Investor KCFC (Kuwait)* [2000] 1 Lloyd's Rep 480, which suggests that, in some Islamic jurisdictions, interest may be awarded under another name.
- 93) Veeder, 'Whose arbitration is it anyway: The parties' or the arbitration tribunal's? An interesting question?', in Newman and Hill (eds) *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, Juris, 2008), p. 344. See also Brower and Sharpe, 'Awards of compound interest in international arbitration: The *Aminoil* non-precedent' (2006) 3 TDM 5.
- 94) Saleh, 'The recognition and enforcement of foreign arbitral awards in the states of the Arab Middle East', in Lew (ed.) *Contemporary Problems in International Arbitration* (CCLS/Kluwer, 1986), pp. 348–349.
- 95) Exceptionally, the LCIA Rules, Art. 26(6), provides that the arbitral tribunal may award compound interest not limited to the period up to the date of the award. For a discussion of compound interest, see paragraphs 9.76ff.
- 96) See Gotanda, 'Awarding interest in international arbitration' (1996) 90 Am J Intl L 40, at 50ff; Gotanda, 'A study of interest', Villanova University School of Law Working Paper Series No. 83 (August 2007), available online at <http://digitalcommons.law.villanova.edu/wps/art83/>, pp. 3ff.
- 97) See, e.g., the English Arbitration Act 1996, s. 49.
- 98) Accordingly, under German conflict-of-laws rules, if an arbitral tribunal sitting in Germany were to conclude that the substantive law of the contract was English, it would apply not only those rules of English law governing interest that English law classifies as substantive, but also those rules that English law classifies as procedural, because a court of arbitral tribunal sitting in Germany would classify such *procedural* rules as being of a *substantive* nature for this purpose.
- 99) English Arbitration Act 1996, s. 49(3). Almost identical provisions are found in the Irish Arbitration (International) Commercial Act 1998, s. 10(2).
- 100) Australian International Arbitration Acts 1974–1989, ss 25(1) and 26; equivalent provisions are also found in the Maltese Arbitration Act 1996, ss 63(1) and 64.

- 101)** Hong Kong Arbitration Ordinance 1997, Ch. 341, ss 2GH and 2GI; Indian Arbitration and Conciliation Act 1996, s. 31(7)(a) and (b); Singapore International Arbitration Act (Ch. 143A) 2002, ss 12(5)(b) and 20.
- 102)** As Professor Park observed in his 2002 Freshfields Lecture, there are, in theory, three kinds of arbitrator—namely, those who can count and those who cannot: see Park, ‘Arbitration’s Protean nature: The value of rules and the risks of discretion’ (2003) 19 *Arb Intl* 279.
- 103)** For the avoidance of doubt, compounding interest involves capitalising interest and accruing further interest on such capitalised interest. The difference between simple and compound interest can be significant where the amount in dispute is large and the time periods involved are lengthy.
- 104)** Arnaldez, Derains, and Hascher, *Collection of ICC Arbitral Awards 1991–1995* (Kluwer Law International, 1997), p. 459.
- 105)** Official Records of the General Assembly, F50, 6th Session, Supplement No. 10 (AR/56/10), Ch. IV, E.1.
- 106)** *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (2000) 39 ILM 1317, at [103].
- 107)** *Wena Hotels Ltd v Egypt*, Award, ICSID Case No. ARB/98/4; IIC 273 (2000), (2002) 41 ILM 896.
- 108)** With respect to NAFTA claims, see *Pope Talbot v Government of Canada*, Award on Damages, Ad hoc UNCITRAL, IIC 195 (2002); *SD Myers Inc. v Government of Canada*, Second Partial Award, Ad hoc UNCITRAL, IIC 250 (2002). Other awards include *Middle East Cement Shipping and Handling G SA v Arab Republic of Egypt*, Award, ICSID Case No. ARB/99/6, IIC 169 (2002); *CME Czech Republic BV v Czech Republic*, Final Award and Separate Opinion, Ad hoc UNCITRAL, IIC 62 (2003); *Azurix Corporation v Argentine Republic*, Award, ICSID Case No. ARB/01/12, IIC 24 (2006); *ADC Affiliate Ltd, ADC & ADMC Management Ltd v Republic of Hungary*, Award, ICSID Case No. ARB/03/16, IIC 1 (2006); *Siemens AG v Argentine Republic*, Award, ICSID Case No. ARB/02/8, IIC 227 (2007); *LG&E Energy Corporation, LG&E Capital Corporation, and LG&E International Inc. v Argentine Republic*, Award, ICSID Case No. ARB/02/1, IIC 295 (2007). All of these decisions are in the public domain and can be found online at <http://icsid.worldbank.org>.
- 109)** Iran–US CTR 122, 269 (1983).
- 110)** Gotanda, ‘Awarding interest in international arbitration’ (1996) 90 *Am J Intl L* 40, at 61.
- 111)** See paragraphs 9.81–9.82.
- 112)** For a comprehensive review of the power of arbitrators to award post-award interest, see Gotanda, *Supplemental Damages in Private International Law* (Kluwer Law International, 1998), pp. 85–93.
- 113)** UNCITRAL Rules, Art. 40(1) and (2).
- 114)** ICC Rules, Art. 37(1).
- 115)** ICDR Rules, r. 34.
- 116)** SCC Rules, Arts 43 and 44.
- 117)** SIAC Rules, Art. 31(1) and (2).
- 118)** LCIA Rules, Art. 28(1).
- 119)** UNCITRAL Rules, Art. 41(3) and (4).
- 120)** See Gotanda, *Supplemental Damages in Private International Law* (Kluwer Law International, 1998), p. 191.
- 121)** UNCITRAL Rules, Art. 40.
- 122)** ICC Rules, Art. 37(1).
- 123)** LCIA Rules, Art. 28(4).
- 124)** In one UNCITRAL case in the late 1990s, the hourly rate claimed for a senior partner in a New York law firm was more than double the hourly rate of a senior partner of a New Orleans firm.
- 125)** UNCITRAL Rules, Art. 40.
- 126)** SCC Rules, Art. 43(4).
- 127)** ICC Rules, Art. 37(3).
- 128)** Separate opinion of Judge Holtzmann, reported in [1985] *Iranian Assets Litigation Reporter* 10860, at 10863; (1985) 8 Iran–US CTR 329, at 332–333.
- 129)** For a detailed review of the practices of the Iran–United States Claims Tribunal, see van Hof, *Commentary on the UNCITRAL Arbitration Rules* (Kluwer Law International, 1991), pp. 293–311.
- 130)** For example, see *Yukos Universal Ltd (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, UNCITRAL, 18 July 2014, at [1887].
- 131)** Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2014), p. 3087.
- 132)** For a comprehensive review of the practices of international tribunals concerning the award of costs, see Gotanda, *Supplemental Damages in Private International Law* (Kluwer Law International, 1998), pp. 173–192.
- 133)** Lord Bingham, *The Business of Judging* (Oxford University Press, 2000), p. 4.
- 134)** Fortier, ‘The tribunal’s deliberations’, in Newman and Hill (eds) *The Leading Arbitrators’ Guide to International Arbitration* (2nd edn, Juris, 2008), pp. 479–480.
- 135)** French Civil Code, art. 1479, states: ‘Les délibérations du tribunal arbitral sont secrètes.’

