

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

LIST OF AUTHORITIES

**AFILIAS DOMAINS NO. 3 LIMITED'S RULE 33 APPLICATION FOR AN
ADDITIONAL DECISION AND FOR INTERPRETATION**

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LIST OF AUTHORITIES

Exhibit No.	Description
CA-148	Martin F. Gusy and James M. Hosking, <i>A Guide to the ICDR International Arbitration Rules</i> (2nd ed., 2019)
CA-149	Gary Born, <i>International Commercial Arbitration</i> (3rd ed., 2021) (<i>excerpt</i>)
CA-150	<i>The Secretary of State for the Home Department v. Raytheon Systems Ltd.</i> [2014] EWHC 4375 (TCC)
CA-151	American Arbitration Association, <i>The Code of Ethics for Arbitrators in Commercial Disputes</i> (1 Mar. 2004)
CA-152	David D. Caron and Lee M. Caplan, <i>The UNCITRAL Arbitration Rules: A Commentary</i> (2nd ed., 2013) (<i>excerpt</i>)
CA-153	Peter Binder, <i>International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions</i> (4th ed., 2019)
CA-154	Jan Paulsson and Georgios Petrochilos, <i>UNCITRAL Arbitration</i> (2017)
CA-155	<i>Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant</i> [2004] EWHC 1354 (Comm)
CA-156	<i>The Law Dictionary</i> (on-line version): pronounce, available at https://thelawdictionary.org/pronounce
CA-157	<i>Merriam-Webster Dictionary</i> (on-line version): pronounce, available at https://www.merriam-webster.com/dictionary/pronounce?src=search-dict-box
CA-158	<i>Merriam-Webster Dictionary</i> (on-line version): decide, available at https://www.merriam-webster.com/dictionary/decide?src=search-dict-box
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CA-160	<i>Metropolitan Property Realizations Ltd. v. Atmore Investments Ltd.</i> [2008] EWHC 2925 (Ch)
CA-161	<i>B v. A</i> [2010] EWHC 1626 (Comm)
CA-162	Report of the Secretary General: Revised Draft Set of Arbitration Rules for Optional Use in <i>Ad Hoc</i> Arbitration relating to International Trade (UNCITRAL Arbitration Rules) (addendum), Commentary on the Draft UNCITRAL Arbitration Rules, U.N. Doc. A/CN.9/112/Add.1 (12 Dec. 1975), <i>reprinted in</i> 7 Y.B. UNCITRAL 166 (1976)
CA-163	UNCITRAL Arbitration Rules (1976)
CA-164	<i>Methanex Corp. v. United States of America</i> , UNCITRAL, Letter to Parties from Tribunal (25 Sept. 2002)

LEGAL AUTHORITY CA-148

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Part I Commentary on the ICDR International Rules, 33 Article 33—Interpretation and Correction of the Award

Martin F Gusy, James M Hosking

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Martin F. Gusy, James M. Hosking

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(p. 289) 33 Article 33—Interpretation and Correction of the Award

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Article 33

1. *Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.*
2. *If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.*
3. *The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.*
4. *The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.*

I. Introduction

33.01 As with most other arbitral rules, the ICDR Rules provide a limited opportunity for interpretation or correction of an award and for an additional award to be made on claims presented, but not included within the award. Article 33 provides a strict deadline for any such interpretations, corrections, or additional awards. The rationale behind such a limited review and on such a strict timeline is the concern not to interfere with the parties' agreement for a fast and final resolution of their dispute. For this reason, arbitrators, courts, and commentators are quick to emphasize the very limited scope of an application under Article 33 or its analogous provisions in other rules. Given the likelihood, however, of at least one party (p. 290) feeling aggrieved by the tribunal's decision, Article 33 can also be subject to creative attempts to 'reargue' a particular legal, evidential, or procedural point.¹

33.02 Article 33 condenses into one Article the powers to interpret, correct, and make an additional award laid out in Articles 37, 38, and 39 of the 2010 UNCITRAL Rules, respectively.² Perhaps the most striking characteristic of the Article is that it covers these three remedies in very short form. As discussed later, the substantive differences between the UNCITRAL provisions and the ICDR Rules are not significant. The AAA Commercial Rules counterpart is considerably less broad than Article 33, but more explicit in providing for a limited power to ‘correct any clerical, typographical, or computational errors ... [but not] to redetermine the merits of any claim’.³

33.03 The drafters of the 2014 amendments to what is now Article 33 did not change the basic structure of the mechanism for interpretation, correction, or issue of an additional award. However, they did make some important additions. In particular, Article 33(2) now provides that any requested interpretation, correction, or additional award forms part of the award and must contain reasoning. Article 33(3), a new paragraph to this Article, permits the tribunal to make certain corrections on its own initiative. Further, Article 33(4), also a new paragraph to the Article, provides for the tribunal to allocate costs associated with proceedings under Article 33. As explained later, however, some form of these revisions is common in most other rules.

33.04 The application of Article 33 may be impacted by national laws containing an independent source of power for the tribunal to modify an arbitral award, although this is typically subject to the parties’ agreement.⁴ Such legislation may also define the point of time in which an arbitrator’s power to act may expire (when the arbitrator becomes ‘*functus officio*’)⁵ and (p. 291) how that relates to the post-award review contemplated by mechanisms such as Article 33.⁶ The ICDR Rules do not specifically address when the tribunal becomes *functus officio*. This uncertainty gave rise to a much-cited US federal appellate court decision opining on the proper scope of the *functus officio* doctrine and its interaction with Article 33’s predecessor (Article 30 of the 2009 ICDR Rules).⁷

33.05 In *T Co Metals, LLC v Dempsey Pipe and Supply, Inc.*,⁸ the US Court of Appeals for the Second Circuit closely analysed Article 33 (then Article 30). The Court examined whether the district court erred in setting aside an amended award made pursuant to the Article and confirming the original award in its place. In the arbitration itself, both parties moved the arbitrator to correct his award. The arbitrator granted partial relief on the basis that his application of certain invoices in evidence to the damages calculation had been in error, even though the errors were not evident on the face of the award. The arbitrator accordingly ‘corrected’ the award by recalculating the damages and issuing an order amending his original award.

33.06 Upon a challenge to the award, the first-instance court vacated the amended award and confirmed the original award, because the arbitrator had ‘exceeded his authority’ by making ‘corrections’ beyond the scope permitted by Article 33 (then Article 30).⁹ The trial court held that the arbitrator’s approach violated the *functus officio* doctrine.¹⁰

33.07 This trial court decision was reversed on appeal, essentially on the ground that the *functus officio* doctrine applies only ‘absent an agreement by the parties to the contrary’.¹¹ By submitting their dispute to the ICDR, the Court found that the parties had submitted themselves to its rules, including the Article on corrections. The Court held that the correction powers of that Article are a source of authority independent from the arbitrator’s inherent authority to correct mistakes.¹² Further, the Court concluded that the parties intended to submit the question of the scope of the tribunal’s Article 33 (then Article 30) powers to the arbitrator rather than the courts.¹³ As such, the Court held that, even if it were to view the arbitrator’s construction of Article 33 (then Article 30) as erroneous, which it did not, it would still lack authority to vacate the amended award.¹⁴ The Court

reversed the lower court's decision, with instructions to vacate the original award and confirm the amended award.

33.08 The *T Co* decision has been the subject of some controversy,¹⁵ particularly concerning the appellate court's willingness to 'permit tribunals to give themselves the power to reconsider (p. 292) decisions [made] in final awards'.¹⁶ But regardless of the court's pronouncements on the predecessor to Article 33, the case provides a rare example of an influential appellate court analysing the ICDR Rules and concluding that the parties' adoption thereof authorizes the tribunal to interpret its own powers with only very limited opportunity for court review.¹⁷

II. Textual commentary

A. Request to interpret, correct, or make an additional award (Article 33(1))

Article 33(1)

Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.

33.09 Any Article 33 application must be lodged with the tribunal 'within 30 days after receipt of the award'.¹⁸ Article 33 does not contain any limitation on what sort of 'award' may be the subject of an application. Where a tribunal has issued a partial award prior to the final award, resort to Article 33 may not always be necessary, however, given the tribunal's authority to make additional interim award or partial awards throughout the arbitration.¹⁹ A recent US federal court decision considered the impact that Article 33 has on partial awards and on the tribunal's authority to issue additional partial awards during the arbitration.²⁰

33.10 In *Ecopetrol SA v Offshore Exploration and Production LLC*, the tribunal issued an interim order, and the Claimant filed a request for a supplemental interim order thirty-nine days later.²¹ The Respondent argued that the tribunal had no authority to issue the supplemental interim order because the Claimant had requested an interpretation of the initial interim award beyond the thirty-day limit in Article 33 (then Article 30).²² The Claimant maintained that it had requested additional interim relief pursuant to the tribunal's authority in Article 24 (then Article 21), rather than an interpretation of the initial interim relief award under Article 33 (then Article 30).²³ The tribunal agreed and issued the supplemental interim award, pursuant to Article 24 (then Article 21).²⁴

(p. 293) **33.11** The Respondent subsequently requested a US federal court to vacate the supplemental award on the basis that the tribunal exceeded its powers by failing to enforce the thirty-day time limit in Article 33 (then Article 30).²⁵ The court found that the tribunal had the authority pursuant to Article 39 (then Article 36) to interpret the ICDR Rules and that the tribunal had exercised its authority to construe the Claimant's request as one for distinct interim relief, rather than for an interpretation of the initial interim award.²⁶ The court concluded that it was bound to defer to the tribunal's decision and denied the request for vacatur.²⁷

33.12 Where Article 33 is implicated, Article 33(1) encapsulates within it three quite distinct remedies that the tribunal may give when faced with an application.

1. Interpretation

33.13 Commentators on analogous rules have stated that the interpretation process does not permit re-argument of a conclusion, nor may new arguments or evidence be raised; rather, it is to provide ‘clarification of the award by resolving any ambiguity and vagueness in its terms’.²⁸ In other words, ‘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’.²⁹ Article 33 follows essentially the same approach as in Article 37 of the 2010 UNCITRAL Rules (which did not substantively change Article 35 of the 1976 UNCITRAL Rules). By comparison, the LCIA Rules, for example, do not permit such interpretation at all.³⁰

2. Correction

33.14 The tribunal’s authorization to ‘correct any clerical, typographical, or computational errors’ is modelled on the language in the ICC, LCIA, and UNCITRAL Rules. The types of error encompassed are well covered in the literature.³¹ Article 33 does not contain the more open-ended language permitting correction of ‘any errors of a similar nature’;³² neither does it contain the language in the UNCITRAL provision making clear that the correction must be ‘in the award’.³³ As discussed above, in the *T Co* case, a reviewing court confirmed that (p. 294) the arbitrator’s determination of the scope of his or her Article 33 power to correct would be afforded ‘significant deference’.³⁴

3. Additional award

33.15 The power to make an additional award addressing claims, counterclaims, or set-offs presented in the proceeding, but omitted from the award, is also found in 2010 UNCITRAL Rules, Article 39 (which is substantially the same as Article 37 of the 1976 UNCITRAL Rules on which Article 33 was based), and LCIA Rules, Article 27.3, but is not in the ICC Rules. The 1976 UNCITRAL Rules required the tribunal to grant such relief only if the omission could be ‘rectified without any further hearings or evidence’, although this language was omitted from the 2010 revised Rules and is not in the text of Article 33(1) of the ICDR Rules. The 2010 UNCITRAL Rules also make clear that the ‘additional award’ procedures may be used following a termination order under the equivalent of ICDR Rules, Article 32(3).³⁵

33.16 The 2014 revisions added language to this provision to make explicit that not only affirmative claims, but also counterclaims and set-offs, may be the subject of an additional award. As noted by a reviewing court, the key question as to whether a claim, counterclaim, or set-off may be the subject of an additional award is whether or not the claim, counterclaim, or set-off was originally ‘presented’ during the arbitration such that the tribunal should have addressed it.³⁶

B. Tribunal may grant request where justified (Article 33(2))

Article 33(2)

If the tribunal considers such a request justified, after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties’ last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.

33.17 Article 33(2) sets the strict timetable requiring a determination ‘within 30 days after receipt of the parties’ last submissions’ on the request for interpretation, correction, or additional award. The direction in Article 33(2) that the tribunal ‘consider[] the contention of the parties’ and that the tribunal’s determination be made after the ‘parties’ last submissions’ anticipates that the parties will exchange some form of submissions on such a

request. Indeed, while not provided for in Article 33, it is standard practice for the ICDR tribunal to set an expedited briefing schedule.

(p. 295) **33.18** Article 33's predecessor (Article 30 in the 2009 ICDR Rules) set the time for the tribunal to make its determination 'within 30 days after the request' was made by the party. Many other major sets of rules, including the 1976 and 2010 UNCITRAL Rules, the LCIA Rules, and the SCC Rules, designate the date of the request as the trigger for the tribunal's deadline to make a determination on interpretation, correction, or an additional award.³⁷ Unless a longer schedule was agreed, thirty days could create an unnecessary time crunch. Accordingly, the revised Article 33(2) adopts an approach similar to Article 35(2) of the ICC Rules, which provides for the tribunal to submit its draft decision to the ICC Court not later than thirty days following expiration of the time limit for comments from the other party, or within such other period as the ICC Court may decide. Article 33 differs from the analogous provision in the ICC Rules, however, which expressly anticipates giving the non-moving party a 'short' time in which to respond ('normally not exceeding 30 days').

33.19 Article 33 was also amended in 2014 to state explicitly that any interpretation, correction, or additional award forms part of the award and must contain the tribunal's reasoning. This revision brings this provision in line with the analogous provisions found in most other major sets of arbitral rules, including the 1976 and 2010 UNCITRAL Rules, the ICC Rules, the LCIA Rules, and the SCC Rules.³⁸

33.20 Even with this revision, it is uncertain whether filing an application under Article 33 will toll the statutory time periods in which a party must file a challenge to the award. As explained, Article 33's predecessor did not explicitly state that any interpretation, correction, or additional award formed part of the award. Noting this, a US court has held that a request for interpretation or correction does not toll the statutory time periods within which a party must challenge the award.³⁹ In the *T Co* case, the arbitrator rendered his decision as an order amending the original award and then issued an 'amended award'.⁴⁰

C. Tribunal may correct on own initiative (Article 33(3))

Article 33(3)

The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.

(p. 296) **33.21** Article 33(3) provides the tribunal with authority to correct or make an additional award on its own initiative. Notably, this provision does not give the tribunal the authority, on its own initiative, to provide an interpretation of its awards.

33.22 The types of corrections that the tribunal may make on its own initiative are limited to the same ones that the tribunal can make upon a party request in Article 33(1)—namely, to correct 'clerical, typographical, or computational errors'. The tribunal's authority to make an additional award on its own initiative is limited to 'claims presented but omitted from the award', which is also similar in scope to Article 33(1). Although paragraph (3) of this Article does not explicitly mention counterclaims and set-offs, as paragraph (1) does, the tribunal's authority to render an additional award on its own initiative on 'claims presented' must also include counterclaims and set-offs. Any correction of an additional award made by the tribunal on its own initiative will be subject to the requirement in Article 33(2) that '[a]ny' correction or additional award 'shall contain reasoning and shall form part of the award'.

33.23 The tribunal's authority to correct awards on its own initiative within a limited window is found in most other major sets of arbitral rules, including the 2010 UNCITRAL Rules and the ICC Rules.⁴¹ The authority for a tribunal also to issue an additional award on its own initiative is, however, less common. The LCIA Rules are one of the few other sets of rules that afford this authority to the tribunal.⁴² Neither the 1976 UNCITRAL Rules, the 2010 UNCITRAL Rules, the ICC Rules, the SCC Rules, nor the SIAC Rules provide the tribunal with this power.

33.24 As previously discussed, Article 33's predecessor in Article 30 of the 2009 ICDR Rules, did not contain any explicit power for the tribunal to interpret, modify, or supplement of its own volition. Even under the prior version of the Rules, however, it might be argued that the tribunal enjoyed an inherent power to make corrections.⁴³

D. Costs (Article 33(4))

Article 33(4)

The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

33.25 Article 33(4) specifies that the parties will be responsible for 'all costs' arising from a request for interpretation, correction, or an additional award. This provision was added with the 2014 amendments to the ICDR Rules.⁴⁴ Notably, this provision's specific reference to 'any request' means that the parties will be responsible for such costs, regardless of whether the (p. 297) request is successful or not. On the other hand, the specific reference to 'any request' suggest that the parties will not be responsible for such costs if the tribunal issues a correction or additional award on its own initiative pursuant to Article 33(3).

33.26 The ICC Rules and 2010 UNICTRAL Rules are amongst the few other sets of rules that contain any specific provisions addressing costs for interpretations, corrections, or additional awards. Article 35(4) of the ICC Rules generally takes an approach similar to the ICDR's, but it also permits the ICC to fix and collect an additional advance on costs to cover an interpretation or correction request. Article 40(3) of the 2010 UNCITRAL Rules is narrower, specifying that the tribunal may *not* charge the parties additional fees for 'interpretation, correction or completion of an award', but may only charge the parties for costs for the arbitrators' reasonable travel and other expenses and for fees and expenses of the appointing authority and the administrator.⁴⁵ Article 33(4)'s reference to 'all costs' likely covers a broader range of fees and expenses. Consistent with Article 34 ('Costs of Arbitration'), such costs may include the fees and expenses of the arbitrators and the ICDR, as well as legal and other costs incurred by the parties.⁴⁶

33.27 When necessary, the tribunal has the discretion to allocate costs associated with an Article 33(1) request between the parties. If a tribunal does make a cost allocation pursuant to Article 33(4), the tribunal would make such costs allocations in its decision on the request for interpretation, correction, or additional award, which will form part of the award.

Footnotes:

¹ See generally on interpretation, correction, and supplementing of awards, GB Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, The Hague, 2014) ch 24; E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1415-17; N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (6th edn, Oxford University Press, Oxford, 2015) paras 9-186-9-192; BW Daly, 'Correction and Interpretation of Arbitral Awards under the

ICC Rules of Arbitration', 13(1) ICC Ct Bull 61 (2002); D Williams and A Buchanan, 'Corrections and Interpretations of Awards under Article 33 of the Model Law', 4 Int'l Arb L Rev 119 (2001); RDA Knutson, 'The Interpretation of Arbitral Awards: When is a Final Award not Final?', 11(2) J Int'l Arb 99 (1994); W Kühn, 'Rectification and Interpretation of Arbitral Awards', 7(2) ICC Ct Bull 78 (1996).

² Article 33 was modelled on the very similar language in Arts 35, 36, and 37 of the 1976 UNCITRAL Rules.

³ See AAA Commercial Rules, s R-50:

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

⁴ See *eg* UNCITRAL Model Law, Art 33:

Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties: (a) a party, with notice to the other 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; (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

⁵ See GB Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, The Hague, 2014) 2513-20 (discussing the *functus officio* doctrine).

⁶ See *eg* UNCITRAL Model Law, Art 32(3) ('The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4)').

⁷ See *T Co Metals, LLC v Dempsey Pipe and Supply, Inc*, 592 F3d 329 (2d Cir 2010).

⁸ 592 F3d 329 (2d Cir 2010).

⁹ See *T Co Metals LLC v Dempsey Pipe and Supply, Inc*, No 07-Civ-7747, slip op (SDNY, 8 July 2008).

¹⁰ *ibid*, 7.

¹¹ *T Co Metals, LLC v Dempsey Pipe and Supply, Inc*, 592 F3d 329, 342 (2d Cir 2010).

¹² *ibid*, 343.

¹³ *ibid*, 344. The court also observed (*ibid*) that Art 36 (now Art 39), which provides that '[t]he tribunal shall interpret and apply these Rules insofar as they relate to its powers and duties', provided an independent basis to conclude the parties intended to submit the question of Art 30's interpretation to the tribunal and not to the courts.

¹⁴ *ibid*.

¹⁵ See M Goldstein, 'Post-Award Reconsideration: Further Comments on the Second Circuit's Decision in *T Co v Dempsey Pipe*', available at <<http://arbblog.lexmarc.us/page/5/>>; HS Zelbo, I Rozenberg, and JM Westerfield, 'When is an Arbitration Award Actually Final?', 32 Nat'l LJ 38, 13 (2010); J 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(5) J

Int'l Arb 519 (2010); GB Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, The Hague, 2014) 3, 32.

16 J 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(5) J Int'l Arb 519 (2010).

17 See further at para 39.06 (discussing *T Co* in the context of Art 34).

18 As noted, filing an application under Art 33 might not toll the statutory limitation period in some jurisdictions for challenging an award. See discussion at para 30.20 (discussing *Oberwager v McKechnie Ltd*, Civ No 06-2685, 2007 US Dist LEXIS 90869, *16-*24 (ED Penn, 10 December 2007)).

19 See ICDR Rules, Art 24 ('Interim Measures') and Art 29(1) ('Awards, Orders, Decisions, and Rulings').

20 See *Ecopetrol SA v Offshore Exploration & Production LLC*, 46 FSupp3d 327 (SDNY 2014).

21 *ibid*, 343.

22 *ibid*.

23 *ibid*.

24 *ibid*, 343-44.

25 *ibid*.

26 *ibid*, at 344.

27 *ibid*.

28 See commentary on 1976 UNCITRAL Rules, Art 35, in D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 881-82.

29 GB Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, The Hague, 2014) 3141; see generally *ibid*, 3141-47. See also L Craig, W Park, and J Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publishing, New York, 2001) para 22-05; BW Daly, 'Correction and Interpretation of Arbitral Awards under the ICC Rules of Arbitration', 13 ICC Ct Bull 1 (2002).

30 See LCIA Rules, Art 27 (allowing only correction of awards or making of additional awards).

31 See eg E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1416; BW Daly, 'Correction and Interpretation of Arbitral Awards under the ICC Rules of Arbitration', 13 ICC Ct Bull 1 (2002); M Goldstein, 'Post-Award Reconsideration: Further Comments on the Second Circuit's Decision in *T Co v Dempsey Pipe*', available at <<http://arblog.lexmarc.us/page/5/>>.

32 Compare 1976 UNCITRAL Rules, Art 36(1). See also Art 38(2) of the 2010 UNCITRAL Rules (broadening the correction power even more to include 'any error or omission of a similar nature'). See also UNCITRAL, *Report of Working Group II on the Work of its 51st Session*, UN Doc A/CN.9/684 (10 November 2009) 109 (clarifying that the term 'omission' refers only to defects in form and not on the substance).

33 See 1976 UNCITRAL Rules, Art 36(1).

- 34** *T Co Metals, LLC v Dempsey Pipe and Supply, Inc*, 592 F3d 329, 345 (2d Cir 2010). But see also J 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(5) J Int'l Arb 524-25 (2010) (criticizing the arbitrator's correction as being beyond the scope of Art 30).
- 35** See discussion of Art 32(3) at paras 32.12-32.14.
- 36** See *Convergia Networks, Inc v Huawei Technologies Co*, No 06 CIV 6191 PKC, 2008 WL 4787503, at *3 (SDNY, 30 October 2008) (explaining that the ICDR Rules only permit an arbitrator to make an additional award on claims presented but omitted from the final award and noting that the petitioner failed to amend its case to include the claims that the tribunal allegedly failed to address).
- 37** 1976 UNCITRAL Rules, Arts 35-37 (setting deadlines of a deadline of forty-five days after receipt of a request for interpretation, thirty days for correction, and sixty days for an additional award); 2010 UNCITRAL Rules, Arts 37-39 (setting deadlines of forty-five days after receipt of a request for interpretation, thirty days for correction, and sixty days for an additional award); LCIA Rules, Art 27 (setting deadlines of twenty-eight days after receipt of a request for correction and fifty-six days for an additional award); SCC Rules, Arts 48-49 (setting deadlines of thirty days after receipt of a request for interpretation or correction and sixty days for an additional award).
- 38** See 1976 UNCITRAL Rules, Arts 35 and 37; 2010 UNCITRAL Rules, Arts 37 and 39; ICC Rules, Art 35; LCIA Rules, Arts 27.1 and 27.3; SCC Rules, Arts 48 and 49.
- 39** See *Oberwager v McKechnie Ltd*, Civ No 06-2685, 2007 US Dist LEXIS 90869, *16-*24 (ED Penn, 10 December 2007) (finding a decision denying a request under Art 30 (Art 33's predecessor) not to be part of the final award and thus the party's challenge to the award was untimely).
- 40** *T Co Metals, LLC v Dempsey Pipe and Supply, Inc*, 592 F3d 329, 336-37 (2d Cir 2010).
- 41** See 2010 UNICTRAL Rules, Art 38(2); ICC Rules, Art 35(1).
- 42** LCIA Rules, Art 27.4.
- 43** See eg GB Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, The Hague, 2014) 3135 ('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 ...'); see also CM di Cío, 'Dealing with Mistakes Contained in Arbitral Awards', 12 Am Rev Int'l Arb 121 [2001]; cf *Danella Constr Corp v MCI Telecoms Corp*, No Civ A91-1053, 1992 WL 82316 (ED Pa, 14 April 1992) (FAA does not provide a basis for an arbitrator to reconsider his or her award), revd *Danella Constr Corp v MCI Telecoms Corp*, 993 F2d 876 (3d Cir 1993) (Table).
- 44** Compare 2009 ICDR Rules, Art 30.
- 45** 2010 UNCITRAL Rules, Art 40(2)-(3).
- 46** See discussion of Art 34 at paras 34.11-34.18.

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Chapter 13: Rights and Duties of International Arbitrators

(1)

This Chapter examines the rights and duties of arbitrators in international arbitrations. First, the Chapter addresses the status of the international arbitrator, including the contractual and ● other bases for that status. Second, the Chapter examines the obligations that are owed by international arbitrators to the parties in an arbitration and the remedies for breaches of such obligations. Third, the Chapter addresses the rights and protections of international arbitrators, including their immunities. Fourth, the Chapter considers choice-of-law issues relating to arbitrators' rights and obligations. Finally, the Chapter briefly discusses proposals to license and otherwise regulate international arbitrators.

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§13.01 INTRODUCTION

An essential aspect of the international arbitral process concerns the status, rights and obligations of the arbitrator. This topic is distinct from the processes of constituting the arbitral tribunal and challenging or removing members of the tribunal; (2) it is also distinguishable from the tribunal's jurisdiction or powers (3) and from the tribunal's conduct of the arbitral proceedings. (4) Rather, this topic concerns the source and content of the individual arbitrator's personal obligations to the parties to the arbitration, and his or her rights and protections, in relation to the arbitral proceedings.

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● Determining the international arbitrator's rights and duties *vis-à-vis* the parties requires defining the status of the arbitrator and ascertaining the content of the rights and obligations that this status imposes on the arbitrator; in international contexts, this also requires determining the law governing the arbitrator's status, rights and obligations. Although these topics lie at the conceptual foundation of the arbitral process, and often have important practical aspects, remarkably little attention has been devoted to them by national legislatures and courts.

As discussed below, different national legal systems take different, often ill-defined, approaches to the arbitrator's status, rights and duties. Nonetheless, there are important similarities in the treatment of these subjects in developed jurisdictions, with most states accorded central importance to the concept of the "arbitrator's contract" with the parties.

In most jurisdictions, the arbitrator's contract is treated as giving rise to a number of important legal obligations on arbitrators. These include the obligations to resolve the parties' dispute in an adjudicatory manner (with various ancillary duties), to conduct the arbitration in accordance with the parties' arbitration agreement, to maintain the confidentiality of the arbitration and to fulfill the arbitrator's mandate. (5) These obligations are enforced through a variety of mechanisms, including civil liability, loss of entitlement to remuneration, termination of the arbitrator's mandate, removal of the arbitrator and prohibitions against further appointments. (6)

At the same time, most jurisdictions also regard the arbitrator's contract and applicable law as granting international arbitrators important rights and protections. These include rights to remuneration, to cooperation from the parties in the arbitral proceedings and to immunities from liability. (7)

§13.02 STATUS OF INTERNATIONAL ARBITRATORS

The status of international arbitrators is central to defining their rights, powers and obligations. Nevertheless, the subject has received surprisingly little attention, resulting in a measure of continuing uncertainty about the legal and conceptual basis for the arbitrator's relations with the parties and their respective rights and obligations. (8)

[A] Status of International Arbitrators in International Arbitration Conventions

The New York Convention (and other international arbitration treaties) contains no provisions addressing the status, rights, or duties of international arbitrators. The subject is instead left almost entirely to national law. As discussed elsewhere, the Convention imposes international obligations on Contracting States to recognize and enforce agreements to arbitrate, (9) ● which might bear indirectly on the arbitrator's status, rights and duties in some cases; in practice, however, the Convention has played virtually no role at all in addressing these matters. (10)

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[B] Status of International Arbitrators in National Arbitration Legislation

Similarly, national arbitration legislation virtually never expressly addresses the

“It is beyond any question that an arbitrator has a duty of disclosure. Such a duty is predicated upon the enormous power, responsibility, and discretion vested in the arbitrator and the very limited judicial review of the arbitrator’s decisions. So often, significant sums of money are at stake. And, of course, an experienced arbitrator whose livelihood depends upon his reputation and skill, always recognizes there is a competitive market for such services. Thus, the duty of disclosure requires a certain degree of introspective reflection or what is commonly known as due diligence. While an arbitrator need not launch a full investigation into his past, an arbitrator must make a reasonable effort, consistent with the effort and care ordinarily exercised by a person who seeks to satisfy a legal obligation, to inform himself/herself of the interests, contacts, and/or relationships that are required to be disclosed.” (181)

The arbitrator’s disclosure obligations are intended primarily to enable the parties to ascertain whether prospective arbitrators satisfy applicable standards of independence and impartiality, and to exercise their challenge rights if they believe that these standards are not satisfied. (182) In addition, however, the arbitrator’s disclosure obligations have a contractual aspect, owed by the arbitrator to the parties under the terms of the arbitrator’s contract. A failure to comply with applicable disclosure obligations can potentially subject an arbitrator to civil liability (subject to available immunities), (183) as well as challenge and removal from the arbitral tribunal.

Some national courts have imposed liability on arbitrators for failing to disclose conflicts of interest. (184) In the words of one French decision, which imposed liability on an arbitrator for failure to disclose a conflict of interest, “[t]he relationship between the arbitrator and the parties, which is contractual in nature, justifies his liability being assessed in the light of the ● ordinary legal conditions [for breach of contract].” (185) Other jurisdictions adopt the opposite result. (186) This again reflects the hybrid and *sui generis* character of the arbitrator’s role, with certain aspects of that mandate being contractual (and a potential source of contractual liability and claims) and certain aspects being adjudicatory (and enjoying quasi-judicial immunities associated with adjudicatory functions).

[4] International Arbitrator’s Obligations of Care, Skill and Integrity

The arbitrator’s obligation to resolve the parties’ dispute includes an obligation to conduct the arbitral proceedings and decide the case with appropriate care, skill and professional integrity. (187) The arbitrator’s duties of care and skill are in some respects akin to those imposed on other professionals, such as lawyers, accountants and bankers (although, as discussed below, the enforcement of these obligations is radically different because of the arbitrator’s entitlement to immunities (188)). This obligation includes devoting the necessary time and attention to the case, and addressing the evidence and submissions with the skill and ability necessary to understand them. These obligations also extend to a duty to decline appointment in arbitrations for which a potential arbitrator is ill-prepared or ill-suited, whether by virtue of a lack of expertise, language abilities, or otherwise. (189)

One of the arbitrator’s most significant obligations is to render an award that is enforceable. This duty is frequently expressed, as an objective, in institutional arbitration rules. (190) In national laws this obligation is generally not expressly set forth: it is an implicit duty of arbitrators. (191) In addition to requiring the preparation and execution of an award, the arbitrator’s ● obligations include the delivery or notification of the award to the parties. (192)

The arbitrator’s obligations include deciding all of the disputes which are presented to him or her. (193) As discussed below, an arbitrator’s failure to decide questions that are submitted to the tribunal constitutes *infra petita*, and may be grounds for annulling or refusing to recognize the award. (194) An arbitrator’s failure to completely decide the parties’ dispute can also entail a breach of his or her contractual obligations of care to the parties. Conversely, an arbitrator is also obliged not to decide matters which have not been submitted by the parties to arbitration; awards on such matters are not only subject to annulment or non-recognition but are contrary to the arbitrator’s contractual mandate. (195)

An arbitrator who is a member of a multi-member tribunal is obligated to participate conscientiously in deliberations with the other members of the tribunal. This obligation is express under some national laws, (196) and implied under virtually all legal systems. (197) This includes the obligation, discussed below, to make oneself available for deliberations in a timely fashion, not to delay the arbitral process by unduly protracting or obstructing the deliberations and to participate collegially in drafting and reviewing the award. (198)

An arbitrator is also impliedly obligated to the parties to act with professional integrity, honoring applicable rules of ethics and professional responsibility. (199) As discussed above, several non-binding codes of conduct or ethics have been adopted by different professional bodies for arbitrators, including the IBA Rule of Ethics, the ABA/AAA Code of Ethics and ● the IBA Guidelines on Conflicts of Interest. (200) These codes should be regarded as expressing the reasonable expectations of commercial parties and most

arbitrators, and ● the arbitrator's contractual obligations can therefore also be said to include a duty to comply generally with any applicable rules of ethical responsibility, at least insofar as these are directed towards the protection of the parties and are consistent with the parties' arbitration agreement.

[5] International Arbitrator's Obligation of Diligence

In addition to exercising reasonable care and skill, arbitrators are obligated to conduct an arbitration with diligence and expedition. As discussed above, one of the parties' objectives in agreeing to arbitrate is to obtain a speedy, efficient resolution of their disputes. (201) Many ethical codes (202) and some national laws impose general requirements for expeditious conduct of the arbitral proceedings, (203) and a few sets of institutional arbitration rules or national laws impose specific time deadlines for rendering an award. (204) Additionally, the parties' arbitration agreement sometimes specifies particular time deadlines or timetables for the arbitration, including in some cases provision for fast-track arbitrations. (205)

The arbitrator's obligations include the duty to comply with both the general requirements of expedition and efficiency, as well as with specific time deadlines imposed by applicable institutional rules or national law, or by the parties' arbitration agreement. These obligations involve the duty to decline a nomination if the arbitrator is unsure of his or her ability to meet prescribed deadlines, and also to decline personally taking on further work if it would endanger complying with existing commitments. (206) It also goes without saying that an arbitrator must make himself available for hearings and deliberations among the members of the arbitral tribunal, must respond promptly to requests for comments and views by the presiding arbitrator and must not seek to delay the arbitral proceedings for personal or partisan advantage. (207)

P 2140 It bears emphasis that the foregoing obligations are fundamental to the arbitral process, yet are not always observed with ideal care. The obligations of diligence and expedition are sometimes regarded as little more than platitudes – perhaps because of past experiences with ● cases settling or parties failing to complain. This attitude is unacceptable and constitutes a breach of an arbitrator's professional and contractual obligations to the parties. (208)

As discussed below, leading arbitral institutions have recognized the need to better ensure that arbitrators fully comply with their obligations of diligence and timeliness. (209) In particular, the ICC has published a Task Force report on minimizing costs and delays in ICC arbitrations. (210) The ICC and other leading arbitral institutions also (properly) consider an arbitrator's past record of timeliness (among other criteria) in making future appointments. (211)

[6] International Arbitrator's Obligation to Apply Law

P 2141 There is an often-overlooked, but essential, aspect of the arbitrator's adjudicative status. (212) The arbitrator exercises authority conferred by law, to resolve the parties' disputes in a legally-binding manner. As noted above, "the services of an arbitrator are principally and habitually those of settling a dispute between two or more parties." (213) As discussed elsewhere, this is an adjudicative function and authority, which consists in hearing the parties' submissions and evidence in fair, objective proceedings and rendering an impartial, reasoned decision that finally decides their rights on the basis of their submissions and evidence. (214) This is a quintessentially ● adjudicatory function, closely akin to that of a judge, which distinguishes the arbitrator's mandate from virtually all others. (215)

This adjudicatory function entails the obligation to decide the parties' disputes in accordance with the applicable law (save in arbitrations *ex aequo et bono* or *amiable compositeur*). (216) Thus, the arbitrator's mandate is not simply to apply the terms of the parties' contract, or even the law chosen by the parties, but *instead to apply the applicable law*, including any relevant provisions of mandatory law, in order to resolve the parties' dispute in accordance with the law. (217)

This adjudicative function transcends, and in rare cases contradicts, the provision of a contractual service to the parties or the fulfillment of a contractual duty. Rather, it is the fulfillment of an adjudicative mandate comparable to that of a judge, applicable even where fulfilling this mandate may be directly contrary to the parties' agreement. As discussed below, this is a highly sensitive responsibility, which is seldom exercised, (218) but one that nonetheless lies at the core of the arbitrator's *sui generis* mission and mandate.

In rare cases, arbitrators will be confronted by evidence suggesting criminal misconduct by one (or both) of the parties. (219) The issue then arises to what extent, if any, the arbitrators may, or must, inquire more deeply into this matter, even if this requires directing the parties to submit further evidence.

The tribunal must obviously act with great care and delicacy in such circumstances. In principle, the tribunal should request evidence only where it is material to deciding the disputes pending before it, and then only where it appears that the parties have not provided sufficient information to permit a satisfactory decision. The tribunal should not proceed as a sort of private attorney general or investigating magistrate to seek out

- 186)** See, e.g., U.S. Revised Uniform Arbitration Act, §14(c) (2000) (“The failure of an arbitrator to make a disclosure required by §12 does not cause any loss of immunity under this section”).
- 187)** 2014 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon 1(B)(3) (arbitrator should accept appointment only if “he or she is competent to serve”); 1987 IBA Rules of Ethics for International Arbitrators, Art. 2(2); ICSID & UNCITRAL, *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement* (2020), Art. 3(b). See also Brazilian Arbitration Law, Art. 13(6) (“In performing his duty, the arbitrator shall behave in an impartial, independent, competent, diligent and discreet manner”); Donovan, *The International Arbitrator as Transnational Judge*, 7 *World Arb. & Med. Rev.* 193, 194-95 (2013) (“It follows that arbitrators have certain basic duties flowing ultimately from the parties’ consent. ... They would surely include ... the duty to act with care, skill and integrity.”).
- 188)** See §13.06[C].
- 189)** 1987 IBA Rules of Ethics for International Arbitrators, Art. 2(2) (“A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is competent to determine the issues in dispute, and has adequate knowledge of the language of the arbitration”). See also Fry & Greenberg, *The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases*, 20(2) *ICC Ct. Bull.* 12, 21 (2009) (ICC Court withheld confirmation of arbitrator because of lack of fluency in language of arbitration).
- 190)** See, e.g., 2017 ICC Rules, Art. 42; 2016 SIAC Rules, Art. 41(2) (“In all matters not expressly provided for in these Rules ... the Tribunal shall ... make every reasonable effort to ensure ... the enforceability of any Award”); 2014 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canons I(A), (G); 2020 LCIA Rules, Art. 32(2); 1987 IBA Rules of Ethics for International Arbitrators, Art. 1 (“Arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes”); 2017 SCC Rules, Art. 2(2).
- 191)** See, e.g., Berger & Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 *Arb. Int’l* 415, 420 (2016) (“it is often said that it is an implied part of any arbitrator’s mandate to render an enforceable award”); G. Horvath, *The Duty of Tribunals to Render An Enforceable Award*, 18(2) *J. Int’l Arb.* 135 (2001); Hunter & Philip, *The Duties of An Arbitrator*, in L. Newman & R. Hill (eds.), *The Leading Arbitrators’ Guide to International Arbitration* 485 (3d ed. 2014) (“One of the principal duties of the arbitrators is ... to make sure that their award is enforceable”); R. Merkin, *Arbitration Law* ¶10.53 (1991 & Update November 2019) (“long-established common law duty of an arbitrator to make an enforceable award”).
- 192)** See, e.g., German ZPO, §1054(4); Austrian ZPO, §606(4); Belgian Judicial Code, Art. 1713(8); Netherlands Code of Civil Procedure, Art. 1058; Swedish Arbitration Act, §31(3); Finnish Arbitration Act, §37; Japanese Arbitration Law, Art. 39(5). See also §23.06[B].
- 193)** See, e.g., *N. Reg’l Health Auth. v. Derek Crouch Constr. Co.* [1984] 1 QB 644, 673-74 (English Ct. App.) (“The primary duty of an arbitrator is to decide all issues referred to him”); 2014 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon V(A) (“The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.”); Norwegian Arbitration Act, §32(1); Donovan, *The International Arbitrator as Transnational Judge*, 7 *World Arb. & Med. Rev.* 193, 194-95 (2013) (“It follows that arbitrators have certain basic duties flowing ultimately from the parties’ consent. ... They would surely include ... duty to act within the scope of authority.”).
- 194)** See §25.04_[F][4]; §26.05[C].
- 195)** See §25.04_[F][4]; §26.05[C]. Arbitrators’ decision-making with regard to jurisdictional and substantive matters will almost always be subject to immunities.
- 196)** See Belgian Judicial Code, Art. 1711. See also Norwegian Code of Civil Procedure, 1915, Art. 463 (“All the arbitrators shall participate in decisions of the arbitral tribunal”) (repealed).
- 197)** Swedish Arbitration Act, §30(1); 2014 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon IV(G) (“Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings”).
- 198)** See §13.04[A].
- 199)** By their terms, most ethical rules do not have mandatory binding effect on the arbitrators (or parties). See §12.05[J] (especially §§12.05[J][2] & [5]); 2014 AAA Code of Ethics for Arbitrators in Commercial Disputes, Note on Construction (“This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.”); 1987 IBA Rules of Ethics for International Arbitrators, Explanatory Note (“The rules cannot be directly binding either on arbitrators, or on the parties themselves, unless they are adopted by agreement.”). See e.g., §12.05_[J]; §25.04_[E]; §26.05.
- 200)** See §12.05[J].
- 201)** See §1.02[B][7].