- 136)** French Civil Code, art. 1468, states: 'Le tribunal arbitral fixe la date à laquelle le délibéré sera prononcé. Au cours du délibéré, aucune demande ne peut être formée, aucun moyen soulevé et aucune pièce produite, si ce n'est à la demande du tribunal arbitral.'
- 137)** Bredin, 'Le secret du délibéré arbitral', in *Études Offertes à Pierre Bellet* (Litec, 1991).
- 138)** De Boissésou, *Le Droit Français de l'Arbitrage National et International* (Joly, 1990), p. 296. See also the comment in Robert, *L'Arbitrage: Droit Interne, Droit International Privé* (5th edn, Dalloz, 1983), para. 360 (authors' translation): 'Although it is practised according to a certain number of foreign laws, notably Anglo-Saxon, the dissenting opinion is prohibited in French domestic law since it violates the secrecy of the tribunal's deliberation ... ' Under German law, unless provided otherwise by the arbitration agreement, deliberations are secret: see *Münchener Kommentar zur Zivilprozessordnung: ZPO*, § 1052 Rn 1-5.
- 139)** *Czech Republic v CME Czech Republic BV*, Case No. T 8735-01, Svea Court of Appeal, IIC 63 (2003). An English translation of the judgment can be found online at <http://italaw.com/sites/default/files/case-documents/ita0182.pdf>; a case summary is available at [2003] Stockholm Arb Rep 167.
- 140)** *Czech Republic*, in the English translation, at 87; in the case summary, at 180.
- 141)** See Gaillard and Savage (eds) *Fouchard, Gaillard, and Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), para. 1374.
- 142)** Sir Robert Jennings, Decision of 7 May 2001, at 7. A summary of the decision was published at (2001) 16 Mealey's Int Arb Rep 2. The full text is available for purchase from Mealey's online.
- 143)** *Economy Forms Corporation v Islamic Republic of Iran*, Award, Case No. 55-165-1, 13 June 1983, quoted in Schwebel, 'The majority vote of an arbitral tribunal' (1991) 2 Am Rev Intl Arb 402, at 409.
- 144)** Mosk and Ginsburg, *Dissenting Opinions in International Arbitration* (Liber Amicorum Bengt Broms, 1999), p. 275.
- 145)** See [Chapter 5](#), paragraphs 5.79ff.
- 146)** Indeed, this is a material part of the duties of party-nominated arbitrators. A party-nominated arbitrator should do his or her best to ensure that he or she understands the case being put forward by the party that nominated him or her and should seek to make sure that the arbitral tribunal as a whole is in the same position. It is, of course, necessary for party-nominated arbitrators to consider carefully the merits of the arguments on both sides and not to be seen as favouring appointing parties. For further discussion of this subject, see Smith, 'Impartiality of the party-appointed arbitrator' (1990) 6 Arb Intl 320.
- 147)** UNCITRAL Rules, Art. 11.
- 148)** Strasbourg Uniform Law, Annex I, Art. 22(3).
- 149)** (1977) II YBCA 172, at 194.
- 150)** *Ibid.*, at 208.
- 151)** An arbitral tribunal has no mandate to return a verdict of *non liquet*. See, e.g., ICSID Convention, Art. 42(2). Therefore, if it is not possible to form a majority, the proper course is for the arbitrators to resign and for a replacement tribunal to be appointed. For an example in which this occurred, see *Tokios Tokelés v Ukraine*, Decision on Jurisdiction, ICSID Case No. ARB/02/18, 29 April 2004.
- 152)** ICC Rules, Art. 31(1). In such a case, the presiding arbitrator's role is very similar, but not identical, to that of an umpire. The difference is that an umpire is not required to make a decision unless and until the arbitrators appointed by the parties disagree. If they disagree, they take no further part in the proceedings and the umpire proceeds as if he or she were sole arbitrator.
- 153)** LCIA Rules, Art. 26(3); Swiss PIL, Ch. 12, s. 189; English Arbitration Act 1996, s. 20(3)-(4); Swiss Rules, Art. 31(1).
- 154)** LCIA Rules, Art. 26(3).
- 155)** ICSID Convention, Art. 48(1).
- 156)** ICSID Convention, Art. 42(2).
- 157)** Note D to Arbitration Rule 47 of 1968, (1968) 1 ICSID Reports 108.
- 158)** Article 57 of the ICJ Statute is generally interpreted as permitting the practice of giving separate opinions: see Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2014), pp. 3052-3053.
- 159)** Alabama Claims of the United States of America against Great Britain, Award rendered on 14 September 1872 by the Tribunal of Arbitration established by Article I of the Treaty of Washington of 8 May 1871. For a discussion of the proceedings, see Cushing, *The Treaty of Washington: Its Negotiation, Execution, and the Discussions Relating Thereto* (Harper & Bros, 1873).
- 160)** ICJ Statute, Art. 57.

- 161)** See, e.g., Redfern, 'Dissenting opinions in international commercial arbitration: The good, the bad and the ugly' (2004) 20 Arb Intl 223, at 236, arguing that dissenting opinions are unwelcome in international commercial arbitration, because:
- It is the *decision* which matters; and it matters *not* as a guide to the opinions of a particular arbitrator, or as an indication of the future development of the law, but because it resolves the particular dispute that divides the parties; and it resolves that dispute as part of a private, not public, dispute resolution process that the parties themselves have chosen.
- 162)** Blessing, 'The new International Arbitration Law in Switzerland' (1988) 5 J Intl Arb 9, at 66.
- 163)** At the time of writing, the Netherlands was updating its 1986 Act.
- 164)** Sanders and van den Berg, *The Netherlands Arbitration Act 1986* (Kluwer Law and Taxation, 1987), p. 33.
- 165)** Cass. Soc. 9 November 1945, Gaz. Pal. 1946 1.22. Note, however, Professor Bredin's comment that legal opinion on this point seems to be divided: Bredin, 'Le secret du délibéré arbitral', in *Études Offertes à Pierre Bellet* (Litec, 1991), p. 71.
- 166)** ICSID Arbitration Rules, r. 47(3); ICSID Convention, Art. 48(4).
- 167)** See, e.g., *Bank Mellat v GAA Development Construction Co.* [1988] 2 Lloyd's Rep 44, per Steyn J, (1990) XV YBCA 521.
- 168)** Discussed further in paragraph 9.202. Article 33 of the ICC Rules provides that no award shall be rendered by the arbitral tribunal until it has been approved by the ICC Court.
- 169)** ICC, *Final Report of the Working Party on Dissenting Opinions* (1991) 2 ICC International Court of Arbitration Bulletin 32.
- 170)** Decision of 7 May 2001, at 7.
- 171)** *Grainger Associates v Islamic Republic of Iran* (1987) 16 Iran-US CTR 317.
- 172)** Lévy, 'Dissenting opinions in international arbitration in Switzerland' (1989) 5 Arb Intl 35, at 35.
- 173)** This question was asked and answered in Alan Redfern's 2003 Queen Mary College/Freshfields Lecture: Redfern, 'Dissenting opinions in international commercial arbitration: The good, the bad and the ugly' (2004) 20 Arb Intl 223.
- 174)** ICSID Arbitration Rules, r. 46.
- 175)** De Boissésou, *Le Droit Français de l'Arbitrage National et International* (Joly, 1990), p. 802 (author's translation).
- 176)** Mosk and Ginsburg, *Dissenting Opinions in International Arbitration* (Liber Amicorum Bengt Broms, 1999), p. 275. See also De Boissésou, *Le Droit Français de l'Arbitrage National et International* (Joly, 1990), p. 802.
- 177)** See [Chapter 5](#).
- 178)** Cremades, 'The arbitral award', in Newman and Hill (eds) *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, Juris, 2008), p. 500.
- 179)** Or, exceptionally, if the parties have agreed to subject the arbitration to the law of a 'foreign' country, in the courts of that country.
- 180)** See [Chapter 11](#), paragraphs 11.55ff.
- 181)** Beresford-Hartwell, 'The reasoned award' (1988) 54 Arbitration 36, at 44.
- 182)** UNCITRAL Rules, Art. 34. See also Swiss Rules, Art. 32.
- 183)** Swiss Code of Civil Procedure, Pt III, art. 384.
- 184)** Swiss PIL, Ch 12, s. 189.
- 185)** Ibid.
- 186)** See Paulsson and Bosman (eds) *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International, 1984).
- 187)** This situation does not apply to countries such as Switzerland, which require an award to be signed, but allow for the signature of the majority or the presiding arbitrator, as the case may be: Swiss PIL, Ch. 12, s. 189(2); Swiss Rules, Art. 32(4).
- 188)** Dubai Court of Cassation, Petition No. 156/2009.
- 189)** ICC Rules, Art. 31(1).
- 190)** LCIA Rules, Art. 26(4).
- 191)** See, e.g., United Nations Economic Commission for Europe (UNECE) Arbitration Rules for Certain Categories of Perishable Agricultural Products, Art. 29.
- 192)** New York Convention, Art. IV(2).
- 193)** See, e.g., UNCITRAL Rules, Art. 40; ICC Rules, Art. 37; LCIA Rules, Art. 28(2).
- 194)** See, e.g., UNCITRAL Rules, Art. 34(3); ICSID Arbitration Rules, r. 47(1)(i).
- 195)** For further discussion on this topic, see paragraphs 9.157ff.
- 196)** See paragraph 9.186.
- 197)** This is less important with a declaratory award, which, by its nature, is not enforceable per se. Nevertheless, a declaratory award should be clear as to its findings if it is to be of real assistance to the parties.
- 198)** However, since public policy considerations vary from country to country, it may be difficult to avoid this in all cases, e.g. an award of interest may be acceptable in the country in which the award is made, but not in the country of enforcement.
- 199)** ICSID Convention, Art. 48(3).
- 200)** UNCITRAL Rules, Art. 34(3).

- 201)** Even where the party-nominated arbitrators are technical specialists, expert in the subject matter of the project or transaction, it is usual for the presiding arbitrator to be a lawyer.
- 202)** See Lord Bingham, *The Business of Judging* (Oxford University Press, 2000). For the risks that the alleged absence of reasons may lead to an arbitral award being overturned, see Redfern, 'ICSID: Losing its appeal?' (1987) 3 *Arb Intl* 98.
- 203)** *State of New York Department of Taxation and Finance v Valenti* 57 AD 2d 174, 393 NYS 2d 797 (1977).
- 204)** For a potential horror story, see *Staatsrechtliche v ICC Schiedsgerichtsentschied*, Bundesgericht, I. Zivilabteilung (Federal Court, First Civil Division), 24 March 1997, (1997) 2 *ASA Bulletin* 316. For commentary, see Kreindler and Kautz, 'Agreed deadlines and the setting aside of arbitral awards' (1997) 4 *ASA Bulletin* 576.
- 205)** See [Chapters 1](#) and [6](#).
- 206)** ICC Case No. 5051.
- 207)** For example, in England, communication of the award to the parties is an essential ingredient, since the time limits for challenging an award run from its delivery to the parties: see Arbitration Act 1996, ss 55(2) and 70(3).
- 208)** For example, Germany, India, and Indonesia: see Paulsson and Bosman (eds) *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International, 1984).
- 209)** See [Chapter 11](#).
- 210)** This must be considered separately from any requirement for the deposit of the award with an arbitral institution.
- 211)** See the award in *Amco Asia Corporation v Indonesia (Resubmission: Jurisdiction)*, ICSID Case No. ARB/81/1, (1992) 89 *ILR* 552, at 560.
- 212)** In France, Belgium, and the Netherlands, recourse can be had to the reasons in order to explain the meaning and scope of the *dispositif*. In Italy, certain cases suggest that *res judicata* may include the entire reasoning. See, in this regard, ILA, *Interim Report on Res Judicata and Arbitration* (2009) 25 *Intl Arb* 1, at 51, 52, and 65.
- 213)** The ILA interim report, the final report, and the ILA Recommendations can all be found at (2009) 25 *Arb Intl* or online at <http://www.ila-hq.org>.
- 214)** ILA, *Final Report on Res Judicata and Arbitration* (2009) 25 *Intl Arb* 72, para. 25.
- 215)** See the commentary on the award in ICC Case No. 3383, Jarvin and Derains, *Collection of ICC Arbitral Awards 1974–1985* (Kluwer Law International, 1994), pp. 394 and 397.
- 216)** Söderlund, 'Lis pendens, res judicata and the issue of parallel judicial proceedings' (2005) 22 *J Intl Arb* 4.
- 217)** In France, arts 1476 and 1500 of the *Nouveau Code de Procédure Civile* provide that an arbitral award has a *res judicata* effect with respect to the dispute that it determines. Similar provisions also exist in Belgium, Spain, Germany, Austria, and Switzerland. See Hanotiau, 'The *res judicata* effect of arbitral awards' (2003) *Supplement ICC International Court of Arbitration Bulletin* 43.
- 218)** For further discussion of the *Pyramids* arbitration, see [Chapter 11](#).
- 219)** Cremades and Madalena, 'Parallel proceedings in international arbitration' (2008) 24 *Arb Intl* 4, at 507; Sheppard, 'Res judicata and estoppel', in ICC (ed.) *Parallel State and Arbitral Procedures in International Arbitration*, ICC Publications No. 692 (ICC, 2005), p. 225; Barnett, *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (Oxford University Press, 2001), p. 135.
- 220)** *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co. of Zurich* [2003] 1 *WLR* 1041.
- 221)** *In the matter of petition of Gemstar TV Guide International Inc. v Henry C Yuen*, Index No. 602094/07, NY Sup., New York Co., NY Misc LEXIS 7845 (2007).
- 222)** ILA, *Final Report on Res Judicata and Arbitration* (2009) 25 *Intl Arb* 72, at 77; ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration, Pt II, paras 4 and 5, (2009) 25 *Intl Arb* 1, at 85.
- 223)** For further discussion of consolidation of arbitrations, see [Chapter 2](#), paragraph 2.238.
- 224)** See, e.g., *Parklane Hoisery Co. v Shore* 439 US 322 (1979); ILA, *Interim Report on Res Judicata and Arbitration* (2009) 25 *Intl Arb* 1, at 48.
- 225)** *Dadourian Group International Inc. v Simms and ors* [2004] EWHC 450 (Ch), [2004] *Arb LR* 17, with commentary in 'The effect of an arbitration award' (2005) 5 *Arb LM* 4.
- 226)** ILA, *Interim Report on Res Judicata and Arbitration* (2009) 25 *Intl Arb* 1, at 21.
- 227)** *Ibid.*, at 58 and 59.
- 228)** See [Chapter 10](#).
- 229)** Model Law, Art. 33(1)(b). See also the English Arbitration Act 1996, s. 57(3).
- 230)** For an example of how and when awards can be considered under s. 57, see *Gold Coast Ltd v Naval Gijon SA* [2006] EWHC 1044 (Comm), [2006] *Arb LR* 381.
- 231)** FAA, § 11.
- 232)** FAA, § 11(c). See *Hall Street Associates LLC v Mattel Inc.* 552 US 576 (2008).
- 233)** For the powers of an arbitral tribunal to correct or complete an award in various national states, see the national reports in Paulsson and Bosman (eds) *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International, 1984).
- 234)** LCIA Rules, Art. 27.