- 202)** 2014 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon I(F) (“An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants ...”); ARIAS–U.S., Code of Conduct (2019), Canon VII (“Arbitrator shall exert every reasonable effort to expedite the process and to promptly issue procedural communications, interim rulings and written awards”); 1987 IBA Rules of Ethics for International Arbitrators, Art. 1 (“arbitrators shall proceed diligently and efficiently”), Art. 7 (“Duty of Diligence”); Gaillard, *Les Manoeuvres Dilatoires des Parties et des Arbitres dans l’Arbitrage Commercial International*, 1990 Rev. Arb. 759; ICC, *Final Report on the Status of the Arbitrator*, 7(1) ICC Ct. Bull. 27, 30 (1996); ICSID & UNCITRAL, *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, Art. 3(c) (2020); Okekeifere, *The Parties’ Rights Against A Dilatory or Unskilled Arbitrator*, 15(2) J. Int’l Arb. 129 (1998).
- 203)** See, e.g., UNCITRAL Model Law, Art. 14 (“without undue delay”); English Arbitration Act, 1996, §33(1); Netherlands Code of Civil Procedure, Art. 1031(2); Swedish Arbitration Act, §17 (arbitrator may be removed if he or she “has delayed the proceedings”); Brazilian Arbitration Law, Art. 13(6) (“In performing his duty, the arbitrator shall behave in [a] competent, diligent ... manner”); Berti, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 185, ¶9 (2000) (parties may file requests that proceedings be advanced in timely manner with court at seat of arbitration based on Article 185 of Swiss Law on Private International Law); R. Merkin, *Arbitration Law* ¶¶10.54-56 (1991 & Update November 2019). See also *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.*, 551 F.2d 1026, 1033 (5th Cir. 1977) (“arbitrator has a duty, express or implied, to make reasonably expeditious decisions”); *Final Award in ICC Case No. 9302*, XXVIII Y.B. Comm. Arb. 54, 66 (2003).
- 204)** See §15.08 [O]; §25.04[C][5]. Some arbitration legislation provides for arbitrator liability in cases involving failure to meet statutory deadlines. See Italian Code of Civil Procedure, Arts. 813, 820 (“The arbitrators shall render their award within the time-limit set by the parties or by law; if they fail to do so and the award is set aside on this ground, the arbitrators shall be held liable for damages”; 180 days from acceptance of appointment to issue award unless otherwise agreed by the parties); Argentine National Code of Civil and Commercial Procedure, Arts. 745, 756 (failure to render award within required time forfeits arbitrator’s fee and exposes arbitrator to liability for costs and damage); Indian Arbitration and Conciliation Act, §29A(4) (“if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay ...”); Indonesian Arbitration and ADR Law, Art. 57. *Compare Judgment of 17 December 2010*, 34 SchH 6/10 (Oberlandesgericht München) (refusing to terminate arbitrator’s mandate for delay, notwithstanding eight-year delay; holding that termination by national court was appropriate only in exceptional cases and that most of delay was due to parties’ and experts’ delays, while delay attributable to arbitrator arose from unforeseen circumstances).
- 205)** See §15.08[J].
- 206)** See, e.g., 2014 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon I(B) (4) (arbitrator should agree to serve only if satisfied “that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect”); 1987 IBA Rules of Ethics of International Arbitrators, Art. 2(3) (“A prospective arbitrator shall accept an appointment only if he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect”). Berger, *Rights and Obligations of Arbitrators in the Deliberations*, 31 ASA Bull. 252 (2013) (“The counterpart of these obligations is to decline the acceptance of cases for which the arbitrator in question may be ill-suited – for example, because of insufficient knowledge of the applicable law or lack of language skills – or may not have the necessary time available”); ICSID & UNCITRAL, *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement* (2020), Art. 8(1) (“Before accepting any appointment, adjudicators shall ensure their availability to hear the case and render all decisions in a timely manner ...”), Art. 8(2) (“Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions”). See also J. Paulsson, *The Idea of Arbitration* 149 (2013) (“It is dishonest to accept appointment without a solid understanding of the relevant domain, or without a considered commitment to give the matter full and timely attention”); Tercier, *Entre Nous A Propos des Relations entre Arbitres*, 2016 Rev. Arb. 1053, 1062 (“[Arbitrators] should not accept appointments if they do not meet the requirements and are not ready to fulfill their mission”); Wilske, *The Ailing Arbitrator: Identification, Abuse and Prevention of A Potentially Dangerous Delaying and Obstruction Tool*, 7 Contemp. Asia Arb. J. 279, 301 (2014) (“it would seem wise to appeal not only to time-challenged, but also to fragile arbitrators and to remind them of Karl-Heinz Böckstiegel’s admonishment that there is always the choice to ‘just say no’ to another demanding engagement that might risk one’s well-deserved reputation”); §13.04[A][6].

- 207)** See Berger, *Rights and Obligations of Arbitrators in the Deliberations*, 31 ASA Bull. 252 (2013) (“The duties of care and diligence include devoting the necessary time and attention to the issues to be determined and analysing the submissions and evidence with the necessary skills and ability”); Fouchard, *Relationships Between the Arbitrator and the Parties and the Arbitral Institution*, in ICC, *The Status of the Arbitrator* 12, 18 (1995) (“An arbitrator who is a member of an arbitral tribunal is also failing in his duty of due diligence if he refrains from taking part in the hearings or in the deliberations. If he were to seek to use this as a means of paralyzing the procedure, particularly if this was in the interest of the party who nominated him, it would constitute a deliberately wrongful act.”); Tao, *Deliberations of Arbitrators*, in P. Shaughnessy & S. Tung (eds.), *The Powers and Duties of An Arbitrator: Liber Amicorum Pierre A. Karrer* 351 (2017) (“An arbitrator’s duty to deliberate could be viewed to include his/her obligations to fix a date for the deliberations, to organize, prepare and participate in the deliberations, and to deliberate on all the litigious questions”); 2014 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI (“An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office”). *CompareKS Norjarl AS v. Hyundai Heavy Indus. Co.* [1992] 1 QB 863, 879 (English Ct. App.) (“Arbitrators are under no absolute obligation to make particular dates available: their obligation is to sit on such dates as may reasonably be required of them having regard to all of the circumstances including the exigencies of their own practices”).
- 208)** At the same time, international arbitration frequently can give rise to complex factual and legal issues, requiring access to witnesses in different locations, speaking numerous languages, with testimony on highly technical matters, while legal issues can arise under obscure or difficult legal systems, requiring translations (of technical matters). The resolution of such matters demands time and attention, as a matter of fairness to both parties. Schwartz, *The Rights and Duties of ICC Arbitrators*, in ICC, *The Status of the Arbitrator* 67, 80 (1995) (“apart from their international character, certain disputes are simply so complex or technical that they are not capable of fair resolution as rapidly as might be the case, for example, with respect to a dispute over the quality of a shipment of lime juice”).
- 209)** See §15.07_[C]; §23.06[A].
- 210)** Y. Derains & C. Newmark (eds.), *ICC Task Force on Reducing Time and Costs in Arbitration: Techniques for Controlling Time and Costs in Arbitration* (2007). The Task Force report was revised in 2018 to reflect modifications made in the 2012 ICC Rules. See ICC, *Controlling Time and Costs in Arbitration, Techniques for Controlling Time and Costs in Arbitration* (2d ed. 2018).
- 211)** The revised 2017 ICC statement of acceptance requires prospective ICC arbitrators to state the “[n]umber of currently pending cases in which [they are] involved.” See ICC, *Arbitrator Statement Acceptance, Availability, Impartiality and Independence Form* (2017). See also J. Fry, S. Greenberg & F. Mazza, *The Secretariat’s Guide to ICC Arbitration* ¶3-382 (2012) (“Disclosure of an arbitrator’s availability also improves transparency for the parties, as it gives them the opportunity to make objections based on what they perceive as inadequate availability. Where there are genuine concerns over availability, the Court may decide not to confirm or appoint the arbitrator.”); Fry & Greenberg, *The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases*, 20(2) ICC Ct. Bull. 12, 19 (2009) (ICC Court refused to confirm arbitrator who had performed poorly in earlier case).
- 212)** Most ethical codes omit express reference to the arbitrator’s obligation to apply the law. Rather, such codes address the subject impliedly, by requiring the arbitrator to render impartial and just decisions, based only on the law and evidence. 2014 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canons V, V(B); 1987 IBA Rules of Ethics, Art. 1. See also L. Craig, *The Arbitrator’s Mission and the Application of Law in International Commercial Arbitration*, 21 Am. Rev. Int’l Arb. 243 (2010).
- 213)** *von Hoffmann v. Finanzamt Trier*, Case No. C-145/96, [1997] E.C.R. 1-4857, ¶17 (E.C.J.). See also *Jivraj v. Hashwani* [2011] UKSC 40 (U.K. S.Ct.) (“quasi-judicial adjudicator”); §1.05_[A]; §2.02_[C][1]; §19.03[B].
- Expectations in some domestic legal traditions occasionally differ. See Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 Hofstra L. Rev. 137, 154-55 (1994) (in poll of domestic US construction arbitrators, 72% answered that they “always follow the law,” while 20% answered that they did not).
- 214)** See §2.02[C][4].
- 215)** See §1.05.
- 216)** See §19.08.
- 217)** See §19.02.
- 218)** See *id.*

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Chapter 23: Form and Contents of International Arbitral Awards

(1)

An arbitral award possesses particular legal significance, conferred by both international arbitration conventions and national law. Concurrent with producing these legal effects, most national laws require that arbitral awards satisfy a number of important legal requirements, as to form, content and other matters. This Chapter addresses the different categories of international arbitral awards, the form requirements applicable to arbitral awards, the requirement for a "reasoned" arbitral award, the possibility of majority and other non-unanimous awards, dissenting, concurring and other separate opinions, and the types of relief typically granted in arbitral awards.

§23.01 CATEGORIES OF INTERNATIONAL ARBITRAL AWARDS (2)

Most national arbitration legislation and institutional arbitration rules provide for a variety of different types of arbitral "awards," including final awards, partial awards, interim awards, consent awards and default awards. Each of these categories of arbitral awards is discussed below. Unfortunately, there is some inconsistency in the usage of these various terms; as discussed below, different authorities, and different legal systems, sometimes adopt different meanings for the same term, or the same meaning for different terms, requiring that these labels be used with care.

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[A] Final Awards

The term "final award" is used in a number of different senses, and has often led to confusion. It is important to avoid such confusion by being clear about those different meanings.

First, as discussed above, all rulings by arbitral tribunals which qualify as arbitral "awards" can be regarded as "final," in the sense that all arbitral awards finally resolve a particular claim or matter with preclusive effect. Thus, all "awards" rendered during the course of an arbitration, including awards made before the arbitration's final conclusion, are "final" because of the preclusive effect that they enjoy. Most obviously, a "partial" award that decides and grants relief on (only) one of several claims in an arbitration will be regarded as "final" in this sense, notwithstanding the fact that further decisions by the tribunal are required to fully resolve the parties' dispute.

Second, as also discussed below, some international arbitration conventions and national arbitration statutes provide for the recognition of only "final" awards, and not of other, "non-final" rulings by arbitral tribunals. Used in this sense, a "final" award refers only to those decisions that have achieved a sufficient degree of finality in the arbitral seat (most obviously, by being granted confirmation or *exequatur*) or that are no longer subject to appeal or annulment in the arbitral seat. Typically, only after an award has been granted *exequatur*, or after appeals from the award have been rejected (or become untimely), is it categorized as "final" in this sense. Note that awards which are "final," in the sense of having preclusive effect, may not be "final" in this sense, of no longer being subject to recourse.

Third, and also confusingly, there is a further usage of the term "final" in connection with arbitral awards. As its name suggests, the term "final award" also refers to the last award in an arbitration, which disposes of all (or all remaining) claims in the arbitration and terminates the tribunal's mandate. The concept of a "final award" must be distinguished from an "award" that is "final," with the latter two terms being used together in the sense of an award no longer being subject to judicial review. A "final award" is also to be distinguished from "partial awards," which "finally" resolve part (but not all) of the parties' claims, and which may become sufficiently "final" for recognition, but in each case without terminating the arbitration and without being "final awards."

Most national arbitration legislation is consistent with the terminology outlined above; these are also the formulae used in most institutional arbitration rules. Using these formulae, a "final award" is the award that disposes of either all the parties' claims or all the parties' remaining claims in the arbitration (and is therefore the last award in the arbitration). Both such a "final award" and earlier "partial awards" are "final," and may be capable of recognition and enforcement, but there is only one "final award" in any arbitration and only a "final award" concludes the arbitration and renders the tribunal *functus officio*.

It follows from the above that an arbitral tribunal should not purport to make a "final award" unless it has considered and disposed of all the parties' claims in the arbitration

encompassing the language of the award. (196) In both instances, failure to make the award in the requisite language may constitute a defect of form and arguably provide a basis for annulment or non-recognition of the award. (197)

P 3290 It is possible that national law in the arbitral seat would impose language requirements on the award. (198) If this were the case, the award would be exposed to annulment or non-recognition if it were not in the required language (subject to arguments that, where the parties ● had otherwise agreed, national law was contrary to Articles II and V(1)(d) of the New York Convention). (199)

§23.03 REQUIREMENT THAT INTERNATIONAL ARBITRAL AWARDS BE REASONED (200)

It is now a nearly universal principle that, unless otherwise agreed, international arbitral awards must set forth the reasons for the tribunal's decision, as well as containing a dispositive section specifying the relief ordered by the tribunal. This requirement for a reasoned award is reflected in international arbitration conventions, national arbitration law and institutional arbitration rules, and plays an important role in the contemporary international arbitral process.

[A] Requirement for Reasoned Award in International Arbitration Conventions

The New York Convention (like the Inter-American Convention) does not expressly address the subject of reasoned awards. In contrast, Article VIII of the European Convention provides that the parties "shall be presumed to have agreed that reasons shall be given for the award," except where: (a) the parties "expressly declare" to the contrary; or (b) the parties "have assented to an arbitration procedure under which it is not customary to give reasons for awards" and neither party requests reasons. (201) This provision is expressive of the expectations of parties in most contemporary international contexts, and (absent contrary agreement) can be regarded as a general principle of law in the context of international commercial and investment arbitration. (202)

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[B] Requirement for Reasoned Award in National Arbitration Legislation

Historically, there was no universal rule under many national laws that arbitral awards be reasoned. (203) The traditional rule under English common law was that unreasoned awards were enforceable and the practice of making unreasoned awards was common. (204) Consistent with this, English, U.S., Indian and Hong Kong courts historically did not require that arbitral awards state the arbitrators' reasons for their award. (205) Nonetheless, modern arbitration legislation in most developed jurisdictions – save the United States – has superseded the common law rule and expressly requires that arbitrators give reasons for awards made within national territory, unless otherwise agreed by the parties. (206)

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Article 31(2) of the UNCITRAL Model Law is representative of contemporary arbitration legislation, providing that "the award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given." (207) Under the Model Law, reasoned awards are the default rule, unless the parties affirmatively agree to the contrary. (208) Other arbitration legislation is similar, (209) while some statutes go further, mandatorily requiring reasons ● to be given in all cases (regardless of the parties' agreement). (210) Similarly, leading institutional arbitration rules almost uniformly require reasoned awards, either on a mandatory basis (211) or absent contrary agreement. (212)

The requirement for reasoned awards rests on contemporary assessments of the purposes and demands of the adjudicative process. A leading English authority expressed the rationale as follows:

"By the end of the judgment the whole of the judge's thinking on the facts and the law should have been laid bare, that all who run may read. It should be fair to assume that he has not been led to his decision by matters he has not mentioned. No cards regarded by him as significant should remain face downwards or in the pack. His decision may later be held to have been right or wrong, but at least there should be no real doubt what he decided or why." (213)

Simply put, it is regarded as an essential aspect of the judicial process – and the related adjudicative process of arbitration (214) – that the decision-maker be required to explain the reasons for his or her decision. This is necessary in order to constrain the power of the decision-maker (reducing the risk of arbitrary, corrupt, whimsical, or lazy decisions), to enhance the quality of the decision-making process (by requiring thoughtful, diligent analysis) and to provide the parties with the opportunity not only to be heard, but to hear and see that their submissions have been considered and how they have been disposed of. (215)

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Indeed, a reasoned decision, explaining how legal rules apply to factual determinations, is the essence of adjudication, distinguishing it from legislative, executive and other forms of decision-making. (216) These considerations are ordinarily more, not less, important in the context of arbitral decisions, as compared to judicial decisions, because arbitrators do not have the training, institutional responsibilities and discipline, or appellate oversight, of national court judges. (217) Nonetheless, some courts have also held that an arbitral award need not satisfy the same standard of reasoning as a national court judgment, (218) on the basis that arbitration is designed to settle disputes expeditiously. (219)

It has also been suggested that the requirement for reasoned awards conflicts with the arbitrator's independence and ability to creatively and flexibly resolve commercial disputes:

“When we talk about the arbitrator's freedom from reasoned awards, it will frequently be the case that we are really talking about his freedom from over-broad rules or time-honoured categories that might otherwise appear to dictate a result he would prefer to avoid. This is, then, a freedom that makes possible an arbitrator's flexibility in decision-making and a maximum attention to context.” (220)

Although there is practical force to this observation, it mischaracterizes the essential character of international commercial arbitration, which is an adjudicative process in which arbitrators apply the law. If parties wish to give an arbitrator “freedom from over-broad rules or time-honoured categories,” they agree to arbitration *ex aequo et bono*, which grants arbitrators that freedom from legal rules. If parties do not do so, however, then the arbitrators' mandate is to apply the law – accompanied by a strong appreciation of the parties' commercial setting and objectives – with the requirement for reasons serving to guarantee the diligence and quality of that adjudicatory process.

[C] Content of Requirement for Reasoned Award Under National Arbitration Legislation

The requirement for reasons under most national arbitration legislation does not demand that the arbitrators write a learned article on the issues in dispute, nor deliver an award of any particular length. Indeed, in some instances, longer is not better, but worse, in arbitral awards, by tending to obscure the real issues and bases for decision. P 3294 (221) The essential requirement for reasoning in an arbitral award is that the tribunal identify the issues that are dispositive in the dispute and explain, concisely, the thought-process underlying its decision: this entails stating the material evidentiary premises for the tribunal's decision, the content of the relevant legal rules and contractual provisions and why those rules lead to a specified result given the tribunal's evidentiary determinations.

There are various formulations for what constitutes a reasoned award. (222) One of the most satisfactory is:

“All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a ‘reasoned award.’” (223)

This requirement for a concisely-reasoned award can be regarded as expressing the parties' presumptive expectations in any contemporary international commercial arbitration. Indeed, a well-reasoned Australian decision adopts precisely this view under the UNCITRAL Model Law:

“The Model Law, Art. 31(2) ... [does] not say that the arbitrator must deal with every substantial argument put forward by the contending parties. Nor [does it] state that the arbitrator should state the evidence from which he or she draws his or her findings of fact and give reasons for preferring some evidence over other evidence. The reasons required are those for making the award. To the extent that a crisp summary of that is required, I would adopt the statement of principle of Donaldson LJ in *Bremer v Westzucker* [quoted above].” (224)

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● Among other things, there is no requirement that a “reasoned” award list the evidence that the parties have submitted or discuss how the tribunal evaluates each item of evidence. (225) Likewise, in evaluating an award's reasoning, courts should not presume that a tribunal was confused or inattentive, but should instead be prepared to infer that the tribunal has adopted logical or necessary views regarding the evidence and the law.

The requirement for a reasoned award is also not a requirement for a well-reasoned award: bad or unpersuasive reasons are still reasons, and will satisfy statutory requirements for reasoned awards. (226) As discussed below, in a limited number of jurisdictions, awards made in locally-seated arbitrations may be annulled if they are

- 209)** See, e.g., English Arbitration Act, 1996, §52(4); Swiss Law on Private International Law, Art. 189(2); German ZPO, §1054(2); Netherlands Code of Civil Procedure, Arts. 1057, 1065(1)(d) (annulment of award if “award is not signed or does not contain reasons in accordance with the provision of Article 1057”); Austrian ZPO, §606(2); Hong Kong Arbitration Ordinance, §67(1); Australian International Arbitration Act, Schedule 2, Art. 31; Chinese Arbitration Law, Art. 54; Japanese Arbitration Law, Art. 39(2); Malaysian Arbitration Act, §33(3); Norwegian Arbitration Act, §36; South Korean Arbitration Act, Art. 32(2); Costa Rican Arbitration Law, Art. 31(2); Peruvian Arbitration Act, Art. 56(1); Venezuelan Commercial Arbitration Law, Art. 30; Egyptian Arbitration Law, Art. 43(2) (“The arbitral award shall state the reasons upon which it is based unless the parties to arbitration have agreed otherwise or the law applicable to the arbitral proceeding does not require the award to be supported by reasons ...”).
- 210)** See, e.g., French Code of Civil Procedure, Art. 1482; Belgian Judicial Code, Art. 1713(4); Russian International Arbitration Law, Art. 31(2) (omitting Model Law phrase “unless otherwise agreed by the parties”); Ukrainian Arbitration Law, Art. 31(2); Brazilian Arbitration Law, Art. 26. See Delvolvé, *Essai sur la Motivation des Sentences Arbitrales*, 1989 Rev. Arb. 149; E. Loquin, *JurisClasseur Procédure Civile* Fasc. 1042, ¶31 (2016) (in domestic arbitration only).
- 211)** See, e.g., 2017 ICC Rules, Art. 32(2); 2006 ICSID Rules, Rule 47(1)(i); 2015 NAI Rules, Art. 44(1)(e); 2017 Ukrainian Chamber of Commerce and Industry Rules, Art. 60.
- 212)** See, e.g., 2013 UNCITRAL Rules, Art. 34(3); 2010 UNCITRAL Rules, Art. 34(3); 1976 UNCITRAL Rules, Art. 32(3); 2014 ICDR Rules, Art. 30(1); 2016 SIAC Rules, Art. 32(4); 2020 LCIA Rules, Art. 26(2); 2018 HKIAC Rules, Art. 35(4); 2015 CIETAC Rules, Art. 49(3); 2018 VIAC Rules, Art. 36(1); 2020 WIPO Rules, Art. 64(c).

The United States and United Kingdom initially opposed the 1976 UNCITRAL Rules’ proposed requirement for reasoned awards. After debate, the Rules were drafted to require reasons, except where the parties agreed otherwise (either expressly or by implication). UNCITRAL, *Summary Record of the Tenth Meeting of the Committee of the Whole (II)*, Ninth Session, U.N. Doc. A/CN.9/9/C.2/SR.10, ¶¶62, 64-65, 73-75 (1976).

- 213)** Bingham, *Reasons and Reasons for Reasons*, 4 Arb. Int’l 141, 145 (1988). See also Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 366 (1978) (“Adjudication is ... a device which gives formal and institutional expression to the influence of reasoned argument in human affairs”); Helfer & Slaughter, *Toward A Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 320 (1997) (“Reasons should explain why and how a particular conclusion was reached. To reason in this context, means to give reasons for a particular result, regardless of the logic or mode of reasoning underlying those reasons.”); Shapiro, *The Giving Reasons Requirement*, 1992 U. Chi. Legal F. 179, 181 (“in the Western tradition, the very concept of political authority ... implies the capacity to give reasons”).
- 214)** See §1.05 [A]; §2.02 [C][4]; §13.04; §23.03[E].
- 215)** D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 801 (2d ed. 2013) (“Among the most important obligations that the arbitral tribunal owes the parties is the rendering of a coherent, accurate, and complete award”).
- 216)** The requirement for a reasoned award arguably encourages principled decision-making, by making it more difficult to adopt unprincipled compromise decisions. See Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy*, 37 Mich. J. Int’l L. 1, 19-20 (2015).
- 217)** Compare T. Webster & M. Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* ¶¶32-37 to 38 (4th ed. 2018) (“Providing legal reasons is the most difficult part of drafting the Award, which in many cases turns out to be the weakest part of the Award. ... Some view the weakness in legal reasoning as in part a result of the fact that most ICC Awards are not published and that if published, this is often without the names of the arbitrators who participated in their drafting.”).
- 218)** See, e.g., Hope, *Awards: Form, Content, Effect*, in W. Rowley (ed.), *The Guide to Challenging and Enforcing Arbitration Awards* 12, 18-19 (2019).
- 219)** *Judgment of 28 September 2016*, 18 OCg 3/16i (Austrian Oberster Gerichtshof); *Judgment of 3 April 2007*, Saudi-Egyptian Co. for Touristic Dev. v. Meridian SA, Case No. 123/119 (Cairo Ct. App.).
- 220)** Rau, *On Integrity in Private Judging*, 14 Arb. Int’l 115, 149 (1998).
- 221)** For a sharply-critical view of lengthy awards, see *Nazari v. Iran, Dissenting and Concurring Opinion of Howard Holtzmann in Award in IUSCT Case No. 559-221-1 of 24 August 1994*, 30 Iran-US CTR 163, 168-69 (1994) (“I also write separately to call attention to the Tribunal’s growing tendency to write Awards that are overly long and excessively detailed – a tendency that, regrettably, this Award exemplifies. ... A plea for brevity must, in principle, be brief. ... The issue is not a choice of literary style. At stake is the efficient use of the Tribunal’s limited time, funds and facilities – resources which are, in my view, endangered by the present practice in drafting awards.”). See also Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 Duke L.J. 739, 792 (“[A]n insistence on a very detailed standard and a culturally unique ratiocinative style for the reasoning requirement would open up many awards to challenges of nullification and undermine the entire process of international arbitration. Hence, there would appear to be very compelling reasons for the substantially reduced requirement found in international arbitral practice and adopted in the text of Article 52 of the ICSID Convention.”).

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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.

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)

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)

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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)

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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)

P 3408 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)

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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)

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§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.

- 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).

LEGAL AUTHORITY CA-150

Judgments

Secretary of State for the Home Department v Raytheon Systems Ltd

Arbitration – Award – Setting aside award – Z being employed by Y – Proceedings concerning alleged termination of contract – Arbitration taking place – Arbitrators holding Y improperly terminating contract – Y appealing – Whether serious irregularity in tribunal's findings concerning liability and quantum

[2014] EWHC 4375 (TCC), HT-2014-00056, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

QBD, TECHNOLOGY AND CONSTRUCTION COURT

AKENHEAD

8, 9, 19 DECEMBER 2014

19 DECEMBER 2014

R Stewart QC, L-A Mulcahy QC, M Icolm Sh and K Powell for the Claimant

J Smouha QC and E Wood for the Defendant

Pinsent Masons LLP; Clifford Chance LLP

AKENHEAD J:

[1] Given confidentiality considerations and the fact that the application under review is made under the [Arbitration Act 1996](#) and relates to a confidential arbitration, I initially ordered that the identities of the parties were not to be disclosed (subject to any application otherwise), they being referred to as Y and Z. I sought therefore to be as circumspect as is appropriate in the drafting of this judgment. Since the handing down of this judgment on 19 December 2014, the parties later agreed that this judgment can be handed down publicly. I will still below refer to the Claimant as “Y” and the Defendant as “Z”. HS means the Home Secretary.

[2] Z was employed by Y under a contract (“the Agreement”) made some years ago to design, develop and deliver very substantial technology systems. The likely value of the Agreement was a high nine figure sum, if not more. The Contract was purportedly terminated in July 2010 by Y. Issues arose relating to the responsibility for such termination and Y instituted arbitration proceedings with the arbitrators being English and American (nominated by Y and Z respectively) and the chairman being Canadian. The arbitrators produced their lengthy Partial Final Award on 4 August 2014, albeit corrected by memorandums dated 18 August and 29 September 2014. In broad terms that Award decided that Y had unlawfully terminated the Agreement, dismissing Y's money claims, that Y had repudiated the Agreement and that Z had accepted that repudiation. The arbitrators awarded damages to Z which included £126,013,801 for what was known as claim A4 – Transfer of Assets. Other sums awarded totalled £59,581,658 plus some interest.

[3] Y seeks to have the Partial Award set aside and declared to be of no effect. Y relies on [s 68\(2\)\(d\)](#) of the Arbitration Act 1996 on the grounds of “serious irregularity” affecting the tribunal or the award on the basis of “failure by the tribunal to deal with all the issues that were put to it”, those issues relating to what Y articulates as important parts of its case on liability and on quantum in relation to Claim A4. These relate to two associated issues on liability and three on quantum. In broad terms, the tribunal's failure in relation to liability is said to have been to disregard key parts of Y's case in relation to contractual default by proceeding only to address whether there was breach by Y of a condition precedent in the termination clause and in relation to quantum to ignore Y's case on the value of assets transferred after termination and on the need for any cost basis of evaluation to exclude costs which were attributable to default on the part of Z.

[4] The parties have provided the court with some 3,400 pages of documentation as well as 42 legal authorities. The prose parts of the witness statements run to 137 pages and of the skeleton arguments to 155 pages. The law and practice is largely agreed, albeit that there are some minor variants, upon which the case will probably not depend. Apart from the award, I have been referred in argument to no more than about 200 pages of the exhibits to the statements. Whilst one understands the potential impact of an application such as this succeeding or not and the desire of parties to leave no actual or imagined stones unturned, there should be a great appreciation of the need to limit the material for such an application and its defence to what is really and positively relevant, particularly where the parties are before a specialist court which has specific experience of the type of contract with which the application is concerned.

THE CONTRACT

[5] It is unnecessary for the court to make any findings as to what the contract means. However, it is necessary to refer to a number of the terms to put the arbitrators' approach and findings into context. Clause 11 required Z to provide the specified Services in accordance with the Agreement provisions, including the “Service Requirements”, “Standards”, “Good Industry Practice” and the “Quality Plans”. Provision was made by Cl 12 for “Additional Services” to be called for and provided. Clauses 23 to 26 addressed delays in implementation.

[6] Clause 23.1 required Z to “ensure that, in the design, development and implementation of the System and the delivery of the Services, each Milestone is Achieved or more before its associated Milestone Date”. These Milestone Dates were identified in Sch 2.1 Pt G, Sch 6.1 and the “Service Provider Implementation Plan”. Clause 23.2 provided that Z was to notify Y “as soon as reasonably practicable” if “the design, development, testing or implementation of the System or the delivery of the Services . . . does not conform with the Implementation Plans and may cause Delay to”, amongst other things, achieving “any Milestone by its associated Milestone Date”. Within ten days of becoming aware of such actual or potential delays, the parties were to “comply with the Remedial Plan Process to rectify any Delay” (Clause 23.3). Clause 23.4 provided that Z “shall have no claim. . .for any Compensation as a result of any Delay, to the extent that it is not the result of a Compensation Event”. Where the Delay arises due to a Compensation Event the provisions in Cl 25.2 were to apply. Clause 24 dealt with delays in implementation attributable to Z's default; thus, by Cl 24.1 if any Milestone was not achieved by the requisite date, Y was to issue a Non- Conformance Report. Clause 24.2 provided for Delay Deductions as set out in Sch 7.1 to be made for the period of culpable delay, such “Deductions” in effect being a form of liquidated damages. Clause 25 provided for delays in achieving Milestone Dates as a result of, amongst other things, an Authority Cause (defined as “any material breach” by Y, albeit that Sch 1 – Definitions qualifies that somewhat). Without making any legal finding, it is however at least highly arguable that the provisions of Cl 25 provide for conditions precedent which required Z to give effective and timely Compensation Notices, failing which it was not to “be entitled to any Compensation or relief in respect of the Compensation Event concerned” (Clause 25.2.5). Clause 26.1 provided that where a “Delay arises from an event other than a Force Majeure Event, Compensation Event or Relief Event, the Service Provider shall be responsible for such a Delay”. Clause 57.3 also required Z to give Y an “OS Relief/Compensation Notice” within ten days of it becoming aware that a Relief Event (such as fire, explosion or strike) or Authority Cause had “adversely affected or [was] likely to adversely affect the

ability of [Z] to observe and/or perform its other obligations”; if such a Notice was not provided within the requisite time-frame then Z “shall not be entitled to any relief . . . in respect of the Authority Causes . . .” (Clause 57.3.8).

[7] Payment to Z was governed largely by Sch 7.1 and Annexes thereto. Although there were various phase payments, substantial payments were only payable upon achieving the various milestones. It was common ground that, at least up to the stages which had been reached by the time of termination, Z's financial entitlements were such that its costs would significantly exceed such entitlements.

[8] Clause 69 addresses termination rights and is probably the key clause at least so far as this application is concerned. Clause 69.1 is, so far as is material, in the following terms:

“69.1 This Clause 69.1 sets out the rights of [Y] to terminate this Agreement for cause:

69.1.1 [Y] may terminate this Agreement by giving a Termination Notice to [Z] if one or more of the circumstances set out in Clause 69.1.2 exist, each being a Default. Such Termination Notice shall specify the Default and specify whether [Y], in accordance with paragraph 2.15 of Schedule 7.1 (Charges and Invoicing), wishes to exercise its rights to recover all or part of the Clawback Eligible Payments as described in paragraph 2.15.1 of Schedule 7.1 (Charges and Invoicing).

69.1.2 The circumstances giving rise to [Y's] right to terminate in the event of Default are:

(a) [Z] is in material Default which it has failed to remedy in accordance with the Remedial Plan Process;

(b) [Z] commits a material Default of this Agreement which is irremediable;

(c) [Z] commits repeated Defaults (whether of the same or different obligations and regardless of whether those Defaults are remedied), which [Y] considers, in its reasonable opinion, collectively constitute a material Default, in which case Clause 69.1.2(a) or 69.1.2(b) shall apply;

(d) [Z] has failed to Achieve a Key Milestone by the dates set out in the Implementation Plans or in accordance with any Remedial Plan which has been agreed under Schedule 8.9 (Remedial Plan Process), in which case Clause 69.1.2(a) shall apply

(l) any Programme Milestone is not Achieved within three (3) months of the scheduled date for the Achievement of the relevant Programme Milestone.

In determining whether to exercise any right of termination pursuant to this Clause 69.1.2 [Y] shall:

(i) act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing it; and

(ii) give all due consideration, where appropriate, to action other than termination of this Agreement.”

I have underlined the last part of this clause and I will refer to this part of the Clause as the “Process Requirements”. Clauses 69.2 to 69.4 provided for termination in other circumstances such as for convenience. Clause 69.5 provided for termination for a continuing Force Majeure Event or Relief Event.

[9] Clause 74 provided as follows:

“74.1 The termination of this Agreement in accordance with Clause 69 or its expiry shall not affect the accrued rights of either Party.

74.2 Following the service of the Termination Notice, the Service Provider shall continue to provide the Services in accordance with the provisions of this Agreement up to and including the Exit Management Date.

74.3 Notwithstanding the termination of this Agreement for any reason, it shall continue in force to the extent necessary to give effect to those of its provisions which expressly or by implication have effect after termination.”

Clause 75 provided for payments to be made on termination, there being cross-reference to Sch 7.2 in respect thereof.

[10] The Agreement provided for the transfer of “Assets” to Y following termination during what was called the Exit Management Period so that, presumably, Y could secure the benefit of whatever work had been done. Schedule 7.2 provided (Clause 1.5.1) that Y was to pay “the Unrecovered Costs less any Rectification Costs in respect of the Assets transferred”. The term “Unrecovered Costs” was defined as being:

“as at the Termination Date, the costs that were forecast to be incurred by [Z] in the performance of this Agreement as detailed in the Reference Financial Model, to the extent that the same have actually been incurred (which shall be no greater than the level to which they were forecast and to be incurred in the Reference Financial Model) and which have not been recovered through the Charges or the Compensation Payment.”

THE ARBITRATION

[11] Extensive pleadings, witness statements and expert reports were exchanged. The hearing of the liability and quantum issues extended to 42 working days. There were lengthy opening and closing submissions in writing as well as oral presentations at the beginning and the end of the hearing.

[12] The Partial Award ran to 267 pages of text with Annexes which included a Consolidated List of Issues prepared by the parties organised by subject matter and cross reference to the written closing submissions. The Introduction at para 5 indicated that the Agreement “imposed on [Z] a number of commercially burdensome terms” which it had agreed to accept, including the need to rely on former consortium partners who had originally bid together with Z but who had dropped out but who still remained involved with the work

as well as dependence upon other stakeholders associated with Y, albeit not contracting parties. At para 7, the arbitrators explained that Z and Y “encountered differences and conflicting expectations” and these “difficulties never really abated and, in some respects, quickly grew to become major problems in the course of their ongoing dealings with one another, going on that the 'interdependence between [Z] and the principal stakeholders required a high level of co-operation which in the end seldom occurred'.” These “contractual challenges and [Z's] difficulties in meeting them ultimately led [Y] to terminate the Agreement, purportedly for cause, on 22 July 2010” (Paragraph 8). The arbitrators go on:

“11 This is a complex dispute. The Agreement runs to 218 pages and cross-references nearly 60 lengthy formal and informal schedules, the 'compressed' version of which fills three volumes. The parties' pleadings, including Annexes, ran to almost 4000 pages. The tribunal received written witness statements from no fewer than 60 fact witnesses, often two and sometimes three per witness, and principal and reply expert reports from eight expert witnesses, supplemented by joint reports from pairs of experts. The parties also delivered extensive written and oral opening and closing submissions. During the course of eight weeks of hearing, the tribunal heard live testimony from over 50 of the factual witnesses and all 8 expert witnesses. In addition, there were several procedural hearings conducted before the final hearing, together with two days at the end devoted to oral closing argument.

12 The evidence presented to the tribunal covered almost every aspect of the interactions between the parties over a period of more than three years. Despite its complexity, however, the many points in contention turn on three principal issues:

(a) Was [Y's] termination of the . . . Agreement lawful?

(b) If the termination was lawful, what are the financial consequences of a lawful termination by [Y]?

(c) If the termination was not lawful, what are the financial consequences of [Y's] repudiation of the . . . Agreement?”

[13] From paras 50 to 208, the tribunal presented its “Factual Overview”. At paras 78 to 84, it considers and explains the “Gateway Mechanism” which was “to allow [Y] to monitor [Z's] progress on the Programme” explaining that the “project was broken down into four stages known as Release Projects: RP1, RP2, RP3 and RP4” (Paragraph 78). Each Release Project was broken down into five distinct phases numbered ATP1 to ATP5 relating to “design, development, system testing, end-to-end testing and live operational testing” with the successful completion of each stage being “called a Milestone or Authority to Proceed” (Paragraph 81). The arbitrators then, in relatively broad historical terms, addressed what actually happened from the commencement of the project in 2007 with consideration of the RP1 ATP1 stage (Paragraphs 92 to 107), the RP2 ATP1 stage (Paragraphs 108 to 124), “Infrastructure and Subcontractor Issues” (Paragraphs 124 to 131), “CCN 35 and its Aftermath” referring to a Change Notice which varied the scope of RP1 amongst other things (Paragraphs 132 to 145), the “Notice of Material Default and the Remedial Plan Process” which addressed a Notice of Material Default issued by Y to Z in July 2009 relating to RP2 Milestones not being achieved and calling for Remedial Plans (Paragraphs 145 to 173), the “Reset Negotiations” which took place between February and early July 2010 and related to possible restructuring of the Agreement (Paragraphs 173 to 179), the impact of the General Election and “Steps Leading to Termination” between 12 May 2010 and 7 July 2010, when the decision to terminate was taken (Paragraphs 180 to 201) and, finally, the Termination Notice dated 22 July 2010 which also dealt with what happened following the Termination (Paragraphs 202 to 208). It is noteworthy that the arbitrators refrained in this part of the award from attributing responsibility or fault for the undoubted delays which appear to have occurred.

[14] In paras 209 to 232, the arbitrators give a “high-level” summary of the parties' primary positions. Y's position was that it “acted lawfully terminating the Agreement following a long history of delays, failures in performance and incompetence on the part of [Z]” including failures to meet Milestone dates, to deliver or maintain Plans and to provide adequate Service Management and that it made efforts to maintain the Programme and to assist Z to remedy its alleged Defaults. Y's assertion was that it acted in accordance with CI 69.1.2 in particular it acted reasonably and proportionately having regard to the gravity of the offences and gave all due consideration to options other than termination of the Agreement. Z's position was that the purported termination was a wrongful repudiation of the Agreement, asserting that there was no event of Default, that if any Default did occur it was caused by Y's wrongdoing and that Y did not act in a reasonable and proportionate manner in deciding whether to terminate and did not give due consideration to action other than termination for cause. The arbitrators set out what Z alleged were Y's failures said to have caused the Defaults to arise, including failures to manage the Programme or engage and manage the relationship with various other parties. They refer to Z's allegations that Y did not consider termination for convenience, conclusion of the Reset negotiations or continuing the Agreement.

[15] From paras 233 to 635, the arbitrators analysed that which they considered to be material. They refer to the Consolidated List of Issues appended to the Award saying (Paragraph 235) that their analysis was “guided by the Consolidated List of Issues, keeping in mind the parties' recognition that it may not be necessary for the tribunal to determine all of the issues that the parties have identified”. They went on at para 236 saying that in this (long) part of the Award they would examine “a number of preliminary issues, the outcome of which will define the scope of its further analysis of the specific points of contention between the parties”. What then followed was a detailed analysis, in effect, of whether or not (what I have called) the Process Requirements of CI 69.1.2 were complied with. They said that they would examine “Issue B (Meaning and Effect of CI 69)” first as “it presents some basic threshold questions that must be considered before entering into an examination of Issue A ('Termination/Repudiation')”. At para 241 they listed basic threshold questions within Issue B which had to be considered before examining Issue A:

“(a) Who made the decision to terminate? Was it the [HS] alone, the MPRG, or some combination of . . . officials including the HS acting with others . . . ?

(b) To the extent that the decision to terminate was influenced by the MPRG's recommendations – and to the extent that the MPRG process was flawed or did not take into account the contractual requirements of termination for cause – was the decision to terminate fundamentally flawed and thereby unlawful?

(c) In any event, even if the decision to terminate was taken by the [HS] acting alone, as argued by [Y], did [the HS] comply with the requirements found in Clause 69.1.2(i) and (ii)? Did [the HS], in other words, or when determining whether to exercise any right of termination pursuant to this Clause 69.1.2 act in a reasonable and proportionate manner, having regard to such matters as the gravity of any event and the identity of the person committing it, and did [the HS] give all due consideration, where appropriate, to action other than termination of the Agreement?”

[16] The arbitrators then proceeded to consider whether CI 69.1.2(i) and (ii) were conditions precedent or innominate terms. The arbitrators concluded at para 260 that the Process Requirements “are conditions precedent to a valid exercise of any rights of termination by [Y], rather than innominate terms” giving reasons including at sub-paragraph (d) that they were “fundamental to the exercise of [Y's] rights of termination of the purpose of this Agreement” and at para (g) “. . . The tribunal agrees that both establishing an event of Default in the first part of CI 69.1.2 and fulfilling the mandatory requirements in the second part of CI 69.1.2 are necessary conditions to the right to terminate the Agreement for cause.” They went on at paras 263 – 5 in addressing the sub-issue as to whether the requirements of CI 69.1.2(i) and (ii) applied solely to the decision

to terminate itself or also to the decision-making process:

“263 The introductory phrase 'in determining whether to exercise any right of termination . . . [Y] shall . . .' is followed by the requirement to 'act in a reasonable and proportionate manner . . .' and '. . . give all due consideration . . .'. In the opinion of the tribunal these phrases indicate a process by which a decision to terminate is reached. This part of Clause 69.1.2 is predicated on a right of termination already existing and requires [Y] to act in a certain manner when determining whether to exercise any such right. Thus assuming an event of Default giving rise to a right to terminate is established, any determination whether to exercise that right must be subjected to the further requirements set out in the second half of Clause 69.1.2. That is to say, the determination is bound to include the process by which such a decision is made.

264 This conclusion does not mean, however, that the process by which the decision to exercise the right of termination is made must be elevated into a quasi-public law exercise that includes the formal requirements of administrative law The tribunal . . . finds that there is 'no right to be heard' as alleged by [Z].