- 235)** ICC Rules, Art. 35(1). For a comprehensive survey of applications for correction and/or interpretation of awards under the ICC Rules that have been made since the introduction of Art. 29, see Brooks Daly, 'Correction and interpretation of arbitral awards under the ICC Rules of Arbitration' (2002) 13 ICC International Court of Arbitration Bulletin 1.
- 236)** SCC Rules, Art. 41(1).
- 237)** UNCITRAL Rules, Art. 38(2).
- 238)** UNCITRAL Rules, Art. 37(1). Curiously, Art. 37(2) does not contain the express safeguard for the arbitral tribunal that appears in Art. 39(2), '[i]f the arbitral tribunal considers the request for an award or additional award to be justified'. But common sense dictates that the literal language meaning of Art. 37(2) could not be used to force the arbitral tribunal to give an interpretation, at least when it considers the request to be spurious.
- 239)** UNCITRAL Rules, Art. 39(1).
- 240)** In a case in which one of the authors was an arbitrator, the losing respondent requested an interpretation, but the arbitral tribunal determined that this was a manifest attempt by that party to cause the arbitral tribunal to review its decision on the merits of the case.
- 241)** The ICDR Rules, Art. 30, contain similar provisions to those of the UNCITRAL Rules.
- 242)** ICSID Arbitration Rules, rr 50–52.
- 243)** ICSID Arbitration Rules, r. 51(3).
- 244)** For an example of the relevant ICSID Rules in practice, see *Marvin Feldman v Mexico*, Correction and Interpretation of the Award, ICSID Case No. ARB(AF)/99/1, IIC 158 (2003).
- 245)** See Chapter 10, paragraph 10.75.
- 246)** ICC Rules, Art. 33.
- 247)** *Syrian Petroleum Co. v GTM-Entrepose SA*, Proc. No. 58/1990, Swiss Federal Court Decision of 16 July 1990 (unpublished).
- 248)** For a description of the procedures followed by the ICC Court in scrutinising awards, see Craig, Park, and Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana, 2000), ch. 20.
- 249)** Of 118 cases, 22 had been renegotiated: Naimark and Keer, 'Post-award experience in international commercial arbitration' (2005) 60 Disp Res J 94.
- 250)** Mistelis and Baltag, 'Recognition and enforcement of arbitral awards and settlement in international arbitration: Corporate attitudes and practices' (2008) 19 Am Rev Intl Arb 319, at 324.
- 251)** See, e.g. *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.
- 252)** See Chapter 2. See also Paulsson and Rawding, 'The trouble with confidentiality' (1995) 11 Arb Intl 303.
- 253)** *Samizdat*, meaning literally 'self-publishing', was the clandestine copying and onward distribution of government-suppressed literature in Soviet states. Individuals who received a copy of a censored text would be expected to make copies, often by hand, and then to hand those out for further consumption, copying, and distribution.
- 254)** The list, set up by the late Professor Thomas Wälde, has been described as a 'vehicle where the blue-eyed theorists meet the rock of reality ... [where] theoreticians [can no longer] graze on the prairies of theory in groups of like-minded people rather than slog it out at the coalface of legal practice': 'OGEMID: An exchange practice–theory vehicle', posted online at OGEMID, 23 May 2008.
- 255)** See, e.g., Laird and Weiler's <http://www.investmentclaims.com>, or Professor Newcombe's Investment Treaty Arbitration website, online at <http://ita.law.uvic.ca/>.

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LEGAL AUTHORITY AA-117

a **World Trade Corporation Ltd v C
Czarnikow Sugar Ltd**
[2004] EWHC 2332 (Comm)

b QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
COLMAN J
3, 6 AUGUST, 18 OCTOBER 2004

c *Arbitration – Award – Remission – Applicant seeking remission of arbitration award on basis of treatment of evidence by arbitral panel – Whether applicant should have exhausted any other available recourse – Whether matters complained of relating to ‘issues’ in the arbitration – Arbitration Act 1996, ss 57, 68.*

By a contract dated 10 April 1996, the defendant sold the claimants 10,000 mt of sugar. The contract specified that the claimants would pay a deposit of *d* \$US350,000 and that payment would be by means of a letter of credit to be opened prior to shipment. A dispute arose and the defendant terminated the contract and sold the sugar to the buyers at a price below the contract price. The matter was then referred to arbitration where the claimants argued that the defendant had been in repudiatory breach by terminating the contract and claimed reimbursement of the deposit, alternatively that the defendant had not provided any evidence of its efforts to mitigate its loss. The arbitrators found that the claimants had not opened a letter in accordance with an extension of time granted by the defendants and that they had been in repudiatory breach of the contract. However they awarded the claimants an amount by which their deposit exceeded the defendant's damages. The claimants brought an application *e* under s 68 of the Arbitration Act 1996 to remit the award to the arbitrators complaining about the manner in which the evidence had been treated. Upon the application, the defendant submitted that the application under s 68 could not be brought unless the requirements of s 70(2)(b)^a, requiring that any available recourse under s 57 of the 1996 Act, had first been exhausted. Section 57(3)(a)^b related to the correction of the award in relation to accidental slips or for the clarification of any ambiguity and s 57(3)(b) applied where an additional award was required because a claim which had been presented to the tribunal had not been dealt with in the award. The issues arose, inter alia, firstly, whether s 57(3) applied and secondly, whether there had been a failure by the tribunal to deal with any 'issues' within the meaning of s 68(2)(d) of the 1996 Act.

h **Held** – (1) The omission to attach weight or sufficient weight to particular evidence in arriving at a conclusion on a question of fact was not a basis for deploying s 57(3)(a). An award which determined a question of fact relevant to an issue to be decided and in doing so gave weight to some evidence but failed to give weight to or even mention other evidence could not normally be treated as containing any ambiguity at all. Further, the criticisms of the claimant did not fall within s 57(3)(b) because the failure of the tribunal to mention certain evidence relied on by a party as supporting a relevant finding of fact did not mean that

a Section 70(2) of the Act is set out at [4], below

b Section 57(3) of the Act is set out at [5], below

there had been a failure to deal with a claim. The word ‘claim’ in that context did not mean a submission in support of a relevant question of fact. It meant a claim for relief by way of damages, declaration or otherwise, such as would have to be pleaded (see [8], [14], below). a

(2) Section 68(2)(d) was designed to cover those issues the determination of which was essential to a decision on the claims or specific defences raised in the course of the reference. The fact that s 68(2)(d) was confined in its application to essential issues as distinct from the reasons for determining them should give rise to no practical difficulties. The provision should be approached by asking whether that which had not been dealt with would be included in an agreed list of issues prepared for the purposes of a case management conference if instead of an arbitration the matters were to be determined in court. In the instant case none of the matters relied on by the claimants could be said to be capable of being described as a failure by the tribunal to deal with issues that were put to it (see [16], [20], [32], [51], below). b
c

Notes d

For the law relating to challenges to an arbitration decision see 2(3) *Halsbury’s Laws* (4th edn reissue) paras 73, 74.

For the Arbitration Act 1996, ss 57, 68 see 2 *Halsbury’s Statutes* (4th edn) (2003 reissue) 693, 700. e

Cases referred to in judgment e

Al Hadha Trading Co v Tradigrain SA [2002] 2 Lloyd’s Rep 512.

Ascot Commodities NV v Olam International Ltd [2002] CLC 277.

Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452, [1932] All ER Rep 181, HL. f

Groundshire v VHE Construction [2001] BLR 395.

Hussman (Europe) Ltd v Al Ameen Development and Trade Co [2000] 2 Lloyd’s Rep 83.

Margulead Ltd v Exide Technologies [2004] EWHC 1019 (Comm), [2004] 2 All ER (Comm) 727.

Torch Offshore LLC v Cable Shipping Inc [2004] EWHC 787 (Comm), [2004] 2 All ER (Comm) 365. g

Weldon Plant Ltd v The Commission for the New Towns [2001] 1 All ER (Comm) 264.

Application h

The claimants, World Trade Corporation Ltd, brought an application under s 68 of the Arbitration Act 1996 seeking the remission of an award of a panel of three arbitrators of the Refined Sugar Association dated 27 February 2004. The award was given in an arbitration between it and the defendant C Czarnikow Sugar Ltd in relation to a contract dated 10 April 1996 for the sale of 10,000 mt of sugar. The facts are set out in the judgment. j

Sailesh Panchmatia a director with permission of the court for the claimants.

Simon Rainey QC and *Nicholas Craig* (instructed by *Richards Butler*) for the defendant.

a 18 October 2004. The following judgment was delivered.

COLMAN J.

INTRODUCTION

b [1] This is an application under s 68 of the Arbitration Act 1996 to remit to the panel of three arbitrators of the Refined Sugar Association a final award dated 27 February 2004 whereby they awarded to the claimants World Trade Corporation Ltd (WTC) \$US39,600 plus \$US13,800 simple interest up to the date of the award. The respondent in the arbitration—defendants to this application—were C Czarnikow Sugar Ltd (Czarnikow). By a contract dated 10 April 1996 Czarnikow sold to WTC 10,000 mt of sugar comprising 7,000 mt of c Thai raw sugar and 3,000 mt of Thai white sugar on cippo East African port terms. It was a term of the contract that WTC would make a \$US350,000 deposit which was to stand as security for their performance. It was further a term of the contract that WTC would pay by means of a letter of credit to be opened, as the arbitrators found, prior to shipment. The arbitrators found that WTC did not open a letter in accordance with an extension of time granted by Czarnikow and that in failing to do so WTC was in repudiatory breach of the contract. They further held that Czarnikow accepted that failure as terminating the contract. Czarnikow sold the sugar to the buyers at a price below the contract price.

d [2] In the arbitration WTC claims that Czarnikow was in repudiatory breach in terminating the contract and claimed damages, asserting that the contract price was below the market price at the date of the breach and also claiming reimbursement of the \$US350,000 deposit. Czarnikow alleged that the market price, as evidenced by its two substitute sale contracts, was below the contract price and claimed damages for breach which they said exceeded \$US350,000. The main issues included whether the contract terms as varied included a requirement that a letter of credit should be opened by 21 June 1996 and what loss had been suffered by Czarnikow. WTC submitted that Czarnikow could have sold the sugar to substitute buyers at a higher price than was achieved.

e [3] After a paper hearing the arbitrators concluded that Czarnikow were entitled to treat the contract as terminated and that the contract price exceeded the market price to the effect that Czarnikow were entitled to damages for breach but that their damages were less than \$US350,000. Accordingly, they awarded to WTC the amount by which their deposit exceeded Czarnikow's damages.

THRESHOLD POINTS

f [4] It is submitted on behalf of Czarnikow that given that under s 68(1) of the 1996 Act the right to apply under that section is subject to the restrictions in s 70(2), this application is barred. Section 70(2) provides:

g 'An application or appeal may not be brought if the applicant or appellant has not first exhausted—(a) any available arbitral process of appeal or review, and (b) any available recourse under section 57 (correction of award or additional award).'

j [5] It is submitted that in the present case it was open to WTC to apply to the tribunal under s 57(3) which provides:

'The tribunal may on its own initiative or on the application of a party—(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any

ambiguity in the award, or (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award. These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.’

[6] WTC had failed to apply to the tribunal under (a) or (b). Accordingly, WTC was precluded from applying to remit the award under s 68 on the grounds of serious irregularity.

[7] Investigation of the nature of the three groups of criticisms of the award put forward as the grounds for this application and which are more fully discussed later in this judgment, demonstrates that they are all based on submissions that, in arriving at their conclusions on the facts, the arbitrators decided against the weight of the evidence. The applicants put forward particular features of the evidence in the witness statements and documents put before the arbitrators as grounds for the submission that the arbitrators failed to deal with all the issues put before them. In arriving at their conclusions as to certain material questions of fact they had not considered documents or other written evidence placed before them or had not attached sufficient weight to such documents or evidence.

[8] I am not able to accept the submission that this kind of criticism falls within s 57(3). The omission to attach weight or sufficient weight to particular evidence in arriving at a conclusion on a question of fact is, in my judgment, not a basis for deploying s 57(3)(a). An award which determines a question of fact relevant to an issue to be decided and in doing so, gives weight to some evidence but fails to give weight to or even mention other evidence cannot normally be treated as containing any ambiguity at all. It is not the case that the award or the findings are capable of more than one meaning. The need for clarification does not arise, because the arbitrators have by definition arrived at a clear and unambiguous conclusion on the relevant question of fact. They are under no duty to deal with every possible argument on the facts and to explain why they attach more weight to some evidence than to other evidence. Unless their award is so opaque that it cannot be ascertained from reading it by what evidential route they arrived at their conclusion on the question of fact there is nothing to clarify. To arrive at a conclusion of fact expressly on the basis of evidence that was before them does not call for clarification for it is unambiguously clear that they have given more weight to that evidence than to other evidence.

[9] In this connection, it is clear that arbitrators are not in general required to set out in their reasons an explanation for each step taken by them in arriving at their evaluation of the evidence and in particular for their attaching more weight to some evidence than to other evidence or for attaching no weight at all to such other evidence.

[10] The starting point for the construction of s 57(3) is the Report of the Departmental Advisory Committee on the Arbitration Bill (February 1996) p 58 (para 280):

‘The Court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this Clause. The test of “*substantial injustice*” is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the

a arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened cannot on any view be defended as an acceptable consequence of that choice.'

b [11] It must not be forgotten that the facility under s 57(3) is made available to facilitate such limited supervisory jurisdiction as is provided for. This jurisdiction may well normally require that there should be available to the court the arbitrators' reasons for arriving at their conclusions on the issues in the reference which are free from clerical mistakes or errors arising from an accidental slip or omission and free from ambiguities, as provided for in s 57(3)(a). Thus, for example, the right to apply under ss 67, 68 and 69 is by s 70(2) expressly made subject to the applicant's having first exhausted recourse under s 57. However, the ambiguities which are relevant for this purpose are those which go to the arbitrators' conclusions on those issues raised by the claim and defence and by any reply to the defence. Thus, in *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 All ER (Comm) 365, upon which Mr Simon Rainey QC, on behalf of Czarnikow, strongly relied, one of the issues before the arbitrator was whether a particular misrepresentation as to the strength of the deck of the vessel subsequently time-chartered had induced the charterers to enter into the time charter. The charterers (Torch) alleged that they had been induced to enter into the charter by that misrepresentation. The owners put this in issue. The arbitrator did not mention this point in his reasons and it was impossible to tell what view he had taken. This was clearly potentially a failure to deal with an issue within s 68(2)(d). Cooke J observed (at [28]):

f 'If however Torch had reverted to him, applying for clarification as to whether he had decided against it on inducement by the second representation, it would have been clear in this court whether or not he had determined the issue. It seems to me that s 57(3)(a) can be used to request further reasons from the arbitrator or reasons where none exist. The policy which underlies the Act is one of enabling the arbitral process to correct itself where possible, without the intervention of the court. Torch contended that it was clear that the arbitrator had not decided the issue and that therefore there was no ambiguity in the award which required clarification, but the very existence of a genuine dispute on this question militates against that argument. If there was unarguably a clear failure to deal with an issue, it could be said that there was no ambiguity in the award, but as set out in (*Al Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd's Rep 512 at 526 (para 70)), an award which contains inadequate rationale or incomplete reasons for a decision is likely to be ambiguous or need clarification. There was therefore room for an application by Torch under s 57 ...'

j [12] It will at once be seen that it was unclear what, if anything, the arbitrator had concluded about the issue of inducement the resolution of which was essential in order to ascertain whether the charterers were entitled to rescind for misrepresentation. This judgment does not support the proposition that s 57(3) can be used for the purpose of obtaining an explanation of the steps taken by the tribunal in arriving at its conclusion on facts relevant to essential issues. Nor does the judgment of Judge Havelock-Allan QC in *Al Hadha Trading Co v Tradigrain SA*