265 Nothing in the wording found in Clause 69.1.2(i) and (ii) gives rise to any suggestion that [Z] was entitled to an audience once the right to terminate had arisen. The duties described are expressly directed at [Y]. At that stage, so long as [Y] fulfils these duties and satisfies the other requirements of Clause 69.1.2, it may determine to exercise the right to terminate. That being said, however, the tribunal is also satisfied that the requirements in this Clause obliged the person considering whether to exercise the right of termination to address clearly the particular ground from which that right arose to determine whether it would be reasonable and proportionate to rely upon it and, in particular, to look at the 'gravity' of any offence and the identity of the person committing it. Thus, for example, if Milestones were to be relied upon as giving rise to a right of termination, it would follow in the circumstances of this case that the person deciding whether to terminate on that basis should have reasonably addressed whether [Y] caused or contributed to the missing of those milestones. Even if [Z] had no right of audience in this decision-making, [Y] remained obliged to comply fully with the requirements in Clause 69.1.2, including taking into account whether there were mitigating circumstances that might make it unreasonable or disproportionate to exercise any right of termination, even if the existence of a material Default was established.”

[17] The tribunal then went on to examine events leading up to the delivery by Y of the Termination Notice on 22 July 2010. It examined at paras 270 to 275 the “5 Gateways” effectively relied upon by Y as justifying the service of the Termination Notice, namely failures to achieve Milestones (for RP1, RP2 and RP3) (Gateway 1), to comply with due care, skill and diligence obligations not remedied by Z in accordance with the “Remedial Plan Process” (Gateway 2), “repeated” failures to meet Milestone dates and produce acceptable Remedial Plans (Gateway 3), failure to meet “two Key Milestones” (Gateway 4) and “Service Level Failures and Total Service Credit Deductions” (Gateway 5). The tribunal at paras 272 to 276 determined that for Gateways 1,2 and 5 the Default had to be “material”, that Gateways 1,2 and 3 presupposed that the Default had been the subject of the Remedial Plan Process and that Z had failed to remedy the Default in accordance with that Process and that Gateway 4 merely required proof of a failure to meet a Key Milestone. The arbitrators went on to find that Gateway 2 could not succeed because Notices of Material Default had not been addressed to the default in question and because the Remedial Plan Process had not been initiated in respect of such complaints. Also it was said by the arbitrators that, insofar as Gateways 1 and 3 relied upon failures to meet Milestones RP1, RP2 ATP1 and RP2 ATO, such grounds for termination could not succeed. At para 281 they said that this did not affect the position under Gateway 4.

[18] The tribunal then considered in detail the decision-making process which led to the Notice of

Termination. In this regard, it considered the various reports and recommendations provided to HS, who essentially made the decision to terminate. A Ms H's written submissions to HS of 20 May 2010 were referred to by the tribunal; to this was attached a report of 18 December 2009 which the tribunal interpreted as mentioning "possible [Y] contributions to delay" (Paragraph 307) although this did not find its way into the body of 20 May 2010 submission (Paragraph 308). It referred to a meeting between HS, Ms Homer and others on 24 May 2010 at which there was discussion about the "three main challenges to the Programme – delivery, affordability and data protection issues" and the "fact that Z was in material breach of contract". Reference was made to a submission from Ms Homer to HS on 15 June 2010 (Paragraphs 314 to 318) which suggested that Z was "unable to provide the necessary capability to contracted deadlines [sic]", that due to its failures there had been "significant delays in delivering the capabilities we need" and that Z had been in material breach of contract since July 2009 failing to meet contracted milestones". The tribunal referred to various further submissions to HS (on 22 and 23 June 2010) which suggested that Z's recent performance had improved. By 30 June 2010, the tribunal recorded at para 325 its impression that HS' preferred approach was to reset the agreement.

[19] The arbitrators went on to refer to the MPRG process which involved a review of all relevant major projects which were "high risk, high value and/or carried major reputational risks" (Paragraphs 327 to 350) and its recommendation that the Agreements be immediately terminated for cause. The HS was made aware of this recommendation on 1 July 2010 (Paragraph 351) and the tribunal went on to consider what HS received by way of further advice and her view that she was still keen to "reset" the Agreement (Paragraph 355). HS actually received the MPRG recommendation on 6 July 2010 and various further submissions which she received from Ms H (Paragraph 360). The arbitrators recorded that on 7 July 2010 HS made the decision to terminate a contract with Z, saying in evidence "that the reasons for doing so were Z's history of not delivering on time and my lack of confidence that it would do so in the future" (Paragraphs 362 – 4).

[20] There then followed at paras 380 to 390 subheadings entitled "The tribunal's analytical framework" and "Reasonableness and Proportionality". At paras 380 – 2 they said this:

"380 . . . the tribunal proposes to examine, firstly, the process by which the decision to terminate was taken and then, if required, the substantive grounds for termination on which the decision to terminate was taken.

381 For the purposes of the tribunal's analysis in the remainder of this section, it is assumed, without so concluding, that by mid-May 2010 there was a relevant Default under Clause 69.1.2(a) – (l). In other words, it is assumed that by that date there were circumstances giving rise to a prima facie right to terminate.

382 This working assumption is made in order to focus initially on [Z's] submission that [Y] breached its duty in relation to the requirements found in the second part of Clause 69.1.2."

[21] The arbitrators raised broad questions as to compliance with the Process Requirements and set a number of questions, including: who was the decision maker (found to be HS), in relation to missed Milestones did HS give sufficient consideration to Y's possible contribution to Z's alleged failure to deliver on time, did HS take into account extraneous considerations or, alternatively did HS fail to consider matters that should have been considered, did Y failed to take into account Z's financial position, what significance should be attributed to amongst other things MPRG's 6 July 2010 recommendation, did HS give sufficient consideration to Y's possible contribution to the failure of the Remedial Plan Process and what was the relevance of Service Management issues?

[22] The tribunal at para 624 of the Award listed its conclusions in relation to whether Y has complied with

the Process Requirements:

“The tribunal has found four instances in which [Y] failed to meet its obligations under Clause 69.1.2 for Agreement with respect to the exercise of any right of termination it may have had. In particular:

(a) [HS] failed to address in any adequate fashion the difficult question of whether and, if so, to what extent [Y] had caused or contributed to the Defaults on which [HS] was relying to terminate the Agreement;

(b) [HS] relied upon and deferred to the recommendation of the MPRG [HS'] reliance upon and deference to the MPRG's recommendation was flawed and similarly not compliant with Clause 69.1.2(i) of the Agreement.

(c) [Y] invoked [Z's] alleged failures to remedy Defaults in accordance with the Remedial Plan Process in the Termination Letter in circumstances where [Y] had:

(i) Abused the Remedial Plan process;

(ii) Required [Z] to perform the Agreement after [Y] had rejected [Z's] Second Remedial Plan, thereby losing the right to terminate for [Z's] failure to remedy alleged Defaults in accordance with the Remedial Land Process,

(iii) Unfairly keeping [Z] in a contractual limbo for six months (although three months was subject to a standstill) during which time [Z] continued to perform under the CAP agreement; and

(d) [Y] invoked alleged Service Management failures as grounds for termination of the Agreement in circumstances in which:

(i) At least 6 of the alleged Service Management Failures did not occur and the Service Credit Cap limits giving rise to termination rights have not been exceeded (ie there had been no material Default);

(ii) Even if such events had occurred, they were merely 'bedding-in issues, the last of which took place six months prior to [Y's] termination of the CAP agreement'; and

(iii) [HS] did not appear to have been advised of the existence of alleged Service Management issues, and was therefore not in a position to consider the reasonableness and proportionality of termination on the basis of Service Management failures.”

[23] The tribunal went on at para 626 that it was “mandatory” that Y fulfilled the Process Requirements “if it was to lawfully terminate the Agreement for cause” and that Y had failed to comply with those requirements, thus breaching its duty “to act reasonably and proportionately when determining whether to exercise the right of termination in June and July 2010”. The consequence in effect was that by not following the requisite Process Requirements and by purporting to terminate under the contract Y was in repudiatory breach of

contract which repudiation was accepted by Z (see paras 627 to 635).

[24] The tribunal then moved on to quantum from paras 636 to 806, listing at para 637 Z's "principal and/or alternative claims: A1(i) being for some £434 million for "repudiation – expectation damages" and A1(ii) alternatively being some £321 million for "termination for convenience". Claims were then listed: A2 (repudiation – reliance damages – some £285 million), A3 (unjust enrichment – some £306 million), A4 (transfer of assets – some £126 million or alternatively £144 million), A5 (outstanding debt and retention claims – some £23 million), A6 (amounts relating to claimed changes – some £13 million) and A7 (other losses – some £11 million). The total listed by the tribunal was almost £483 million and it is thus clear that they were under the apprehension (broadly correctly) that a number of these claims were alternative. The tribunal found at paras 685 and 687 that a contractual cap imposed a limitation of just under £50 million on Z's A1(i), A1(ii) and A2 claims but not in relation to its alternative claim A3.

[25] At para 689, the tribunal confirmed that: ". . . notwithstanding the termination, the parties operated the Exit Management provisions under the Agreement, although [Z] reserved its position as to [Y's] entitlement to do so. In summary [Y] asked certain assets . . . to be transferred to it." It then refers to the fact that the parties were agreed that Z was "entitled to be recompensed for the costs it incurred in providing those assets, insofar as Z had not already been paid for such assets." This is a reference to the Transferred Assets claim A4 which is the subject matter of challenge on this application. In para 690 the tribunal quote from Z's Closing Submissions accepting that the value of the Transferred Assets (the "Unrecovered Costs") was also included within Claim A1. That A1 claim is summarised at para 695 as including "Unrecovered work in progress" (nearly £248 million), "Unrecovered Exit Management costs" (£3.8 million), various other costs as well as a claim for loss of profit of just over £95 million. At para 698, the tribunal summarises Z's basis of calculation as being the difference between "the amount it expected to receive less the costs it expected to incur and what in fact it has received and the costs it has incurred at the date of termination plus costs incurred as a result of the termination". It records at para 699 that Y maintained that Z had "put forward a global claim comprising all of the expenditure it considers it would have incurred, regardless of whether those costs would have been recoverable under the Agreement", going on that the calculations "wrongly assume that any increase in the costs above the amount [Z] estimated at the time it entered into the Agreement was as a result of delays and problems caused by [Y]"

[26] The tribunal went on to consider the differences between the quantum experts, Mr Taub and Mr Boulton, the principal one being referred to at para 706, namely Mr Boulton's assumption "that all or the vast majority of the costs incurred were or would have been recoverable under the Agreement [including] all costs incurred due to delays and other problems encountered in the course of performance of the Agreement". It found at para 707 that in respect of the A1 claim on the basis of Y's expert analysis at least the amount of the contractual cap was due and accordingly that sum was awarded in respect of Claim A1.

[27] Claims A2 and A3 were addressed in short order, A2 (at para 709) on the basis that A2 was caught by the contractual cap and A3 (at para 710) because Z had accepted that if the tribunal awarded the capped amount it had no separate claim.

[28] Paragraphs 711 to 730 addressed the "Transferred Assets" claim (now the subject matter of challenge on this application). The tribunal summarised the history at para 711 to the effect that Y gave instructions in July 2010 pursuant to the Exit Management provisions of the Agreement and identified the assets which it required Z to transfer and that Z in agreeing to transfer such assets reserved its position that the Exit Management provisions had no contractual force following the repudiation. It referred to Y's argument as to how the Assets were to be valued under the Agreement (Paragraph 713). It went on to identify the basis of Z's claim (£126,013,801 as cost plus 15% profit margin). The tribunal explained that this cost was arrived at:

"714 . . . by calculating the percentage of [Z's] costs incurred on the whole project that had

been recovered and applying the unrecovered percentage to the cost of the assets transferred to [Y]. Thus [Z] maintains that it incurred costs totalling £413,021,490. It has been paid £141,598,315 and has therefore recovered 34.3% of its costs; 65.7% are unrecovered.

715 [A witness] lists the assets included in the Asset Register and the costs allocated to those assets He identifies the sum of £191,753,736 as attributable to the assets that were . . . transferred. As he explains, the assets comprise not merely hardware, software and such like, but '[a]ll of [Z's] cost base (and its subcontractor costs) [that were] involved (directly or indirectly) in the provision of these Assets.

716 On the basis that the cost of the transferred assets is £191,753,736 and [Z] has recovered 34.3% of these costs through payments from Y, the remaining balance, 65.7% of £191,753,736, results in [Z's] claim of £126,013,801

717 It is therefore apparent that [Z] has not followed the contractual route to arrive at Unrecovered Costs and there is reason to believe that sum claimed would not approximate with the Unrecovered Costs, calculated in accordance with Agreement.”

[29] The tribunal went on:

“719 That is not, of course, fatal to [Z's] claim. Since the tribunal has found that [Y] repudiated the contract, [Z] was released from further performance of its obligations under the Agreement, including the performance of the Exit Management provisions. As recorded above, [Z] reserved its position and therefore in transferring the assets at the request of [Y], [Z] was conferring a benefit on [Y]. The entitlement to a remedy arises from the fact that [Y] purported to exercise a right which it knew (and accepts) would entitle [Z] to additional payment, on the assumption that it had properly terminated the Agreement. However [Y] also knew that [Z] disputed the termination and that it contended that [Y] had repudiated the Agreement. Thus, as recorded above, [Z] reserved its position when agreeing to transfer the assets which are the subject of [Z's] Damages Claim A4. In the tribunal's view, in these circumstances, were [Y] to retain the benefit of the Transferred Assets without payment to [Z], this would give rise to unjust enrichment. Z is accordingly entitled to maintain a claim in unjust enrichment.”

[30] The tribunal then went on to summarise over four paragraphs some of the evidence relating to the costs of and/or value of the Transferred Assets, including some evidence about what the costs might have been or were forecast to be to the effect that, although Z was claiming £126.1m in relation to assets which it forecast would cost £50.4 million and in respect of which it had been paid £42.2 million. At para 724, the tribunal continued:

“The state of the evidence is not satisfactory; in particular, there is considerable uncertainty as to the sums which had already been paid in relation to the transferred Assets. However since the tribunal is attempting to assess the value of the unjust enrichment, it can only proceed on the basis of the cost to [Z] of producing the relevant assets, less the sums paid. In this connection the costs forecast by the RFM is strictly irrelevant. Nevertheless the tribunal notes two matters:

(a) It is common ground the payment structure under the Agreement was 'sculpted' so that [Z] would be operating at a loss during the earlier part of the project. It is therefore to be expected that the costs [Z] incurred would not be matched by the payments made under the Agreement

by the Authority”

[31] The tribunal continued towards its overall finding:

“725 One further concern is that [Z's] calculations do not seek to allocate any of the payments made by [Y] [for] the transferred assets; its calculation is simply based on an average

726 . . . [Y] acknowledges that [Z's] 'claim for Transferred Assets is not included in its primary A1 counterclaim, as that claim already includes all of the costs that [Z] has incurred in connection with the Agreement.' Nonetheless, the tribunal has considered whether the capped amount to be awarded in relation to [Z's] A1(i) claim must necessarily include some portion of the costs incurred to produce the Transferred Assets The tribunal has not been assisted by either party in relation to potential overlap, but by a majority determine that if there was any such overlap the onus would have been on [Y] to show it and it has not endeavoured to do so in any of its submissions.

727 Having regard to all these submissions, the tribunal finds that, on the balance of probabilities, Z's calculations are broadly correct and the tribunal proposes to adopt them in its valuation of [Z's] Claim A4 on the basis that they fairly reflect the net value of the Transferred Assets, the benefit of which [Y] has taken.

728 Thus the tribunal accepts that the cost to [Z] of producing the assets which were transferred to [Y] was £191,753,736 and that it had already been paid 34.28% of its costs by the date of termination, leaving a net claim of £126,013,801.”

The tribunal declined to add the 15% profit uplift and by a majority at para 730 awarded the sum of £126,013,801 as damages for Claim A4.

THE LAW

[32] The material parts of [s 68](#) of the Arbitration Act 1996 provide as follows:

“(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 –

. . .

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

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –

- (a) remit the award to the tribunal, in whole or in part, for reconsideration,
- (b) set the award aside in whole or in part, or
- (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.”

[33] The legal teams are, properly, in agreement to a very large extent as to what the law and practice are in relation to applications under [s 68\(2\)\(d\)](#) of the Arbitration Act 1996. I can summarise it as follows:

“(a) Section 68 reflects 'the internationally accepted view that the court should be able to correct serious failures to comply with the 'due process' of arbitral proceedings: cf art 34 of the Model Law.' (see *Lesotho Highlands Development Authority v Impregilo SpA* [\[2005\] UKHL 43](#), Paragraph 27); relief under Section 68 will be appropriate only where the tribunal has gone so wrong in the conduct of the arbitration that 'justice calls out for it to be corrected.' (ibid).

(b) The test will not be applied by reference to what would have happened if the matter had been litigated (see *ABB v Hochtief Airport* [2006] 2 Lloyd's Rep 1, paragraph 18).

(c) The serious irregularity requirement sets a 'high threshold' and the requirement that the serious irregularity has caused or will cause substantial injustice to the Applicant is designed to eliminate technical and unmeritorious challenges (*Lesotho*, paragraph 28).

(d) The focus of the enquiry under Section 68 is due process and not the correctness of the tribunal's decision (*Sonatrach v Statoil Natural Gas* [2014] 2 Lloyd's Rep 252 paragraph 11).

(e) Section 68 should not be used to circumvent the prohibition or limitations on appeals on law or of appeals on points of fact (see, for example, *Magdalena Oldendorff* [2008] 1 Lloyd's Rep 7, Paragraph 38, and *Sonatrach* Paragraph 45).

(f) Whilst arbitrators should deal at least concisely with all essential issues (*Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 Toulson J at 284D), courts should strive to uphold arbitration awards (*Zermalt Holdings SA v and Nu Life Upholstery Repairs Ltd* [\[1985\] 2 EGLR 14](#) at page 15, Bingham J quoted with approval in 2005 in the *Fidelity* case [2005] 2 Lloyds Rep 508 paragraph 2) and should not approach awards 'with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults on awards with the objective of upsetting or frustrating the process of arbitration'.

(g) As to Section 68(2)(d):

(i) There must be a 'failure by the tribunal to deal' with all of the 'issues' that were 'put' to it.

(ii) There is a distinction to be drawn between 'issues' on the one hand and 'arguments', 'points', 'lines of reasoning' or 'steps' in an argument, although it can be difficult to decide quite where the line demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a 'high threshold' that has been said to be required for establishing a serious irregularity (*Petrochemical Industries v Dow* [2012] 2 Lloyd's Rep 691 paragraph 15; *Primera v Jiangsu* [2014] 1 Lloyd's Rep 255 paragraph 7).

(iii) While there is no expressed statutory requirement that the Section 68(2)(d) issue must be 'essential', 'key' or 'crucial', a matter will constitute an 'issue' where the whole of the Applicant's claim could have depended upon how it was resolved, such that 'fairness demanded' that the question be dealt with (*Petrochemical Industries* at paragraph 21).

(iv) However, there will be a failure to deal with an 'issue' where the determination of that 'issue' is essential to the decision reached in the award (*World Trade Corporation v C Czarnikow Sugar Ltd* [2005] 1 Lloyd's Rep 422 at paragraph 16). An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes (*Weldon Plan Ltd v The Commission for the New Towns* [2000] BLR 496 at paragraph 21).

(v) The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the Section 68(2) application (*Primera* at paragraphs 12 and 17).

(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).

(viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue (*Fidelity Management v Myriad International* [2005] 2 Lloyd's Rep 508, paragraph 10, *World Trade Corporation*, paragraph 19). A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it (*Hussman v Al Ameen* [2000] 2 Lloyd's Rep 83).

(ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences (*World Trade Corporation* at paragraph 45). The fact that the reasoning is wrong does not as such ground a complaint under Section 68(2)(d) (*Petro Ranger* [2001] 2 Lloyd's Rep 348, *Atkins v Sec of State for Transport* [2013] EWHC 139 (TCC), paragraph 24).

(x) 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 legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise (*Petrochemical Industries* at paragraph 27. If the tribunal decides all those issues put to it that were essential to be dealt with for the

tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues (*Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm), paragraph 30).

(xi) It is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will not be engaged. However, if the issue does arise by virtue of the route the tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will be engaged.

(xii) Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) (*Ascot Commodities v Olam* [2002] CLC 277 and *Atkins*, paragraph 36). The court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard.

(h) In relation to the requirement for substantial injustice to have arisen, this is to eliminate technical and unmeritorious challenges (*Lesotho*, paragraph 28). It is inherently likely that substantial injustice would have occurred if the tribunal has failed to deal with essential issues (*Ascot*, 284H-285A).

(i) For the purposes of meeting the 'substantial injustice' test, an Applicant need not show that it would have succeeded on the issue with which the tribunal failed to deal or that the tribunal would have reached a conclusion favourable to him; it necessary only for him to show that (i) his position was 'reasonably arguable', and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award (*Vee Networks Ltd v Econet Wireless International* [2005] 1 Lloyd's Rep 192, paragraph 40).

(h) The substantial injustice requirement will not be met in the event that, even if the Applicant had succeeded on the issue with which the tribunal failed to deal, the court is satisfied that the result of the arbitration would have been the same by reason of other of the tribunal's findings not the subject of the challenge.”

THE CHALLENGES

[34] The Grounds of Challenge lodged by Y summarise the Grounds relied upon justifying its application under s 68(2)(d). Liability Grounds 1 and 2 are respectively that the tribunal failed to deal with or address in any way:

“3.1 the legal consequences of the fact that [Z] did not comply with the contract provisions, as it was required by the [Agreement] to do, in order to be entitled to contend that failure to achieve contractual Milestones was other than the sole responsibility of [Z] . . . and

3.2 although it is common ground that the tribunal had to judge the reasonableness and proportionality of the termination for cause pursuant to Cl 69.1.2(i) the tribunal failed to make any assessment of the nature and seriousness of any relevant Default(s) on the part of [Z] which prima facie entitled a termination for cause, in order to consider whether, in light of the

same, it was objectively reasonable and proportionate to terminate the Agreement.”

[35] The three “Quantum Grounds”, 1, 2 and 3 respectively, are that the tribunal failed to address the following in respect of the Transferred Assets Claim A4:

“4.1 that the calculation of compensation should follow the method agreed by the parties in accordance with express provisions;

4.2 that the assessment of compensation should not exceed the amount that would have been recoverable had the agreement been performed according to its terms.

4.3 that [Z] should not be permitted to recover sums on a global basis without any consideration of its own actual or possible breaches of contract.”

[36] Broadly, Y's position, in respect of the Liability challenges, is that the tribunal ignored or overlooked its “central argument” that, because Z had not served proper notices and consequential material under Clauses 23 and 25 substantiating its case that it was not responsible for delays, contractual responsibility for the missed contractual Milestones lay solely with Z (Liability Ground 1). It goes on that despite the fact that there was extensive evidence and argument about Z's “Defaults” such as there was an expectation that the tribunal would determine the rival contentions and because the tribunal itself considered that Y had made no adequate assessment of the nature and seriousness of any relevant Default which prima facie entitled it to terminate, the tribunal itself carried out no such assessment (Liability Ground 2).

[37] In relation to the Liability challenges, again, broadly, Z's position is that, for the reasons which the tribunal itself gave, it was not necessary or essential to address the issue as to the extent to which contractually Z was actually in breach of contract or in Default because the Process Requirements, which went to process, were not complied with; put another way, the tribunal, it argues, found that the Process Requirements were a condition precedent which was not complied with and therefore the termination by Y was unlawful, such that it was unnecessary to determine the extent to which Z was actually in Default (Liability Ground 1). As for Liability Ground 2, Z argues that the tribunal found that issues as to the actual nature and seriousness of any Defaults on the part of Z did not arise because HS' decision-making “process” did not comply with the condition precedent to the right to terminate. It argues overall that Y's challenge is essentially on analysis put forward on the basis that the arbitrators were wrong and is in reality a challenge to the correctness of the decision. It argues overall that there is no substantial injustice because there were three other free standing breaches of the condition precedent about which there is no challenge so that, in consequence, the termination was still unlawful and in effect the application on these two Liability Grounds gets Y nowhere.

[38] So far as the Quantum Grounds of challenge are concerned, Y argues that the tribunal failed to consider and deal with important issues namely whether Z's Transferred Assets claim should be assessed in accordance with the terms of the Agreement, whether the unjust enrichment claim should be limited to what Z was entitled to if the Agreement had been performed and whether it could properly be assessed on a global cost basis without any consideration of Z's own actual or potential breaches of the Agreement.

[39] Z argues that in reality none of these arguments was put to the tribunal and they did not represent issues which had to be dealt with by the tribunal. For instance it is said that, in relation to the global costs point (Quantum Ground 3), this was only argued in relation to “Unrecovered Costs” in the context of Claim A1 and not in relation to Claim A4. In any event, it is argued that the tribunal did deal with the first two issues

at para 718 to 719 and 724 of the award.

[40] There are issues between the parties as to what the appropriate relief should be in the event that the court finds that any of the challenges are justified. I will deal with those as necessary but not necessarily in this judgment.

THE LIABILITY CHALLENGES

[41] The two Liability Grounds of challenge are obviously connected and both arise out of the fact that the arbitrators decided that it was unnecessary to consider or make findings about the responsibility for the delay, disruption and inefficiency which had occurred prior to termination. An important aspect of this necessarily would have involved a consideration of the legal (contractual) consequences of the (alleged) failure on the part of Z to submit delay and compensation event notices within the contractual time constraints as set out in Clauses 23 and 25 of the Agreement. Put simply, and the argument is a relatively common one in construction, engineering and technology contracts, the contention is that the consequence is that there is no relief by way of extension of time or of financial compensation if the requisite notices are not served in time and the contractor's contractual obligation remains one of complying with the contractual terms as to progress, completion and, in this case, milestones. To the extent that the argument is a good one on any given contract, the contractor will remain fully responsible for achieving the contractual dates for completion and will be liable to liquidated damages type charges for any failure to complete.

[42] There is no doubt, and there was no dispute before the court, but that this issue was an issue in the arbitration which, in the ordinary course of events and if it was necessary to do so, would have had to have been dealt with the arbitrators. There is no suggestion that it was not a wholly arguable point and, from what I have seen of the Agreement, I would accept that it was a reasonably arguable point.

[43] The reason that the tribunal did not address that issue and indeed did not address the questions of the impact of the absence (if that was the case) of requisite notices under Clauses 23 and 25 and of responsibility for the delay, disruption and inefficiency which had occurred on this project was that it found that the Process Requirements in Cl 69.2 were conditions precedent and that Y had not complied with or satisfied those conditions precedent in the process leading up to the termination in late July 2010. The tribunal has been, in its award, transparent as to the steps it took in this regard: it explained, for instance, at para 241, that it proposed to examine compliance with the Process Requirements first. Later it addressed the issue as to whether the Process Requirements were conditions precedent (deciding at para 260 that they were). Then it moved on to consider the decision-making process leading up to the Termination and the extent to which Y failed to comply with the conditions precedent, ultimately finding that there were four respects in which it had failed to meet its obligations under such conditions precedent.

[44] I have formed the view that Liability Ground 1 (which is relatively narrow in scope) has not been established. The tribunal decided, not irrationally, that, when considering the words in the Process Requirements (Y should "act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing it") this would at least include a consideration of whether Y had caused or contributed to the missing of milestones (see for instance para 265). This was not irrational because, if "Defaults" had been committed by Z (thus triggering the implementation of the Process Requirements), the wording of the Process Requirements would be largely superfluous because the conditions precedent in this regard would already be established. Thus, even if Z was, by operation of Clauses 23 and 25 and by any failure to serve timely notices, to be considered as being wholly responsible under the contract for all the delay and even if for the sake of argument all of that delay had been caused by for instance late approvals from or new changes instructed by Y, the arbitrators were saying, in effect, that the Process Requirements required Y (through HS in this case) to have regard to Y's responsibility in fact (if

not contractually) for the Default in question.

[45] It may of course be said that the tribunal was wrong as a matter of contractual construction to conclude, as it must have done, that the contractual argument (that non-compliance with the notification requirements in Clauses 23 and 25 meant in effect that contractually Z was responsible for all the delay which had occurred) did not, so to speak, trump the Process Requirements, as interpreted by the tribunal. I say that the tribunal must have concluded this, although it does not do so in express words. However, for instance, at para 408 of the award, in dealing with HS' evidence on the issue as to whether the HS had given sufficient consideration to Y's possible contribution to Z's failure to deliver on time, the tribunal refers to HS' impression that from the absence of complaint through the Clauses 23 and 25 procedures in effect in consequence she believed that responsibility for delays lay almost entirely with Z.

[46] Moving on to Liability Ground 2, this is somewhat more complex. It was Y's case that all or substantially all the delay was the actual fault and responsibility of Z; to that, as a matter of evidence, reliance was placed on the absence of notices under Clauses 23 and 25 to support this actually fundamental case. In essence, the arbitrators never grappled with this point, preferring in effect to say that because the Process Requirements are just that, namely a process, HS in this case for Y had to be seen to go through the process, even if the result was such as to lay the real fault and responsibility for the delays entirely at the door of Z. Because the arbitrators found that in a number of what they believed were important respects HS, either on the basis of inadequate or incomplete briefing or otherwise, did not consider whether, and if so to what extent, Y had caused or contributed to any of the Defaults and relied upon and referred to the MPRG recommendation, although the process which led to that recommendation was non-compliant with Cl 69.1.2(i), it never got around to considering what might have been considered to be a basic point, which was Y's case that substantially all the delay was down to Z. There was a concentration on what HS did or did not do in relation to the possible responsibility of Y in fact for the delays but the tribunal did not consider the scenario that Z may have been responsible for all the delay.

[47] I would be more understanding of the tribunal's position if it had actually addressed that scenario. The nearest that the tribunal gets to this is at para 413 of the Award when it says this:

“The tribunal is expressly not finding that a full and proper consideration of [Z's] complaints against [Y] in June and July 2010 would have necessarily caused [HS] not to decide on termination for cause. It is the tribunal's finding that [HS] was not, in fact, fully or even adequately informed of [Y's] possible complicity in the Programme delays on which [HS], like MPRG, intended to rely for termination. She was not, therefore, able to do what Clause 69.1.2(i) required. What may have seemed reasonable to [HS] on 7 and 8 July was deficient because of her limited insight into the history of the Agreement and the possible causes of delay.”

At first blush, Z's argument (that the tribunal was there making it clear that this was an important failure of the process and therefore in effect leading to non-compliance with the condition precedent Process Requirements) is not unattractive. However, the tribunal makes much of the fact that Z was alleging significant contributions to the delays by Y (see for instance para 410 of the award) but also of the fact that reports on submissions to HS consistently avoided any suggestion of Y either causing or contributing to the delays (see for instance para 412). The tribunal does not however consider whether it was factually justified for those making submissions to HS not suggesting that Y caused or contributed to delays. Put another way, the tribunal attributes a failure to comply with the conditions precedent to a failure to address possible (and one presumes something more than fanciful) contributions to causing delay by Y, primarily by employees or other agencies, but it does not consider what might be considered to be a very obvious material issue, which was Y's case that Z was wholly or substantially responsible for all the delay. Put yet a third way but rhetorically: could HS or those advising HS be criticised as not complying with the Process Requirements if

all the delay was in fact caused and contributed to only by Z?

[48] I do not have to say that it would be impossible for the tribunal to conclude in principle that, even if the total responsibility for all the delay was in fact that of Z and not that of Y or other agencies, there was still non-compliance. I have little doubt however that, if the tribunal had considered the issue in such terms, there is a real chance that it would have to reconsider some of its key findings. If it had done so, that might well have led to the need to consider the actual facts and the actual causes of responsibility for the delays which occurred and to a realisation that there could be no easy short-cut.

[49] I therefore conclude that Liability Ground 2 has been established.

[50] Before turning to a full consideration of the question as to whether the failure to deal with this issue has led to substantial injustice, Mr Smouha QC has urged the court to find that there cannot be substantial injustice because the tribunal found, ultimately at para 624 of the award, that there were four grounds on which the conditions precedent within the Process Requirements had not been met, three of which he suggested were not related to the failure to meet the requisite milestone dates and there is no challenge in relation to those three findings. The difficulty that I have with this argument is that it is very difficult to say what the tribunal would have decided in these three other respects and their overall impact on the process exercise if it had addressed the impact on the Process Requirements exercise of the question of overall responsibility for the delays. Furthermore, the non-compliance with the condition precedent relating to HS's reliance upon and deferring to the MPRG recommendation was factually tied up with the milestone delay, if not entirely and, thus, it is difficult to say that a different consideration by the tribunal of the factual responsibility for all the delay could not well have led to a different outcome on that suggested non-compliance. In relation to the other two non-compliances relied upon, these relate to different Defaults to be relied upon for Termination (Y's responsibility for alleged failures in the Remedial Plan Process and the non-occurrence of a number of Service Management failures and the delay since other alleged Service Management failures). The problem here in relation to these two latter non-compliances is that the arbitrators have not applied their minds (unsurprisingly) to the permutation as to what might be the case if the first two non-compliances were not non-compliances at all and as to whether there could be effective compliance justifying a termination on milestone delay Default if not on other grounds. I certainly do not consider that it is fanciful for Y to argue that Termination could be justified if the Process Requirements were satisfied in relation to at least one valid Default ground of termination.

[51] I am satisfied that there is substantial injustice here, either because the tribunal did not obviously consider in principle whether there could be or was compliance with the Process Requirements in circumstances in which the entire responsibility for the milestone delay was that of Z and/or whether the substantial responsibility for such delay was that of Z. The substantial injustice arises not simply from the fact that these issues were not clearly dealt with. They arise in the context that both parties spent a large amount of time, resources and indeed money in presenting their cases and evidence as to responsibility for the delays, disruption and inefficiencies. The fact that these issues were not addressed even in the context of compliance with the Process Requirements might well lead an objective party or informed bystander to consider that the tribunal was simply seeking to avoid getting into the detail. I do not suggest however that, subjectively or consciously, that is what the tribunal was here actually doing.

THE QUANTUM CHALLENGES

[52] I can deal with Quantum Challenge 1 simply. The arbitrators decided in para 719 that because Y had repudiated the Agreement Z was released from further performance of its obligations including the performance of the Exit Management provisions; it is from those provisions that the evaluation of the Transferred Assets by reference to "Unrecovered Costs" was to take place. Although one could didactically

criticise the arbitrators for not going into some more detail, it is clear that they were saying that, by reason of the repudiation by Y (accepted by Z), the contractual route (see reference in para 718) did not have to be followed and Z had an unjust enrichment entitlement in effect as a restitution route remedy. It could be said that some arbitrators might have spelt out that the effect of an accepted repudiation in English law is that the parties are released from further performance and that the consequence of that is that neither party can then proceed on the basis that such further performance could or would produce a certain result which in some way contractually limits or defines what compensation the innocent party to the repudiation is entitled to. It could be said that the arbitrators could have given more reasons but that is an insufficient criticism under s 68(2)(d). In so far as there was an argument by Y (and there may well have been) that the Agreement did operate to dictate what was to be paid to Z for the Transferred Assets, the arbitrators answer that in para 719 of the award by saying that those provisions were not to be performed following the accepted repudiation. It is necessarily implicit in what the arbitrators are saying that there was no contractual framework which the parties had left in place to regulate compensation following repudiation on the part of Y. I therefore dismiss Quantum Challenge 1.

[53] Moving on to Quantum Challenge 2, this is somewhat more complex. Y says that it did argue that, even if Z was entitled to its unjust enrichment restitutionary remedy for the Transferred Assets, the allowable sum or value to be put on this was still to be determined by reference to the contractual value. Reliance was placed on the Commercial Court decision in *Robert Taylor v Motability Finance Ltd* [\[2004\] EWHC 2619 \(Comm\)](#) in which Cooke J said this:

“ . . . there can also be no justification, even if a restitutionary remedy is available, for recovery in excess of the contract limit. Such recovery would itself be unjust since it would put the innocent party in a better position than he would have been in if the contract had been fulfilled. In deciding any quantum meruit regard must be had to contract as a guide to value put upon the services and also to ensure justice between the parties.”

This substantive argument is one well-known in the TCC (and indeed other courts) to the effect that, if the services or thing provided by a supplier is something which was to be supplied under a contract prices and values for which had been agreed, but the contract for one reason or another is not or is no longer enforceable, then the quantum meruit or reasonable price is often to be determined by reference to what the parties had otherwise agreed.

[54] The issue about the evaluation of Claim A4 listed as Annex 5 to the Award was in broad terms (at p 37): “What monetary award (if any) is [Z] entitled to either on the basis of (i) the provisions of the Agreement; or (ii) [Y’s] alleged unjust enrichment, representing the value of the Transferred Assets that were transferred . . . at [Y’s] request following termination of the Agreement?”

[55] However, looking at paras 722 to 725 of the award, the essence of what the arbitrators are saying is that it was very difficult to discern what was or would have been due under the Agreement. For instance at para 724, they describe the evidence as unsatisfactory and they feel constrained to fall back on the basis of evaluation relating to the cost to Z “of producing the relevant assets less the sums paid”. One might say that this approach was wrong as a matter of law or indeed of fact, on the basis that the *Motability* decision suggests otherwise and that the onus of proof was on Z and it might be said that Z had not proved its case even on a cost basis (particularly if its evidence was not “satisfactory”). However, the court should not, on an application under s 68(2)(d), allow an application if all that is being complained about is that the arbitrators were in error of fact or law. It should be pointed out that the Dispute Resolution Procedure (Schedule 8.3 to the Agreement) provided in Cl 2.6.4 that the right of either party to appeal on the question of law was excluded; there is in any event no right to appeal or to seek to appeal as such in respect of a challenged finding of fact.

[56] Therefore, irrespective of whether an issue was raised on the applicability of the *Motability* approach to evaluation of restitutionary claims in relation to Claim A4, it can, properly, be said that in effect the arbitrators did address it by saying that it was difficult to determine what was or would have been due under the Agreement and that, rightly or wrongly, it felt obliged to fall back on the cost approach. For instance, the costs forecast basis was, the arbitrators noted, likely to be “skewed” in effect against Z by the payment structure under the Agreement being “sculpted”. One might say that this was, again, in law or in fact, wrong but that is not a proper basis of challenge under s 68(2)(d). The fact that some arbitrators might simply have said that Z had not proved its case in this context is not enough for such a challenge.

[57] I therefore dismiss the challenge on Quantum Ground 2.

[58] Quantum Ground 3 however raises a much more serious issue. Assuming, as the arbitrators did, that they had to and should go down the cost route of evaluation of the unjust enrichment, which is readily comprehensible as a pragmatic and practical solution, the background, of which the arbitrators were well aware having heard evidence and argument about it over 42 days, was that both Z and Y had been arguing that the fault and responsibility for the apparently undoubted delay, disruption and inefficiency in the delivery of the project which had occurred was the other party's. This was not simply an argument about whether or not Z had served contractual notices claiming for delay or compensation events; there were substantive issues as to the fault and responsibility for that delay, disruption and inefficiency. At the very least, given the arbitrators' experience and in particular the known experience of at least one of the members of the tribunal in the construction and technology field (and indeed in the TCC), it must have been within their collective horizon of knowledge that Y was arguing that all or at least most of the delay, disruption and inefficiency was the actual fault of Z and that, if one was to base an unjust enrichment award on total costs incurred, at least a credible argument might have been that one needed to take out of the evaluation costs attributable to delay, disruption and inefficiency which was the fault of Z. Of course, there is virtually nothing in this nearly 300 page award about who was responsible or at fault in respect of the delay, disruption and inefficiency which seems to have occurred, given that it was common ground that key Milestones had not been achieved and by the time of the termination had been substantially delayed.

[59] The issue therefore comes down to whether there was before the arbitrators an issue that in relation to Claim A4 that, if the arbitrators were to go down the cost route approach to evaluate the unjust enrichment said to have occurred as a result of the transfer of the Assets, account should be taken of the extent to which those costs related to any delay, disruption and inefficiency which was the fault or responsibility of Z. I understand that it is common ground that, if this issue was sufficiently raised before the arbitrators, they did not address it. That in any event would be a proper concession given that nowhere do the arbitrators review who was to blame for the delay, disruption and inefficiency and given that in consequence no account was taken of this in the award.

[60] I have formed the very clear view that this issue was raised and in forming this view I have had regard to the following factors:

“(a) The issue was very broadly defined in the list of issues actually annexed to the award (see above).

(b) It is clear that Z's approach through its evidence on costs was based on the assumption that the delay, disruption and inefficiency were not the fault and responsibility of Z. For instance, Mr Boulton, Z's quantum expert in his First Report (Volume 1 Paragraph 2.4) said that he had 'assumed that Z's case that [others including Y] were responsible for the majority of delays and problems on the programme is correct'. He was later to say in the Second Joint Quantum Expert report (Paragraph 5.10) that it was for the tribunal to determine Z's case and evidence 'that the wrongful acts or omissions of [Y] caused delay and additional costs for [Z] and this

eroded the margin that [Z] would otherwise have achieved'. Mr Quinn, a witness called by Z who had prepared Z's claims, under cross-examination said (or possibly under questioning from the tribunal) that it would be a 'very, very difficult, if not impossible task' to assess the financial effect of individual the faults or delays on the part of Z' and that he had not done that exercise (Day 40 Transcript, page 11).

(c) It was thus clear that, generically at least, Y was raising before the arbitrators the unsatisfactory nature of the cost exercise in not addressing the extent to which Z was responsible for the delay, disruption and inefficiency which had occurred.

(d) The real argument comes down to an even narrower point, namely whether the various points about whether any cost-based claim should have taken into account the delays, disruptions and inefficiencies on the part of Z, were or were sufficiently clearly related by Y to the Transferred Assets Claim, A4. It seems to be accepted at the very least that they were raised in relation to Claim A1, albeit that in the result the arbitrators felt that it was unnecessary to address these points because, at least in relation to Claim A1, there had apparently been acceptance by Y's expert that at least the amount of the contractual cap was due (Paragraph 707).

(e) One therefore needs to consider whether the issue was sufficiently raised in relation to Claim A4. It is abundantly clear from the award itself that there was a close correlation between the A1 and A4 Claims because both were based on overall cost and an analysis of what costs had not been recovered by Z from Y to date. That can be seen by comparison of what the arbitrators say between Paragraph 694 and 708 in relation to Claim A1 and what they say about Claim A4.

(f) Y's Statement of Reply and Defence to Counterclaim pleads:

(i) At paragraph 4 (in its Overview) that Z seeks to claim 'on the basis that it was entitled to claim all of the costs incurred . . .' [and] makes no attempt to identify the causal consequences of any matters for which it blames [Z] [but instead] its Claim is put forward on a wholly global basis . . . (Paragraph 4.1).

(ii) Under a Heading '[Z's] 'Global' or 'Total Costs' Claim, Y asserted that Z did not 'attempt to . . . apportion the loss allegedly suffered between the Delaying events' and as a result its claim was a 'global' or a 'total cost' claim in the sense that the global sum has been put forward as the measure of damage resulting from more than one causative event which are said to be the responsibility of [Y] and that the events have been 'rolled up' with no attempt to apportion the loss between them' (Paragraph 7.1 and 7.2).

(iii) At Paragraph 65.74.3, specifically in relation to Claim A4, Y pleaded that it denied that '[Z] is entitled to recover a greater sum as an award for unjust enrichment than it would have recovered pursuant to the provisions of the Agreements or that it was reasonable for [Z] to have incurred costs in excess of those recoverable under the Agreement.'