[2002] 2 Lloyd's Rep 512, nor that of Judge Bowsler QC in *Groundshire v VHE Construction* [2001] BLR 395 support such a proposition. a

[13] Accordingly, if, which I do not accept, there were in the present case an ambiguity in the arbitrators' explanation for having reached their conclusion on certain of the facts relevant to the issues before them, this would not engage the obligation of WTC under s 70(2) to invite the arbitrators to supply clarification or correct their award under s 57(3)(a). b

[14] Further, there could be no basis upon which the criticisms of WTC could fall within s 57(3)(b). An argument that by reason of the tribunal's making no mention of certain evidence relied on by a party as supporting a relevant finding of fact, there has been a failure to deal with a 'claim' would be untenable. The word 'claim' in that context does not mean a submission in support of a relevant question of fact. It means a claim for relief by way of damages, declaration or otherwise, such as would have to be pleaded. c

[15] Accordingly, s 70(2) does not in this case operate as a bar to relief under s 68. d

SECTION 68(2)(d): GENERAL PRINCIPLES d

[16] This provision is, in my judgment, designed to cover those issues the determination of which is essential to a decision on the claims or specific defences raised in the course of the reference. In *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER (Comm) 264 at 279, Judge Humphrey Lloyd QC observed: e

'... s 68(2)(d) of the 1996 Act is not to be used as a means of launching a detailed inquiry into the manner in which the tribunal considered the various issues. It is concerned with a failure, that is to say where the arbitral tribunal has not dealt at all with the case of a party so that substantial injustice has resulted, eg where a claim has been overlooked, or where the decision cannot be justified as a particular key issue has not been decided which is crucial to the result. It is not concerned with a failure on the part of a tribunal to arrive at the right answer to an issue. In the former instance the tribunal has not done what it was asked to do, namely to give the parties a decision on all the issues necessary to resolve the dispute or disputes (which does not of course mean decisions on all the issues that were ventilated but only those required for the award). In the latter instance the tribunal will have done what it was asked to do (or will have purported to do so) but its decision or reasoning may be wrong or flawed. The arbitral tribunal may therefore have failed to deal *properly* with the issues but it will not have failed to deal with them.' f
g
h

[17] In *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 at 284 Toulson J said:

'Nor is it incumbent on arbitrators to deal with every argument on every point raised. But an award should deal, however concisely, with all essential issues. One of the heads of serious irregularity recognised in s. 68(2)(d) is "Failure by the tribunal to deal with all the issues that were put to it". The central point raised by Ascot on its appeal was that if the bills of lading were pledged as security, as appears on the face of the October 1998 contract, Olam's loss was not to be approached in the same way as if they were j

a beneficial owners of the cargo. The point has, with respect, not been addressed.’

[18] In *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd’s Rep 83 at 97 (para 56) Thomas J observed:

b ‘I do not consider that s. 68(2)(d) requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning, but it is no more than that.’

c [19] In *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm) at [42], [2004] 2 All ER (Comm) 727 at [42], I observed:

d ‘Deficiency of reasoning in an award is therefore the subject of a specific remedy under the 1996 Act. It is accordingly self-evident that: (i) failure to deal with an “issue” under s 68(2)(d) is not equivalent to failure to deal with an argument that had been advanced at the hearing and therefore to have omitted the reasons for rejecting it; (ii) Parliament cannot have intended to create co-extensive remedies for deficiency of reasons one of which (s 68) was a general remedy which might involve setting aside or remitting the award in a case of serious injustice and one of which (s 70(4)) was designed to provide a specific remedy for a specific problem; (iii) the court’s powers under s 68(2) being engaged only in a case where the serious irregularity has caused substantial injustice, the availability of the facility to apply for reasons or further reasons under s 70(4) would make it impossible to contend that

e any “substantial injustice” had been caused by deficiency of reasons.’

f [20] The fact that s 68(2)(d) is confined in its application to essential issues as distinct from the reasons for determining them should give rise to no practical difficulties. If one simply approaches that provision by asking whether that which has not been dealt with is capable of being formulated as an essential issue of the nature of what would be included in an agreed list of issues prepared for the purposes of a case management conference if instead of an arbitration the matters were to be determined in court, the answer should normally be obvious.

g [21] With those considerations in mind I turn to consider the three specific grounds for this application.

MITIGATION AND THE COST OF INSURANCE

h [22] Following their termination of the contract Czarnikow sold the sugar in two lots. They sold 3,000 mt of white sugar on 1 July 1996 to Djama Omar Said at a price of \$US380 per mt cif Berbera on the MV Al Baky which had arrived at Berbera on 1 or 2 July. The price was paid on 3 July. As the sale was on cif terms Czarnikow had to take out insurance for \$US1,254,000, at a premium of 1.5% plus 0.25% for war risks and 0.425% for the vessel’s age. Czarnikow sold the balance of 7,000 mt of raw sugar on 10 July 1996 to Mohammed Enterprises

j (Tanzania) Ltd at a price of \$US350 per mt cif Dar Es Salaam. The price included insurance which Czarnikow purchased at 0.25% plus 0.25% war risks and 0.425% age uplift on a cargo value of \$US2,695,000. Czarnikow claimed as damages its loss on these resale contracts amounting to \$US329,167.40 plus interest which brought the total to above \$US350,000. They claimed, in consequence, that the deposit of \$US350,000 made by WTC must be forfeited and was not returnable. WTC submitted that it was Czarnikow who were in breach in terminating the

contract and claimed damages for loss of profit on a resale at \$US405 per mt ciffo Mombasa plus insurance and increased freight costs as well as the return of the deposit. Alternatively, Czarnikow had not sold at the best price available and had produced no evidence of its efforts to mitigate. They relied on sales which they claimed to have negotiated to a Mr Kones and to Premjee EA as a buyer from Czarnikow at no less than the contract price under WTC's contract with Czarnikow.

[23] The arbitrators found (at paras 159–163 of their reasons) that there was no concluded contract between WTC and Mr Kones. They stated (at para 163):

‘In view of the evidence overall, we are not satisfied that there was a firm and binding contract with Mr Kones for the following reasons: (a) we have not seen a contract; (b) WTC on 15 July 1996 simply referred to an “offer” and withdrew it with no apparent consequences; (c) WTC were still offering the cargo to other potential purchasers on 5 July 1996; (d) no letter of credit was ever provided.’

[24] The arbitrators reached the conclusion (at paras 164–171) that there never had been a firm offer by Premjee EA to Czarnikow to pay for the cargo at the contract price. They stated:

‘170. Having considered all of the evidence and the submissions, we find it difficult to make WTC and Premjee EA's version of events fit with the fax from Premjee EA to WTC of 10 July 1996. At that stage, Premjee EA's concern appeared to be to get the letter of credit from Mr Kones, and they said in this fax that they had until noon to do so. That is not consistent with Mr Mead having told Czarnikow the previous day that Premjee EA would pay for the documents and that the documents should be presented to RZB Bank for payment.

171. Overall, on the evidence we are not satisfied that a formal offer was put forward by Premjee EA to Czarnikow to pay for the cargo at the contract price. Indeed, given that it is Mr Mead's evidence that the discussions in which Premjee EA offered to buy the cargo took place over three days (9–11 July), it is extremely surprising that nothing was put in writing as might have been expected for a cargo worth some \$US2.6m.’