(g) In its (extensive) Closing Submissions, Y addressed quantum in some detail (with particular detail provided in Appendix E). At Paragraph 43.19, albeit addressing Claim A1, it said:

'[Z's] updated expectation loss claim [A1] ignores the fixed-price nature of the Agreement and is based upon unsupported unstated assumptions. Instead of attempting to properly assess the position it would have been in if termination had not occurred, [Z] simply claims all its costs on a global basis (whether recoverable under the Agreement or not) and an assumed level of profit. [Z] justifies its approach on the entirely unrealistic assumption that [Y] was responsible for the preponderance of 'delays and problems' encountered *and* that these were the sole cause of [Z's] failure to achieve the profit that it had hoped for.'

(h) In Appendix E, Y addressed the quantum of Z's Counterclaim in some detail. At Paragraph 16, it addresses Z's A1 Claim asserting that it was a 'global claim' about which there were legal objections which they had addressed in Appendix C which dealt with delay (C Paragraph 16.4 and 16.5). At Paragraph 16.7 Y says that the claim 'makes no attempt to take into account the history of the performance of the parties prior to termination, does not attempt to assess any losses allegedly caused by any individual [Y] breaches but instead makes a global claim'. It is clear that, in relation to Claim A1 at least, Y was challenging the quantum based on cost on grounds which included that it was objectionable on the basis that it was a global claim, which amongst other things, included costs which were attributable to Z's own failings.

(i) In Appendix E, Y addressed the Claim A3 for unjust enrichment saying that it was unjustified as being 'either legally misconceived or unsupported by the evidence' and 'an attempt . . . to avoid the consequences of the negotiated terms of the Agreement it freely entered into' (at paragraph 19.3).

(j) At Paragraph 20, Y made submissions about Claim A4 in relation to Transferred Assets. It refers to Mr Boulton's assumption in his costings that Y was responsible for the problems and delays (Paragraph 20.5). It sets out how Z calculates its claim (Paragraph 20.10) with a starting point of the total costs incurred by Z at the Termination Date, less what sums had been paid at that time by Y and in effect criticise it as being a claim 'on a global basis' (Paragraph 20.13). Y goes on to criticise this approach because it 'fails to identify how the Unrecovered Costs it claims are 'in respect of the Assets Transferred"' (Paragraph 20.14).

(k) It follows that it was or should have been clear to the arbitrators that Claim A4 was being challenged as a 'global cost' claim which was said to be unjustified and unsound in effect at least in large part because it assumed, wrongly, that all the problems of delay, disruption and inefficiency were attributable to Y. I say 'wrongly' because there was a mass of evidence from both sides as to the fault and responsibility for the delay, disruption and inefficiency which had occurred up to the date of termination, with both parties blaming the other. That was something which the arbitrators decided either consciously or subconsciously (in relation to this Claim A4) that it was unnecessary to bear in mind."

[61] It follows that the arbitrators overlooked the need to address the issue of Claim A4 being a global claim and therefore to address the fault and responsibility of Z (if any) in relation to the delay, disruption and inefficiencies which it seems to have been common ground had occurred to a significant extent before the termination. They therefore failed to deal with this issue. It was a very important issue, not least because the consequence of the failure has been that some £126 million has been awarded to Z. It almost goes without saying that, necessarily, there has been substantial injustice because the arbitrators have not addressed the key issues as to (a) whether or not there were problems which were the fault and responsibility of Z and (b) if so, what impact that had on the cost recovery claim which formed the basis of the substantial award in relation to Claim A4. This cannot be classified as anything less than substantial injustice because the arbitrators have not applied their minds to the issue at all and any right minded party to arbitration would feel that justice had not been served.

DECISION AND CONSEQUENCES

[62] In my judgment, there has been serious irregularity on the grounds set out in s 68(2)(d) in relation to matters raised as Liability Ground 2 and Quantum Ground 3 and substantial injustice has resulted from the tribunal's omission to deal with such matters.

[63] I leave open the question of what the appropriate relief is. I did hear substantial argument about this but I indicated that I might consider it appropriate to hear the parties again in the light of any specific permutation of findings. Given that I have rejected three grounds of challenge and allowed two, I propose to hear the parties at the hearing to be fixed after the hand down of this judgment.

[64] Given the sensitivities which had been raised in correspondence between Counsel (particularly for Y), I would propose to hand the judgment down on 19 December 2014 with a direction that its contents may be communicated only to the legal teams and senior representatives of Y and Z. I will extend time for applications for permission to appeal until a further hearing which should be fixed in the first half of January 2015 if at all possible. That hearing will address the appropriate relief to be granted as well as any issues as to costs.

Judgment accordingly.

LEGAL AUTHORITY CA-151



The Code of Ethics for Arbitrators in Commercial Disputes

Effective March 1, 2004

The **Code of Ethics for Arbitrators in Commercial Disputes** was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association® and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA®.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the **Code of Professional Responsibility for Arbitrators of Labor-Management Disputes**.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.



Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a “party-appointed arbitrator”) and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties’ agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator’s fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.



CANON I: An arbitrator should uphold the integrity and fairness of the arbitration process.

- A.** An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.
- B.** One should accept appointment as an arbitrator only if fully satisfied:
 - (1)** that he or she can serve impartially;
 - (2)** that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
 - (3)** that he or she is competent to serve; and
 - (4)** that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.
- C.** After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.
- D.** Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
- E.** When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
- F.** An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.
- G.** The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.
- H.** Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.
- I.** An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.



Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II: An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.

- A.** Persons who are requested to serve as arbitrators should, before accepting, disclose:
 - (1) any known direct or indirect financial or personal interest in the outcome of the arbitration;
 - (2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
 - (3) the nature and extent of any prior knowledge they may have of the dispute; and
 - (4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.
- B.** Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.
- C.** The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.
- D.** Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.
- E.** Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.
- F.** When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.



- G.** If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:
 - (1)** An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or
 - (2)** In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.
- H.** If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:
 - (1)** Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or
 - (2)** Withdraw.

CANON III: An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

- A.** If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.
- B.** An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:
 - (1)** When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
 - (a)** may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
 - (b)** may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.
 - (2)** In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;
 - (3)** In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;
 - (4)** In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;
 - (5)** Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or
 - (6)** If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.
- C.** Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.



CANON IV: An arbitrator should conduct the proceedings fairly and diligently.

- A.** An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.
- B.** The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.
- C.** The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.
- D.** If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.
- E.** When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.
- F.** Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.
- G.** Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to Paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude *ex parte* requests for interim relief.

CANON V: An arbitrator should make decisions in a just, independent and deliberate manner.

- A.** The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
- B.** An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
- C.** An arbitrator should not delegate the duty to decide to any other person.
- D.** In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.



CANON VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

- A.** An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B.** The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
- C.** It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.
- D.** Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII: An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.

- A.** Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.
- B.** Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:
 - (1)** Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;
 - (2)** In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and
 - (3)** Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII: An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.

- A.** Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.
- B.** Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.



Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX: Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this code, except as exempted by Canon X.

- A.** In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.
- B.** Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.
- C.** A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:
 - (1)** Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;
 - (2)** Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and
 - (3)** Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.
- D.** Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.



CANON X: Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations Under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

- (1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and
- (2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations Under Canon II*

- (1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
- (2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations Under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

- (1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
- (2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);
- (3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
- (4) Canon X arbitrators may not at any time during the arbitration:
 - (a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
 - (b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or
 - (c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.



- (5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
- (6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and
- (7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations Under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations Under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations Under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

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Part VI The Award, Ch.26 Post-Award Proceedings

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1. Introduction

Among the most important obligations that the arbitral tribunal owes the parties is to render a coherent, accurate, and complete award.¹ Because international arbitration often involves complex claims adjudicated at a quick pace by arbitrators who may not be operating in their native language, ambiguities, mistakes, and omissions can taint the final (p. 802) product—perhaps to the point of compromising the validity of the award. To allow the arbitrators to rectify these problems, Articles 37, 38 and 39 of the UNCITRAL Rules, respectively, grant the arbitral tribunal post-award authority to interpret, correct, and complete an award, if necessary.² In so doing, they provide a narrow exception to the basic rule of finality of awards.³ Articles 37, 38, and 39, however, are not mechanisms by which a party may reargue its case or introduce new arguments or claims for resolution by the arbitral tribunal.

In addition to interpretation, correction and completion of an award, this chapter addresses the debatable subject of an arbitral tribunal's inherent power to revise an award in the event of fraud or corruption.

2. Interpretation of the Award—Article 37

A. Text of the 2010 UNCITRAL Rule⁴

Article 37 of the 2010 UNCITRAL Rules provides:

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.
2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 34, paragraphs 2 to 6, shall apply.

B. Commentary

(1) General

Unfortunately, in some cases, the terms of an award may be written unclearly, obscuring the arbitral tribunal's decision on the claims presented by the parties. Article 37 of the UNCITRAL Rules establishes a procedure whereby a disputing party may request the arbitral tribunal to provide an interpretation of a previously rendered award.

Interpretation, as distinguished from other post-award proceedings, provides a means of “clarification of the award” by resolving any ambiguity and vagueness in its terms.⁵(p. 803) Interpretation may be particularly useful in the context of a continuing business relationship, where because of the award's unclear terms the parties require further guidance from the arbitral tribunal on the meaning of their future obligations.⁶

Interpretation is not a mechanism for revisiting an issue or claim that the arbitral tribunal should have addressed in the award but did not.⁷ Any such omission would have to be dealt

or to review conclusions in awards rendered by the Tribunal find no basis in the [1983] Tribunal Rules. ...

The Tribunal has examined the Award, in particular, the figures and calculations used to compute the amount payable to the United States. No error in computation or error of a similar nature (p. 821) has been detected. For this reason, the Tribunal denies the request in so far as it is based on Article 36 of the [1983] Tribunal Rules.

Islamic Republic of Iran and United States of America, Case No A27, Full Tribunal, Order of August 5, 1998, at 1:

1. The Tribunal notes the Islamic Republic of Iran's "Request to Order the United States to Comply with Award No 586-A/27-FT dated 5 June 1998," filed on 24 July 1998 (Doc. 40) ("Request").

2. According to the [1983] Tribunal Rules, after a final award has been rendered, the Tribunal may "give an interpretation of the award" (Article 35), correct "any errors in computation, any clerical or typographical errors, or any errors of similar nature" (Article 36), or "make an additional award as to claims presented in the arbitral proceedings but omitted from the award" (Article 37). *Westinghouse Electric Corporation and Islamic Republic of Iran*, Decision No DEC 127-389-2 (23 Apr. 1997). Iran's Request does not fall within the scope of Articles 35, 36, or 37 of the [1983] Tribunal Rules. Nothing in the Tribunal Rules provides a basis for granting the Request, which is therefore denied.

4. Additional Award—Article 39

A. Text of the 2010 UNCITRAL Rule⁶¹

Article 39 of the 2010 UNCITRAL Rules provides:

1. 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.
2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.
3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

B Commentary

(1) General

Article 39 authorizes the arbitral tribunal to make an award "as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal." The provision reflects a concern that in most jurisdictions an award that fails to address all claims raised in arbitration will not be recognized or enforced.⁶² Article 39 thus provides the arbitrators a (p. 822) mechanism for completing their mandate, when necessary, by making an award that resolves all remaining claims.⁶³ As the *travaux préparatoires* note, in the absence of such a provision, "a lengthy, costly arbitration might be totally invalidated because the

arbitrators inadvertently failed to rule in their award on each part of every claim raised during the arbitral proceedings.”⁶⁴

Article 39 potentially applies in two scenarios in which the arbitral tribunal has failed to address claims presented in the arbitral proceedings. First, where any existing award or awards are incomplete, Article 39 allows the arbitral tribunal to make an “additional award.” Second, where the arbitral proceedings are concluded by a “termination order” that fails to resolve all matters in the arbitration, the arbitral tribunal may render an “award” with respect to all remaining claims. In the latter situation, the term “additional award” is not necessarily applicable since it is very possible that during the arbitration no previous award has been made. The terms “termination order” and “award” (as opposed to “additional award”) are new to the 2010 UNCITRAL Rules. They were included to ensure that arbitral tribunals would have the requisite authority to fulfil their duties in the event it neglected to resolve claims, regardless of what mechanism was used to conclude the proceedings.⁶⁵

Article 39 serves as an express agreement by the parties to extend the arbitrators’ jurisdiction over the dispute to make an additional award.⁶⁶ Such agreement may or may not be necessary in practice depending on the requirements of the applicable national arbitration law. In some jurisdictions, an award that fails to address all claims is not a final award; thus the arbitral tribunal’s jurisdiction over the dispute remains in force until all outstanding claims are resolved.⁶⁷ Nevertheless, an additional award is an “award” within the meaning of the Rules and thus should comply with Article 34(2) through 34(6), as required by Article 39, and the rule on majority voting contained in Article 31.⁶⁸

Professor Sanders observed during the original Committee discussions that corresponding Article 37 of the 1976 UNCITRAL Rules was intended to cover “obvious cases of omission” in which the arbitrators failed to render a complete award.⁶⁹ Article 39 should be similarly understood. Examples of obvious cases of omission may include when the arbitrators have failed to fix or apportion the costs of arbitration,⁷⁰ rule on a claim for (p. 823) interest payments, or adjudicate in the award a counterclaim that was asserted without substantial supporting evidence.⁷¹ Article 39 obviously has no effect in cases of deliberate omission where an arbitral tribunal has for specific reasons intentionally chosen not to address a claim or issue in the award.⁷² Nevertheless, to avoid any misunderstandings, it is good practice for an arbitral tribunal to document in the award the disposition of each of the parties’ respective claims, no matter how small or inconsequential their bearing is on the outcome of the case.

Article 39(2) grants the arbitral tribunal wide discretion to determine if a request for an additional award is “justified.”⁷³ The arbitrators, for example, may reject a request on grounds that there was no omission of claims,⁷⁴ that the award sufficiently addressed the alleged omissions,⁷⁵ and that the party’s request generally falls outside the scope of Article 39.⁷⁶ The arbitrators have no express authority to make additional awards *sua sponte*, although arguably they must inform the parties of the discovery of any important omissions as part of their general duty to ensure the validity and enforceability of the award.⁷⁷

Article 39 permits an arbitral tribunal to conduct further hearings or gather additional evidence, if necessary, in order to address claims that it neglected to decide. In so doing, the Working Group that revised the Rules broke from the approach of corresponding Article 37 of the 1976 UNCITRAL Rules, which expressly prohibited further hearings and evidence.⁷⁸ Rather, Article 39 follows the approach of Article 33(3)–(4) of the UNCITRAL Model Law. In drafting that instrument, the Working Group recognized that denying the arbitral tribunal these procedures could place the entire award in jeopardy of being set aside.⁷⁹ In discussions to revise the Rules, some delegates expressed concerns that the possibility of further hearings and evidence might encourage dilatory tactics,⁸⁰ though the general consensus appears to have been that the authority to conduct further hearings and

UNCITRAL Based Arbitration Rules (2010) 554 (“The scope of the Tribunal's ability to correct an Award is limited to issues of misinterpretation of intent, typographical errors and similar corrections. The correction does not reach the level of changing the outcome of the Award.”).

⁵² See, eg, *Component Builders Inc* (1983 Tribunal Rules), reprinted in section 3(D)(2).

⁵³ *Component Builders Inc* (1983 Tribunals Rules), n 52.

⁵⁴ See, eg, *Paul Donin de Rosiere* (1983 Tribunal Rules), reprinted in section 3(D)(2).

⁵⁵ Note that tardiness has been a leading basis for rejection of a correction request before the Iran-US Claims Tribunal. See, eg, *Component Builders Inc* (1983 Tribunal Rules), reprinted in section 3(D)(2).

⁵⁶ This requirement, found in the last sentence of Article 38(1), is new to the article on corrections, though a similar provision existed in Article 37 of the 1976 UNCITRAL Rules on additional awards. UNCITRAL, 43rd Session, UN Doc A/CN.9/684, n 45, at 24, para 106-07. For a discussion of the discretion afforded to the arbitral tribunal to determine whether a request is “justified,” see section 4(B)(1).

⁵⁷ The only significant dispute to arise during the drafting of Article 36 of the 1976 UNCITRAL Rules was in regard to the parties’ 30-day time limit for making a request for correction. Some representatives spoke in favor of no time limit. UN Doc A/CN.9/SR.167, n 5, at 207 (Comments by Mr Ganske, Federal Republic of Germany, Mr Melis, Australia, and Mr Eyzaguirre, Chile). See also UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.12, n 25, at 3, para 15 (Comment by Mr Guevara, Philippines). One delegate suggested that the proposed time limit for requesting corrections to an award run, not from the date of the award, but from the time the parties were required to discharge their obligations. See UN Doc A/CN.9/SR.167, n 5, at 208 (Comment by Mr Réczei, Hungary). Another representative argued that when it came to dealing with requests for correction the window of opportunity “could not be left open indefinitely.” UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.12, n 25, at 3, para 16 (Comment by Mr Mantilla-Molina, Mexico).

⁵⁸ A Vollmer and A Bedford, “Post-Award Arbitral Proceedings,” (1998) 15(1) J Intl Arb 37, 49, warn that “a party could delay finality for substantial periods by filing request after request.” We do not agree. The 30-day time limit does not reset each time corrections to the award are made. It is possible, however, that an additional 30-day period would exist for a valid request to correct a previously corrected award.

⁵⁹ UN Doc A/CN.9/112/Add.1, n 5, reprinted in (1976) VII UNCITRAL Ybk 166, 180 (Commentary on Draft Article 32(2)).

⁶⁰ See, eg, *Harold Birnbaum* (1983 Tribunal Rules), reprinted in section 3(D)(1).

⁶¹ Corresponding Article 37 of the 1976 UNCITRAL Rules provides:

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.
3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

- 62** UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1, n 5, reprinted in (1976) VII UNCITRAL Ybk 166, 180 (Commentary on Draft Article 32).
- 63** UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1, n 5, reprinted in (1976) VII UNCITRAL Ybk 166, 180.
- 64** UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1, n 5, reprinted in (1976) VII UNCITRAL Ybk 166, 180.
- 65** UNCITRAL, 43rd Session, UN Doc A/CN.9/684, n 45, at 25, para 115 (describing a proposal for the revision as “a solution for parties in case the arbitral tribunal failed to address all issues in a termination order). Another proposal, which received support but was ultimately not adopted, called for revising the Rules to ensure that a termination order has “the legal effect or character of an award.” Para 115 (proposing to insert in the Rules: “For purposes of Article 37 [on settlement and other grounds for termination], a termination order should be treated as an award”). Accord J Castello, “UNCITRAL Rules,” in F Weigand (ed) *Practitioner's Handbook on International Commercial Arbitration* (2nd edn 2009) 1523.
- 66** J Castello, “UNCITRAL Rules,” n 65, 1523.
- 67** See K Berger, *International Economic Arbitration*, n 1, 637. Article 32(1) of the Model Law, as amended, provides: “The arbitral proceedings are terminated by the final award. ...”
- 68** An additional award, like all awards rendered under the Rules, is subject to the rule of majority voting, pursuant to Article 33.
- 69** Professor Sanders observed that corresponding Article 37 of the 1976 UNCITRAL Rules “was intended to cover obvious cases of omission on the part of the arbitrators, in other words cases in which, although all the elements necessary for an award had been submitted, the arbitrators had not rendered a complete award.” UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.12, n 25, at 4, para 22. See also P Sanders, “Commentary on UNCITRAL Arbitration Rules,” n 17, 214.
- 70** See, eg, *Assistance in Developing Educational System, Inc* (1983 Tribunal Rules), reprinted in section 4(D)(1).
- 71** UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1, n 5, reprinted in (1976) VII UNCITRAL Ybk 166, 180 (Commentary on Draft Article 32(1)).
- 72** UN Doc A/CN.9/SR.167, n 5, at 208 (Comment by Mr Krispis, Greece). See also UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.12, n 25, at 4, para 25. See *Islamic Republic of Iran and United States* (Case B61), reprinted in section 4(D)(2).
- 73** The commentary on the Revised Draft explains that the arbitrators have “full discretion, upon receipt of the request of a party for an additional award, to decide whether or not to make such an award.” UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1, n 5, reprinted in (1976) VII UNCITRAL Ybk 166, 181 (Commentary on Draft Article 32(2)).
- 74** *Woodward-Clyde Consultants* (1983 Tribunal Rules); *Flexi-Van Leasing* (1983 Tribunal Rules); *Intl Schools Services, Inc* (1983 Tribunal Rules); *Exxon Research and Engineering Co* (1983 Tribunal Rules); *Reza and Shahnaz Mohajer-Shojaee* (1983 Tribunal Rules); and *Esahak Saboonchian* (1983 Tribunal Rules); all reprinted in section 4(D)(2).
- 75** *Harris Intl Communications, Inc* (1983 Tribunal Rules), reprinted in section 4(D)(2).
- 76** *Iran and United States*, Case No A/27 (1983 Tribunal Rules), reprinted in section (D)(2).

- ⁷⁷ See also Chapter 24, section 2(B)(2).
- ⁷⁸ Article 37 of the 1976 UNCITRAL Rules is reprinted in n 61. Note that in revising the Rules some delegates argued that Article 37(2) could be read as allowing further hearings and evidence. UNCITRAL, 40th Session, UN Doc A/CN.9/614, n 31, at 26, para 129.
- ⁷⁹ See H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law*, n 14, 891 (commenting on Article 33(3) of the Model Law).
- ⁸⁰ UNCITRAL, 40th Session, UN Doc A/CN.9/614, n 31, at 26, para 128.
- ⁸¹ See Article 37, 1976 UNCITRAL Rules. Note that proposals were considered by the Working Group to include express language in the Rules to define the conditions required for further hearings or evidence, but these did not receive significant support. *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Seventh Session* (Vienna, September 10-14, 2007), UNCITRAL, 41st Session, UN Doc A/CN.9/641, at 22-23, para 19 (2007).
- ⁸² UNCITRAL, 41st Session, UN Doc A/CN.9/641, n 81, at 22, para 118 (“The Working Group agreed that paragraph (2) was intended to be limited to claims presented during the course of the arbitral proceedings.”).
- ⁸³ For a discussion regarding the timing of submissions, see Chapter 12.
- ⁸⁴ This provision tracks Article 33(4) of the Model Law, as amended, though, unlike the Rules, the Model Law provision applies not only to additional awards, but also to corrections and interpretations. For discussion of the provision, see H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law*, n 14, 891-2.
- ⁸⁵ See UNCITRAL, UN Doc A/CN.9/WG.II/WP.149, n 32, at 20, para 79 (Secretariat's commentary on Draft Article 37(2)).
- ⁸⁶ UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.12, n 25, at 3-4, para 21 (1976) (Comment by Mr Lebedev, USSR).
- ⁸⁷ UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.12, n 25, at 4, para 25 (Comments by Mr Pirrung, Federal Republic of Germany).
- ⁸⁸ See P Sanders, “Commentary on UNCITRAL Arbitration Rules,” n 17, 214.
- ⁸⁹ UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1, n 5, reprinted in (1976) VII UNCITRAL Ybk 166, 181 (Commentary on Draft Article 32(2)).
- ⁹⁰ UNCITRAL, UN Doc A/CN.9/WG.II/WP.149, n 32, at 18, para 72. The revised technical requirements in Article 34(2)-(6) omit the requirement that the arbitral tribunal must file or register an award.
- ⁹¹ A substantially similar example of practice can be found at *International Schools Services, Inc and Islamic Republic of Iran*, Decision No DEC 61-123-1 (April 28, 1987), reprinted in 14 Iran-US CTR 279, 281 (1987-I).
- ⁹² Such authority cannot be derived from Article 17(1) of the UNCITRAL Rules. See *Methanex Corp* (1976 Rules), reprinted in section 5(B).
- ⁹³ See Chapter 24, section 2(B)(2).
- ⁹⁴ Under Article V(2)(b) of the New York Convention, recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that recognition and enforcement would be contrary to the public policy of that country. The US Federal Arbitration Act allows for the setting aside of an award procured by corruption, fraud, or undue means. 9 US Code § 10. For further

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Article 33: Correction and Interpretation of Awards; Additional Award

- (1) Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties:
 - (a) a party, with notice to the other 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;
 - (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award.
- (2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within 30 days of the date of the award.
- (3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 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. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days.
- (4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.
- (5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award. (1)

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1. INTRODUCTION

Article 33 regulates the correction, interpretation and addition to an arbitral award by the tribunal after the award has been issued. Because the tribunal's mandate ends with the termination of the proceedings, (2) which is achieved *inter alia* by a final award, a specific provision is necessary in order to enable the tribunal to correct any errors in computation, clerical or typographical errors or errors of a similar nature; to give an interpretation of a specific point or part of the award; or to make an additional award as to the claims presented in the proceedings but omitted from the award.

It is evident that art. 33 was modelled on arts 37, 38 and 39 of the UNCITRAL Arbitration Rules: (3) art. 37 of these Rules is concerned with the interpretation of the award, an issue similarly dealt with by art. 33(1)(b) of the Model Law. Further, the wording of art. 38 of the UNCITRAL Arbitration Rules is used by art. 33(1)(a) of the Model Law, which deals with the correction of the award, and the Rules' art. 39 bears great resemblance to art. 33(3) of the Model Law, which regulates the issuance of an additional award.

Article 33 uses time limits for the parties' request for correction, interpretation or addition to the award and related action by the tribunal. These time limits were a major source of discussion during the drafting of the provision: One view thought it inappropriate to fix any such periods at all because it was feared that the situation could arise in which the tribunal would for good reasons be unable to act in compliance with such a fixed time period. (4) As an alternative, supporters of this view suggested the use of a general formula such as the tribunal having to act 'promptly' or 'without delay'. (5) The opposing view, however, 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. (6) The Working Group managed to find a compromise between these opposing views by, on the one hand, setting time periods (thirty days for a correction or interpretation and sixty days for an additional award) and, on the other hand, granting the tribunal the option to extend these time periods when necessary under the circumstances (art. 33(4)). (7)

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

P 437 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. (8) ● Logically, it follows that the same argument applies not only for the interpretation but also for the correction of errors and the additional award.

Before exploring the three possibilities of correcting, interpreting and adding to the final award, a quick reference to art. 33(5) seems appropriate. This article states that the 'provisions of art. 31' apply to the above-mentioned alterations to the arbitral award, which means that any alteration has to meet the full form requirements portrayed in this provision. Therefore, any correction must be signed by all of the arbitrators, and it must include a statement of reasons for the correction.

2. CORRECTION OF ERRORS

The arbitral tribunal may correct 'any errors in computation, any clerical or typographical errors or any errors of similar nature' (9) contained in the award, either upon request of a party or on its own motion. The errors affected by this provision are mainly flagrant mathematical errors or typing errors, which would otherwise complicate the execution of the award. The party requesting such an action from the tribunal has a time limit of thirty days from the receipt of the award to do so, and the tribunal may take a further thirty days from the receipt of the request until the correction is made. According to art. 33(4), however, the tribunal may – 'if necessary' (10) – extend the thirty-day time period in order to make the correction.

The Working Group stressed the mandatory character of art. 33(1)(a) which prevents the parties from contracting out of this provision. The parties do, however, have the option of setting a different time limit for requesting the correction. (11)

Article 50(1) of the Sultanate of Oman's arbitration law not only restricts the parties' discretion in setting a different time limit for making a correction – which is, for example, also done by the German and the Islamic Republic of Iran's arbitration laws – but also restricts the number of instances where a correction is possible:

The arbitral tribunal may rectify purely material errors of writing or arithmetic contained in the award, either on its own initiative or upon request of the parties. Such a correction, which is not discussed with the parties, must be made within 30 days following the making of the award or the application for correction, as the case may be. The arbitral tribunal may extend this time by another 30 days if it deems necessary.

The above provision stands in stark contrast to the Sri Lankan adoption of art. 33, which could not be more detailed on the issue:

Correction and interpretation of award; Additional awards

27(1) Within 14 days of receipt of the award, unless another period of time has been agreed upon by the parties, whether at the request of the arbitral tribunal or otherwise -

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- (a) a party, with notice to the other party, may request the arbitral tribunal -
 - (i) to correct in the award any errors in computation, any clerical or typographical errors or omissions or any errors of a similar nature; or
 - (ii) to modify the award where a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision on the matter referred;
 - (b) if so agreed upon by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

Article 33(2) of the Model Law permits the tribunal to correct errors of the above-mentioned type on its own motion within thirty days from the date of the award. This enables the tribunal to correct errors without being dependent on a party's request.

3. INTERPRETATION OF THE AWARD

In 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. (12) Consequently, the provision speaks of 'an interpretation of a specific point or part of the award'. A further deviation from art. 37 of the Rules is the time period within which the tribunal is supposed to decide on the appropriate interpretation. The Model Law grants the tribunal only thirty days as opposed to the forty-five days envisaged by the UNCITRAL Arbitration Rules provision. This was changed in order to harmonize the time limits in art. 33. As mentioned above, the tribunal may extend time limits according to art. 33(4), giving this change only minor

significance.

In the Commission, the provision in art. 33 on the interpretation of the award was confronted with a great deal of discussion, and the delegates from the International Bar Association, (13) Australia, (14) the USA, (15) the United Republic of Tanzania, (16) the German Democratic Republic (17) and Finland (18) among others proposed the deletion of this part of the article. It was stated that the provision 'invited attempts on the part of both the winner and the loser to get changes made in the merits of the award' (19) and that it 'might be used as a means for the losing party to harass the arbitral tribunal'. (20) The Finnish delegate, Mr Moeller, spoke from experience since a similar provision had been employed in his legal system, but had failed to function, satisfactorily making a repeal necessary. (21)

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In support of retention of the interpretation provision, it was advanced that interpretation might be necessary where the award was written in a language other than the mother tongue of its drafter, which often leaves room for ambiguity. The Commission agreed on a compromise, which permitted the interpretation of specific points or parts of the award, but only if the parties agreed so. (22)

When agreeing on allowing the interpretation of the award the parties have to be aware that the result reached might not always provide the hoped-for result and could perhaps give rise to new problems. For example, the tribunal could fail to reach agreement on the appropriate interpretation and problems that up until then had been undiscovered or intentionally avoided could be uncovered. On the other hand, however, one of the parties will nearly always seek the clarification or interpretation of an unclear arbitral award, and if the arbitral tribunal does not or cannot fulfil this task, the enforcing court will do so; it is submitted that the tribunal, of course, is better suited to fulfil that task.

The above-mentioned party agreement, which is necessary to allow the tribunal to interpret parts of the award, is not a prerequisite in all adopting jurisdictions. Germany, the Sultanate of Oman and Tunisia, among others, permit the tribunal to make this interpretation even if no such party agreement is present. Further, a number of adoptions declined to limit the interpretation only to 'specific point or part[s] of the award', as is recommended by the Model Law. The Republic of Bulgaria, for example, speaks of the interpretation of the 'award' (art. 43), or art. 32(1) of the Islamic Republic of Iran's law employs the wording 'remove any ambiguity'.

The provision that implemented both of the above alterations on adoption was art. 49 of the Sultanate of Oman's arbitration law:

- (1) Within 30 days following receipt of the award, one of the parties to the arbitration may request the arbitral tribunal to interpret obscure points of the decision. The applicant for such an interpretation must notify his request to the other party before presenting it to the arbitral tribunal.
- (2) The interpretation is made in writing within 30 days following the application to the arbitral tribunal. If the arbitral tribunal deems necessary, it may extend this time by another 30 days.
- (3) The interpretative award is held to be a complement of the arbitral award which it interprets and is subject to the provisions which are applicable to it.

4. ADDITIONAL AWARD

The tribunal may, upon request by a party, make an additional award as to claims presented in the proceedings but omitted from the award. (23) This consequence seems logical in light of the fact that clearly, in the given case, the tribunal acted *infra petita* ● and did not entirely fulfil its mandate. (24) In the absence of such a provision, the parties could still set aside either the whole award (if the points cannot be separated) or the relevant part of the award. (25)

However, it is possible for the parties to agree that this provision is not to apply to their arbitration; art. 33(3) therefore is of a non-mandatory character. While the parties have the standard thirty days to make the request for an additional award, the tribunal can take twice as long (sixty days) to make the additional award. This is due to the 'usually more difficult and time-consuming task of making an additional award'. (26) In addition, the tribunal may also hold additional hearings or ask for further evidence. (27)

5. CASES (CLOUT)

The following cases are indexed by UNCITRAL's CLOUT database (28) on art. 33:

Article 33 (general)

- **Case 267** – Zimbabwe/Harare High Court: *Zimbabwe Electricity Supply Commission v. Genius Joel Maposa*, No. HH-231-98 (on March 29 and 9 December 1998) (29)

The court in this case found that an award which violates public policy would have to be one that would undermine the integrity of the system of international

arbitration as put in place by the Model Law; this would include cases of fraud, corruption, bribery and serious procedural irregularities. In the case at hand, no moral turpitude was attached to the arbitrator's conduct, and thus the award could not be said to be in conflict with public policy (art. 34 of the Model Law). The court found that the arbitrator's error which had occurred was clearly one of computation for which art. 33 of the Model Law made adequate provision.

- **Case 1468** – Singapore/Court of Appeal: *LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd* (16 August 2012) (30)
On the question of the court's power to declare an additional award a nullity, the court stated here that in the light of art. 5 of the Model Law it did not have jurisdiction to confirm, vary, set aside or remit an award except where so provided in the Singaporean Arbitration Act.

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Article 33(1)

- **Case 207** – Singapore/Singapore International Arbitration Centre (SIAC): *SIAC Arb. No. 6 of 1996* (6 February 1998) (31)
The presiding arbitrator in this case held that art. 33(1) of the Model Law empowered the tribunal to correct a certificate of costs as an 'error of a similar nature'.

Article 33(1)(a)

- **Case 625** – Canada/Federal Court, Trial Division: *Relais Nordik Inc v. Secunda Marine Services Ltd* (12 April 1990) (32)
This case involved the situation where the defendant had requested the arbitral tribunal to correct an error in computation of the award, while the claimant had applied for recognition and enforcement of the same award. The court held that in spite of the fact that there was no disagreement between the parties as to the correction to be made to the award and that the latter related to a minimal amount, the award had not yet become binding on the parties within the meaning of art. 36(1)(a)(v) of the Model Law, since the arbitral tribunal had not made its determination on the request for correction and was still seized of the matter.

Article 33(3)

- **Case 663** – Germany/Oberlandesgericht Stuttgart: *1 Sch 22/01* (4 June 2002) (33)
The main issue in this case was whether in arbitration proceedings, where the tribunal had denied its jurisdiction (art. 16(1) of the Model Law) and where the claimant had been ordered to pay costs, an arbitral tribunal had the power to render a supplementary award fixing the costs, due by the claimant, while the setting-aside proceedings against the main award were still pending.

6. CONCLUSION

In all of the above-mentioned cases, the arbitral tribunal has discretion in deciding whether and to what extent it will deal with the request. The decision either becomes part of the award or, as is the case with the additional award, constitutes a separate arbitral award.

The Model Law fails to address the question of what legal effect such a request has on the arbitration under art. 33. A suggestion was made in the Working Group that the award be suspended during these additional proceedings; (34) however, this issue was not mentioned in any of the following sessions. Article 34(3) of the Model Law nevertheless allows the drawing of certain conclusions regarding the effect of such a ● request: it is submitted that if the three-month time limit for setting aside an award commences after a request under art. 33 has been disposed of by the tribunal (35) (which could, theoretically, take up to 120 days in case of an additional award (36)), it must follow that until that point in time the award has not yet officially been 'made'.

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References

- 1) Article 33 of the UNCITRAL Model Law on International Commercial Arbitration, United Nations documents A/40/17, annex I and A/61/17, annex I.
- 2) A/CN.9/264, art. 33, para. 1.
- 3) A/CN.9/216, para. 98; A/CN.9/WG.II/WP.38, art. 34, n. 30.
- 4) A/CN.9/246, para. 119.
- 5) A/CN.9/246, para. 121.
- 6) A/CN.9/246, para. 120.
- 7) A/CN.9/246, para. 122.
- 8) A/CN.9/246, para. 124; A/40/17, para. 271.
- 9) Article 33(1)(a) and 33(2) of the Model Law.

- 10) Article 33(4) of the Model Law.
- 11) A/CN.9/232, para. 178.
- 12) A/CN.9/216, para. 98.
- 13) A/CN.9/SR.329, para. 38.
- 14) A/CN.9/SR.329, para. 39.
- 15) A/CN.9/SR.329, para. 40.
- 16) A/CN.9/SR.329, para. 41.
- 17) A/CN.9/SR.329, para. 44; A/CN.9/263, art. 33, para. 2.
- 18) A/CN.9/SR.329, para. 45.
- 19) A/CN.9/SR.329, para. 40.
- 20) A/40/17, para. 266.
- 21) A/CN.9/SR.329, para. 45.
- 22) A/40/17, para. 269.
- 23) Article 33(3) of the Model Law.
- 24) A/CN.9/WG.II/WP.50, para. 22.
- 25) A/CN.9/WG.II/WP.50, para. 22.
- 26) A/CN.9/264, art. 33, para. 2.
- 27) A/CN.9/WG.II/WP.50, para. 21; A/CN.9/246, para. 125.
- 28) Cf. UNCITRAL's CLOUT database at <http://www.uncitral.org/clout/> for abstracts; the case numbers given correspond with those of CLOUT. The allocations of cases to the particular articles of the Model Law follow those defined in the CLOUT abstracts.
- 29) A/CN.9/SER.C/ABSTRACTS/25.
- 30) A/CN.9/SER.C/ABSTRACTS/157.
- 31) A/CN.9/SER.C/ABSTRACTS/16.
- 32) A/CN.9/SER.C/ABSTRACTS/56.
- 33) A/CN.9/SER.C/ABSTRACTS/61.
- 34) A/CN.9/WG.II/WP.50, para. 20.
- 35) Cf. art. 34(3) of the Model Law.
- 36) That is up to thirty days for the requesting party, another thirty days for the other party to respond and possibly sixty days for the tribunal to decide.

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UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional award]

1976 Rules**Article 37: Additional award**

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.
3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

2010 Rules**Article 39: Additional award**

1. 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.
2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.
3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

1. After interpretation and correction (articles 37-38), article 39 provides a further, exceptional post-award extension of the tribunal's authority where this is necessary to ensure that the award has its proper effect. It empowers the tribunal to 'make an award or an additional award' where a claim presented during the proceedings was left undecided by the tribunal. (1) This provision reflects the drafters' concerns that, in many jurisdictions, an award which does not address all ● the claims raised in the arbitration may not be recognized or enforced, (2) or possibly even set aside (as opposed to being remitted to the tribunal for reconsideration). The corrective mechanism in article 39 therefore prevents the neutralisation of a lengthy, costly arbitration where the arbitrators have 'inadvertently failed to rule in their award on each part of every claim raised during the arbitral proceedings'. (3) Thus, the tribunal's jurisdiction is extended where a party makes a 'justified' request for an additional award. (4)

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2. The three prongs of article 39 of the 2010 Rules, as well as the modifications to the 1976 corresponding provision, are addressed below.

A Request for an Award or an Additional Award: Article 39(1)

3. Article 37 of the 1976 Rules provides that, within 30 days of having received the award, and giving notice to the other party, a party may request that the tribunal make an additional award. This provision therefore does not provide for the situation where the arbitral tribunal has issued a termination order pursuant to article 34 of the 1976 Rules (article 36 of the 2010 Rules) despite having failed to address certain of the parties' claims. Under the 2010 Rules, article 39 provides that the tribunal may issue an 'award' (as opposed to an 'additional award'), where it has issued a termination order but must subsequently address claims that it has left undecided. (5) This change is also reflected in the new wording of article 39(1), which was revised from 'claims presented in the arbitral proceedings but omitted from the award' to 'claims presented in the arbitral proceedings but not decided by the arbitral tribunal' (emphasis added). (6)

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4. Under both the 1976 and 2010 versions of the Rules, the scope of an additional award should be limited to claims that were in fact presented in the arbitral ● proceedings. The relevant provisions are not to serve as a means by which a party, having failed to raise an issue or submit evidence, may go back to correct such failings. (7) In short, these provisions do not permit the tribunal to revisit its final awards. (8) Article 39 was intended to address instances of obvious omissions where arbitrators have 'failed to render a complete award'; for example, by failing to fix or apportion arbitration costs or to rule on a particular claim. (9) This provision was not intended to apply, however, where the tribunal deliberately elects not to address a particular claim or issue in the award because it regards it as unnecessary to do so given their decisions on other issues which render further consideration moot. (10) In order to avoid any ambiguity on this score, tribunals may well document the disposition of all claims in the award, 'no matter how small or inconsequential their bearing is on the outcome of the case'. (11) A formula which tribunals sometimes employ to that end is to record in the dispositive part of their

decision that they thereby reject all other claims and submissions.

5. Under both article 37(1) of the 1976 Rules and article 39(1) of the 2010 Rules, a party must request the additional award: the tribunal may not act on its own initiative. However, one may argue with considerable force that the tribunal may (or even should) inform the parties of any important omissions it may discover, pursuant to its duty to ensure the enforceability and validity of the award. (12) The decision whether or not to make a request for an additional award will then rest with the parties.

B Rendering of The Award or Additional Award: Article 39(2)

P 356 6. Under article 39(2) of the 2010 Rules, it is for the tribunal to determine whether a request for an additional award is 'justified'. This was also the position under article 37(2) of the 1976 Rules, (13) and, in practice, tribunals have exercised their authority to reject requests for additional awards on a number of grounds. (14) For ● example, tribunals in some cases have considered that, contrary to a party's allegations, no claims had been omitted, (15) or that the alleged omissions had in fact been sufficiently addressed in the award. (16) For example, in *British Caribbean Bank*, the respondent requested an additional award on the basis that the tribunal had failed to rule on the question of whether the general methodology, as articulated in the *Chorzow Factory* case (17) applied, or if compensation could be calculated according to special requirements in the relevant investment treaty. The claimant argued that the respondent was merely attempting to challenge the tribunal's reasoning on compensation, and that the tribunal had fully and finally disposed of the issue of compensation in its final award. The tribunal agreed with the claimant and rejected the request for an additional award. (18)

7. Under article 37(2) of the 1976 Rules, the tribunal could only 'complete its award' if the request was justified and the omission 'c[ould] be rectified without any further hearings or evidence'. (19) Article 39(2) of the 2010 Rules removes this requirement, recognizing that arbitrators should be free to convene fresh hearings or call for further evidence if they consider that this is necessary for the tribunal to render or complete an award. This change was inspired by Article 33(3) of the UNCITRAL Model Law. The drafters of the Model Law considered that the entire award could be at risk of being set aside if the tribunal was denied the possibility of an adversarial process, (20) and the drafters of the 2010 Rules agreed. (21)

C Time-Limits

8. Article 39 of the 2010 Rules lays down two time-limits. First, parties have 30 days from the receipt of the award or termination order to submit a request. Second, the tribunal has 60 days from the receipt of such a request 'to render or complete its award'.