[25] And in rejecting WTC's whole case on failure to mitigate, the arbitrators said:

‘We come to the conclusion that none of the alternatives other than those which were taken by Czarnikow were sufficiently firm to justify Czarnikow waiting any longer in reselling the cargo. Although there might have been what could loosely be called “interest” in the cargo, they appear to have been little more than hypothetical; the fact is that the cargo was distressed and we adopt what was said in *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, [1932] All ER Rep 181 to the effect that it is easy for the party in breach to criticise after the event. We see no reason why Czarnikow would wish to sell the cargo other than at the best realisable price and although the deposit would have given them some comfort, the absence of any evidence as to any other firm buying interest leads us to the conclusion that the prices obtained on the resales must be accepted as forming the basis for the assessment of Czarnikow's losses.’

a [26] The reference to *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, [1932] All ER Rep 181 is to the passage in the speech of Lord Macmillan ([1932] AC 452 at 506, [1932] All ER Rep 181 at 204):

b 'Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.'

d [27] In calculating the damages the arbitrators found that, in order to calculate the net resale price available to Czarnikow, it was necessary to deduct the cost of insurance which was 2.175% of 110% of the contract price which totalled \$US9.09 per mt. They observed:

e 'The insurance premium paid by Czarnikow was criticised by WTC, who submitted that they had been able to secure a premium of 1.4125% (although this was on the assumption that the vessel was not going to Berbera, in a war risk zone). Looking at the matter overall, we do not regard the premiums paid by Czarnikow as unreasonable.'

f [28] In Mr Jayprakash Panchmatia's witness statement in support of this application it is stated (at para 8) that the arbitrators overstated Czarnikow's recoverable loss because they had in effect done no more than accept the prices for which Czarnikow actually disposed of the sugar. He continues: 'It was WTC's case that there was more evidence on that point than the tribunal appears to have considered and that it was in WTC's favour.'

g [29] He emphasises that the arbitrators should have held not merely that Czarnikow might have sold at the prices negotiated with Mr Kones and with Premjee EA but that they ought to have done so or at least at the available market price of which those sales were evidence. The sale by WTC to Mr Kones was indeed a binding contract and therefore good evidence of the market price. However, it was important that the arbitrators should also take into account the price at which buyers in the market showed interest as distinct from concluding a contract and they had failed to do so. The witness statement then lists at paras 18 and 20 a number of documents before the tribunal which it relies on as showing respectively market interest and WTC's contemporaneous criticisms of Czarnikow's failure to respond to available purchase offers. Then attention was drawn to the paucity of evidence of market value adduced by Czarnikow:

22. The only evidence produced by Czarnikow in relation to market price or its own efforts to mitigate its loss was documentation (of a not particularly substantial nature) showing the two sales which are actually concluded—with *Establissement Djama Omar Said* for 3,000 tons of whites ... and the *Mohammed Enterprises Ltd* for 7,000 tons of raws ...

23. The absence of evidence from Czarnikow is all the more surprising and perhaps indicative given the contemporaneous complaints by WTC which are evidenced in the correspondence referred to above.

24. One would have expected to see offers of sale or notes of Czarnikow's attempts to contract with other potential purchasers, perhaps along the lines of the note which William Rook said that he kept in respect of his conversation with WTC (described at paras 16 and 17 of the award). In the absence of evidence to the contrary, it must be inferred that Czarnikow did not contact well-known purchasers of sugar in East Africa, or even those suggested by WTC, such as E D & F Mann or Kakira Sugar of Uganda. Reference is made to the following documents previously before the tribunal

...
(a) WTC's fax to Czarnikow dated 13 July 1996 ...

(b) WTC's fax to Czarnikow dated 24 June 1996 ...

25. One would also have expected to see evidence of Czarnikow investigating the potentially more advantageous sale which might have been concluded with G Premjee. That Czarnikow was in contact with G Premjee was admitted by Czarnikow's witness, Mr Guy Toller, at para 27 of his first witness statement ... This is confirmed in the statement of Barry Mead of G Premjee ... who also indicates that his attempts to contact Mr Toller and Mr Rook of Czarnikow appeared to be ignored.

26. Mr Mead was a witness independent of WTC and his statement was prepared some years before the arbitration took place. In these circumstances, I respectfully suggest that the tribunal should have considered the implications of what he said for Czarnikow's apparent failure to mitigate its losses.

27. It is also surprising that Czarnikow did not appear to seek a buyer in Kenya, where prices were likely to be better than in Somalia. Reference is made to the fax from Cargill Kenya Ltd to Premjee EA ... in which a price of 41.50 shillings per kilo is quoted ciffa Mombasa. I believe that this would have equated to about \$US418 per mt at the time.'

[30] These submissions were then the basis for the overall criticism (at para 28):

'It is my belief that WTC raised a good case to the effect that Czarnikow's resales were not made at the best price likely to be obtained in the market at the relevant time. In comparison, Czarnikow produced next to nothing. The tribunal however did not consider the relevance of these points apart perhaps from the very brief para 172. It was most important for it to do so, since any increase in the notional market price with Czarnikow should have obtained would have lead directly to an increase in the amount of money which Czarnikow would have been ordered to repay to WTC.'

[31] These criticisms are essentially to the effect that the arbitrators failed to take into account evidence that was to be found in the witness statements and documents put before them and accorded undue weight to other evidence before them. The question that the arbitrators had to decide was what was the market price of the sugar at the relevant time. The dispute on the facts was as to whether and if so to what extent Czarnikow had proved that the market price was below the contract price. That went to the issue whether Czarnikow had suffered any loss caused by WTC's repudiatory breach of contract. In order to resolve that

a issue the arbitrators had to decide whether in selling the two parcels of sugar at the prices obtained, Czarnikow had failed to mitigate its loss and had sold below the true market price. However, whether the arbitrators accorded to any particular evidence more weight or less weight or no weight at all was not an 'issue' within the meaning of s 68(2)(d). It was merely the process of resolving the issue of what loss, if any, had been suffered by Czarnikow.

b [32] Accordingly, none of the matters relied on by WTC can be said to be capable of being described as a failure by the tribunal to deal with issues that were put to it.

c [33] As to the cost of insurance, at paras 29–34 of the witness statement, Mr Jayprakash Panchmatia criticises the award for having concluded that the insurance costs born by Czarnikow were as high as they were. It is said that the arbitrators should have considered whether Czarnikow should have taken an assignment of WTC's insurance policy on the goods. Further, the tribunal did not take into account that Czarnikow's insurance costs were higher than those of WTC, a matter relevant to whether Czarnikow's costs were reasonable. Nor did they consider the benefit to be derived from the inclusion of the load and discharge port survey costs in WTC's premium but not in that of Czarnikow.

d [34] The criticisms all go to the tribunal not having expressly referred to or expressly considered evidence which was before them. However, examination of the relevant paragraphs of the reasons shows that the arbitrators had indeed adverted to the evidence relied upon and had clearly regarded it as of little or no weight in deciding the main issue of loss before them.

e [35] For these reasons, there is no substance in the criticism that the arbitrators failed to deal with an issue put to them with regard to the cost of insurance.

THE FAX DATED 10 APRIL 1996

f [36] This document was relied upon by WTC before the arbitrators in the following context.