P 357 9. In contrast to article 37(2) of the 1976 Rules, article 39(2) of the 2010 Rules now expressly allows the tribunal to extend, 'if necessary', the time-limit for making ● the award. In practice, the possibility for extension will facilitate briefing and also adequate consultation between the arbitrators in preparing the additional award, particularly in complex cases. This revision, which is consistent with the UNCITRAL Model Law, (22) was not without controversy in the Working Group. In fact, the terms 'if necessary' were the result of a compromise, signalling that tribunals should not unhesitatingly grant themselves extensions. (23) In the absence of good reasons justifying the extension, the arbitral tribunal 'shall' render or complete its award within the time-limit provided. The use of the term 'shall' implies more than a best-efforts undertaking; it implies that the tribunal has a duty to render or complete the award within the stipulated time-limit. (24) This is also consistent with the statement of availability provided in the Annex to the 2010 Rules, (25) and the tribunal's duty, under article 17(1) of the 2010 Rules, to provide a fair and efficient arbitral process.

D Technical Requirements: Article 39(3)

10. Although this may or may not be necessary, depending on the *lex arbitri*, (26) article 39 of the 2010 Rules nevertheless serves as an agreement between the parties to prolong the tribunal's jurisdiction over the dispute. Therefore, the additional award is an award within the meaning of the Rules and must comply with the requirements in article 34(2)-(6), as provided by article 39(3). The additional award must also comply with the majority-vote requirement stipulated in article 33(1). (27)

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References

- 1) This is also referred to as *infra petita*. See Peter Binder, *Analytical Commentary to the UNCITRAL Arbitration Rules*, para. 39-005 (Sweet & Maxwell 2013).

- 2) See UNCITRAL Report of the Secretary General on the Draft UNCITRAL Arbitration Rules, 12 December 1975, UN Doc A/CN.9/112/Add.1, 180 para. 1 ('Most national arbitration laws provide that the arbitrators' failure or omission to deal with all the claims raised in the arbitration is sufficient reason for setting aside or refusing to enforce an award'). Note, however, that this is not a ground for refusal of recognition or enforcement of the award under Article V(1)(c) of the New York Convention. See also David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules, A Commentary*, 821 (2nd ed., Oxford University Press 2013); Nicola C. Port, Scott E. Bowers, et al., 'Article V(1)(c)', in Herbert Kronke, Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 276 (Kluwer 2010); and John Savage & Emmanuel Gaillard (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, para. 1700 (Kluwer 1999).
- 3) See UNCITRAL Report of the Secretary General on the Draft UNCITRAL Arbitration Rules, 12 December 1975, UN Doc A/CN.9/112/Add.1, 180 para. 1.
- 4) See Stewart A. Baker & Mark D. Davis, *The UNCITRAL Arbitration Rules in Practice – The Experience of the Iran-United States Claims Tribunal*, 196 (Kluwer 1992). Similar provisions allowing for an additional award can be found in, e.g., Article 37 of the Swiss Rules, Article 48 of the SCC Rules and Article 27.3 of the LCIA Rules.
- 5) See UNCITRAL Report of 51st Session, 10 November 2009, UN Doc A/CN.9/684, para. 113.
- 6) *Ibid.*, para. 115.
- 7) Baker & Davis, *suprafn 4*, at 197. See also Pieter Sanders, *Commentary on UNCITRAL Arbitration Rules*, II YCA 172, 176, 213 (1977).
- 8) James E. Castello, 'UNCITRAL Arbitration Rules, Section IV, Article 39' in Loukas A. Mistelis (ed), *Concise International Arbitration*, 257-258 (2nd ed., Kluwer 2015).
- 9) Caron & Caplan, *suprafn 2*, at 822; see also Sanders, *suprafn 7*, at 213.
- 10) See Baker & Davis, *suprafn 4*, at 197; see also UNCITRAL Summary Record of the 12th Meeting, 22 April 1976, UN Doc A/CN.9/9/C.2/SR.12, para. 25, Mr Pirrung (Federal Republic of Germany).
- 11) See Caron & Caplan, *suprafn 2*, at 823.
- 12) *Ibid.*
- 13) See UNCITRAL Report of the Secretary General on the Draft UNCITRAL Arbitration Rules, 12 December 1975, UN Doc A/CN.9/112/Add.1, 181 para. 4; see also Baker & Davis, *suprafn 4*, at 197; and *Harris International Telecommunications Inc v. Islamic Republic of Iran* (1988) 18 Iran-US CTR 76 (where the tribunal rejected a request by indicating that the award had been 'expressly restricted' to the issue in question; i.e., that the tribunal's omission of the point in question had been intentional).
- 14) Caron & Caplan, *suprafn 2*, at 823. See also Baker & Davis, *suprafn 4*, at 198 (noting one 'archetypical case' in which the Iran-US Claims Tribunal did grant a request under article 37 as a result of its failure to rule on a request for costs).
- 15) See, e.g., *Woodward-Clyde Consultants v. Islamic Republic of Iran*, Case No. 67, Chamber Three, Order of 30 December 1983; *Flexi-Van Leasing Inc v. Islamic Republic of Iran* (1986) 13 Iran-US CTR 325, 327; *Exxon Research and Engineering Co v. Islamic Republic of Iran* (1987) 16 Iran-US CTR 110, 111.
- 16) See, e.g., *Harris International Telecommunications Inc v. Islamic Republic of Iran* (1988) 18 Iran-US CTR 76, 77.
- 17) See *Case Concerning the Factory at Chorzow (Germany v. Poland)*, PCIJ Series A No 9 (1927).
- 18) See *British Caribbean Bank Limited v. The Government of Belize* (PCA Case No. 2010-18) Decision on the Respondent Motion pursuant to the UNCITRAL Arbitration Rules, Articles 36 and 37, 7 March 2015, <www.italaw.com>.
- 19) See UNCITRAL Report of the Secretary General on the Draft UNCITRAL Arbitration Rules, 12 December 1975, UN Doc A/CN.9/112/Add.1, 181 para. 4; Caron & Caplan, *suprafn 2*, at 823; Sanders, *suprafn 7*, at 213.
- 20) Caron & Caplan, *suprafn 2*, at 823.
- 21) *Ibid.*; see also UNCITRAL Report of 45th Session, 5 October 2006, UN Doc A/CN.9/614, para. 128.
- 22) See Article 33(4) of the Model Law (providing, in pertinent part, that '[t]he arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award'). See also Pieter Sanders, *Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?*, 20(3) Arb Int 243, 256 (2004).
- 23) Cf. article 25 of the 2010 Rules, which requires the application of a standard of justifiability – as opposed to necessity – in determining whether a time-limit extension should be permitted for the communication of written statements.
- 24) For an example of the distinction between 'undertake' and 'shall', see *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Rep 12, 50 (2004). The ICJ concluded that the 'shall' found in article 36, paragraph 1 (b) of the Vienna Convention on Consular Relations imposed more than a best-efforts undertaking upon the United States. According to the Court, 'shall' was to be understood as imposing an 'obligation incumbent upon [the United States]'

- 25) The statement of availability is listed in the Annex to the 2010 Rules as an 'addition to the statement of independence'. It provides: 'I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules'.
- 26) See Caron & Caplan, *supra*fn 2, at 822 (explaining that, '[i]n some jurisdictions, an award that fails to address all claims is not a final award; thus the arbitral tribunal's jurisdiction over the dispute remains in force until all outstanding claims are resolved').
- 27) *Ibid.*

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LEGAL AUTHORITY CA-155

All England Official Transcripts (1997-2008)*

Ronly Holdings v JSC Zestafoni G Nikoladze Ferroalloy Plant

[2004] EWHC 1354 (Comm)

(Transcript)

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

GROSS J

22 JUNE 2004

Arbitration – Award – Ascertainment of loss – Method of ascertainment

22 JUNE 2004

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Part 39 of the Civil Procedure Rules (formerly RSC Ord 59, r(1)(f), Ord 68, r1). See Practice Note dated 9 July 1990, [\[1990\] 2 All ER 1024](#).

J Gruder QC for the Claimant

B McClure for the Defendant

Ince & Co; Derrick French & Co

GROSS J:

INTRODUCTION

[1] This is an application by the Claimant (“Ronly”) for relief under ss 67 and/or 68 and/or 69 of the [Arbitration Act 1996](#) (“the Act”), following an award by Mr Ian Kinnell QC dated 19 December 2003 (“the award” and “the arbitrator” respectively), whereby he ordered the Defendant (“Zestafoni”) to pay to Ronly, forthwith, US\$10,088,834.57 plus interest thereon.

[2] The gravamen of Ronly's complaint is that the arbitrator, having held that a sum of US\$16,083,772.40 was “outstanding” under the underlying agreement forming the subject matter of the arbitration, directed that a “capital” sum of only US\$10,088,834.57 should be “immediately payable” by Zestafoni to Ronly. The effect of the relief sought by Ronly would be to increase the sum immediately payable by the shortfall between the sum outstanding and the sum immediately payable, namely, US\$5,994,937.83 (“the shortfall amount”).

[3] There is also before the court a very subsidiary application by Ronly, in effect to correct the award. No more need be said of that application until the end of the judgment.

[4] Returning to the principal application, the nature of Ronly's claims for relief appears from its claim form dated 20 February, 2004, which included the following:

"1. A declaration pursuant to the [Arbitration Act 1996 s 67](#) . . . that the arbitrator. . . had no jurisdiction to take into account as he did in paras 50 and 52 of his Award credits due from the Claimant to other companies who were not parties to the arbitration . . . under contracts which had not been referred to him, or under other contracts with the Respondent in circumstances where the Respondent had expressly declined to extend the jurisdiction of the arbitrator to include matters arising under such other contracts.

2. Further or alternatively an order (i) that the Award be set aside in so far as Mr Kinnell refused to direct that the full amount found by him to be due under the contract referred to him be paid immediately by the Respondent to the Claimant and (ii) that the Award be remitted to Mr Kinnell and that he be directed to find that all the sums outstanding under the Ferroalloy Production Agreement as found by him are immediately payable to the Claimant by the Respondent together with interest on those sums.

3. Further or alternatively the Claimant seeks an order pursuant to . . . s 68(2)(b) that such parts of paras 50 and 52 of the Award in which Mr Kinnell seeks to limit the "directory part of" his Award be set aside and that those parts of the Award be remitted to him for reconsideration with the direction that he has no power to take into account any matters not arising under the Ferroalloy Production Agreement.

4. Further or alternatively, and only in so far as maybe necessary, the Claimant seeks permission to appeal to the court pursuant to . . . s 69 on the following question of law arising out of the award:

Whether or not the interest of justice entitled the arbitrator to take into account, when considering his Award, sums which may be due either under contracts between the Claimant and third parties or between the Claimants and the Respondents in circumstances where the Respondents had expressly stated that they did not agree that the arbitrator should have jurisdiction . . ."

[5] In so far as relevant, ss 67–68 of the Act provide as follows:

"67(1) A party to arbitral proceedings may . . . apply to the court –

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction . . .

(3) On an application under this section . . . the court may by order –

- (a) confirm the award,
- (b) vary the award, or
- (c) set aside the award in whole or in part.

68(1) A party to arbitral proceedings may . . . apply to the court challenging an award . . . 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 –

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67); . . .

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

(3) If there is shown to be serious irregularity . . . the court may –

- (a) remit the award to the tribunal, in whole or in part, for reconsideration,
- (b) set the award aside in whole or in part, or
- (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect . . . Unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.”

[6] It is unnecessary to set out the well-known provisions of s.69 of the Act providing for leave to appeal to the court on a question of law arising out of the proceedings; leave is of course not to be granted unless (inter alia) the decision of the tribunal is obviously wrong or, where the question is one of general public importance, the decision of the tribunal is at least open to serious doubt.

[7] For completeness, I record but need not recount that there has been a dispute as to whether the arbitrator had jurisdiction at all, a matter determined adversely to Zestafoni by Colman J on 16 February 2004 (in, I am told, [\[2004\] EWHC 245 \(Comm\)](#)). I further record that Zestafoni wishes to reserve the question as to whether the award was within the jurisdiction which was held to exist by Colman J; nothing about this suggested reservation impacts upon the matters which must now be decided.

The history

[8] The history of this matter has a distinct “Alice in Wonderland” air.

[9] The arbitrator was appointed to determine disputes arising under a Ferro-Alloy Production Agreement (“the agreement”). As the arbitrator observed, the agreement’s essential purpose was for the supply to the Zestafoni alloy plant of electricity and raw materials and for the supply by the plant of ferro-alloys; in somewhat simplified terms, Ronly was to supply the electricity and raw materials and Zestafoni agreed to produce and supply ferro-alloys to Ronly.

[10] In the original (unamended) Points of Claim in the arbitration, Ronly claimed a balance of US\$15,081,242.13 as due and payable under the agreement and in respect of cash advances made. The Points of Claim then gave credit for balances due from Ronly (1) under the “Seymour Contracts” (see below) and (2) under other contracts with Zestafoni. The relevant paragraphs in the Points of Claim read as follows:

“The Seymour Contracts

11. Between about October 1998 and about May 2000 various contracts were concluded between Seymour Ltd, an offshore company acting as agents for the Respondent and Fapet International Chemical Trading Inc, acting as agents for the Claimant.

12. Pursuant to the Seymour Contracts, the Claimant made cash advances to the Respondent in return for shipments of ferro-alloys by the Respondent. In the case of the Seymour shipments the cash advances made by the Claimant amounted to less than the value of the ferro-alloys delivered by Seymour. On a final reconciliation of the amounts due under the Seymour contracts the balance of moneys due to Seymour was as follows . . .

Total due to Respondent US\$3,528,858.19

16. It was agreed between Seymour and the Respondent, and the Claimant and Fapet that the amount due to Seymour of US\$3,528,858.19 would be used as a set-off against payment of the outstanding amounts due under the Agreement of 30 September 1997 and in respect of the cash advances made by the Claimant to the Respondent . . .

The Zestafoni contracts

17. Between about February 1998 and about December 2001 the Claimant and Fapet concluded further contracts with the Respondent pursuant to which they supplied raw materials and electricity and made cash advances to the Respondent, in return for the supply of ferro-alloys by the Respondent.

18. On a final reconciliation of the amounts due under the Zestafoni contracts there was a balance due to the Respondent in the amount of US\$2,466,079.64 . . .

19. It was agreed between the Respondent on the one side and the Claimant and Fapet on the other that the US\$2,466,079.64 due under these further contracts would be used as a set off against payment of the outstanding amounts due under the Agreement of 30 September 1997 and in respect of the cash advances made by the Claimant to the Respondent . . .”

Accordingly, the total of the sums for which, as matters then stood, credit would be given by Ronly, amounted to the shortfall amount, ie US\$5,994,937.83.

[11] It is not unfair to observe that the various Responses which Zestafoni provided to the Points of Claim are somewhat opaque; on any view, however, it does not appear that Zestafoni agreed or admitted the facts contained in the paragraphs of the Points of Claim set out above. Further and on any view, it is plain that Zestafoni denied that the arbitrator had jurisdiction to deal with any matters other than disputes arising under the (Ferro-Alloy Production) agreement.

[12] By this stage, at least for the time being (if now no longer), well-known English solicitors, Norton Rose, had come to represent Zestafoni, itself a Georgian company. On 13 February 2003, Ince & Co, solicitors for Ronly, wrote to Norton Rose in what might be thought very fair and plain terms. The Ince & Co letter said this:

“ . . . Whether the set-off contracts should form part of the arbitration proceedings:

Zestafoni state that the set-off contracts should not form part of the arbitration proceedings. The consequence of this stance is that the amount of the claim against them will increase to US\$15,787,107.95 excluding interest . . . ”

[13] Nothing daunted, as I have been told without objection, Zestafoni, represented by Norton Rose, maintained its stance at a hearing before the arbitrator on the 6 March, 2003; the reference was to deal with and only with the agreement; all other contracts were excluded from the arbitration. Subsequently, Norton Rose produced Points of Defence, dated 31 March 2003, which emphasised Zestafoni's position that the arbitrator had no jurisdiction (whatsoever) to determine the disputes which had been referred to him. Following an order by the arbitrator, Norton Rose then produced Further Points of Defence, dated 23 April 2003. So far as here relevant, these Further Points of Defence said this:

“Cash contracts; Zestafoni and Seymour contracts

3. Regarding the 'cash contracts' and 'set-offs' including the 'Zestafoni and Seymour contracts' (together 'the Cash Contracts'), it was proposed at the hearing on 6 March that they be excluded from the jurisdiction of this Tribunal. The Claimants reserved the right at the hearing to re-introduce these contracts in the reference, but have not exercised this right. In any event and without prejudice to our contention that the Cash Contracts as described and as pleaded by the Claimants are beyond the jurisdiction of this Tribunal, . . . we set out our brief further submissions on the Seymour contracts . . .

Set-off

8. The following submissions are expressly without prejudice to the Respondent's position that this Tribunal has no jurisdiction to determine any dispute under the Cash Contracts . . . as they do not fall under the Agreement.

9. Referring to the 'Seymour contracts', for example, in our submission these are contracts between Zestafoni and Seymour pursuant to which Zestafoni supplied ferro-alloy to Seymour and were due to receive payment direct from Seymour. These contracts were separate from the Agreement (between different parties and with their own dispute resolution mechanism). To

the extent that there is any dispute under the Seymour contracts this is to be resolved between the parties to the Seymour contracts under such contracts' own dispute resolution mechanism, not by this Tribunal.

10. Further, we attach . . . a Payment Agreement between Zestafoni and Seymour pursuant to which Seymour agree to make payment to Ronly in satisfaction of Seymour's obligations to Zestafoni. In accordance with the Payment Agreement, payment was made to Ronly with the effect that Zestafoni's indebtedness to Ronly under the Agreement was reduced by a further US\$6,928,168.

11. It appears that Ronly have failed to take into account receipt of such payments from Seymour. It follows that Ronly's calculations in the Points of Claim are incorrect. We reserve the right to particularise this further in witness evidence.”

Plainly, there was no admission in this pleading of the matters which I have set out from the Ronly Points of Claim. Both the nature of the Seymour contracts and the calculations were very much in dispute. It was further clear that Zestafoni would object to the arbitrator making any determination in respect of such contracts; they had, as Norton Rose said in terms, their own dispute resolution mechanism.

[14] Against this background, Ronly now abandoned its attempt to resolve the entire position between itself, Zestafoni, Fapet and Seymour, encapsulated in the original Points of Claim. Extensive amendments were made to the Ronly pleadings in the arbitration. So far as the Points of Claim were concerned, these were amended to delete all reference to the Seymour and (other) Zestafoni contracts. As a result, the proposed credits were deleted and the amount claimed was accordingly increased by the shortfall amount of US\$5,994,937.83.

[15] At the substantive hearing before the arbitrator in July 2003, Ronly obtained permission for these amendments; no terms were imposed. On the pleaded cases before the arbitrator, there was, therefore, neither any agreement nor any issue as to credits to be given by Ronly – or, if it be said that the Norton Rose Further Points of Defence raised some such issue – at least no issue which could be explored, still less determined, without reference to contracts other than the agreement.

The award

[16] I come next to the key passages in the award. It is ultimately simplest to set them out at some length:

“45. . . . [the original Points of Claim] . . . raised matters outside the scope of this Award, but, among other things, also indicated the Claimants' willingness to give credit against their overall claim because of substantial sums from which they had been able to benefit under agreements and arrangements outside the scope of the Ferroalloy Production Agreement.

46. The Claimants were content for all these matters to be dealt with within the reference . . . but, on any view, this would have involved an extension of my jurisdiction beyond the terms of my initial appointment, and that . . . could be achieved only by agreement between the parties.

47. By the time of the . . . [6 March] hearing . . . the Respondents had, however, decided that they were not prepared to extend my jurisdiction to any extent beyond what had been agreed

(which, of course, they in any event disputed). Whether the Respondents or their then representatives anticipated this or not I do not know, but the Claimants sought in due course to take advantage of the Respondents' decision by amending their claim, removing from it those credits that they had previously been prepared to allow in the Respondents' favour . . .

48. At the hearing . . . counsel for the Claimants argued that, having made their choice to exclude from my consideration everything which did not fall strictly within the ambit of the Ferroalloy Production Agreement, the Respondents could not complain if the Claimants now sought strictly to enforce their entitlement under that agreement. Although they did not resile from their position that I had no jurisdiction to look into matters falling to any extent outside the scope of the Ferroalloy Production Agreement, the Respondents . . . argued that, in making any monetary award in the Claimants' favour, I should not overlook the sums in respect of which the Claimants had been previously prepared to give credit. While it remained the case, the Respondents said, that it was not open to me to investigate the contracts or arrangements that had led to this result, the Respondents were not at this stage in a position similar to a party seeking to set off some claims as yet to be determined. So far as concerned the position between the Claimants and the Respondents, this should be treated as would have been the case had payment of the sums in question actually been made by the latter to the former.

49. I have to say that I found the issue a novel and troublesome one. Counsel for the Claimants took a robust, and seemingly entirely logical approach. Having declined to extend my jurisdiction to cover those matters that had given rise to the credits which the Claimants had previously been prepared to allow, the Respondents could scarcely now object if the benefits that they might otherwise have enjoyed were now to be withdrawn from them. I should . . . make a monetary award entirely without reference to anything other than the position under the Ferroalloy Production Agreement. But, with respect to him, the Claimants' counsel . . . offered no very compelling reason why, in the interests of justice, I should not be able to make a distinction between what I might determine to be the position merely by reference to the Ferroalloy Production Agreement and what I might direct should forthwith be paid by the Respondents to the Claimants.

50. Although I have some sympathy for the Claimants' position, the conclusion that I have reached is that it is open to me, and right that I should make the distinction to which I have referred in the preceding paragraph. It was entirely understandable for the Claimants to say that it was the Respondents' own choice that led them to being deprived of a benefit they might otherwise have enjoyed, but they – the Respondents – were not obliged to agree to any modification of the agreement to arbitrate, and they cannot . . . be properly penalised for not having done so. An illustrative (if not very close) analogy to the present situation may be seen in a case in which an admission had been made, which may not be withdrawn without leave. Where justice demands, the admission may be allowed to be withdrawn, but not otherwise. For example, where the admission has been obtained by improper means such as misrepresentation, one would expect it to be allowed to be withdrawn. In the present case there is no such suggestion, nor has there even been a suggestion that the Claimant have themselves had second thoughts as to what, looking at the broader picture, it was appropriate to allow as a credit to the Respondents . . . my jurisdiction is constrained by the terms of the . . . Agreement, and by the terms of my appointment, and, accordingly, I can make no determination binding upon the parties concerning the sums in respect of which the Claimants were previously prepared to give credit. So far as the directory part of my Award is concerned, however, I propose to take those sums into account, leaving it to the parties to resolve by other means any outstanding differences that may remain concerning the contracts and arrangements from which they were derived.

51. . . . I can now summarise the sums outstanding under the . . . Agreement . . . [Total] US\$16,083,772.40.

52. According to their (unamended) Points of Claim, the Claimants had been willing to give credit for the total sum of US\$5,994,937.83. I shall therefore direct that the capital sum immediately payable to the Claimants by the Respondents amounts to US\$10,088,834.57.”

[17] What might be termed the formal parts of the award included the following:

“5. I ORDER AND DIRECT that, by reference to the sums stated in subparagraphs 1 to 4, above, amounting in total to US\$16,083,772.40, the Respondents shall forthwith pay to the Claimants the sum of US\$10,088,834.57.

9. This Award is final as to the matters determined in the preceding sub-paragraphs, but is otherwise interim in the reference. For the avoidance of doubt, I have made no determination as to the true accounting position between the Claimants and the Respondents in relation to the contracts or arrangements referred to in paras 45 to 52 above . . . ”

[18] For my part, I have much sympathy with the arbitrator in the position in which he found himself, as recounted in the award. Moreover, if I may say so, his good intentions in seeking to promote an overall commercial settlement, are at once apparent. The question remains, however, as to whether his approach is sustainable. To that I must return, having first summarised the rival cases.

The rival cases in outline

[19] For Ronly, Mr Gruder QC submitted that the arbitrator's approach was unsustainable. There had been no study of any contracts other than the agreement; they had been treated as outwith the arbitrator's jurisdiction. There had been no agreement as to the credits due to Zestafoni. In so far as Ronly had represented in the (original) Points of Claim that it was willing to give credit, that representation had not been relied upon by Zestafoni and had gone with the amendment. More generally, at least unless the credits constituted a “transaction” set-off, the arbitrator had no jurisdiction to take them into account, arising, as they did under other contracts outside his jurisdiction; see: *Aectra Refining v Exmar* [1995] 1 All ER 641, [1994] 1 WLR 1634; *Glencore v Agros* [1999] 2 Lloyd's Rep 410. There was, however, no need to decide if the credits did constitute a transaction set-off, as the arbitrator had made no binding determination in that regard. While the arbitrator's approach might have been a good idea if all concerned were reasonable, in practice he had left Ronly exposed; as Mr Gruder put it, what would happen if Seymour (for example) commenced proceedings against Ronly to recover monies due under other contracts? Ronly could find itself facing a shortfall under the agreement and exposed to Seymour's claims under the other contracts. Finally, in leaving Ronly to collect “by other means” sums due to it under the agreement, the arbitrator had failed to deal with the issues before him. In the circumstances, Ronly was entitled to succeed in its application, whether under s 67 or s 68 of the Act, or, but only if need be, under s 69.

[20] For Zestafoni, Mr McClure submitted that the hearing before the arbitrator had proceeded on the basis that there was no dispute as to the fact that the credits put forward in the unamended Points of Claim were due to Zestafoni. There had been no suggestion that the concession was untrue. The balance in favour of Zestafoni was to be treated as akin to a payment already made by Zestafoni to Ronly. There was no need to decide whether the credits gave rise to a transaction set off, because the parties had gone beyond that; they had agreed that there was a balance due to Zestafoni. Essentially, Zestafoni relied on the reasoning set out

in the arbitrator's award. The arbitrator had not been in error but, if there was an error, it did not go to his jurisdiction. At most, a question of law arose but not one on which it could be said that the arbitrator's decision had been open to serious doubt, let alone obviously wrong. Ronly was not entitled to the relief sought or any relief.

Discussion

[21] In my judgment, with respect, the arbitrator's approach was unsustainable and Ronly is entitled to the relief sought.

[22] (1) Leaving the matter in limbo: In paras 49–51 of the award, the arbitrator drew a distinction between (i) the position as he found it by reference to the agreement and hence the sums owing by Zestafoni to Ronly thereunder; and (ii) the amount directed to be immediately payable by Zestafoni to Ronly. The upshot was, as already observed, a shortfall amount of some US\$5.995 million. In that regard, as it seems to me, the parties and the matter were left in limbo. The arbitrator was the only tribunal to which Ronly could turn to obtain payment of the shortfall amount. But the arbitrator has neither ordered payment thereof nor determined that the shortfall amount is not due to Ronly. Instead, notwithstanding the arbitrator's determination that that sum is outstanding under the agreement, the arbitrator has done no more than express the hope that the parties would “resolve by other means any outstanding differences that may remain concerning the contracts and arrangements from which they were derived”. That cannot be right.

[23] As a matter of principle:

(i) An award must be final as to all issues decided (save exceptionally and irrelevant here, when the arbitrator is empowered by the parties to grant relief on a provisional basis pursuant to s 39 of the Act).

(ii) Subject to (iv) below, an award must be complete as to all issues before the tribunal; an award which leaves any such issues undecided, cannot be maintained.

(iii) An arbitrator has no power to reserve a decision on issues before him to others to resolve.

(iv) An arbitrator only has power to reserve issues to himself for later decision if he proceeds by way of an “interim” award (see now s 47 of the Act).

See, generally: Mustill & Boyd (2nd ed), at pp 386–8; Russell (21st ed), at para 6-081.

[24] On the face of it, the arbitrator's approach in paras 49–51 of the award contravened principles (ii) and (iii) above; the issue of the shortfall amount was before him; but the fate of the shortfall amount was to be left to the parties or to others to resolve.

[25] If it be said – I am not sure that Mr McClure actually said it – that the award can survive as a valid interim award, then, with respect, I would be unable to accept a submission to this effect. As it seems to me, the parties and the arbitrator might have gone down that path, depending on their approach to the arbitrator's jurisdiction, but it is now too late for it to be viable. My reasons are these:

(i) For the award to stand as an interim award, it must be contemplated that, if need be, the parties would return to the arbitrator for a determination as to whether the shortfall amount is to be paid by Zestafoni to Ronly or is to be credited by Ronly in favour of Zestafoni. It is here that the difficulties, arising from the course already taken by the arbitration, become insuperable.

(ii) As paras 49–51 of the award disclose, the arbitrator has already foresworn investigating the contracts and arrangements other than the agreement – accepting in this regard the submissions of Zestafoni that he had no jurisdiction to do so and should not do so. But unless the arbitrator explored those other contracts and arrangements, he could make no determination as to the destination of the shortfall amount going beyond that which he was already in a position to have made in the award. Further, if the parties were to return before the arbitrator, nothing said by Mr McClure suggested to me that Zestafoni's position as to the arbitrator's jurisdiction would be any different from that which it had been until now.

(iii) On this footing, a further hearing before the arbitrator would be futile. I cannot read the award as intending to commit the arbitrator and the parties to a pointless exercise. Whatever the theoretical position as embodied in para 9 of the formal parts of the award, in my judgment, the award was not in this respect intended to stand as an interim award; as foreshadowed, the intention instead was that the parties or third parties would, somehow, resolve the destination of the shortfall amount.

[26] Pulling the threads together, the arbitrator was appointed to determine the issues arising on the reference. On one view, he has failed to deal with an issue put to him, namely, the fate of the shortfall amount. Alternatively, having determined the sums outstanding under the agreement, he has taken upon himself a power to withhold payment of the shortfall amount pending a resolution of its fate by the parties or third parties. On either analysis the award cannot stand; the right answer, in the light of what had gone before in the arbitration, is that the arbitrator ought to have gone on to order payment of the shortfall amount to Ronly.

[27] Accordingly, I am satisfied that Ronly is entitled to succeed under s 68 of the Act. For my part, I would have been minded to think that s 68(2)(d) is the sub-section most obviously applicable; the fact that it is not mentioned in the Claim Form is neither here nor there as it was addressed both in Mr Gruder's skeleton and oral arguments. But it matters not because Ronly is any event entitled to succeed under s 68(2)(b) of the Act, a subsection which was dealt with in terms in the Claim Form.

[28] (2) Credits no longer part of the arbitration: Mr McClure argued that the arbitrator was right not to order payment of the shortfall amount because the arbitration had proceeded on the basis that the credits were agreed. He adduced no evidence in support of this proposition and said, instead, that he relied primarily on the award. In particular, Mr McClure relied on the concluding two sentences of para 48 of the award and the sentence in para 50 of the award which stated that there had not “even been a suggestion that the Claimants have themselves had second thoughts as to what, looking at the broader picture, it was appropriate to allow as a credit to the Respondents”.

[29] To my mind – quite apart from the fact that the arbitrator made no determination that the shortfall amount was not due to Ronly – there are a number of conclusive objections to this approach which would otherwise have had the effect, as Mr Gruder aptly put it, of allowing Zestafoni to eat it and have its cake. First, Ronly's stance had been, as is apparent, premised on the “broader picture”; but that broader picture was not before the arbitrator, by reason of Zestafoni's insistence that the arbitrator's jurisdiction be confined to the agreement, even to the extent of not investigating other contracts or arrangements. Secondly, Ronly's “offer” as to the credits had not been “accepted” by Zestafoni. It follows that there was no agreement as to

the credits offered by Ronly. Nor does an analysis in terms of estoppel assist Zestafoni; given that Zestafoni disputed the correctness and basis of Ronly's assertion as to credits, even if Ronly's assertion could be viewed as a representation, there was manifestly no reliance. Thirdly, once the amendment was permitted without the imposition of terms, there was no longer any live assertion before the arbitrator as to Ronly's position with regard to the "broader picture". It is as if an offer is withdrawn before any acceptance; that the offer was or may have been genuine is neither here nor there; no consequences flow from it. The analogy drawn by the arbitrator with admissions (in para 50 of the award) is, with respect, either unhelpful or assists Ronly; here, Ronly had been allowed to withdraw its "admission".

[30] In summary, I cannot accept and the award does not support the conclusion that the arbitration proceeded on the basis that the credits had been agreed. Instead the arbitrator did no more than seek to hold Ronly to a position which had been adopted on the basis of a different premise and from which it had, by its amendment, now been permitted to withdraw. That amendment, so far as the credits are concerned, was the end of the matter; as the credits were no longer on offer, they were no longer available to be taken into account; nor was there any live issue relating to them. For completeness, I add this; in para 47 of the award the arbitrator speculated as to whether Zestafoni realised what would be the consequences of its decision not to agree an extension of his jurisdiction. All I would say is that if Zestafoni did not appreciate the likely consequences, that was not the fault of Ronly; the Ince & Co letter of 13 February 2003 (set out above) could not have been more plain.

[31] In the circumstances, on this basis as well, Ronly is entitled to the relief which it seeks. Though the matter could be put under s 67 of the Act, my preference is for s 68(2)(b); the arbitrator was exceeding his powers by dealing with a matter not or no longer before him. To have done so, a fortiori given Zestafoni's unyielding stance on jurisdiction, was simply unfair to Ronly.

[32] (3) The position as to set-off: For completeness, I must refer to the question of set-off. In the event, both counsel were agreed that there was no purpose in exploring this question, albeit for very different reasons. Mr Gruder said that this was so because the arbitrator had no jurisdiction to consider any of the other contracts under which a set-off might have arisen and in any event made no binding determination in this regard. Mr McClure submitted that as the parties were agreed on the credits to be allowed any further study was unnecessary.

[33] For my part, by virtue of the conclusions to which I have already come, I cannot accept Mr McClure's submission. Moreover, at least in one respect, I am not inclined to favour Mr Gruder's argument as to jurisdiction. I agree, however, that no detailed consideration of set-off is called for. My reasons are these:

(i) Questions of some intricacy arise as to the classification of set-offs and the correct approach to be followed when a claim before an arbitrator is met by an argument that there is a set-off available arising under some separate transaction over which the tribunal does not have jurisdiction. Provisionally, I would be minded to think that an arbitrator does or should have jurisdiction to allow a "transaction" set-off, in effect amounting or akin to a defence, to be raised to reduce or extinguish a claim, even though that set-off arises under another contract, outside the tribunal's jurisdiction: see: *Aectra Refining* at pp 1648 and following and *Glencore v Agros* at pp 416–417, both supra. As it seems to me, the investigation and determination of the availability and amount of such a set-off do not involve the arbitrator arrogating to himself a jurisdiction over separate contracts which he does not have (albeit that considerations of issue estoppel may well arise); instead, these steps form part of the process of arriving at a conclusion of whether a defence is properly available in respect of the contract as to which the arbitrator alone has jurisdiction. However, all these observations are provisional only, given that for reasons which follow, such questions do not arise for decision in this matter.

(ii) Where a decision is called for in respect of a set-off said to arise under a separate contract, then, absent agreement: (1) the point must be properly in issue before the arbitrator; (2) the arbitrator must necessarily investigate the position prevailing in respect of that separate contract; (3) if need be (and unless the arbitrator is proceeding by way of interim award, for example pending a decision on the separate contract by another court or tribunal and with an appropriate reservation of jurisdiction) the arbitrator must make a determination as to the position prevailing in respect of that separate contract; (4) in the light of any such determination, the arbitrator must come to a conclusion as to whether the alleged set-off is indeed available or whether, if not a transaction set-off, it faces a procedural bar, of the nature discussed in the two authorities referred to above.

(iii) In the present case, no issue of set-off was before the arbitrator. As already discussed, Ronly had withdrawn all reference to the credits it had been willing to allow. For its part, Zestafoni, far from raising a defence of set-off, vigorously objected to the arbitrator considering any contract other than the agreement. But unless he did so, plainly he could reach no conclusion on the availability or amount of any set-off. For his part, the arbitrator accepted this Zestafoni submission.

(iv) It was accordingly inevitable and is plain from the award that the arbitrator did not make any determination that the shortfall amount was not to be payable because it constituted a set-off. As already canvassed, he made no determination in this regard at all.

(v) In the circumstances, it is not for the court to consider whether the credits amounting to the shortfall amount might have constituted a transaction set-off potentially available to Zestafoni by way of a defence, serving to reduce Ronly's claim.

[34] (4) Overall conclusion on the principal application: For the reasons given, I allow Ronly's application, under s 68, alternatively under s 67 of the Act, as set out above. There is accordingly no need to say any more of the application under s 69 of the Act.

[35] In a nutshell, the award was incomplete in respect of the fate of the shortfall amount; in the circumstances of this arbitration, the arbitrator was instead bound to order payment of that amount to Ronly, given the conclusions to which he had already come as to the sums outstanding under the agreement. The award cannot be defended on the basis of the credits originally offered by Ronly; those credits had disappeared from the arbitration following the permitted amendments to Ronly's Points of Claim. Nor can the arbitrator's approach be justified by reference to the doctrine of set-off; the issue of set-off was not before him and he made no determination in that regard. That the arbitration might have followed a different course is now, on the particular facts of this matter, water under the bridge. In my judgment, the parties must address their overall accounting position against the reality of an order for immediate payment of the shortfall amount.

The application to correct the award

[36] I can deal with this subsidiary application summarily. It would appear that Ronly raised with the arbitrator the question of correcting the award under s 57 of the Act (essentially, the slip rule), to reduce (by some very small sum) the amount payable to it. Curiously, Zestafoni opposed any such correction. The arbitrator thereafter declined to make any correction.

[37] Before me, Mr Gruder very fairly conceded that any application under s 57 faced insuperable jurisdictional difficulties. I agree. The power under that section is one for the arbitrator not the court to exercise. What remained, was an application, contained in the claim form, under s 68 of the Act, to the effect already summarised. I inquired of Mr McClure as to Zestafoni's position and he told me that it continued to oppose any correction to the award. In these somewhat unusual circumstances, it seems idle to spend any more time on this application. It is unnecessary to say more than that I am not persuaded that there is in the present respect any serious irregularity in the award; I therefore dismiss Ronly's subsidiary application.

[38] I shall be grateful for the assistance of counsel in drawing up an appropriate order reflecting my conclusions and on all questions of costs.

Judgment accordingly.

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What is PRONOUNCE?

To utter formally, officially, and solemnly ; to declare aloud and in a formal manner. In this sense a court is said to “pronounce” judgment or a sentence. See *Ex parte Crawford*, 36 Tex. Cr. R. 180, 36 S. W. 92.

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pronounce

[verb](#)

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pro·nounce | \ prə-ˈnaɪn(t)s  \
pronounced; pronouncing

Definition of *pronounce*

[transitive verb](#)

- 1 : to declare officially or ceremoniously the minister *pronounced* them husband and wife
- 2 : to declare authoritatively or as an opinion doctors *pronounced* him fit to resume duties
- 3a : to employ the organs of speech to produce pronounce these words especially : to say correctly I can't pronounce his name
- b : to represent in printed characters the spoken counterpart of (an orthographic representation) both dictionaries pronounce *clique* the same
- 4 : [recite](#) speak the speech, I pray you, as I *pronounced* it to you— William Shakespeare

[intransitive verb](#)

- 1 : to pass judgment
- 2 : to produce the components of spoken language

 [Other Words from *pronounce*](#)  [More Example Sentences](#)  [Learn More About *pronounce*](#)

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decide

[verb](#)

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de·cide | \ di-'sīd  , dē- \
decided; deciding; decides

Definition of *decide*

[transitive verb](#)

1a : to make a final choice or judgment about decide what to do couldn't decide whether to take the job or not

b : to select as a course of action —used with an infinitive *decided to go*

c : to [infer](#) on the basis of evidence : [conclude](#) They *decided* that he was right.

2 : to fix the course or outcome of (something) The Dodge teeters on the rear wheels, hanging there, as the hand of gravity decides my fate.— Larry Webster It is an imprecise science, but one that ultimately may decide the course of this and many seasons to come.— Steve Hummer especially : to bring to a [definitive](#) end one blow *decided* the fight

3 : to [induce](#) to come to a choice her pleas *decided* him to help

[intransitive verb](#)

: to make a choice or judgment decide on where to go

[Other Words from *decide*](#) [Synonyms](#) [Choose the Right Synonym](#) [More Example Sentences](#) [Learn More About *decide*](#)

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SINCE 1828


determine

[verb](#)

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de·ter·mine | \ di-'tər-mən  , dē- \
determined; determining

Definition of *determine*

[transitive verb](#)

1a : to fix conclusively or authoritatively determine national policy

b law : to decide by judicial sentence determine a plea

c : to settle or decide by choice of alternatives or possibilities trying to determine the best time to go

d : [resolve](#) she *determined* to do better

2a : to fix the form, position, or character of beforehand : [ordain](#) two points determine a straight line the extent to which genetics determines one's personality

b : to bring about as a result : [regulate](#) demand determines the price

3a : to fix the boundaries of

b : to limit in extent or scope

c : to put or set an end to : [terminate](#) determine an estate

4 : to find out or come to a decision about by investigation, reasoning, or calculation determine the answer to the problem determine a position at sea

5 biology : to bring about the determination (see [determination sense 7](#)) of determine the fate of a cell

[intransitive verb](#)

1 : to come to a decision had determined on becoming a doctor

2 : to come to an end or become void

 [Synonyms](#)  [Choose the Right Synonym](#)  [More Example Sentences](#)  [Learn More About *determine*](#)

LEGAL AUTHORITY CA-160

All England Official Transcripts (1997-2008)*

Metropolitan Property Realizations Ltd v Atmore Investments Ltd

[2008] EWHC 2925 (Ch)

(Transcript)

CHANCERY DIVISION

SALES J

28 NOVEMBER 2008

Landlord and tenant – Rent – Review – Arbitration – Respondent landlord leasing property to appellant tenant subject to rent review clause – Parties failing to agree new rent value – Parties referring matter to arbitration – Tenant challenging arbitrator's award – Whether arbitrator's decision flawed – [Arbitration Act 1996, s 68](#)

28 NOVEMBER 2008

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [\[1990\] 2 All ER 1024](#).

G Fetherstonhaugh QC for the Tenant

W Clark for the Landlord

McGrigors; Mace & Jones

SALES J:

[1] This is an application made under [s 68](#) of the Arbitration Act 1996 for an order remitting an award dated 20 February 2008 made by Mr DC Stanger (“the Arbitrator”) in respect of a rent review clause in a lease. The Claimant, Metropolitan Property Realizations Ltd (“Metropolitan”) is the tenant under that lease. The Defendant, Atmore Investments Ltd (“Atmore”), is the landlord.

[2] The relevant lease is an under-lease dated 29 September 1964 granted for a period of about 99 years. The property to which it relates comprises a small parade of shop units with residential flats on the floor above them, located in Partington Street, Failsworth. The lease is a full repairing and insuring lease. Clause 1(b) provides for rent reviews to take place every 21 years.

[3] The second rent review fell due in September 2006. Clause 1(d) of the lease sets out the formula to be applied on each review in the following terms:

“(d) 'the yearly rent value of the demised premises' as at the last quarter day but one before the end of a rent period shall mean the amount agreed between the Landlord and the Tenant as the yearly rent value of the demised premises as at such day or failing agreement the amount determined as the yearly rent value of the demised premises at such day by an arbitrator to be nominated by the President for the time being of the Royal Institution of Chartered Surveyors on the application of the Landlord made before but not more than one quarter before the beginning of the next succeeding rent period and so that in the case of any such arbitration the amount to be determined by the arbitrator shall be the amount which shall in his opinion represent a fair yearly rent for the demised premises at the relevant date having regard to rent values then current for property let without a premium with vacant possession and to the provisions of this Lease (other than the rent hereby reserved)”

The relevant date referred to in relation to the present case was 24 June 2006. The parties were unable to agree the amount of the yearly rent value, so the question of the amount of a fair yearly rent was referred to arbitration.

[4] The lease provides in cl 2 that the rent payable should be the greater of:

“(i) a rent equal to the rent payable during the last preceding rent period: and

(ii) a rent equal to six elevenths of the yearly rent value of the demised premises as at the last quarter day but one before the end of the last preceding rent period.”

It is common ground that the assessment under (ii) was to involve the calculation of the fair yearly rent of the demised premises as at 24 June 2006, with the application of the six elevenths formula to take place in relation to the figure so determined. In other words, it was common ground that in assessing the fair yearly rent of the demised premises one should ignore the six elevenths calculation.

[5] The arbitration was conducted by reference to written materials alone. For Metropolitan, the written submissions were prepared by Mr Simon Burbidge, a chartered surveyor. Atmore's written submissions were prepared by Mr Peter Owen, who also is a chartered surveyor.

[6] The submissions put in by Mr Burbidge for Metropolitan followed advice provided by leading counsel as to the proper approach which should be adopted to valuation of a lease of this kind. Metropolitan was represented at the hearing before me by different leading counsel, Mr Fetherstonhaugh QC. He made it clear in his submissions that Metropolitan did not now seek to contend that the method of valuation proposed in the previous counsel's opinion and adopted by Mr Burbidge is correct. That method involved discounting the relevance to the calculation of a fair yearly rent of the rental income which could be achieved upon sub-letting the units in the demised premises. In his written submissions at paras 6.2 to 6.4 Mr Burbidge submitted:

“6.2 The simplistic way to look at this matter is to apply a market rental figure to each of the component parts of the property to get a total rent and then take 6/11 of that figure as being the rent applicable however the Leading Counsel's Opinion clearly states that that is not the correct approach. We are to assume that the whole development is available to let on the open market with vacant possession for a term of 57 years with the remaining terms being as per the subject

lease. The rent payable will then be 6/11 of that figure.

6.3 The question this raises is having regard to the nature of the development, the income likely to be received from subtenants, the costs liabilities under the lease, shopping patterns at the time of the review and general demand for units in such a location would there be a market for such a lease at a rental in excess of that already paid?

6.4 My view is that there would not. The evidence of the cost/income spreadsheet shows minimal benefit for a great deal of effort. With the opening of the 24 hour Tesco close by it is only going to become harder to attract sub-tenants for the commercial parts in the future and harder for them to stay in business”

He concluded at para 6.10:

“6.10 A 57 lease term on a property of this nature in such a location is inconceivable in the current market. In my opinion the only way a theoretical Tenant would be persuaded to take a 57 year lease of a property of this nature in such a location would be on a peppercorn basis.”

Mr Burbidge put forward no alternative argument as to what the proper position should be if the Arbitrator did not accept the fundamental point of principle he was putting forward as to the approach to valuation to be adopted, and preferred instead the approach put forward by Atmore.

[7] Mr Owen, for Atmore, presented a case which started from analysis of the rental income which on the evidence available he thought could be identified as obtainable for each of the units within the parade of shops and for each of the residential flats. Taking account of rents which had in fact been achieved for such units, he concluded that the yearly rental value of the shops would be £5,000 per annum for each standard unit and that the rental value for the residential flats would be £3,600 per annum each, with some associated garages. He then aggregated these figures to give an overall rental income figure for the whole of the demised premises.

[8] Mr Owen made three adjustments to the figure given on this basis of calculation. First, he considered that a deduction should be made for a management charge. At para 5.3.6 of his submissions he said:

“5.3.6 *Management Charge*

5.3.6.1 . . . In a building with multiple occupancy, it is normal to make a discount for management. It is also quite usual to make a discount from sub-let income when an occupier sub-lets part of a larger demise.

5.3.6.2 Neither of these instances is entirely similar to the subject circumstances but I see there a principle which applies to whomsoever collects the rent.

5.3.6.3 With regard to the amount of that management charge, I refer you to the attached memo from my colleague, Mark Hopley, who is the Associate Director in charge of the Management Department at Legat Owen. You will see that in his view a typical charge would be 5% of the rents collected, although he does point out that some residential agents are

charging 10%. He also refers to the RICS's preference and Code in this regard and gives his opinion that the likely management fees, involved with a parade of this nature, would be in the order of £10,000 per annum.

5.3.6.4 I am therefore adopting that in my calculation. I see it as good first hand evidence and it shows, in percentage terms, a charge of some 9% which fits in with Mr Hopley's general observations."

[9] Second, Mr Owen allowed for a deduction in respect of an estimate of the extent to which the shop units and residential units might be unlet, and so empty or void, during the 21-year period for which the new rent would apply. He concluded that the void rate for the shop units would be of the order of 10% over the relevant period. For the residential units, he concluded that the void rate would be 15%.

[10] Third, Mr Owen made an adjustment in favour of taking account of the fact that the new rent would, once established, last for the extended period of 21 years. His view was that it was necessary to make an adjustment for the increasing imbalance from the original bargain as the term progresses. Accordingly, he adopted an approach (which he described as being common among practitioners) of making an addition of 1% for every year over five, giving a total adjustment of 16%.

[11] He set out his calculation in s 6 of his report, headed "The Yearly Rent Value", as follows:

Total yearly rent value for shops	£78,450
Flats and maisonettes	£42,720
Garages	£1,400
	£122,570
Add 16% for 21 year rent review pattern	£19,611
Deduct management cost	(£10,000)
Deduct shop voids at 10%	(£7,845)
Deduct residential & garage voids at 15%	(£6,618)
	£117,718
Say £118,000 per annum	

[12] His calculation therefore proceeded on the basis of what a notional tenant of the whole demised premises would receive by way of rental income from sub-lets of the shop units and the residential units. The adjustments that he made were to reflect the real monetary value of that stream of rental income in the hands of that notional tenant. Having established the value of that stream of rental income in the hands of the notional tenant, Mr Owen then equated that figure with what he contended should be regarded as the fair yearly rent of the demised premises for the purposes of clauses 1 and 2 of the lease. However, the fair yearly rent which cl 1(d) of the lease required him to calculate was the rent that would be payable by the notional tenant to the landlord. On Mr Owen's calculation, equating the income for the notional tenant from sub-letting the units with what that tenant would pay the landlord, the notional tenant under the fair rent calculation would derive no benefit for itself from taking the lease. It was difficult, therefore, to see why any prospective tenant would actually wish to take on the lease on these terms. This flaw in Mr Owen's methodology, however, was not one that was pointed out by Mr Burbidge for Metropolitan.

[13] The Arbitrator in his reasoned award reviewed the submissions made by Mr Burbidge for Metropolitan and by Mr Owen for Atmore. He decisively rejected Mr Burbidge's submission discounting the assistance to be derived from looking at the rental values of the individual units and preferred the submission of Mr Owen to the effect that those rental values should form the basis of the calculation of the fair yearly rent. No

criticism is made of the Arbitrator on what was, as the parties' submissions had been presented to him, the central point which was in issue between the parties. The Arbitrator's conclusion was to agree with Mr Owen "that the occupational leases provide the best evidence for the market rents for shops and flats". He went on to say:

"I do not share [Mr Burbidge's] view that there is no market for a lease of this nature. I agree that the lease is unusual, but like [Mr Owen] have no doubt that if there is a profit rent to be made for the next 57 years, there will be investors in the market wanting that opportunity. Having established that I find [Mr Owen's] approach to be correct, I will now look at his valuation in detail."

[14] Reviewing Mr Owen's calculation in detail, the Arbitrator accepted all of Mr Owen's adjustments, noting that there was "little opposition" from Mr Burbidge to these adjustments. He concluded that the yearly rent value for the demised premises should be £118,000 per annum, accepting Mr Owen's submission in that regard.

[15] The criticism that Mr Fetherstonhaugh now makes of the Arbitrator's reasoning is that on the approach that he adopted, based on Mr Owen's submissions, the calculation set out and accepted by him allowed for no element of profit in respect of the lease for the notional tenant. I did at one stage during the hearing wonder whether the management charge might be said to include some potential profit element for the notional tenant, if it decided to manage the properties for itself. However, Mr Fetherstonhaugh rightly points out that in the arbitration award the management element is treated as a "charge" for the notional tenant and is described as "a deduction of £10,000 for the tenant's management costs". Mr Clark for Atmore was unable to point to any profit element for the notional tenant in the Arbitrator's calculation. It is therefore difficult to conclude that the Arbitrator had formed the view that there would be a profit element for the notional tenant to be found within the management charge adjustment in his calculation.

[16] Accordingly, on this issue regarding the basis for the Arbitrator's reasoning, I accept Mr Fetherstonhaugh's submission. It appears to me that on the submissions and calculation put forward by Mr Owen, which were adopted into the reasoning and calculation of the Arbitrator, there is no element of profit for the notional tenant taking a lease of the demised premises. The yearly rent of £118,000 determined to be payable by that tenant to the landlord simply equals the monetary value of the sub-lettings to be made by the tenant.

[17] [Section 68](#) of the Arbitration Act 1996 provides in relevant part as follows:

"CHALLENGING THE AWARD: SERIOUS IRREGULARITY.

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.

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 –

. . .

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

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may:

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.”

[18] As indicated by the last part of s 68(1), there are restrictions upon the right of application to the court to set aside an arbitration award. Section 70(2)(b) of the 1996 Act provides that no application may be made to the court under s 68 if the Applicant has not first exhausted any available recourse under s 57 to the arbitrator to correct the award. Section 57 of the Act provides:

“CORRECTION OF AWARD OR ADDITIONAL AWARD.

57(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.

(4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.

(5) Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.

(6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.

(7) Any correction of an award shall form part of the award.”

[19] Mr Clark for Atmore emphasises that the particular criticism of Mr Owen's calculation which Mr Fetherstonhaugh now advances for Metropolitan, to the effect that it does not allow for any profit element for the notional tenant, was not put forward in the submissions for Metropolitan in the arbitration, even as a fall-back, alternative case. Mr Clark submits that in these circumstances it cannot be said that there has been any “serious irregularity” on the part of the Arbitrator resulting in “substantial injustice” to Metropolitan. He submits that as a matter of general approach the court should strive to uphold arbitration awards; that “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 arbitral process” that the court may intervene; and that under s 68(2)(d) this will be “where the arbitral tribunal has not dealt at all with the case of a party so that substantial injustice has resulted”: see *Fidelity Management SA v Myriad International Holdings BV* [\[2005\] EWHC 1193 \(Comm\)](#), [\[2005\] 2 All ER \(Comm\) 312 at 5](#) to 10, [\[2005\] 2 Lloyd's Rep 508](#), in which Morison J reviews the principles applicable and relevant authorities. There is a high threshold which must be crossed before a court will be justified in intervening in an arbitration award under s 68. In the present case Mr Clark says that that threshold has not been crossed. Metropolitan lost on its one and only argument in the arbitration (as to which no criticism of the Arbitrator is suggested by Metropolitan) and it did not present an alternative case that the calculation put forward by Mr Owen should not be accepted because it allowed for no profit element for a notional tenant. Therefore, Mr Clark submitted, the Arbitrator did sufficiently deal with the cases put forward on each side in the arbitration and his calculation of the fair yearly rent does not involve any error falling within the scope of s 68(2)(d).

[20] Mr Fetherstonhaugh submitted that failure to deal with a substantial issue between the parties will fall within s 68(2)(d), and that this is what had happened in this case. He relied upon the decision of the Court of Appeal in *Checkpoint Ltd v Strathclyde Pension Fund* [\[2003\] EWCA Civ 84](#), [\[2003\] 1 EGLR 1 at para 58](#), [\[2003\] 08 EGCS 128](#) per Ward LJ:

“58 . . . The court should not make its own guess at the rental figure and make a comparison with the amount awarded. Rather, the court should try to assess how the tenant would have conducted his case but for the procedural irregularity. It is the denial of the fair hearing, to summarise procedural irregularity, that must be shown to have caused a substantial injustice. A technical irregularity may not. The failure to deal with a substantial issue probably will”

[21] I do not accept Mr Clark's submission that the requirements in s 68(2)(d) have not been satisfied so as to justify the court's intervention in this case. The basic issue put to the Arbitrator for determination was the question of the fair yearly rent as calculated in accordance with cl 1(d) of the lease. That issue required the Arbitrator to determine the notional market rent which a notional tenant would pay in respect of the demised premises for the remaining term of the lease. The court should not read an arbitration award “with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults . . . and with the objective of upsetting or frustrating the process of arbitration” (*Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [\[1985\] 2 EGLR 14](#), 275 EG 1134, per Bingham J). Nonetheless, if there is a glaring illogicality contained in the central reasoning in an award, the court may intervene. In my view, even though Metropolitan did not present distinct submissions in the arbitration on the question of a flaw in Mr Owen's calculation, it was still incumbent on the Arbitrator to reason through his award in a logical way, satisfying himself that the calculation which he adopted into his award was coherent in light of the commercial approach which he decided should be applied and sufficient to answer the basic issue which he had to resolve. I consider that this is what was reasonably to be expected of the arbitral process in this case.

[22] This was in fact the way in which the Arbitrator sought to approach his task. He did not simply adopt Mr Owen's calculation, but examined and decided upon each element in it in the course of reasoning through his own award. The Arbitrator explained the commercial logic which he thought appropriate to provide the basis for the calculation of the fair yearly rent in the passage of his award quoted at para 13 above. His approach assumed that a notional tenant would take a relevant notional lease at a rate which included a profit element for itself. Unfortunately, however, it is clear that the calculation the Arbitrator then carried out to arrive at the fair yearly rent did not in fact include any element of profit for the notional tenant. He failed to identify the amount of the notional tenant's profit which was appropriate and failed to allow for an element of such profit in the calculation of fair yearly rent, which he had himself identified as a relevant factor to be taken into account. For that reason, I consider that the Arbitrator's award was obviously flawed as a matter of the commercial logic which he himself decided should be applied. It cannot be regarded as a rationally sustainable resolution of, or dealing with, the basic issue which he had to determine.

[23] Section 68(2)(d) is “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”: *World Trade Corp Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm), [2004] 2 All ER (Comm) 813 at 16, [2005] 1 Lloyd's Rep 422, cited in *Fidelity Management v Myriad International Holdings* at 9(1). In my judgment, the Arbitrator failed to determine and allow for the notional tenant's profit element, which was on his reasoning a matter essential to his decision on the issue he had to resolve. This failure by the Arbitrator fell within s 68(2)(d), in that it amounted to a “serious irregularity” by virtue of which he failed to deal with the basic issue which he had to decide. It has caused substantial injustice, in that Metropolitan has been deprived of the benefit of a rationally sustainable arbitral award, and the award which has been made is flawed in a manner which may cause Metropolitan substantial financial detriment in having to pay an excessive amount of rent under the lease for a very extended period of time.

[24] At the hearing, Mr Clark made a further submission, that Metropolitan should have applied to the Arbitrator under s 57 of the 1996 Act to correct or clarify his award, and that having failed to do so it was prevented by operation of s 70(2)(b) of the 1996 Act from applying to the court under s 68. Metropolitan had in its pleading and evidence made clear its view that there was no avenue of relief available under s 57, so s 70(2)(b) had no application. In my judgment, that is right. The error in the arbitration award was clearly not a typographical error, amenable to correction under the part of s 57 which corresponds with the usual slip rule applicable to court judgments. Nor, in my view, was the error in the award of which Metropolitan wished to complain a matter of an ambiguity or lack of clarity in the award. The award made was clear, but it was founded upon an error of reasoning. Therefore, I do not consider that Metropolitan is debarred from applying to the court under s 68.

[25] For these reasons, Metropolitan's claim under s 68(2)(d) succeeds. The relief claimed by Metropolitan is remission to the Arbitrator for a re-determination by him, limited to determination of the appropriate element of profit for a notional tenant to be included in the calculation of fair yearly rent, and for that element to be taken into account in the calculation made in the existing award. I so order.

Judgment accordingly.

LEGAL AUTHORITY CA-161

Judgments

B v A

Arbitration – Award – Challenge to award on grounds of lack of jurisdiction and/or serious irregularity – Parties entering into share purchase agreement (SPA) governed by Spanish law for purchase and sale of entire share capital in C company owned by claimant – Defendant subsequently discovering that part of C's turnover obtained from improper and illegal billing practices – Defendant commencing arbitration – Arbitration tribunal deciding that claimant should indemnify defendant pursuant to express indemnity provision in SPA – Claimant challenging award – Preliminary issue arising – Whether material relied upon by claimant disclosing case with realistic prospect of success for challenge of arbitrators' final award

[2010] EWHC 1626 (Comm), 2009 Folio 1645, (Transcript)

QBD, COMMERCIAL COURT

TOMLINSON J

28, 29 APRIL, 1 JULY 2010

1 JULY 2010

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [\[1990\] 2 All ER 1024](#).

M Black QC for the Claimant

V Flynn QC for the Defendants

SC Andrew; Latham & Watkins

TOMLINSON J:

[1] This hearing of a preliminary issue concerns the ambit of a permissible challenge to the validity of an arbitration award, under [ss 67](#) and [68](#) of the Arbitration Act 1996, “the Act”, where the lack of jurisdiction or serious irregularity is alleged to have arisen in consequence of the arbitral tribunal having failed to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, as required by s 46 of the Act.

[2] It is common ground that if the challenge is potentially maintainable under s 67, a full re-hearing would be required in order to determine whether the challenge succeeds – see the decision of Rix J in *Gulf Azov v Baltic Shipping* [\[1999\] 1 All ER 476](#), [1999] 1 Lloyd's Rep 68, followed on numerous occasions by judges of the Commercial Court and regarded by Langley J in *Peterson Farms v C & M Farming Ltd* [\[2004\] EWHC 121 \(Comm\)](#), [2004] 1 Lloyd's Rep 603 as “now clearly established”. It was at one time thought that a full re-hearing of this issue would require a hearing of five days duration, with oral evidence as to Spanish law,

here the chosen proper law. In the light of that, and since it was recognised that the challenge might be ruled not maintainable without the need for a re-hearing, the parties sensibly strove to identify a preliminary issue which might form the vehicle for an examination of the permissible ambit of a challenge of this unusual nature. In the event the preliminary issue which emerged after a contested hearing had given the opportunity for the matter to be argued and further refined is:

“Does the material relied upon by the Claimant disclose a case with a realistic prospect of success for the challenge of the Final Award of the majority of the arbitrators in ICC Arbitration No 13912/EC/ND under section 67 and/or 68 of the [Arbitration Act 1996](#).”

It is this issue which I directed to be determined and which I must now determine.

[3] The underlying facts which gave rise to the dispute may be shortly stated. A, B and C are all Spanish companies. B owned all of the share capital of C. B is a manufacturing company. C was involved in the development, manufacture and marketing of equipment for computer-aided design and computer-aided manufacturing in the industry with which B is concerned. The group of companies of which A is a part is in the same business as C.

[4] On 2 April 2004 A as buyer and B as seller entered into a Share Purchase Agreement, the “SPA”, for the purchase and sale of 100% of the share capital in C and the debt owed by C to B. The SPA is written in English but is governed by Spanish law. It provides for disputes to be referred to arbitration under the Rules of Arbitration of the International Chamber of Commerce, “the ICC”. The place (“seat”) of the arbitration was to be London and the language of the arbitration was to be English. The obligations of A were guaranteed by its French parent company X but this is of no relevance save in so far as it serves to emphasise that neither the parties nor the dispute had any connection with either England or English law.

[5] Pursuant to the SPA A agreed to pay B Eur46 million, plus one million shares in A, plus or minus certain contractually stipulated adjustments. The precise value of the total purchase price was the subject of expert analysis and debate in the arbitration but approximated to Eur52 million.

[6] After the purchase A discovered that over 10% of C's turnover came from transactions involving over-billing and other improper and illegal billing practices. Much of the over-billing took place in connection with European Union and local government grant programmes. In other instances, C assisted its distributors and customers to commit tax evasion both through over-billing and a scheme of fictitious invoices, and paid kickbacks to obtain sales. C also participated in customs and import tax fraud by understating the real value of goods by including fake invoices in shipments of goods to countries such as Brazil. The relevant factual findings are to be found in s Q of the Award at paras 40, 48, 53, 54, 67, 69 and 72.

[7] A's concerns and complaints were first made known in November and December 2004. B rejected them out of hand as false, malicious and libellous.

[8] On 30 June 2005 A commenced the arbitration. The claim was for sums exceeding Eur54 million, therefore exceeding the purchase price and giving rise to the riposte of B in the arbitration that A could not seriously be contending that the company which they had bought had no value. The claims were based on allegations of “*dolo*” (fraud), and breach of express representations and warranties in the SPA.

[9] Three arbitrators were appointed. They were:

i) Mr Thomas H Webster, a Canadian lawyer in practice since 1979, now practising in Paris but also admitted to the Bar in New York, as an English solicitor and as an *avocat* in France, with wide experience of international arbitration.

ii) Mrs Teresa Zueco Pena, a Spanish lawyer, also admitted to the Bar in Brussels and, at the time of her appointment as arbitrator, shortly to sit for admission in New York. She has practised since 2000 in Madrid, Brussels and New York. The materials before me do not disclose the extent of her previous experience either of sitting as arbitrator or of conducting international arbitration.

iii) As Chairman, Mr Van Vechten Veeder QC, an English barrister with very wide experience of international arbitration.

[10] In the usual way there was an exchange of requests for arbitration, answer, reply and execution of terms of reference. There was then exchange of memorial and counter memorial followed by a procedural hearing and a further round of reply memorial and counter memorial. The first main evidential hearings took place from 23 April to 5 May 2007 and from 28 May to 2 June 2007. A was represented at these hearings by Messrs Latham and Watkins, Paris. B was represented by English Counsel instructed by Messrs Herbert Smith and by Messrs Buffete Ramon Hermosilla of Madrid. Written submissions were made in August 2007. A final hearing took place on 28 and 29 November 2007. Further written submissions were made in January 2008. The Final Award was issued on 21 October 2009 and notified to the parties on 28 October 2009.

[11] The Award was made by a majority comprising Mr Webster and Mr Veeder. The tribunal ordered B to indemnify A pursuant to an express indemnity provision in the SPA, art 10.1. The indemnity, in respect of multiple breaches of the express warranties given and representations made in the SPA, was in the sums of Eur15 million and Eur90,495. In addition the tribunal awarded both pre-award and post-award interest, Eur6.5 million towards A's costs and US\$440,000 in respect of the ICC's costs. It is a fully reasoned award running to 348 pages.

[12] It is common ground that by agreement to the ICC Rules of Arbitration the parties waived their right to any form of recourse in so far as such waiver can be validly made – see art 28.6 of the Rules. An application for leave to appeal under s 69 of the Act is therefore unavailable to B, although this is academic because by virtue of s 82 a question of law, to which alone an application under s 69 can relate, means for this purpose a question of the law of England and Wales. Under art 10.6 of the SPA the amounts awarded should have been paid within ten days after publication of the Award. They have not been paid. However recourse under ss 67 and 68 remains available. The relief available under those sections of the Act does not yield to the agreement of the parties to exclude it.

[13] The dissenting arbitrator issued a Dissenting Opinion of some 19 pages. It is expressed in unusually trenchant terms. Indeed Mr Vernon Flynn QC for A described it as intemperate. The dissenting arbitrator was highly critical of her colleagues. They had, she said, decided to ignore the parties' agreement to submit the SPA to Spanish law and had in an arbitrary fashion proceeded to decide the dispute "*ex aequo et bono*". They had she said done so for two reasons. Firstly, coming from a common law system, they did not feel comfortable with Spanish law and preferred "to grant an indemnity under art 10.1 of the SPA as if such clause would be self-governing, and not limited by Spanish law". Secondly, they had felt it necessary to punish reprehensible conduct, ignoring the question whether such conduct caused any actual economic damage to A and imposing punitive and multiple damages in a manner which was not permitted under

Spanish law and thus ignored the remedies available within the limits of the law of the contract. The majority had “hidden” behind a broad interpretation of art 10.1 of the SPA and, despite their effort to camouflage it, wrongly granted punitive and multiple damages to punish the existence of the over-billing practices, “disguising” such a penalty as enormous contractual damages for breach of warranties and representations. The majority had ignored or exempted A from the burden of proof of the economic consequences of the over-billing conduct, accepting a damages calculation based on the existence of *dolo* notwithstanding that A's claims for *dolo* were dismissed. The Award was in consequence, she said, illegal, as a matter of public order, under Spanish law. The dissenting arbitrator concluded her Opinion with this paragraph:

“67 Finally, I would like to add that the Award sends a wrong sign to the market that, in my modest opinion, undermines the credibility of commercial arbitration. After reviewing the written and oral testimony in the proceedings and then, reading the Award one could conclude that an easy way to 'buy cheap' is to find a reprehensible conduct in the Target (that nevertheless does not affect the assets or the clients), go ahead with the transaction without renegotiating the price, and then initiate an arbitration so as the Buyer gets the monies of the penalty imposed to the Target as a punishment for the reprehensible conduct even if the reprehensible conduct has not caused any economic loss to the Buyer. I sincerely believe that commercial arbitration should not permit such kind of business.”

[14] As is apparent from the Dissenting Opinion and as adumbrated above, art 10.1 of the SPA lay at the heart of the conclusion of the majority. It provides:

“10.1 *Indemnification*

Except as otherwise provided in this Article 10, from and after the date hereof, the Seller hereby agrees to indemnify, defend and hold harmless the Purchaser or, at the Purchaser's sole option, the Companies (collectively, the '*Indemnified Parties*') against and in respect of any reduction or shortfall in assets, or any increase or surplus in liabilities whatsoever, and any prejudice, damage, loss, or costs that are suffered directly by the Purchaser or any of the Companies (including penalties), and were not expressly disclosed in this Agreement or its Schedules ('*Loss*' or '*Losses*'), resulting from or incident to:

- (a) any breach or inaccuracy of any representation or warranty made by the Seller in this Agreement or in any certificate or other document delivered in connection herewith;
- (b) any claim having its cause or origin prior to 31 December 2003;
- (c) any inaccuracy or omission of the 2003 Audited Financial Statements in light of the Accounting Principles.”

A's primary claim was advanced under this Article, but a claim was also advanced by reference to the Spanish Civil Code and in particular arts 11.01, 11.06, 11.07, 11.24, 14.84, 14.85, 14.86 and 14.90.

[15] At the arbitration the tribunal heard evidence as to the content and application of Spanish law from two expert witnesses, Professor Gomez for A and Professor Fernandez-Armesto for B. That evidence is discussed at Pt F of the Award, which contains what is on the face of it a learned and informed analysis of the relevant principles. The tribunal's conclusions under this head were:

“F-51 As already noted, the Parties' respective submissions on this part of the case were complex. However, given its decisions elsewhere in this Award, it is possible to state the tribunal's conclusions in summary form, as follows:

F-52 First, A cannot and, in fact does not now, advance its claim as an action for price reduction under Article 1486 of the Civil Code. Such a claim would fail on the facts of this case, *in limine*, given the expiry of the limitation period; and A never claimed rescission, for obvious practical and commercial reasons, making rescission impossible.

F-53 Second, on the facts, the tribunal decides the Parties' dispute in the present case, in this Award, without attributing any *dolo* to B in the negotiations and execution of the SPA; and the tribunal rejects the contrary case advanced by A.

F-54 Third, the substantive burden of alleging any *dolo* against a party rests on the aggrieved party making that allegation under the Civil Code. The tribunal concludes that B has not discharged this burden of proof in regard to its allegation of *dolo incidental* against A in the negotiations and execution of the SPA; and accordingly the tribunal rejects that part of B's case alleging the contrary.

F-55 Lastly, as noted at the outset of this Part F of the Award, A's primary claim is advanced under Article 10 of the SPA, as an express contractual indemnity for B's breaches of contractual warranties and representations under Article 9 of the SPA. That claims does not depend on *dolo* by B; it does not depend upon any statutory remedy granted under the Spanish Civil Code, including Articles 1101 and 1486 CC; and, as self-contained contractual remedy providing for an indemnity, it is not incompatible with the Spanish Civil Code. A's claim for an indemnity under Article 10 of the SPA depends only upon the scope and effect of Articles 9 and 10 of the SPA, as a *lex specialis* agreed between the Parties to be interpreted under the relevant Spanish rules of contractual interpretation (together with the ICC Rules). These matters are considered in the ext Part G of this Award.”

[16] At Pt G of the Award the tribunal turned to the interpretation and application of art 10.1. I must set out certain passages from this Part of the Award:

“G-23 *Other factors*: The tribunal also notes that under Article 17(2) of the ICC Rules and (to the extent relevant) English law, as the *lex loci arbitri* under Article 14.75 of the SPA (cited above in paragraph A-10), a term of an otherwise valid contract is generally to be regarded as valid unless it infringes a mandatory provision of an applicable law. Under Spanish law, here the substantive law applicable to Article 10 of the SPA, the term of a contract is likewise valid unless it infringes a mandatory rule of Spanish law (Article 1278 CC). In the present case, no Party has alleged that Article 10 of the SPA infringes any mandatory rule of Spanish law or other rule of Spanish public policy. Nor did any Party assert that there was any Spanish custom or trade usage that would be relevant to, let alone modify, the interpretation of Article 10 of the SPA. Indeed, it was common ground that the language of Article 10 was based on Anglo-Saxon model wording and not on Spanish practices in this field of legal professional activity, to which the tribunal has already referred elsewhere in this Award.

...

G-27 Accordingly, the tribunal decides to approach the Parties' respective cases by reference

to the unequivocal wording of Article 10 of the SPA. As already indicated, the tribunal is here required to apply and does apply the Parties' express consensual wording, to be applied as a matter of English language and in accordance with Spanish legal rules of contractual interpretation. It does so hereafter in this Award, by reference to the actual words used in Article 10.1 of the SPA, as interpreted above. Those words provide the contractual remedy in the form of an indemnity, without any further limitation as to the nature of that remedy or the methodology applicable to calculate that remedy imposed on a claim for damages under the Spanish Civil Code. Where the Parties have expressly agreed, bring free to do so under Spanish law, their own consensual remedy with a very broad scope, the tribunal can see no reason why that contractual bargain should be affected by provisions of the Spanish Civil Code providing different non-consensual remedies in different circumstances. The tribunal's approach, therefore, makes the issues arising under the Spanish Civil Code (considered in Part F above) ultimately of no consequence to this Award, given also the tribunal's decisions on *dolo*.

G-28 It may be noted that the tribunal's approach conforms strictly with Article 1091 of the CC, which provides: *Las obligaciones que nacen de los contratos tienen fuerza de ley entre las partes contratantes, y deben cumplirse al tenor de los mismos*. ('Obligations arising out of contracts are binding in law among the contracting parties and have to be complied with according to their terms'). As to this provision of the Spanish Civil Code, Professor Fernández-Armesto testified, in his first expert report (Paragraph 23), that: 'This action, which is frequently referred to as *actio ex contractu*', derives from art 1091 CC and its purpose is to force the counterparty to comply with the contractual obligations it has accepted. A frequent remedy sought in an *actio ex contractu* is to obtain damages – damages as defined in the contract, or, if no definition of damages has been agreed, as defined in the Civil Code. In our case, this is the option chosen by Claimants: A is alleging a breach by B of its representations and warranties in clause 9 of the SPA, and requesting damages as defined under clause 10.' He likewise testified that contracting parties may agree, under Spanish law, their own consensual remedy in lieu of applying provisions of the Spanish Civil Code [*ibid* paragraph 72]. Whilst Professor Fernández-Armesto developed his own disputed interpretation of Article 10.1 of the SPA in support of B's case, it is significant that he supported the approach described above, as a general principle of Spanish law.

G-29 It may also be noted that the tribunal's approach is not incompatible with Article 1107 CC, as regards damages 'foreseen or foreseeable' (cited in Paragraph F-4 above). First, the tribunal is here addressing compensation for a contractual indemnity and not damages under the Spanish Civil Code. Second, the scope of that contractual indemnity agreed by B is recorded in the widest terms by the Parties' themselves, sufficient to include all claims determined below in favour of A in this Award.

G-30 Lastly, it should be noted that the tribunal's approach, whilst disputed between the Parties as a matter of contractual interpretation, did not give rise to any argument by the Parties based on public policy or '*ordre public*', whether Spanish or English, at any stage of these arbitration proceedings. It would of course violate fundamental principles of fairness in an international arbitration under the ICC Rules for any tribunal in its final award to address such un-made arguments based on un-alleged facts and un-cited law; and this tribunal will not do so in this Award – save to conclude that it is far from manifest how the tribunal's contractual interpretation of Article 10 of the SPA, even if erroneous, can possibly give rise to any violation of Spanish '*ordre public*.'"

[17] The parties were agreed that it is a fair inference from the content of para G30 that the majority

arbitrators intended it as a riposte to what they knew the dissenting arbitrator had said or intended to say in her Dissenting Opinion. The same is true of para Q97 which I reproduce below.

[18] Part Q of the Award related to quantum issues. For present purposes I am content to adopt the analysis of Mr Michael Black QC for B of the approach adopted by the tribunal:

- i) It calculated the Total Consideration – paras Q11 to Q16;
- ii) It generated an Implicit Revenue Multiple by dividing the consideration by the revenue reported in C's Financial Statements – paras Q17 to Q25;
- iii) The tribunal reduced the revenue figure by the amounts it had found to be overstated in breach of the representations and warranties to produce an Adjusted Revenue figure. It then multiplied the Adjusted Revenue by the Implicit Revenue Multiple to produce a Revised Price. It then deducted the Revised Price from the Total Consideration. This exercise produced a figure of Eur8.14 million which it described as "Compensation before risk adjustment" – paras Q26 to Q60;
- iv) The tribunal then seemingly abandoned this figure and embarked upon a new calculation under which it again deducted the amounts it found to be overstated in breach of the representations and warranties from the Revenue as Reported in C's financial statements, but this time applied a Risk Adjustment to Implicit Multiple of 25% to represent the risk factor that a purchaser of C would factor into his price had he known of the matters constituting the breaches of the representations and warranties. This included the possibility of unproved, unknown and unquantifiable risks – paras Q61 to Q78;
- v) The 25% risk factor was then applied to the Implicit Revenue Multiple which was in turn applied to the Adjusted Revenue Base to yield a further discounted price, Estimate of actual Value Received. That further discounted price was then deducted from the price paid to produce Compensation after Risk Adjustment of Eur19.15 million – para Q79;
- vi) The tribunal then reduced that figure to Eur15 million on the basis of its view as to what price A might have been willing to pay for C in all the circumstances "as now known". The tribunal also stated that that figure included compensation in respect of the matters discussed earlier in the award where no specific compensation had been awarded – paras Q81 to Q96;
- vii) To this figure, was added the sum of Eur90,495.00 in respect of the costs of the services of a Mr A.

[19] Before me B relied on the report of a further expert in Spanish law, Professor Dr Rodrigo Bercovitz Rodriguez Cano, Professor of Civil Law at the Autonomous University of Madrid. I understand why B wished for the purposes of this application to rely upon a further expert, independent of Professor Fernandez-Armesto who gave evidence on their behalf at the arbitration, although I have some reservations about the implications if this is generally to be permitted.

[20] I have already pointed out that the dissenting arbitrator was deeply critical of the approach of the majority. I do not propose to summarise her criticism here any further than I have already done since it is not

fully adopted by Professor Bercovitz. Professor Bercovitz does however confirm that the interpretation of the SPA, including art 10.1, must be made according to Spanish law hermeneutic, ie interpretative, rules.

[21] At this point I should say a word about the status of the Dissenting Opinion. It is not in my view formally part of the Award of the tribunal. I was helpfully referred to the Final Report on Dissenting and Separate Opinions prepared by a Working Party of the ICC Commission on International Arbitration chaired by Mr Martin Hunter. The Report was adopted by the Commission on 21 April 1988. I am comforted to find that a large majority of the members of the working Party reached that same conclusion. A dissenting opinion might be admissible as evidence in relation to procedural matters, as where for example it is alleged that some aspect of the procedures adopted in the arbitration worked unfairly to the disadvantage of one party – see per Coulson J in *F Ltd v M Ltd* [2009] EWHC 275 (TCC), [2009] 2 All ER (Comm) 519, [2009] 1 Lloyd's Rep 537 at 543. So too where the proper law of the dispute is English law and there is an appeal on point of law, I can see that the views of a dissenting arbitrator might well inform the decision of the court. In the present case however I find it difficult to ascribe any formal status to the Dissenting Opinion. In so far as it expresses conclusions of Spanish law which go beyond any evidence as to the content of that law given at the arbitration, I do not see how I can have regard to it.

[22] Professor Bercovitz does not in his very substantial report support the argument of the dissenting arbitrator to the effect that the award rendered by the tribunal is illegal or invalid as being contrary to Spanish *ordre public*. When I combine this with the tribunal's observations in paras G23 and G30 to the effect that it was not suggested at the arbitration that the tribunal's approach gave rise to any violation of public order principles, it seems to me that I must simply disregard what the dissenting arbitrator says on that score. Furthermore Mr Black in his oral submissions rowed back from any suggestion that the majority arbitrators had consciously disregarded the applicable provisions of Spanish law, and he did not pursue the suggestion that the majority arbitrators had simply decided the dispute "*ex aequo et bono*". In these circumstances the views of the dissenting arbitrator are of little relevance to the application. They amount at best to inadmissible opinion evidence as to the process of reasoning adopted by the majority arbitrators and I doubt if I can properly have regard to them, let alone accord them any weight.

[23] Reverting to the award of the tribunal, I should finally set out certain paragraphs from Pt Q, the title to which is "The Quantum Issues". The first five paragraphs of the Introduction to this Part of the Award are as follows:

"Q-1 As decided earlier in this Award, the tribunal has dismissed any claim for *dolo* by A and every substantive claim by X; but the tribunal has found that there were several breaches of the contractual representations and warranties made by B in Article 9 of the SPA agreed with A.

Q-2 The tribunal has also decided that the appropriate measure of compensation for A with respect to those breaches is the contractual standard expressly agreed by the Parties in Article 10.1 of the SPA, namely the broad indemnity 'against and in respect of any reduction or shortfall in assets, or any increase or surplus in liabilities whatsoever, and any prejudice, damage, loss or costs . . .' (This provision is cited in full above in Paragraph G-2 of this Award).

Q-3 As already indicated in this Award, the tribunal here applies this specific contractual language agreed between and signed by the Parties, rather than the general provisions in the Spanish Civil Code as to damages for breach of contract (applying in the absence of the Parties' special agreement). As decided in Parts F and G of this Award, the tribunal sees no inconsistency in this approach with other statutory remedies under the Spanish Civil Code; and the tribunal's approach under Article 10 of the SPA is not to be equated with those statutory remedies (including damages or price reduction under Articles 1101 and 1486 CC).

Q-4 In particular, as discussed above in Part F of this Award, there was considerable debate between the Parties' legal experts over the use of different methodologies for A's claims under the Spanish Civil Code, including damages and price reduction. In interpreting Article 10 of the SPA, the exercise required of the tribunal is materially different, as it must reflect the agreement of the Parties on a contractual indemnity. The fact that the calculation of such an indemnity under Article 10.1 of the SPA may result in an amount or even a methodology that could be compared to a damages or price reduction calculation under Articles 1106 or 1486 of the Spanish Civil Code is irrelevant. The Parties here agreed, expressly, on the consensual remedy in the form of an indemnity in Article 10 of the SPA: and that indemnity could well overlap with damages calculated according to other remedies without signifying that the tribunal has applied those other remedies and not Article 10.

Q-5 The Parties' respective cases on quantum in regard to Article 10.1 of the SPA produced starkly different results. The Parties relied principally upon the expert testimony of their respective expert witnesses, particularly Ms Ryan for A and Mr Haberman for B. The tribunal found the testimony of Ms Ryan and Mr Haberman particularly helpful; and both were impressive and independent experts, intent on assisting the tribunal in a complicated and difficult case for non-experts in forensic accountancy. However, as noted below, Mr Haberman's instructions from B significantly limited his expert evidence (as compared to Ms Ryan); and overall the tribunal found Mr Haberman's testimony, as a result, materially less helpful than Ms Ryan's testimony."

I should interpose that Ms Ryan and Mr Harberman were both forensic accountants. At para Q72 there is a pithy reflection of the extent of the malpractice by C which the evidence had revealed:

"Q-72 The risk allocation agreed by the Parties in the SPA was such that B was to bear the risk of any representations and warranties. It is difficult to imagine how financial statements could conceivably reflect even approximately the affairs of C given the level of tainted transactions. Not only was there a significant degree of risk; but there was also a clear contractual understanding that B was to bear this kind of risk as a material part of the Parties' commercial bargain, as recorded in the SPA. This risk was not assumed by A under the SPA."

The arbitrators' final conclusion is expressed as follows:

"Q-86 . . . as already indicated, the total consideration paid by A under the SPA was the compromised result of the Parties' negotiations and not the joint result of Ms Ryan's methodologies.

Q-87 As regards B, whatever the private thinking of A, B did not base its negotiating price directly on CX 6 or any other valuation sheet; and B also made it clear to A that in order to acquire C, A would have to pay a minimum price plus a premium, including the repayment of B's long-term loan to C of Eur37.7 million. Otherwise B would not have sold C to A, as A clearly understood and accepted during the negotiations.

Q-88 As regards A (with X), A was not an investment fund intending to pay a market price to acquire a certain stream of revenues for a given year in order to recover annually a certain percentage of its investment.

Q-89 In this case, A was ready to pay a premium over a market valuation in order to remove

permanently one of its principal competitors from the world market, to increase A's market share and to prevent Y (as another competitor) from itself acquiring C; and all that was achieved by A under the SPA.

Q-90 To such extent, A's expectations in terms of annual revenues and return were therefore not the only and perhaps not even the primary consideration in acquiring the Company. Moreover, A's expectation as to a stream of revenue was not limited to 2003 as a particular year, which is the basis for Ms Ryan's approach.

Q-91 Moreover, there is a factor much emphasized by B: A's claims should not produce a result where the Company was worth nothing or almost nothing: see its case summarized in Part B above. The question arises as to what the overall price for the Company should have been in all the circumstances, as now known, assuming that A would have agreed to buy the Company and B would have agreed to sell it. The tribunal has difficulty in finding that the overall price would have been Eur19.15 million lower than that paid under the SPA; but it is satisfied that such a price would have been at least Eur15 million lower than this contractual price.

Q-92 Accordingly, the tribunal decides that, in all these circumstances, Ms Ryan's methodologies, however adjusted, cannot dictate any precise figure as the answer to the question facing the tribunal as regards the Quantum Issues in this Award.