[37] It was Czarnikow's case that the letter of credit was to be opened by WTC prior to shipment in accordance with those terms of the contract evidenced by documents entitled by the arbitrators 'Written Terms'. Those terms, in so far as material, were set out in the reasons as follows:

g '24. The written terms provided for a price on the basis c&ffo Dar Es Salaam Tanzania, made up of three elements: (a) the weighted average of the prices at which Czarnikow bought 197 lots of the May 1996 New York no 11 contract, on buyer's executable orders; (b) a premium of \$US103 per mt for the raw sugar and \$US113 per mt for the white sugar; (c) the actual cost of freight paid by Czarnikow in chartering a vessel to ship the sugar to Dar Es Salaam Tanzania.

h 25. The written terms provided that pricing was to be completed two days before the expiry of the May 1996 no 11 contract, and that shipment was to be during May 1996.

j 26. The written terms also provided for WTC to transfer by latest 15 April 1996 the sum of \$US150,000 as a "non-returnable performance deposit" to Czarnikow's bank account. The written terms stated that this deposit "shall secure the contract" but that if the May 1996 New York no 11 contract moved lower than the weighted average of the price of the sugar, Czarnikow would be entitled to call for adverse margin cover in the event that the difference exceeded \$US50,000. For the balance of the contract value, WTC

were to open an irrevocable letter of credit through RZB Bank in London prior to shipment. A fully operable letter of credit was to be received before the seller would ship the sugar.’ a

[38] It was WTC’s case that the written terms did not accurately set out the terms which had been orally agreed upon. Those terms were evidenced by a fax dated 10 April 1996 from WTC to its bankers, RZB in London. If that were correct, that would be material to WTC’s submissions on the underlying issue whether WTC was, in the circumstances, under an obligation to open a letter of credit before shipment, their failure to do so having been accepted by Czarnikow as a repudiatory breach. In essence, WTC was advancing a case that they were not obliged to accept Czarnikow’s nomination of a vessel unless Czarnikow had already effected a sub-purchase by a third party from WTC and further that shipment was not to be until end June/July. b
c

[39] This document was relied upon by WTC as accurately reflecting the terms of the contract agreed between them over the telephone, including Czarnikow’s duty to procure a sub-purchase, of which no mention was made in the written terms relied on by Czarnikow.

[40] The arbitrators therefore had to determine what the terms of the oral contract were by reference to contemporary documents containing inconsistent terms. In essence, the documents were therefore deployed as evidence of the terms of the agreement. The arbitrators accepted Czarnikow’s submissions that the contents of the written terms were the best evidence of what had been agreed. Their reasoning is to be found at paras 135–148 of their reasons. Having set out Czarnikow’s submissions (at para 140), they stated that they had considered carefully the fax of 10 April 1996 and observed firstly that they found it strange that a document on which WTC placed so much weight was not disclosed until their reply submissions were served, although it had previously been referred to in WTC’s main witness statement. Secondly, they drew attention to three features of the fax which they regarded as ‘oddities’. Those matters were all obviously material to the weight to be attached to the fax as evidence of the contract. d
e
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[41] Then (at para 141) they voiced their doubts as to the quality of that evidence:

‘We regard the above matters as sufficient to cast doubt on whether the fax really did reflect what WTC thought they had agreed with Czarnikow. It may be that WTC wished to give RZB a general picture of what was agreed, but without being too specific and perhaps putting the contract in a better light.’ g

[42] They went on to consider other factors (at para 142), all of which were relevant to the quality of WTC’s case on the 10 April fax and to Czarnikow’s case on the terms agreed upon and they concluded (at para 148)— h

‘on the totality of the evidence and on the balance of probabilities that the written terms in all material respects reflected the agreement reached between the parties on 10 April 1996.’ j

[43] Upon this application it is submitted that the arbitrators failed to deal fully with all the issues on the question of WTC’s fax to RZB of 10 April 1996. The respects in which, it is submitted, the arbitrators failed to do so are set out in paras 38 and 39 of the witness statement of Jayprakash Panchmatia. He draws

a attention (at para 38) to three respects in which he says that the arbitrators either took into account irrelevant matters or failed to take into account facts which were relevant to the question whether the fax was good evidence of the terms agreed upon or based their conclusion on erroneous factual assumptions. It is said (at para 39) that the arbitrators failed to consider one possible way in which WTC's conduct subsequent to 10 April was consistent with the terms stated in their 10 April fax. It is further submitted that the tribunal failed in evaluating the evidence to take into account four further documents.

b [44] These criticisms of the arbitrators were expanded in Mr Sailesh Panchmatia's second witness statement (at paras 24–30). These were directed to the arbitrator's doubts as to the authenticity of the fax and to whether any adverse inference should be drawn from the time at which it was disclosed and its original purpose vis-à-vis WTC's bank.

c [45] On analysis, these criticisms are all directed to asserting that the arbitrators misdirected themselves on the facts or drew from the primary facts unjustified inferences. Those facts are said to be material to an 'issue', namely what were the terms of the oral agreement. However, each stage of the evidential analysis directed to the resolution of that issue was not an 'issue' within s 68(2)(d). It was merely a step in the evaluation of the evidence. That the arbitrators failed to take into account evidence or a document said to be relevant to that issue is not properly to be regarded as a failure to deal with an issue. It is, in truth, a criticism which goes no further than asserting that the arbitrators made mistakes in their findings of primary fact or drew from the primary facts unsustainable inferences.

d [46] Accordingly, even assuming that each of the criticisms of the arbitrators' reasoning advanced on behalf of WTC was well-founded, such mistakes and omissions could not fall within s 68(2)(d).

e *f* THE FAX DATED 3 JUNE 1996

[47] The reasons (paras 149–158) found that WTC were in breach by failing to put up a letter of credit prior to shipment but that Czarnikow had waived this breach by entering into an agreement with WTC under which time for providing the letter of credit was extended to 21 June 1996. This agreement was found to be made in the course of a telephone conversation on 3 June 1996 and its terms evidenced by WTC's fax timed at 15.01 hrs that day and confirmed by Czarnikow's fax sent in response. WTC then sent a fax at 15.26 hrs which stated that there would be a few days' further delay. It was submitted on behalf of WTC before the tribunal that this subsequent fax evidenced the agreement between the parties. The arbitrators rejected that submission and therefore concluded that WTC's failure to open a letter of credit by 21 June 1996 was a repudiatory breach which Czarnikow were entitled to accept on the following day.

g [48] WTC criticises this reasoning on the grounds that WTC's second fax of 3 June was evidence in support of WTC's account of what was agreed about extension of the time for opening the letter of credit. In this connection, Mr J Panchmatia stated in his witness statement that it was unbelievable that Czarnikow did not respond in order to challenge the contents of this fax in view of the fact that in his additional statement put before the tribunal, Mr Toller of Czarnikow had stated that he had seen that message. In Mr S Panchmatia's witness statement further complaint was made that the arbitrators had accepted Mr Toller's evidence as to why he had not responded to that message although it was put forward in a supplementary statement in addition to that which had been

exchanged, that being an unfair way of receiving evidence because WTC could not afford to participate in an oral hearing in the course of which there could have been cross-examination of Mr Toller. a

[49] The question which the arbitrators had to determine was the date under the contract by which a letter of credit was to be opened. That went to the issue whether WTC were in breach on 1 July when Czarnikow treated the contract as terminated. Having decided that the original time for opening a letter of credit (prior to shipment) had passed and WTC's breach in failing to do so had been waived, the arbitrators had to decide whether, as alleged by Czarnikow, there was an agreement for the extension to 21 June. In addressing this question the arbitrators had to decide whether there had been an oral agreement to that effect. For this purpose they considered the messages which had passed between the parties on 3 June and decided that the first messages from Czarnikow and WTC on that day evidenced what had been agreed but that WTC's fax of 15.36 hrs had not been capable of varying that agreement. The substance of the criticism by WTC is that the arbitrators were wrong to fail to give weight to that fax and not to conclude that it evidenced the oral agreement. In other words, they gave weight to one document rather than another as a source of evidence. b

[50] From this analysis, it is clear that the true complaint is not of a failure to address an issue but of the tribunal's evaluation of the evidence before it in the course of determining an issue. Such a criticism is, as I have already explained, outside the scope of s 68(2)(d). There was therefore no serious irregularity in this respect under s 68. c

CONCLUSION d

[51] As appears from this judgment, none of the criticisms in the grounds for this application is on analysis directed to a failure by the tribunal to deal with an 'issue' within the meaning of s 68(2)(d). No other basis for remission for serious irregularity is relied upon. It follows that this application must be dismissed. e

Application dismissed. f

Rukhsana Ali Barrister.