Q-93 *Final Conclusion:* Bearing all these further factors in mind, in particular that set out in Paragraph Q-91 above, the tribunal decides to select a lesser figure required by Article 10 of the SPA to indemnify A, calculated as at 2 April 2004.

Q-94 Accordingly, the tribunal reduces its initial figure of Eur19.15 million under Ms Ryan's methodologies and determines the amount of the contractual indemnity under article 10 of the SPA at Eur15 million, payable by B to A. It would, of course, be possible to select a different figure; but the tribunal is concerned that any higher figure would introduce an unacceptable element of subjective judgment inconsistent with the intent expressed in article 10 and could therefore risk an injustice to B.

Q-95 On the other hand, the tribunal considers that it is not possible to select any lower figure consistent with all the evidence, including the expert testimony, adduced in these proceedings; and that any such lower figure would risk in turn an injustice to A. The tribunal is satisfied that the harm caused by B to A was substantial; and it considers that the compensation must likewise be substantial to provide the corresponding indemnity required under Article 10 of the SPA. The difficulties in assessing the precise amount of that indemnity do not mean that a lesser indemnity should be awarded, still less no indemnity at all.

Q-96 It should be noted that the tribunal has also borne much in mind the claims awarded to A earlier in this Award where no specific compensation has been assessed in respect of such claims, on the basis, that the same can legitimately be taken into account in calculating this indemnity under Article 10 of the SPA as a whole: namely A's Claims 2, 4, 6B1 and 6B2 addressed above in Parts L, M and O of this Award. The tribunal considers that Ms Ryan's methodology is sufficient, as here applied by the tribunal, to compensate A without any further specific compensation, given the broad scope of the indemnity provided by Article 10.

Q-97 Lastly, the tribunal expresses its self-confidence, in full, that its approach above does not

grant any double-remedy to A for the same contractual harm, still less any punitive damages. A did not seek punitive damages. Nor does B allege that there has been any claim for punitive damages by A. Nor does Mr Haberman maintain in the Experts' Joint Report that Ms Ryan's calculations in any way involve a claim for punitive damages. As regards double remedies, A did assert remedies in the alternative. However, the discussion in this part of the Award is not about the amount of alternative remedies but relates to the amount of the indemnity claimed under Article 10 of the SPA as a result of serious breaches of Article 9 of the SPA. The facts of this case and the terms of this Award speak for themselves."

[24] The essence of the challenge to the award is that the majority arbitrators failed to apply the chosen law, contrary to their obligation under s 46 of the Act which, so far as relevant, provides:

"46(1) The arbitral tribunal shall decide the dispute –

(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or

(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal."

Although as I have already indicated Mr Black in his final reply pulled back from the breadth of some of his earlier submissions, he nonetheless submitted that the dichotomy between disregard of the law and mistaken application of it is too blunt an instrument to be useful. He accepted that arbitrators could without breach of s 46(1) make an error in application of the law but suggested that the dividing line is where the mistake is so serious as to amount to a departure from the chosen law. Such a departure he suggested amounts to an excess of jurisdiction which may be challenged under s 67 of the Act, alternatively in a proper case it can be addressed under s 68(2)(b) – serious irregularity consisting in the tribunal exceeding its powers otherwise than by exceeding its substantive jurisdiction.

[25] I cannot accept the integrity, utility or practicality of the suggested dividing line dependent upon the gravity of the error in application of the law. In my judgment Mr Vernon Flynn QC for A is right to contend that for a challenge of this sort to have any prospect of success, a conscious disregard of the provisions of the chosen law is a necessary but not a sufficient requirement. I should add for the avoidance of doubt that any suggestion of conscious disregard here is simply unsustainable. The arbitrators carefully considered the provisions of Spanish law. They concluded, at paras G27 to G30, that Spanish law provides no impediment to the parties agreeing their own consensual remedy in lieu of applying provisions of the Spanish Civil Code. Professor Fernandez-Armesto did not dispute this proposition. Nor as I understand him does Professor Bercovitz. Paragraphs 59 to 61 of his report read:

"2 Proof of the contractual damages and the burden thereof according to Spanish Law

59 In principle, in Spanish Law, breach of contract does not by itself generate the obligation to pay compensation. For a compensatory action for breach of contract to be successful, the creditor must, as a general rule, prove not only the breach, but also that that breach has caused him damage. Only if effective damages have derived for the creditor has he the right to demand indemnification. This has been repeatedly stated by the Spanish Supreme Court, in what is a doctrine that is absolutely consolidated.

60 This general rule fails to apply only when the parties agree otherwise in the contract. So, for example, when they agree a conventional penalty, whereby the debtor undertakes to pay an amount predetermined in the contract in the event that it fails to comply with any of the obligations established therein.

61 Article 10 of the SPA does not suppose any exception to the general rule whereby the breach only gives rise to the obligation to pay compensation if it causes damage to the creditor. On the contrary, it establishes the obligation for B to repay the losses suffered directly by A or C as a result of a breach of contract, without presuming or predetermining (quantifying) the indemnifiable loss. By default, art 10 of the SPA is subject to the general rules regarding proof of damages according to Spanish Law which, as has already been said and as I explain later on, fill in the gaps in the contract. In other words, given the silence of art 10 of the SPA on how to quantify the compensation, the rules established by Spanish law on how compensation should be quantified and who is to prove the facts relevant to this effect, must be applied.”

I note also para 99:

“99 Nothing, however, impedes the parties to a contract from agreeing that, in case of non-compliance, the mere risk of damages must be compensated for; however this is not common contractual practice in Spain. In any case, if this is not indicated in the contract, and by comprehensive application of art 1106 CC, the mere risk of damages does not give the creditor the right to exact compensation.”

At footnote 62 to this passage Professor Bercovitz notes:

“In the same way that the parties can agree upon a conventional penalty apart from the reality of the damages caused by non compliance, they can agree that the mere risk of damages will be compensated for. Logically, in such a case, no additional damages can be required if the risk becomes definite, because then there would be a double compensation. Unless, again, it was expressly agreed that if the risk were to become definite, not only real damages and harms would be compensated for, but also those to which such risk referred. In this case, there is no doubt that the moderating power of the courts could operate if the lack of compliance were not damaging.”

The thrust of the evidence of Professor Bercovitz as I read it is that he disagrees with the interpretation of art 10.1 adopted by the majority arbitrators. If he were to convince the court that he is right the arbitrators would at most be shown to have made an error of law.

[26] It was decided by the House of Lords in *Lesotho Highlands Development Authority v Impregilo SPA and others* [2005] UKHL 43, [2006] 1 AC 221, [2005] 3 All ER 789 that an error of law does not involve an excess of power under s 68(2)(b) of the Act. Mr Black submitted that Lord Steyn in that case was not addressing the misapplication of foreign law. I do not consider that the conclusion can be any different whether the law under consideration is English law or a foreign law. Making an error as to the application of the applicable law can involve no excess of power under s 68(2)(b) since, as Lord Steyn explained, the concept of a failure by the tribunal to reach the “correct decision” as affording a ground for challenge under s 68 is wholly inimical to the scheme and purpose of the Act. However as it happens Lord Steyn makes clear at para 23 of his speech that he was approaching the matter on the basis that the tribunal might have made an error in either form: a misinterpretation of the underlying contract, which was governed by the law of Lesotho, or a misinterpretation of its powers under s 48(4) of the 1996 Act, an error of English law.

[27] I would add that it would be odd indeed if an error in the application of foreign law could give rise to the possibility of an unconstrained challenge under s 68 bearing in mind that a challenge based upon an alleged error in the application of English law is subject to the filter requirement imposed by s 69 that, save with the agreement of the parties, no such challenge may be pursued without the leave of the court. Furthermore leave will only be granted if the statutory criteria spelled out in s 69 are satisfied.

[28] Mr Black relies also upon s 67. Reliance upon s 67 was abandoned in the Court of Appeal in the *Lesotho* case and only the challenge under s 68 was pursued in the House of Lords. However that may be, it is plain that s 67 cannot here be invoked. Section 67 is concerned with challenges based on substantive jurisdiction. Section 82 of the Act provides that "'Substantive jurisdiction', in relation to an arbitral tribunal, refers to the matter specified in s 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly." Section 30(1) provides:

"Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to –

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement."

It is plain that an error in the application of the chosen law does not involve a lack of substantive jurisdiction as it is defined in the Act. If demonstrated, which here it is not, a breach of s 46 can as I see it be addressed only under s 68(2)(b).

[29] I regard these conclusions as entirely consistent with the decision of Langley J in *Peterson Farms Inc v C&M Farming Ltd* [\[2004\] EWHC 121 \(Comm\)](#), [2004] 1 Lloyd's Rep 603. There the challenge was made under s 67 alone. As recorded in para 7 of Langley J's judgment, the essence of Peterson's case was that the tribunal had no jurisdiction to entertain claims by entities which were not named as parties to the agreement. The challenge succeeded on that basis – see in particular paras 67 and 68 of the judgment. Mr Black submitted that *Peterson* should properly be analysed as a case involving s 46. It is true that Langley J discussed at para 46 whether the tribunal's approach was in accord with s 46, and concluded that it was not. However because the tribunal so plainly had no jurisdiction to entertain claims by entities who were not party to the arbitration agreement, Langley J had no need to consider whether a breach of s 46 is remediable under s 67. I have already concluded that it is not. In so far as Professor Merkin at para 7.31 of his work *Arbitration Law, 2009*, suggests to the contrary, I respectfully disagree. Langley J also observed at para 43 of his judgment that the identification of the parties to an agreement is a question of substantive law. He did not need to discuss the implications of the failure to apply the correct law having arisen from an erroneous interpretation of the underlying agreement.

[30] For all these reasons I have concluded that the material relied upon by B does not disclose a case with a realistic prospect of success for the challenge of the Award under s 67 and/or s 68 of the Act. I would go further. In my judgment once it is accepted, as Mr Black did in his reply on B's behalf, that no allegation of impropriety is made against the arbitrators, then the challenge to the Award is simply hopeless. An allegation of conscious disregard of the governing law is an allegation of impropriety and Mr Black was right to eschew

it. The essence however of B's case is that the tribunal erred in its construction of art 10.1 under the relevant Spanish rules of contractual interpretation. That cannot possibly be a valid ground of challenge. I would venture to suggest that this challenge would not have been made had not the dissenting arbitrator put forward (i) the allegation of impropriety which B eschews, and (ii) the suggestion that the Award is illegal, as a matter of public order under Spanish law, which Professor Bercovitz does not support.

[31] The preliminary issue must accordingly be answered “no”.

Judgment accordingly.

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award. If, before the award is made, the continuance of the arbitral proceedings becomes unnecessary or impossible for any other reason, the arbitrators shall inform the parties of their intention to issue an order for the discontinuance of the proceedings. The arbitrators shall have the power to issue such an order unless a party objects to the discontinuance.

2. The arbitrators shall, in the order for the discontinuance of the arbitral proceedings or in the arbitral award on agreed terms, fix the costs of arbitration as specified under article 33. Unless otherwise agreed to by the parties, the arbitrators shall apportion the costs between the parties as they consider appropriate.

3. Copies of the order for discontinuance of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitrators to the parties. Where an arbitral award on agreed terms is made, the provisions of article 27, paragraph 7, shall apply.

INTERPRETATION OF THE AWARD

Article 30

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitrators give an interpretation of the award. Such interpretation shall be binding on the parties.

2. The interpretation shall be given in writing within 45 days after the receipt of the request, and the provisions of article 27, paragraphs 3 to 7, shall apply.

CORRECTION OF THE AWARD

Article 31

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitrators to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitrators may within 30 days after the communication of the award make such corrections on their own initiative.

2. Such corrections shall be in writing, and the provisions of article 27, paragraphs 6 and 7, shall apply.

ADDITIONAL AWARD

Article 32

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitrators to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. Report of the Secretary General: revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules (A/CN.9/112/Add.1)*

SECTION I

Commentary on article 1

Introduction

1. The purpose of the UNCITRAL Arbitration Rules is to facilitate arbitration of disputes arising out

* 12 December 1975.

2. If the arbitrators consider the request for an additional award to be justified and consider that the omission can be rectified without any further hearing or evidence, they shall complete their award within 60 days after the receipt of the request.

3. When an additional award is made, the provisions of article 27, paragraphs 2 to 7, shall apply.

COSTS

Article 33

1. The arbitrators shall fix the costs of arbitration in their award. The term "costs" includes:

(a) The fee of the arbitrators, to be stated separately and to be fixed by the arbitrators themselves;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitrators;

(d) The travel expenses of witnesses, to the extent such expenses are approved by the arbitrators;

(e) The compensation for legal assistance of the successful party if such compensation was claimed during the arbitral proceedings, and only to the extent that the compensation is deemed reasonable and appropriate by the arbitrators;

(f) Any fees charged by the appointing authority for its services.

2. The costs of arbitration shall in principle be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties if they consider that apportionment is reasonable.

DEPOSIT OF COSTS

Article 34

1. The arbitrators, on their appointment, may require each party to deposit an equal amount as an advance for the costs of the arbitration.

2. During the course of the arbitral proceedings the arbitrators may require supplementary deposits from the parties.

3. If the required deposits are not paid in full within 30 days after the communication of the request, the arbitrators shall notify the parties of the default and give to either party an opportunity to make the required payment.

4. The arbitrators shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

of international trade transactions. This object is made clear in the title: "International commercial arbitration rules", and from certain provisions of the Rules appropriate to international arbitration, such as the provisions that a sole arbitrator and a presiding arbitrator shall be of a nationality, other than that of the parties (article 7, para. 1, and article 8, para. 2).

2. The Rules, however, do not include a provision limiting their scope of application to the settlement of disputes arising out of international trade transactions. An attempt to so limit the scope of application of the Rules by a provision in the Rules would present the difficult problem of defining the term "international trade transactions", and might open up new grounds for challenges to arbitration.

3. Furthermore, it does not appear necessary to have such a limiting provision. In the case of a uniform law or convention which is applicable despite the absence of specific agreement between the parties as to its applicability, the need to define the scope of application is imperative. In contrast, since the Rules become applicable only when the parties have entered into a written agreement making them applicable, a clear indication of the intended scope of application of the Rules is sufficient. The parties can then make the Rules applicable to cases they consider appropriate.

4. The Rules also do not require that the arbitration clause or separate arbitration agreement referring to these Rules have an international character in that the parties, when concluding it, must have their habitual residence or their principal places of business in different countries. Such a requirement would also give rise to problems of interpretation and create additional grounds for challenge to arbitration.

5. Another reason for the absence of a provision in the Rules restricting their scope of application to "international trade transactions" is the fact that the Rules permit the parties, by written agreement, to modify any provision in the Rules (article 2). When the parties are given this option, a provision restricting the scope of applicability of the Rules ceases to be mandatory, since the parties can give to the Rules a wider scope of application whenever they so desire.

6. These considerations have led to the result that the scope of application of the Rules is not restricted to the arbitration of disputes arising out of international trade transactions. The parties can therefore also apply the Rules in purely domestic cases, although the Rules have been prepared with international trade transactions in mind.

Paragraphs 1 and 4

7. Under paragraph 1, the Rules become applicable by virtue of an agreement in writing which expressly refers to the Rules. Writing is required in order to avoid uncertainty as to whether the Rules have been made applicable. The agreement may be concluded after a dispute has arisen, or—the normal case—long beforehand by an arbitration clause in a contract. Under paragraph 4, the class of disputes that can be settled in accordance with the Rules is defined in very wide terms. The language of this paragraph is modelled on that of article 1, paragraph 1, of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974.

Paragraph 2

8. This paragraph makes it clear that a Government, State agency, or State organization may be party

to an arbitration clause or agreement which refers to the Rules. The paragraph is modelled on article II, paragraph 1, of the 1961 European Convention on International Commercial Arbitration, which similarly recognizes the right of legal persons, considered by the law applicable to them as "legal persons of public law", to conclude valid arbitration agreements.

Paragraph 3

9. This paragraph is substantially based on article II, paragraph 2, of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, in recognition of modern business practices, provision has been made for an exchange of telexes as a possible method of entering into an arbitration clause or arbitration agreement. A similar provision is found in article I, paragraph 2 (a) of the 1961 European Convention on International Commercial Arbitration.

Commentary on article 2

1. Under this article the parties may regulate the course of the arbitral proceedings in the manner they consider appropriate. The requirement that a modification of the Rules must be in writing is intended to create certainty as to the ambit of such a modification.

2. It may be noted that, under article 26, the Rules can be modified by the behaviour of one party if the other party does not promptly object to such behaviour (implied waiver).

Commentary on article 3

Paragraph 1

1. The Rules provide for the giving of notices, notifications, communications or proposals by one party to the other at various stages in the arbitral proceedings, within periods of time established under the Rules. This paragraph specifies when such notices, notifications, communications or proposals are deemed to have been received. The paragraph supplements the rule contained in the first sentence of paragraph 2 of this article with regard to the date on which a period of time prescribed under the Rules commences to run. The rule contained in paragraph 1 is modelled on article 14, paragraph 2 of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974.

Paragraph 2

2. Several provisions in the Rules state that actions described in such provisions shall or may be taken by the parties or the arbitrators within a specified period of time after the receipt of a notice, proposal, notification or communication (e.g., article 6—after receipt of notice; article 7, paragraphs 2 and 3—after receipt of proposal; article 8, paragraph 3—after receipt of notification; article 10, paragraph 1—after receipt of communication). The first sentence of this paragraph specifies the day on which such period shall begin to run, while the other sentences concern the effect of official holidays and non-business days on the running of the period.

*Commentary on article 4**Paragraphs 1 and 3*

1. The notice to be given under paragraph 1 is intended to inform the respondent of the fact that arbitration proceedings have been initiated for the purpose of asserting a claim against him. Similar provisions appear in article 3 of the ECE Arbitration Rules, article II, paragraph 3 of the ECAFE Arbitration Rules, section 7 of the Commercial Arbitration Rules of the American Arbitration Association, and section 7 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission.

2. The information required to be included in the notice under subparagraphs (b), (c), (d) and (e) of paragraph 3 will acquaint the respondent with the particulars of the claim and enable him to decide on his future course of action, e.g., whether the claim should be contested, and if contested, the identity of the person he should choose or appoint as arbitrator. Subparagraph (f) enables the claimant to take at this stage a step which may be necessary to carry forward the arbitral proceedings, i.e., to suggest whether the arbitral tribunal should be composed of one or three arbitrators.

Paragraph 2

3. The time of commencement of arbitral proceedings may have relevance to the question whether provisions on prescription of rights or limitation of actions under national law are operative in relation to the dispute or disputes submitted to arbitration. This paragraph lays down a rule as to the time arbitral proceedings are deemed to commence. This rule is modelled on that contained in article 14, paragraph 2, of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974.

Commentary on article 5

1. This article gives a party the right to be represented by a counsel or agent upon the communication of the name and address of such person to the other party. The right to be represented by an agent is also recognized in article 30 of the ECE Arbitration Rules, article VI, paragraph 8 of the ECAFE Arbitration Rules, section 21 of the Commercial Arbitration Rules of the American Arbitration Association, section 20 of the Rules of Procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce, and article 15, paragraph 5 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

2. Such representation may take place at any stage of the arbitral proceedings, including any hearing called by the arbitrators (e.g., under article 14, para. 2) or any meeting convened by the arbitrators for the inspection of goods (under article 15, para. 3). The communication of the name of the counsel or agent is necessary so as to assure the other party that such counsel or agent possesses the requisite authority to act on behalf of the party whom he claims to represent.

3. The second sentence of this article has been added in recognition of the fact that, in arbitration practice, the requisite authority always exists and need not be expressly communicated when a counsel or agent acts in the manner described therein. A similar provision appears in section 21 of the Commercial

Arbitration Rules of the American Arbitration Association.

SECTION II

Commentary on article 6

1. Early agreement by the parties to an arbitration clause or arbitration agreement on the number of arbitrators will accelerate the arbitral proceedings by eliminating the period of time specified under this article within which parties must endeavour to reach agreement on such number. The introduction to the Rules (A/CN.9/112, para. 16) recommends that an arbitration clause or separate arbitration agreement concluded by the parties should be supplemented, whenever possible, by an agreement as to the number of arbitrators.

2. Since it is normal practice to have three arbitrators in the arbitration of disputes arising out of international trade transactions, this article specifies that there shall be three arbitrators if the parties fail to reach agreement on this question. A similar provision as to the number of arbitrators is contained in section 8 of the Rules of Procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce, and article 4 of the ECE Arbitration Rules.

3. The 15-day period specified in the article is considered to be sufficient to allow the parties to communicate with each other and reach agreement as to the desired number of arbitrators.

4. The question has been examined as to whether this article should contain a provision stating that, even where parties fail to reach agreement on the number of arbitrators within the 15-day period specified in this article and the arbitral tribunal, therefore, is to consist of three members, the parties have the right to agree subsequently that there shall be a single arbitrator. It is considered that no express provision to this effect is needed, since the desired result may be obtained by the parties agreeing in writing to modify this article in accordance with article 2.

*Commentary on article 7**Paragraph 1*

1. The requirement that a sole arbitrator shall be of a nationality other than that of the parties is designed to further a desired objective, namely, that the sole arbitrator shall be impartial in the performance of his duties. A similar requirement is contained in article 2, paragraph 6 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Cases may arise, however, where both parties have complete confidence in the impartiality of a proposed sole arbitrator of the nationality of one or both parties. In such cases the parties can appoint that person as the sole arbitrator, after agreeing in writing to modify this paragraph in accordance with article 2.

Paragraph 2

2. The provision within this paragraph requiring the claimant to make his proposal by telegram or telex is imposed with a view to accelerating the arbitral proceedings. It is considered that 30 days is a period of time of sufficient length for the parties to communicate with each other and endeavour to reach agreement on the identity of the sole arbitrator.

Paragraph 3

3. If, before the expiration of the 30 days specified in paragraph 2 of this article, the parties conclude that they cannot agree on the identity of the sole arbitrator, there would be an unwarranted delay in the arbitral proceedings if the parties were nevertheless compelled to await the expiration of the comparatively long period of 30 days before applying to a previously designated appointing authority, or before endeavouring to reach agreement on an appointing authority in cases where there has been no previous designation. This paragraph therefore provides that the appropriate step can be taken immediately after the parties have concluded that they cannot agree.

4. Since a previous designation by the parties of an appointing authority will accelerate arbitral proceedings which reach the stage covered by this paragraph, the introduction to the Rules (A/CN.9/112, para. 15),* recommends that an arbitration clause or separate arbitration agreement concluded by the parties should be supplemented by an agreement between the parties designating an appointing authority.

5. Although the parties may not have sufficient confidence in the same individual whom they could choose as the sole arbitrator, they may have sufficient confidence in the ability of an impartial appointing authority to make a suitable appointment. This paragraph, therefore, requires the parties, when they have not previously designated an appointing authority, to endeavour to reach agreement on the choice of such an authority. The specified period of time within which they must endeavour to reach agreement is 15 days, in contrast to the period of 30 days specified in paragraph 2 of this article for reaching agreement on the choice of a sole arbitrator. It is considered that this shorter period is justified by the fact that the number of possibilities which are likely to be examined by the parties when endeavouring to reach agreement on the choice of an appointing authority is likely to be smaller than would be the case when they are endeavouring to reach agreement on the choice of a sole arbitrator.

Paragraph 4

6. If, in the circumstances described in paragraph 3 of this article, the parties have not succeeded in designating an appointing authority who would appoint the sole arbitrator, the claimant can under this paragraph apply to one of the institutions mentioned in subparagraphs (a) and (b) in order to secure the designation of an appointing authority.

Paragraph 5

7. The obligation to send to the appointing authority the documents described in this paragraph is imposed on the claimant in order to ensure that the appointing authority will have the information necessary to enable it to select an arbitrator qualified to deal with the dispute in question.

Paragraph 6

8. The list-procedure to be followed under this paragraph is contained in the arbitral rules of certain arbitral institutions, e.g., section 12 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission; section 12 of the Commercial Arbitration

Rules of the American Arbitration Association; and article 9 of the Rules of the Netherlands Arbitration Institute. The advantage of this procedure is that it gives the parties, who failed to agree on the appointment of the sole arbitrator, some indirect influence over the ultimate appointment by permitting them to express their preferences and objections with regard to the names communicated by the appointing authority.

9. Examples of cases in which the penultimate sentence of this paragraph becomes applicable because the list-procedure fails to produce the desired result are: the failure of one or both parties to return a list; objections by one or both parties to all the names on the list; and failure by the parties to reach common agreement with regard to any person on the list.

*Commentary on article 8**Paragraph 1*

1. This paragraph specifies the usual procedure for the appointment of arbitrators where the arbitral tribunal is to consist of three arbitrators. Under this paragraph, read together with paragraph 4 of this article, the right to choose the presiding arbitrator is given in the first instance to the arbitrators, and not to the parties. This solution is in conformity with current practice in the arbitration of commercial disputes. Similar provisions are contained in article II, paragraph 3 (b) of the ESCAP (formerly ECAFE) Arbitration Rules, and article 3 (b) of the ECE Arbitration Rules.

Paragraph 2

2. The impartiality of the presiding arbitrator is of special importance in an arbitral tribunal consisting of three arbitrators since the other two arbitrators are normally appointed directly by the parties. The requirement that the presiding arbitrator be of a nationality other than the nationality of the parties is intended to further the objective that the presiding arbitrator be impartial. A similar provision is contained in article 2, paragraph 6, of the Rules of Conciliation and Arbitration of the ICC. Cases may arise, however, where the two party-appointed arbitrators, or the parties, have complete confidence in the impartiality of a proposed presiding arbitrator of the nationality of one or both parties. In such cases that person may be appointed as the presiding arbitrator after the parties have agreed in writing to modify the requirement of nationality, in accordance with article 2.

Paragraph 3

3. This paragraph provides a procedure whereby the arbitral proceedings can be continued despite the failure of the respondent to appoint his arbitrator. In such a case, the appointing authority, at the request of the claimant, appoints the second arbitrator in the place of the respondent, and does so at its discretion.

4. Since a previous designation by the parties of an appointing authority will accelerate the arbitral proceedings in the circumstances under consideration, the introduction to the Rules (A/CN.9/112, para. 115),* recommends that an arbitration clause or separate arbitration agreement concluded by the parties should be supplemented by an agreement between the parties designating an appointing authority.

*Reproduced in this volume, part two, III, 1, *supra*.

*Reproduced in this volume, part two, III, 1, *supra*.

Paragraph 4

5. The provision in this paragraph requiring the claimant to make his proposal by telegram or telex is intended to secure the acceleration of the arbitral proceedings. It is considered that 30 days is a period of time of sufficient length for the parties to communicate with each other and endeavour to reach agreement on the identity of the presiding arbitrator.

Paragraph 5

6. This paragraph is identical with paragraph 3 of article 7, except that that paragraph applies to the choice of a sole arbitrator, while this paragraph applies to the choice of a presiding arbitrator. Subject to this difference in the scope of application of this paragraph, the comments made in relation to paragraph 3 of article 7 also apply to this paragraph.

Paragraph 6

7. The comments made in relation to paragraph 4 of article 7 are also applicable to this paragraph.

Paragraph 7

8. This paragraph is identical with paragraph 5 of article 7, and the comments made in relation to paragraph 5 of article 7 are also applicable to this paragraph.

Paragraph 8

9. The comments made in relation to paragraph 6 of article 7 are applicable to this paragraph, i.e., the appointing authority shall appoint the presiding arbitrator by following the list-procedure provided for in that paragraph.

Commentary on article 9

1. Although this article specifies the categories of arbitrators who can be challenged, and the grounds for challenge, it should be noted that the provisions contained in this article are subject to the mandatory rules relating to these issues contained in the applicable national law.

Paragraph 1

2. Under this paragraph, either party may challenge any arbitrator who was chosen or appointed under these Rules, irrespective of the method of choice or appointment. The paragraph also lays down a single ground for challenge of all categories of arbitrators. Since this ground for challenge has general application, it may be noted that a party-appointed arbitrator on a 3-member arbitral tribunal can be challenged on the ground that circumstances exist that give rise to justifiable doubts as to such arbitrator's impartiality or independence, even if such doubts are due to his relationship to the party who appointed him. The provisions contained in this paragraph are modelled on similar provisions contained in article 6 of the ECE Arbitration Rules, and article III, paragraph 1, of the ESCAP (formerly ECAFE) Arbitration Rules.

Paragraph 2

3. This paragraph sets forth a list, which is not exhaustive, of circumstances constituting grounds for challenge under paragraph 1. Proof of the existence of a circumstance would disqualify an arbitrator, even though no doubt in fact existed as to the impartiality and independence of the arbitrator concerned. This list also serves to draw the attention of the parties to

typical cases which fall within the general ground of challenge specified in paragraph 1. Paragraph 11 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission, and section 18 of the Commercial Arbitration Rules of the American Arbitration Association also contain provisions specifying that the financial or personal interest of an arbitrator is a ground for his disqualification.

Paragraph 3

4. Since no one knows better than a prospective arbitrator himself whether circumstances exist which are likely to disqualify him, this paragraph imposes an obligation on him to disclose such circumstances at the earliest stage at which disclosure is possible. Such disclosure is likely to prevent the appointment of arbitrators who may later be challenged successfully. Thus the interruption of the course of arbitral proceedings resulting from a challenge is avoided.

5. This provision is modelled on similar provisions contained in paragraph 17 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission and section 18 of the Commercial Arbitration Rules of the American Arbitration Association. As an appointment may take place despite such disclosure by a prospective arbitrator, an obligation is also imposed on an arbitrator upon appointment to disclose circumstances likely to disqualify him to parties to whom there had been no prior disclosure. The result of the latter rule, combined with the time-limit for a challenge imposed by paragraph 1 of article 10, is that most challenges are likely to be made at an early stage of the arbitral proceedings, when they will cause less disruption of the course of the arbitral proceedings.

*Commentary on Article 10**Paragraph 1*

1. Challenge of an arbitrator results in an interruption of the course of arbitral proceedings, and a successful challenge will result in a serious interruption arising from the need to appoint a substitute arbitrator and the possible need to repeat hearings held prior to such challenge (para. 3 of article 12). It is therefore desirable that challenges, if any, should be made at the earliest possible stage in the arbitral proceedings. The time-limit of 30 days imposed by this paragraph seeks to achieve this objective.

2. The first 30-day period mentioned in this paragraph will apply when the ground for the challenge was already known to the challenging party at the time notice of the appointment of the arbitrator who may be challenged was communicated to such party. The 30-day period mentioned thereafter applies if the ground for the challenge becomes known to the challenging party subsequent to such communication.

3. A party who has a right of challenge may waive such right. A waiver will take place automatically when no challenge is made within the applicable 30-day period specified in this paragraph.

Paragraph 2

4. The notice of the challenge required under this paragraph enables, *inter alia*, the other party to decide whether he is to agree to the challenge, and the challenged arbitrator to decide whether he is to withdraw

from his office, as provided in paragraph 3 of this article.

Paragraph 3

5. If the other party agrees to the challenge, the challenged arbitrator is removed from office, irrespective of the view of the challenged arbitrator, or of the view of the appointing authority who may have appointed such arbitrator, as to the validity of the challenge.

6. When an arbitrator loses his office under the circumstances described in this paragraph, the application of the provisions contained therein will result in a substitute arbitrator being appointed or chosen pursuant to the procedures applicable under article 7 or 8 to the appointment or choice of the particular type of arbitrator (i.e., sole, presiding or party-appointed) who has lost his office.

Commentary on article 11

Paragraph 1

Subparagraph (a)

1. An appointing authority which has appointed an arbitrator in accordance with the provisions of article 7 or 8 of the Rules is a neutral third party. Such authority is therefore an appropriate tribunal to decide on the challenge of the arbitrator it had appointed.

Subparagraph (b)

2. An appointing authority designated by the parties would have been so designated because the parties considered that such authority was impartial. Such authority is therefore an appropriate tribunal to decide on the challenge of an arbitrator, although it had not appointed the arbitrator concerned.

Subparagraph (c)

3. When subparagraphs (a) and (b) do not apply, subparagraph (c) provides for the designation of an appointing authority in accordance with the provisions of article 7 or 8 to decide on the challenge. The provisions of article 7 will apply to such designation if the challenged arbitrator is a sole arbitrator; the provisions of article 8, paragraph 3 will apply if the challenged arbitrator is a party-appointed arbitrator; and the provisions of article 8, paragraphs 5 and 6 will apply if the challenged arbitrator is a presiding arbitrator.

Paragraph 2

4. When an arbitrator loses his office by reason of a challenge being sustained, the application of the provisions contained in this paragraph will result in a substitute arbitrator being appointed or chosen pursuant to the procedures applicable under article 7 or 8 to the appointment or choice of the particular type of arbitrator (i.e., sole, presiding, or party-appointed) who has lost his office. With the object of preventing delay in the course of the arbitral proceedings, this paragraph modifies the procedures applicable under article 7 or 8 by providing that, where such procedures would require the designation of an appointing authority for the appointment of an arbitrator, the appointing authority which decided on the challenge under paragraph 1 shall make the appointment.

Commentary on article 12

1. Rules governing arbitral proceedings generally provide for the replacement of arbitrators on the follow-

ing grounds: death of an arbitrator; inability of an arbitrator to perform his functions due to his physical or mental incapacity; unwillingness to perform the functions required of an arbitrator; or resignation by an arbitrator from his office.

Paragraph 1

2. Under paragraph 1, on the death or resignation from office of an arbitrator, the substitute arbitrator is selected according to the procedure that, under these Rules, applies to the appointment or choice of the arbitrator who is to be replaced. Therefore, if a sole arbitrator is to be replaced, the provisions of article 7 apply, and the relevant provisions of article 8 govern the replacement of a party-appointed arbitrator or of a presiding arbitrator.

Paragraph 2

3. This paragraph applies to the challenge and replacement of arbitrators on the ground of incapacity or failure to perform the functions of an arbitrator, the procedures governing the challenge and replacement of arbitrators under articles 10 and 11 of these Rules. Consequently, the party who alleges that an arbitrator is incapacitated or has failed to act must notify the arbitrator concerned and the other party of this challenge. Upon receipt of this notification, the other party may agree to the removal of the challenged arbitrator or the arbitrator may decide to withdraw from his office; in all other cases, pursuant to the procedures laid down in article 11, the appropriate appointing authority will have to decide on the validity of the challenge made against the arbitrator.

4. When an arbitrator loses his office on the ground of incapacity or of failure to act, regardless of whether such loss of office resulted from the agreement of the other party to the charge, the withdrawal of the arbitrator from his office, or the decision of an appointing authority, a sole arbitrator shall be replaced in accordance with the provisions of article 7 of these Rules, and a party-appointed or presiding arbitrator in accordance with the relevant provisions of article 8.

Paragraph 3

5. In recognition of the special role that is played in arbitral proceedings by the sole or presiding arbitrator, this paragraph provides that when such an arbitrator is replaced, all hearings that were held previously must be repeated. When a party-appointed arbitrator is replaced, following the appointment of the substitute arbitrator, the arbitral tribunal has discretion to decide whether any or all prior hearings shall be repeated.

Commentary on article 13

1. This article applies to all instances where the names of persons who may be appointed as arbitrators are proposed by one party to the other party, or by an appointing authority to both parties. Such proposals may concern the appointment of the sole arbitrator (article 7, paras. 2 and 6) or the appointment of the presiding arbitrator (article 8, paras. 4 and 8).

2. This article is designed to ensure that, when these Rules provide that a party may be involved in the process of selecting an arbitrator, he will be provided with information as to the name, nationality and

qualifications of persons proposed as arbitrators by the other party or by an appointing authority.

SECTION III

Commentary on article 14

Paragraph 1

1. Article 14 contains provisions concerning the conduct of the arbitral proceedings by the arbitrators. Since flexibility during the proceedings and reliance on the expertise of the arbitrators are two of the hallmarks of arbitration, paragraph 1 gives the arbitrators the power to regulate the conduct of the proceedings, provided that both parties "are treated with equality and with fairness".

Paragraph 2

2. Under this paragraph the arbitrators must, if either party so requests, hold hearings for the presentation of evidence by witnesses or for oral argument by the parties or their counsel. If neither party requests the holding of hearings, the arbitrators may nevertheless decide to hold hearings to hear the presentation of evidence by witnesses or to hear oral argument by the parties or their counsel.

3. Under this paragraph, the arbitrators are not given the power to refuse to hear evidence that a party wishes to present by witnesses, on the ground that such evidence would be immaterial or irrelevant to the resolution of the dispute. Even in a case where the arbitrators decide to conduct the proceedings "solely on the basis of documents and other written materials", they may, under paragraph 3 of article 15, arrange for the inspection of goods, other property or documents.

4. It may be noted that on the question of hearings, article 14, paragraph 2, adopts a middle course between the differing approaches taken in the ECE Arbitration Rules and the ECAFE Arbitration Rules. Under the ECE Arbitration Rules (article 23), hearings will be held unless the parties agree that the arbitrators may render an award based solely on documentary evidence. Under the ECAFE Arbitration Rules (article VI, paragraph 5), normally proceedings are to be conducted solely on the basis of documents, subject to an agreement to the contrary by the parties or a decision to the contrary by the arbitrators. Under these rules, the arbitrators determine in principle how to conduct the arbitration, but they must hold hearings if one party so requests.

Paragraph 3

5. This paragraph, based on the rule found in article VI, paragraph 2, of the ECAFE Arbitration Rules, is intended to ensure that each party is fully informed, at the same time as the arbitrators, of the contents of documents and information furnished by the other party to the arbitrators during the arbitral proceedings.

Commentary on article 15

Paragraph 1

1. Following closely the wording of article 14 in the ECE Arbitration Rules, this paragraph provides that in the absence of an agreement by the parties on the place of arbitration, such place shall be determined by the arbitrators. The agreement of the parties as to

the place of arbitration may be contained in the arbitration clause (e.g., the model arbitration clause at paragraph 20 of the introduction to these Rules (A/CN.9/112)* and the ECE model form of arbitration clause make provision for an agreement by the parties as to the place of arbitration), in the separate arbitration agreement, or in a later agreement by the parties. If the agreement by the parties as to the place of arbitration is arrived at on a later date, it need not be in writing, but must be communicated to the arbitrators.

Paragraphs 2 and 3

2. These paragraphs preserve some freedom for the arbitrators in determining the locale of arbitral proceedings, even in cases where the parties have agreed upon the country or city that will be the place of arbitration. This limited flexibility is necessary so that the arbitrators can perform certain functions, e.g. hear witnesses or inspect goods, at locales that are appropriate, having regard to the exigencies of the particular arbitration.

Paragraph 4

3. Paragraph 4 of this article is useful, since, when issues arise concerning the enforceability of arbitral awards or the requirements as to the form of such awards, reference is on some occasions made to the national law of the "place of arbitration" and on other occasions to the national law of the "country where the award was made" (see e.g. article V, paragraph 1, subparagraphs (a), (d) and (e) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

Commentary on article 16

1. This article resolves the problems of language that may arise in international arbitrations, where the parties, arbitrators and witnesses often have differing language backgrounds. It is desirable that the agreement of the parties, or in its absence the determination by the arbitrators, as to the language or languages to be used should be arrived at as early as possible.

Paragraph 1¹

2. Under this paragraph, the parties may agree on the language or languages that will be used in a particular arbitral proceeding. This agreement may be contained in the arbitral clause or separate arbitration agreement, or may be reached at some time before or even after the commencement of the arbitral proceedings. (See article 4, para. 2, as to the date on which arbitral proceedings are deemed to commence.) However, this faculty can no longer be exercised if the arbitrators have been appointed and, despite a request by the arbitrators, the parties fail to reach an agreement on the language or languages to be used. In the absence of an agreement by the parties, the arbitrators will determine the language or languages to be used

* Reproduced in this volume, part two, III, 1, *supra*.

¹ It is suggested that the following revised text should replace the text of article 16, para. 1, reproduced in A/CN.9/112. The revision consists of the addition of the words in italics:

"1. Subject to a *prior* agreement by the parties, the arbitrators shall, promptly after their appointment, determine, *after consultation with the parties*, the language or languages to be used in the proceedings".

in the proceedings, taking into account the exigencies of the arbitration.

Paragraph 2

3. Under paragraph 1, the agreement of the parties or the determination by the arbitrators governs the language to be used at any oral hearings, as well as the language in which written communications and statements are to be made. Where documents are submitted in a language that is not the language agreed to by the parties or determined by the arbitrators, the arbitrators, under paragraph 2, may order the party concerned to accompany such documents by a translation in the language or languages of the arbitration.

Commentary on article 17

1. The "statement of claim", which is dealt with in this article, must be distinguished from the "notice of arbitration" governed by article 4 of these Rules. The "notice of arbitration" serves the function of informing the respondent that the claimant is submitting to arbitration a dispute arising out of a contract between them. The date of delivery of this notice marks the commencement of the arbitral proceedings and sets in motion the machinery for the choice or appointment of the arbitrators. This notice also sets forth, *inter alia*, the general nature of the claim, an indication of the amount involved, and the relief or remedy sought by the claimant. The information contained in the "notice of arbitration" will help the parties, or the appointing authority, as the case may be, in the selection of arbitrators. On the other hand, the "statement of claim" is communicated only after the arbitrators have been chosen or appointed. It is the first written statement in a possible series of such statements by which the parties endeavour to state and substantiate their positions regarding the dispute (see articles 18 and 20).

2. The arbitrators may, in some cases, have received a copy of the notice of arbitration before their appointment (e.g. if they asked to see it before deciding whether or not to agree to serve as arbitrators), or soon after their appointment. However, article 4 contains no requirement that the "notice of arbitration" be sent to the arbitrators upon their appointment.

Paragraph 1

3. The first document that the claimant must communicate to the arbitrators is the "statement of claim" governed by this article. Paragraph 1 provides that the claimant must communicate his statement of claim, in writing, to the respondent and to each of the arbitrators. In order to apprise the arbitrators of the scope of their jurisdiction and of the frame of reference for the dispute, this paragraph requires that a copy of the contract and of any separate arbitration agreement be annexed to the statement of claim.

4. It should be noted that, while article 17, paragraph 1, requires that the statement of claim shall be communicated "within a period of time to be determined by the arbitrators", article 21 provides that normally this period of time should not exceed 15 days.

Paragraph 2

5. This paragraph describes the information that must be contained in the statement of claim. Although

in his statement of claim the claimant is obliged to include "a statement of the facts supporting the claim", he is not required to annex the documents which he deems relevant and on which he intends to rely. Paragraph 2, however, states that, should he wish to do so, a claimant may annex to his statement of claim a list of the documents he intends to submit in support of his claim or he may even annex the relevant documents themselves. It is believed that, since claimants are generally interested in the resolution of the dispute submitted to arbitration as quickly as possible, they will in a large number of cases annex to their statements of claim the documents or copies of the documents on which they intend to rely. In cases where the claimant does annex a list of such documents or copies of the documents themselves, he is not precluded from submitting additional or substitute documents at a later stage in the arbitral proceedings, in the light of the position taken by the respondent in his statement of defence.

Paragraph 3

6. Under this paragraph, the statement of claim may be supplemented or altered by the claimant, provided that the arbitrators in their discretion permit the change to be made and, further, that the respondent is given an opportunity to reply to the claim as modified.

Commentary on article 18

Paragraph 1

1. Under the provisions of this paragraph, the statement of defence must be communicated by the respondent to the claimant and to each of the arbitrators "within a period of time to be determined by the arbitrators". It should be noted that under article 21 of these rules, the time-limits established by arbitrators for the communication of written statements should normally not exceed 45 days.

Paragraph 2

2. This paragraph is designed to ensure that the statement of defence responds to the information that is required to be included in the statement of claim under the provisions of subparagraphs (b), (c) and (d) of paragraph 2 of article 17. In addition, the respondent has the option (similar to the option given to the claimant under article 17, para. 2) of annexing the documents or copies of the documents on which he intends to rely for his defence or of including a reference to such documents, without prejudice to his right to present additional or substitute documents at a later stage in the arbitral proceedings.

Paragraph 3

3. This paragraph permits the respondent to assert in his statement of defence claims arising out of the same contract as the one on which the claim made in the statement of claim was based. Such claims may be asserted either as counterclaims or as set-off.

4. Although, under this paragraph, a claim asserted as a counterclaim or set-off must arise out of the same contract as the claim made in the statement of claim, the parties may agree, under special circumstances, that the respondent may assert as a counterclaim or

set-off a claim that did not arise out of the same contract as the claim raised in the statement of claim, such as where disputes arising out of other contracts are also referred to arbitration under these Rules. Pursuant to article 2 of these Rules, such agreement of the parties would have to be in writing.

Paragraph 4

5. This paragraph makes it clear that the provisions of article 17 relating to the required contents of the statement of claim and to the possibility of supplementing or altering claims apply also to counterclaims and to claims relied on as set-off.

Commentary on article 19

1. This article empowers the arbitrators to rule on objections to their jurisdiction to decide the particular dispute that is before them. Similar provisions may be found, e.g., in article V, paragraph 3 of the 1961 European Convention on International Commercial Arbitration; article 41, paragraph 1 of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States; article 18, paragraph 1 of the Uniform Law annexed to the 1966 European Convention Providing a Uniform Law on Arbitration; article VI, paragraph 3 of the ECAFE Arbitration Rules; and article 18 of the ECE Arbitration Rules.

2. It should be noted that, although article 19 does not state expressly that rulings by the arbitrators as to their jurisdiction are subject to judicial supervision and control, it is clear that these rulings are subject to such supervision and control, exercised in accordance with the mandatory provisions of the applicable national law.

Paragraph 1

3. This paragraph gives the arbitrators power to rule on objections to their jurisdiction and provides specifically that objections based on a denial of the existence or validity of the arbitration clause or separate arbitration agreement are included among the objections to their jurisdiction on which the arbitrators are empowered to rule. Objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement may be based, amongst others, on any of the following grounds: non-existence or lapsing; nullity, including nullity resulting from the fact that under the applicable arbitration law the subject-matter of the dispute may not be submitted to settlement by arbitration; and claims that the particular dispute does not fall within the scope of the parties' agreement to submit certain specified disputes to arbitration.

4. Objections as to the existence or validity of the arbitration clause or of the separate arbitration agreement constitute allegations that the arbitrators were not validly authorized to function as arbitrators. Other objections, e.g. that the arbitrators exceed their terms of reference at some point during the arbitral proceedings or that they failed to comply with a material provision in the arbitration clause or in the separate arbitration agreement, are only allegations that the arbitrators lacked jurisdiction to take some particular action and do not involve allegations to the effect that

the arbitrators could not serve at all in that capacity. Paragraph 1 of article 19 is designed to cover all objections to the jurisdiction of the arbitrators, irrespective of the grounds for, and extent of, such objections.

Paragraph 2

5. This paragraph establishes the separability of the arbitration clause from the contract of which the arbitration clause forms a part. It authorizes the arbitrators to determine the existence or validity of such a contract, but makes it clear that the invalidity of the arbitration clause does not necessarily follow from a finding that the main contract is invalid. A similar provision may be found in article 18 of the Uniform Law annexed to the 1966 European Convention Providing a Uniform Law on Arbitration. Paragraph 2 reflects the view that the arbitration clause, although contained in, and forming a part of, the contract, is in reality an agreement distinct from the contract itself, having as its object the submission to arbitration of disputes arising from or relating to the contractual relationship.

Paragraph 3

6. Under the provisions of this paragraph, pleas alleging the lack of jurisdiction of the arbitrators must normally be raised in the statement of defence or, with respect to a counterclaim, in the reply to the counterclaim. However, the arbitrators may admit a plea that is made only at a later stage in the arbitral proceedings if the delay was justified under the circumstances. An example of a plea raised with justified delay would be a plea based on facts newly discovered by the objecting party.

Paragraph 4

7. Since objections as to the jurisdiction of the arbitrators involve procedural matters, this paragraph authorizes the arbitrators to either rule on such objections as preliminary questions or to decide these issues only in their final award. This solution is in conformity with the discretion granted to arbitrators by article 14, paragraph 1 of these Rules to conduct the arbitral proceedings "in such manner as they consider appropriate" and with paragraph 2 of article 41 of the 1965 Washington Convention on the Settlement of Investment Disputes: "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the centre . . . , shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute".

Commentary on article 20

1. Under these Rules, the claimant must communicate his statement of claim to the respondent and to each of the arbitrators (article 17). Article 25, paragraph 1 provides the sanction for non-compliance: "the arbitrators shall issue an order for the discontinuance of the arbitral proceedings". The respondent is then given an opportunity to respond to the statement of claim (article 18). Article 25, paragraph 2 provides that if the respondent fails to submit a statement of defence, nevertheless "the arbitrators may proceed with the arbitration". Thus, normally, the arbitrators will receive a statement of claim and a statement of defence.

Paragraph 1

2. Under this paragraph, the arbitrators may require that the parties submit written statements in addition to the statement of claim and the statement of defence. Also, the parties themselves may agree on a further exchange of written statements. This paragraph provides the arbitrators and the parties with an opportunity to insist on an exchange of further written statements, in recognition of the custom under several national arbitration laws, especially in countries with a civil law system, to call for a second statement by the claimant (*rejoinder* or *réplique*) and a second response by the respondent (reply to the rejoinder, or *duplique*).

Paragraph 2

3. Since a claim raised by the respondent in his statement of defence as a counterclaim is a novel claim as far as the claimant is concerned (although article 18, para. 3 requires that the counterclaim must have arisen out of the same contract as the original claim by the claimant), paragraph 2 of article 20 provides that the arbitrators must permit the claimant to present a written reply to the counterclaim.

Paragraph 3

4. This paragraph is based closely on a provision in article 24 of the ECE Arbitration Rules. Although incorporated as a guide to the arbitrators and the parties, this provision may be viewed as a specific example of the general rule in article 14, paragraph 1 to the effect that "the arbitrators may conduct the arbitration in such manner as they consider appropriate".

Commentary on article 21

1. Disputes submitted to arbitration should be settled as quickly as possible. It is, however, not possible to prescribe in these Rules rigidly fixed time-limits within which the various required written statements must be communicated. It has been found that rigid time-limits cannot be imposed in domestic commercial arbitrations and of course this holds true even more for international commercial arbitrations. The 45-day period mentioned in this article as the usual time-limit for the communication of written statements is merely intended to serve as a general guideline from which the arbitrators may deviate whenever warranted by the particular circumstances.

2. Under this article, the claimant should normally be given only 15 days to communicate his statement of claim to the other party and to the arbitrators. The reason for this is that already at the time he initiates the arbitral proceedings by sending the notice of arbitration (article 4), the claimant should start the preparation of his statement of claim (article 17). During the time period that elapses between the sending of the notice of arbitration and the appointment of the arbitrators (who then establish the time-limit for the communication of the statement of claim, under article 17), the claimant can continue to prepare his statement of claim.

3. Under this article, the arbitrators retain the discretion to extend any time-limits that they had fixed, if such extension is warranted under the circumstances.

4. It should be noted that, pursuant to article 2 of these Rules, the parties may, by an agreement in writing, modify any provision in these Rules pursuant to which the arbitrators are to determine the period of time within which a particular written statement is to be communicated; the parties can accomplish this by a written agreement in which they themselves set the time-limit for the communication of a particular written statement, and they should thereafter inform the arbitrators accordingly.

Commentary on article 22

1. This article sets forth a number of general provisions which are considered useful for the regulation of hearings that may be held in the course of the arbitral proceedings. In addition, the article deals with the presentation of evidence of witnesses by means of their written statements (para. 5) and establishes that the arbitrators have the duty to weigh and evaluate the evidence offered by the parties (para. 6).

Paragraph 1

2. This paragraph requires that the arbitrators "give the parties adequate advance notice" of each hearing. Such notice must specify the date, time and place of the hearing. In most cases hearings will be held at the place of arbitration. However, pursuant to article 15, paragraph 2, the arbitrators may hear witnesses "at any place they deem appropriate, having regard to the exigencies of the arbitration".

Paragraph 2

3. Under this paragraph, each party must disclose, at least 15 days before the hearing, the identity of the witnesses he intends to present. This information will give some idea to the other party of the evidence that will be presented at the hearing and will enable that party to prepare his response to that evidence.

Paragraph 3

4. This paragraph deals with certain preparatory measures for hearings that the arbitrators must take in order to ensure that the hearings will run smoothly. The basic rule is that the arbitrators have full discretion regarding possible arrangements for the interpretation of oral statements and for a verbatim record of the hearing, in keeping with the general rule contained in article 14, paragraph 1, that "subject to these Rules, the arbitrators may conduct the arbitration in such manner as they consider appropriate". However, the arbitrators have to arrange for interpretation or a verbatim record of they receive a timely request from both parties to this effect.

Paragraph 4

5. This paragraph provides that, as a rule, hearings shall be held *in camera*, in conformity with the principle of privacy that is customary in commercial arbitration. The parties, however, may agree that some or all the hearings should be open.

6. The manner in which witnesses are to be interrogated is left to the discretion of the arbitrators. Thus, the arbitrators may decide whether cross-examination of the witnesses is or is not to be permitted. Cross-examination is a technique that is customarily

employed in many areas of the world and cannot therefore be prescribed for international arbitration. Consequently, in cases where both parties or their counsel are accustomed to the technique of cross-examination, the arbitrators may in their discretion permit it, while in cases where one or both parties are unacquainted with this technique the arbitrators may find it inappropriate to permit it.

Paragraph 5

7. This paragraph gives a desired latitude in the manner of presenting evidence at arbitral hearings, by permitting the presentation of evidence in the form of written statements signed by the witnesses. However, it is not required under this paragraph that the witnesses signing such statements also swear to their veracity.

Paragraph 6

8. This paragraph makes it clear that the arbitrators have discretion to decide on the admissibility, relevance and materiality of the evidence offered, and to determine the probative weight that is to be given to such evidence. A similar provision is contained in article 24 of the ECE Arbitration Rules.

Commentary on article 23

1. This article deals with the possibility that during the course of the arbitral proceedings a party will request that interim measures be taken in order to protect the subject-matter of the dispute. Under some national laws such measures may be taken only by the competent judicial authorities, while under other national laws the arbitrators have the discretion to take appropriate interim protective measures. However, if there is a need for the immediate enforcement of protective measures, the assistance of the judicial authorities may be essential in all cases.

Paragraphs 1 and 2

2. These paragraphs concern those cases where under the applicable national law the arbitrators are empowered to take interim measures of protection regarding the subject-matter of the dispute. Under paragraph 1, the arbitrators have the discretion to take such measures, but only if requested by one or both parties.

This paragraph is based on article VI, paragraph 6 of the ECAFE Arbitration Rules, and article 27 of the ECE Arbitration Rules.

3. In order to facilitate the enforcement of interim measures taken by the arbitrators pursuant to paragraph 1 of this article, paragraph 2 authorizes the arbitrators to establish these measures in the form of interim awards. Since the taking of interim measures may entail "costs of arbitration" (article 33), paragraph 2 gives arbitrators the power to require security for such costs.

Paragraph 3²

4. This paragraph makes it clear that a party to the arbitral proceedings may, if he so wishes, request

² It is suggested that the following revised text should replace the text of article 23, paragraph 3, reproduced in A/CN.9/112. This revised text is identical with the text repro-

duced in A/CN.9/112, except that the words in italics have been added:

an appropriate judicial authority to take interim protective measures, without thereby violating the agreement to arbitration contained in the arbitration clause or separate arbitration agreement under which the arbitral proceedings arose. This provision is based on article VI, paragraph 4 of the 1961 European Convention on International Commercial Arbitration.

Commentary on article 24

1. In cases involving matters of a technical nature, or where the existence and scope of particular commercial usages is at issue, the arbitrators may wish to have the benefit of expert opinion before they make their award. In some cases, the arbitrators may also want to receive expert advice on questions of law, although the actual resolution of such questions must be made by the arbitrators themselves.

Paragraph 1

2. This paragraph authorizes the arbitrators to appoint experts who will report to the arbitrators on specific issues arising during the arbitral proceedings. The terms of reference for such experts are established by the arbitrators; however, a copy of the terms of reference must be communicated to the parties. The paragraph is modelled on similar provisions found in the rules of several arbitral institutions, e.g. section 23 of the Rules of Procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce; article 14, paragraph 2 of the Rules of Conciliation and Arbitration of the ICC; and article 21, paragraph 2 of the Rules of the Netherlands Arbitration Institute.

Paragraphs 2, 3 and 4

3. The provisions contained in these paragraphs enable the expert to perform his functions and, at the same time, safeguard the interests of both parties to the arbitration.

Commentary on article 25

1. This article deals with the consequences of a party's failure to submit his statement of claim, statement of defence or other required documentary evidence, and with the effect of a party's failure to appear at a hearing that had been duly called.

Paragraph 1

2. The "statement of claim" is the first document that, pursuant to article 17, must be communicated by the claimant to the arbitrators. Without the statement of claim the arbitrators cannot commence consideration of the dispute, since it is only through that statement that the arbitrators become fully informed about the points at issue and about the facts that in the view of the claimant support his claim. Nor can the respondent prepare his statement of defence without having the statement of claim. For these reasons, paragraph 1 of article 25 provides specifically that if a claimant fails

duced in A/CN.9/112, except that the words in italics have been added:

"A request for interim measures may also be addressed to a judicial authority. Such a request shall not be deemed incompatible with the arbitration clause or separate arbitration agreement, or as a waiver of that arbitration clause or separate arbitration agreement."

The commentary to this paragraph considers the revised text.

to communicate his statement of claim within the period of time set by the arbitrators, the arbitrators have the discretion of granting him an extension of time. Such an initial extension of time will usually be granted by the arbitrators as a matter of course, and may be granted even if the failure to communicate the statement of claim was not justified under the circumstances. It may be noted, on the other hand, that under the general provisions in article 21 of these Rules, the arbitrators may extend any time-limits fixed by them "if they conclude that an extension is justified".

3. However, should the claimant fail to communicate his statement of claim by the date the initial extension granted by the arbitrators for its submission has expired, then under this paragraph the arbitrators are obliged to "issue an order for the discontinuance of the arbitral proceedings", unless the claimant shows "sufficient cause for this failure".

4. Paragraph 1, as a whole, reflects the view that once the claimant has initiated the arbitral proceedings by sending his notice of arbitration to the other party (pursuant to article 4), he should within a reasonable time communicate his statement of claim to the other party and to the arbitrators or face the discontinuance of the arbitral proceedings; in this way the claimant is prevented from threatening the institution of arbitral proceedings regarding a particular dispute without in fact formally going forward with his claim in earnest.

Paragraph 2

5. This paragraph is designed to prevent the possibility that the respondent would try to frustrate the arbitral proceedings by failing to submit his statement of defence. Accordingly, paragraph 2 of article 25 provides that in such a case the arbitrators may go forward with the arbitration, disregarding the fact that no statement of defence was submitted. If, however, the respondent shows that he had justification for failing to submit his statement of defence within the established time-limit, then the arbitrators, pursuant to the provisions of article 21, have the discretion to grant him an extension of time.

6. Where the respondent does not communicate his statement of defence, when proceeding with the arbitration the arbitrators may still convene oral hearings and/or require further documentary evidence from one or both parties. Should the respondent then fail to appear at a duly called hearing or fail to submit further required documentation, the provisions of paragraphs 3 or 4 of this article will apply, respectively.

Paragraph 3

This paragraph assures that a party cannot frustrate the arbitral proceedings by the expedient of not appearing at a hearing that was duly called. It provides, following similar provisions contained in article 31, paragraph 1 of the ECE Arbitration Rules, and article 15, paragraph 2 of the Rules of Conciliation and Arbitration of ICC, that the arbitrators may proceed with the arbitration and that all the parties will be deemed to have been present at the hearing in such a case.

Paragraph 4

8. Under this paragraph, based on article 31, paragraph 2 of the ECE Arbitration Rules, if a party fails

to submit any documentary evidence required by the arbitrators, the arbitrators may nevertheless proceed, and make their award on the evidence that had been presented to them during the arbitral proceedings.

Commentary on article 26

1. Under this article, a party to an arbitral proceeding who knows that a provision of, or requirements under, these Rules was not complied with is deemed to waive his right to object if he does not promptly raise an objection thereto. It should be noted that without a knowledge of the contents of these Rules there can be no knowledge of any non-compliance with them.

2. However, where a party has submitted to arbitration under these Rules, it will be very difficult for him to allege during the arbitral proceedings that he lacks knowledge of the contents of one or more of the provisions of these Rules. Such an allegation would be even more difficult to sustain if the parties had adopted the text of the model arbitration clause or separate arbitration agreement recommended in the introduction to these Rules (A/CN.9/122, para. 12),* since that text contains an express declaration by the parties that the Rules are known to them.

3. It may be noted that this article and article 2 (modification of the Rules by written agreement of the parties) are in some respects interrelated. A waiver pursuant to the provisions of article 26 may be regarded as a modification of these Rules by a tacit, informal agreement of the parties, manifested by the action of one party derogating from the Rules and the knowing acquiescence by the other party to such action.

4. In practice, a waiver under article 26 of the right to object will normally take place only in respect of provisions and requirements in the Rules that are of minor importance. The effect of such a waiver would be that, when an award resulting from the arbitral proceedings is sought to be enforced, the objection to recognition and enforcement of the award specified in article V, paragraph 1 (d) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (i.e., that "the arbitral procedure was not in accordance with the agreement of the parties") could not be raised as to the non-compliance that was the subject-matter of the waiver.

5. This article is based on similar provisions found in section 37 of the Commercial Arbitration Rules of the American Arbitration Association and article 37 of the Inter-American Commercial Arbitration Rules.

SECTION IV

Commentary on article 27

1. This article deals with a number of technical questions regarding the manner in which arbitrators are to make their award and with the legal effect of arbitral awards. The provisions contained in this article are, however, subject to the mandatory provisions of the applicable national law.

Paragraph 1

2. This paragraph, similarly to article 36 of the ECE Arbitration Rules and article VII, paragraph 2

* Reproduced in this volume, part two, III, 1, *supra*.

of the ECAFE Arbitration Rules, authorizes the arbitrators to make interim, interlocutory or partial awards whenever justified under the circumstances of the particular dispute that is before them. The arbitrators may make such awards at any time during the arbitral proceedings.

Paragraph 2

3. The rule in this paragraph, to the effect that awards must contain the reasons upon which they are based, unless the parties have expressly agreed to the contrary, corresponds to article 40 of the ECE Arbitration Rules. This provision reflects the law in many jurisdictions, particularly countries with a civil law system, to require that arbitral awards incorporate the reasons for the decision reached by the arbitrators. At the same time, paragraph 2 permits the parties to agree that the award should not contain reasons in cases where the place of arbitration is in a jurisdiction in which an award need not contain reasons in order to be valid.

Paragraph 3

4. This paragraph requires that an award be made by a majority of the arbitrators in cases where there is a three-member arbitral tribunal. Thus, at least two of the three arbitrators must concur in the award for it to become valid; however, it is not required that the presiding arbitrator be one of the two arbitrators who agree on the award.

5. If a majority of the arbitrators fail to agree on an award, the arbitral tribunal must resolve the deadlock in accordance with the relevant law and practice at the place of arbitration, which is the place where according to article 15, paragraph 4 of these Rules the award must be made. Under the law and practice in many jurisdictions, arbitrators must continue their deliberations until they arrive at a majority decision.

Paragraph 4³

6. This paragraph deals with two matters of a technical nature concerning the form and content of arbitral awards; the requirement that the arbitrators sign their award, and the requirement that the award contain the date and place at which the award was made. As a general rule, all the arbitrators must sign the award, in order to make it clear that all the arbitrators participated in the arbitral proceedings and in the making of the award.

7. An award must contain an indication of the date on which it was made, since that date is of great importance on account of the time-limits that are established by national laws for the filing or registration of arbitral awards, and for the enforcement of arbitral awards. Similarly, an award must clearly show the place where it was made, since the arbitral proceedings must have been conducted in conformity with the mandatory rules of the law applicable at

³ It is suggested that the following revised text should replace the text of the first sentence of article 27, paragraph 4, reproduced in A/CN.9/112. This revised text is identical with that reproduced in A/CN.9/112, except that the words in italics have been added:

"4. An award shall be signed by the arbitrators *and it shall contain the date on which and the place where the award was made...*"

The commentary on this paragraph considers the revised text.

the place of arbitration, and under article 15, paragraph 4 of these Rules, "the award shall be made at the place of arbitration".

8. Paragraph 4 provides further that the validity of an award is not impaired by the failure of any one arbitrator on a three-member arbitral tribunal to sign the award; however, pursuant to this paragraph, the award must state the reason for the absence of that arbitrator's signature. Thus, where two of the three arbitrators agree on an award, the third arbitrator cannot prevent the making of the award by a refusal to sign the award.

9. It should be noted that in some jurisdictions the applicable arbitration law may require that an arbitral award be signed by all the arbitrators before it becomes valid and enforceable; in such a case the applicable national law would prevail over the provision in paragraph 4 of article 27.

10. Paragraph 4 of article 27 does not deal with the possibility that an arbitrator dissenting from the award agreed on by the other two arbitrators may wish to append his dissenting opinion to the award. Consequently, the question of whether an arbitrator may add his dissenting opinion to the award is left for decision to the law applicable at the place of arbitration.

Paragraph 5

11. This paragraph establishes that an award may only be published with the consent of both parties. When publication of an award does take place, the names of the parties are usually omitted and other measures are also taken to avoid disclosure of their identity.

Paragraphs 6 and 7

12. These paragraphs are designed to ensure that both parties will promptly receive copies of the award and that the arbitrators comply with any requirement at the place of arbitration that the award be filed or registered.

Commentary on article 28

Paragraph 1

1. This paragraph is based on the principle of party autonomy for the choice of the law applicable to the substance of a dispute that is referred to arbitration. The wording of this paragraph is modelled on article 2 of the Hague Convention on the Law Applicable to International Sale of Goods of 15 June 1955.

2. The parties' choice of the applicable law may be contained in an express provision in the contract, in the separate arbitration agreement or in a subsequent written agreement between the parties on this point. Alternatively, the choice of law may be an implied one, resulting "unambiguously" from the terms of the contract.

3. It should be noted that in some jurisdictions parties may only choose as the law applicable to the substance of their dispute the law of a jurisdiction having some real connexion with the transaction.

Paragraph 2

4. This paragraph applies where there was no choice of the applicable substantive law under paragraph 1 of article 28, whether by an express clause or resulting from the terms of the contract. In such cases, the law applicable to the substance of the dispute must be chosen by the arbitrators; under paragraph 2 they "shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable". This approach, also found in article VII, paragraph 1, of the 1961 European Convention on International Commercial Arbitration and article 38 of the ECE Arbitration Rules, permits the arbitrators to exercise their discretion in choosing the applicable conflict of laws rules in the light of the particular circumstances of the dispute.

Paragraph 3

5. This paragraph deals with cases where the parties expressly authorize the arbitrators to decide the substance of their dispute *ex aequo et bono* or as *amiables compositeurs*, i.e., based not on the substantive law of any particular jurisdiction but on general principles of law and trade practices. In many jurisdictions arbitrators are permitted to decide on these bases, and provisions similar to paragraph 3 may be found in article VII, paragraph 2, of the 1961 European Convention on International Commercial Arbitration, article 39 of the ECE Arbitration Rules, and article VII, paragraph 4 (b) of the ECAFE Arbitration Rules.

6. Paragraph 3, however, contains an explicit proviso making it clear that arbitrators may decide *ex aequo et bono* or as *amiables compositeurs* only if the arbitration law at the place of arbitration permits such arbitration. Even where such arbitration is permitted, it is generally accepted that the arbitrators remain bound by fundamental principles of public policy (*ordre public*) at the place of arbitration.

Paragraph 4

7. This paragraph provides that "in any case", i.e., regardless of whether the law applicable to the substance of the dispute was determined according to paragraph 1 or 2 of this article, or whether the arbitrators were authorized by the parties to decide the dispute *ex aequo et bono* or as *amiables compositeurs*, the arbitrators throughout the arbitral proceedings and particularly in the making of their award "shall take into account the terms of the contract and the usages of the trade". This gives the arbitrators considerable latitude in arriving at their decision. Similar provisions are contained in article VII, paragraph 4 (a) of the ECAFE Arbitration Rules, article 24 of the ECE Arbitration Rules, and article 13, paragraph 5 of the Rules of Conciliation and Arbitration of the ICC. Furthermore, in the sphere of international commercial arbitration for which these Rules were designed, this result corresponds with the intentions and expectations of the parties.

Commentary on article 29

1. This article applies if, before the award is made, the parties agree to a settlement of their dispute, or if the continuance of the arbitral proceedings becomes unnecessary or impossible for any other reason. It gov-

erns the manner in which the arbitral proceedings are to be concluded in such cases and deals with the apportionment of the costs of arbitration between the parties.

Paragraph 1

2. Where the parties agree to a settlement of their dispute during the course of the arbitral proceedings, this paragraph makes provision for an "order for the discontinuance of the arbitral proceedings" as well as for "an arbitral award on agreed terms". A settlement recorded in the form of an award on agreed terms acquires the legal force of an award. Rule 43 of the Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes similarly distinguishes between an "order of discontinuance" and a "settlement in the form of an arbitral award", while provisions in other arbitration rules, such as paragraph 1 of article VIII of the ECAFE Arbitration Rules, and paragraph 43 of the Rules of Procedure of the Inter-American Arbitration Commission, mention only the latter possibility.

3. Under paragraph 1, to have a settlement reached by the parties recorded as an arbitral award on agreed terms it is not required that the parties submit to the arbitrators the full text of their settlement in such a form that it can be embodied in an award. In practice, the settlement may often be reached orally during the course of a hearing, possibly with the assistance of the arbitrators, and the parties may request the arbitrators to draft an award on agreed terms that corresponds to the settlement reached.

4. The arbitrators, however, are not obligated to record a settlement as an award on agreed terms, even if requested by both parties. Thus, exercising their discretion, arbitrators may be expected to refuse to record as awards those settlements that they deem unlawful or against public policy (*ordre public*) at the place of arbitration.

5. Where the parties reached a settlement and did not request the arbitrators to embody the settlement in an award or where, although requested, the arbitrators in their discretion refused to do so, the arbitrators will issue an order for the discontinuance of the arbitral proceedings.

6. Paragraph 1 also deals with instances where, before an award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible even though the parties have not agreed to a settlement of their dispute. In such cases the arbitrators must notify the parties of their intention to discontinue the arbitral proceedings and may then issue an order of discontinuance. If one or both parties object, however, the arbitrators must proceed with the arbitration and make an award.

Paragraphs 2 and 3

7. These paragraphs have been added to resolve certain technical problems that arise in practice when the arbitral proceedings are for any reason discontinued pursuant to the provisions of paragraph 1 of this article. Under paragraph 2, the apportionment of the costs of arbitration in such cases is left to the discretion of the arbitrators. Under the particular circumstances covered by article 29, the basic principle of article 33, para-

graph 2 to the effect that the "costs of arbitration shall in principle be borne by the unsuccessful party" cannot be applied. It may be expected that, in the absence of any special circumstances, the arbitrators will divide the costs of arbitration equally between the parties in such cases. In addition, any agreement by the parties as to the apportionment of the costs of arbitration would bind the arbitrators.

Commentary on article 30

Paragraph 1

1. After the award has been made, one or both parties may wish that the arbitrators provide an interpretation of the award they have rendered, in order to clarify for the parties its exact meaning and scope. This paragraph permits either party to request that the arbitrators interpret their award. Similar provisions, authorizing the arbitrators to interpret their award, are found in article VIII, paragraph 2 of the ECAFE Arbitration Rules and article 50 of the 1965 Washington Convention on the Settlement of Investment Disputes.

Paragraph 2

2. Under this paragraph, whenever an interpretation is requested by a party and is given by the arbitrators, it must comply with the formal requirements for awards contained in article 27 of these Rules.

3. Article 30 is considered useful in that it provides a vehicle for one or both parties to secure clarification of the award where necessary. Furthermore, in some jurisdictions the competence of the arbitrators is deemed to end with the making of the award, unless the parties had expressly agreed that the arbitrators are to retain a certain limited competence even after the making of their award. Articles 30-32 of these Rules embody express agreements of the parties whereby they authorize the arbitrators to interpret or correct their award and to rectify an omission in their award.

Commentary on article 31

1. This article authorizes the arbitrators to correct certain mistakes in the award, such as errors in computation or those of a clerical nature. A similar provision is contained in article VIII, paragraph 3 of the ECAFE Arbitration Rules.

2. Under that paragraph, the arbitrators may make corrections in their award within a defined period of time, either at the request of a party or on their own initiative. Even in cases where the arbitrators receive a timely request from one or both parties that an error in the award is corrected, the arbitrators have full discretion to decide whether or not they wish to issue such a correction (e.g., the arbitrators may decide that the alleged error whose correction was requested was not an error at all).

Paragraph 2⁴

3. This paragraph provides that any correction of an award issued by the arbitrators must be signed by

⁴ It is suggested that the following revised text should replace the text of article 31, para. 2, reproduced in A/CN.9/112. This revised text is identical with that reproduced in

the arbitrators, communicated by them to the parties and that the requirements at the place of arbitration for the filing or registration of awards must be complied with by the arbitrators. However, in the case of an arbitral tribunal composed of three arbitrators, it is sufficient if the correction of the award is signed by the presiding arbitrator, provided he consulted the other arbitrators prior to his issuing the correction. This latter provision was added to this paragraph in recognition of the fact that in international arbitrations it is likely that the members of a three-member arbitral tribunal reside far from each other and that consequently it may be difficult and time-consuming to obtain the signatures of all the arbitrators.

Commentary on article 32

1. This article is designed to prevent the invalidation of awards on the ground that in their award the arbitrators failed to deal with and decide upon one or more claims presented by either party during the arbitral proceedings. Most national arbitration laws provide that the arbitrators' failure or omission to deal with all the claims raised in the arbitration is sufficient reason for setting aside or refusing to enforce an award. In the absence of a provision such as article 32, a lengthy, costly arbitration might be totally invalidated because the arbitrators inadvertently failed to rule in their award on each part of every claim raised during the arbitral proceedings. To permit, after an award has been made, the making of an additional award as to claims or parts of claims presented during the arbitral proceedings but not dealt with in the original award would contribute to the efficient and effective resolution of the dispute between the parties that had been referred to arbitration.

2. By their adoption of the UNCITRAL Arbitration Rules the parties agree to an extension of the authority of the arbitrators in a number of respects, subject to the mandatory provisions of the law applicable at the place of arbitration. Under article 30 of these Rules the arbitrators may give a binding, written interpretation of the award they have made, and under article 31 the arbitrators may correct errors of a clerical or similar nature in their award. The present article empowers the arbitrators, upon the request of either party, to complete an award they have made by issuing "an additional award as to claims presented in the arbitral proceedings but omitted from the award".

Paragraph 1

3. This paragraph permits a party to request the arbitrators to make an additional award only as to claims that were formally presented during the course of the arbitral proceedings. It therefore applies to matters such as an unintentional failure to fix or apportion the costs of arbitration (article 33), to rule on a claim for interest payments, or to adjudicate in the award a counter-claim that was asserted without substantial supportive evidence.

A/CN.9/112, except that the words in italics have been added: "2. Such corrections shall be in writing and shall be signed by the sole arbitrator or if there was an arbitral tribunal of three members, by the presiding arbitrator after consultation with the other arbitrators. The provisions of article 27, paras. 5, 6 and 7, shall apply."

Paragraph 2

4. Under this paragraph, the arbitrators have full discretion, upon receipt of the request of a party for an additional award, to decide whether or not to make such an award. In addition, the arbitrators may make an additional award only if the omission in the award "can be rectified without any further hearing or evidence". Thus, the additional award would have to be based on the evidence that the arbitrators had before them at the time that they made their original, incomplete award.

Paragraph 3

5. In recognition of the fact that an "additional award" is an "award" within the meaning of these Rules, this paragraph applies the provisions of paragraphs 2 to 7 of article 27 to an additional award.

*Commentary on article 33**Paragraph 1*

1. This paragraph contains a non-exhaustive enumeration of items that are included in the "costs of arbitration". Pursuant to this paragraph, the costs of arbitration are to be fixed in the award and the fee charged by the arbitrators for their services, which forms part of such costs, must be stated separately.

2. Because of the great differences in the nature of disputes that may be referred to arbitration, in the length of arbitral proceedings, and in the demands made on and efforts required of the arbitrators as a consequence, it was not believed possible to develop a uniform schedule of fees for arbitrators.⁵ However, arbitrators, who were selected by the parties or by an appointing authority based on faith in their expertise and in their readiness to adjudicate the dispute with impartiality and fairness, may be expected to act reasonably in setting their own fees.

3. While, under subparagraph (a) of paragraph 1, the fee of the arbitrators must be stated separately in the award, all the other costs of arbitration may be combined into one figure. In cases where arbitrators

⁵ A note concerning a schedule of fees for arbitrators is contained in document A/CN.9/114, reproduced in this volume, part two, III, 4, *infra*.

3. Working paper prepared by the Secretariat: revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules); alternative draft provisions for the draft UNCITRAL Arbitration Rules (A/CN.9/113)

INTRODUCTION

Terms of reference

1. At its eighth session (1-17 April 1975) the United Nations Commission on International Trade Law considered a "Preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade" (A/CN.9/97; UNCITRAL Yearbook, Vol. VI: 1975, part two, III, 1). A summary of the Commission's deliberations at that session is set forth in the report of the Commission on the work of its eighth session (A/10017, annex I; UNCITRAL

were named by an appointing authority, the arbitrators may consult with that authority before setting their fees.

Paragraph 2

4. Similarly to provisions appearing in article 43 of the ECE Arbitration Rules and article VII, paragraph 7 of the ECAFE Arbitration Rules, paragraph 2 of this article lays down as the general rule that the costs of arbitration should be borne by the unsuccessful party, but authorizes the arbitrators to apportion these costs in a different manner whenever justified by the particular circumstances.

*Commentary on article 34**Paragraphs 1 and 2*

1. In *ad hoc* arbitration, it is customary for arbitrators to require an advance payment to cover the costs that will be incurred during the course of the arbitral proceedings. Paragraph 1 provides that each party is to make one half of such advance payment. Paragraph 2 authorizes the arbitrators to require supplementary deposits from the parties, in the light of developments during the arbitral proceedings, e.g., if the proceedings take longer than anticipated or the arbitrators decide that they will need the testimony of experts reporting to them on particular issues (article 24). Similar provisions are contained in article VI, paragraph 7 of the ECAFE Arbitration Rules, and article 28 of the ECE Arbitration Rules.

Paragraph 3

2. Under this paragraph, if a deposit required pursuant to paragraph 1 or 2 of this article is not paid in full within a specified period of time, the arbitrators must notify both parties and give to each party the opportunity to make the required payment. The rule in this paragraph is motivated by the practical consideration that a party who has fulfilled his own obligation by paying one half of the required deposit may have a strong interest in seeing that the arbitration proceeds to a conclusion and may therefore be willing to make the payment required of the other party. If the required payment is still not forthcoming, the arbitrators may either suspend or discontinue the arbitral proceedings.

Yearbook, Vol. VI: 1975, part one, II, 1). At the conclusion of its deliberations, the Commission decided to request the Secretary-General:

(a) To prepare a revised draft of these rules, taking into account the observations made on the preliminary draft in the course of its eighth session;

(b) To submit the revised draft arbitration rules to the Commission at its ninth session.

2. In response to that request the Secretariat has prepared two documents:

LEGAL AUTHORITY CA-163



UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

UNCITRAL Arbitration Rules

GENERAL ASSEMBLY RESOLUTION 31/98

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RESOLUTION 31/98 ADOPTED BY THE GENERAL ASSEMBLY ON 15 DECEMBER 1976

31/98. Arbitration Rules of the United Nations Commission on International Trade Law

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Being convinced that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

Bearing in mind that the Arbitration Rules of the United Nations Commission on International Trade Law have been prepared after extensive consultation with arbitral institutions and centres of international commercial arbitration,

Noting that the Arbitration Rules were adopted by the United Nations Commission on International Trade Law at its ninth session 1/ after due deliberation,

1. **Recommends** the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contracts;

2. **Requests** the Secretary-General to arrange for the widest possible distribution of the Arbitration Rules.

1/ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, chap. V, sect. C.

UNCITRAL ARBITRATION RULES

Section I. Introductory rules

SCOPE OF APPLICATION

Article 1

1. Where the parties to a contract have agreed in writing* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

**MODEL ARBITRATION CLAUSE*

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note - Parties may wish to consider adding:

- (a) The appointing authority shall be ... (name of institution or person);
- (b) The number of arbitrators shall be ... (one or three);
- (c) The place of arbitration shall be ... (town or country);
- (d) The language(s) to be used in the arbitral proceedings shall be ...

NOTICE, CALCULATION OF PERIODS OF TIME

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or

if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee=s last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

NOTICE OF ARBITRATION

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

(a) A demand that the dispute be referred to arbitration;

(b) The names and addresses of the parties;

(c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;

(d) A reference to the contract out of or in relation to which the dispute arises;

(e) The general nature of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;

(b) The notification of the appointment of an arbitrator referred to in article 7;

(c) The statement of claim referred to in article 18.

REPRESENTATION AND ASSISTANCE

Article 4

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

Section II. Composition of the arbitral tribunal

NUMBER OF ARBITRATORS

Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the

parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

APPOINTMENT OF ARBITRATORS (Articles 6 to 8)

Article 6

1. If a sole arbitrator is to be appointed, either party may propose to the other:

(a) The names of one or more persons, one of whom would serve as the sole arbitrator; and

(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.

3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;

(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of

his preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:

(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or

(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

Article 8

1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function.

2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

CHALLENGE OF ARBITRATORS (Articles 9 to 12)

Article 9

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality or independence.

2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.
2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.
3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:
 - (a) When the initial appointment was made by an appointing authority, by that authority;
 - (b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;
 - (c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.
2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for

the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

REPLACEMENT OF AN ARBITRATOR

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR

Article 14

If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

Section III. Arbitral proceedings

GENERAL PROVISIONS

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner

as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

PLACE OF ARBITRATION

Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.

LANGUAGE

Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.
2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

STATEMENT OF CLAIM

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.
2. The statement of claim shall include the following particulars:
 - (a) The names and addresses of the parties;
 - (b) A statement of the facts supporting the claim;
 - (c) The points at issue;
 - (d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

STATEMENT OF DEFENCE

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.
2. The statement of defence shall reply to the particulars *(b)*, *(c)* and *(d)* of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.
3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.
4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

AMENDMENTS TO THE CLAIM OR DEFENCE

Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.
4. In 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.

FURTHER WRITTEN STATEMENTS

Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

PERIODS OF TIME

Article 23

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

EVIDENCE AND HEARINGS (ARTICLES 24 AND 25)

Article 24

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.
2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.
2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.
3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.

4. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.
5. Evidence of witnesses may also be presented in the form of written statements signed by them.
6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

INTERIM MEASURES OF PROTECTION

Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

EXPERTS

Article 27

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference,

established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

DEFAULT

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

CLOSURE OF HEARINGS

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.
2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

WAIVER OF RULES

Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

Section IV. The award

DECISIONS

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision,

if any, by the arbitral tribunal.

FORM AND EFFECT OF THE AWARD

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.
2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.
5. The award may be made public only with the consent of both parties.
6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.
7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

APPLICABLE LAW, AMIABLE COMPOSITEUR

Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall

apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

Article 34

1. 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 both 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.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

INTERPRETATION OF THE AWARD

Article 35

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.
2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.

CORRECTION OF THE AWARD

Article 36

1. Within thirty days after the receipt of the award, either party, with notice to the other 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. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.
2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply.

ADDITIONAL AWARD

Article 37

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.
3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall

apply.

COSTS (Articles 38 to 40)

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.
2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that

authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

DEPOSIT OF COSTS

Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).
2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.
3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.
4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Further information may be obtained from:

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25th September 2002

Dear Colleagues,

*Re: NAFTA Arbitration
Methanex Corporation v United States of America*

By letter dated 28th August 2002 from Messrs Dugan & Wilderotter to the Tribunal, Methanex requested an Interpretation of the Tribunal's First Partial Award of 7th August 2002 under Article 35 of the UNCITRAL Arbitration Rules; and Methanex also requested the Tribunal's assistance in regard to Certain Further Matters.

By the Tribunal's letter dated 10th September 2002 to the Disputing Parties, the Tribunal invited written comments from the USA on Methanex's letter; these were received by the USA's letter dated 23rd September 2002; and we have taken these comments into account in preparing our response. We do not think it necessary to require Methanex to respond to the USA's comments, the reasons for the Disputing Parties' differences being self-evident.

It is convenient to deal separately with (a) Interpretation and (b) Further Matters.

A - Interpretation

1. By its Request for Interpretation, Methanex seeks from the Tribunal an interpretation of the Tribunal's Partial Award in respect of four matters:
 - (i) The definition of "Legally Significant Connection", cited from Paragraph 147 of the Partial Award (page 62);
 - (ii) The contents and scope of the "Fresh Pleading" ordered by the Tribunal, cited from Paragraph 172(5) of the Partial Award (page 74);
 - (iii) The requirements of the Tribunal as to the "Evidence" to be submitted by Methanex, cited from Paragraphs 163, 164 & 165 of the Partial Award (pages 70-71); and
 - (iv) The nature and timetable of the "Future Proceedings", cited from Paragraph 168 of the Partial Award (page 70).

We shall consider each of these matters in turn, subject to a general preliminary comment.

2. Methanex's Request for Interpretation is made under Article 35 of the UNCITRAL Arbitration Rules. It provides:

"(1) Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

(2) The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply [i.e. dealing with the form and effect of the award]."

It is well settled that such a request is limited to an interpretation of the award in the form of clarification; and that it cannot extend to a request to modify or annul the award or take the form of an appeal or review of the award. Indeed, Methanex disclaims expressly any intention of “relitigating any issue the Tribunal has already decided”: see pages 1-2 of Methanex’s letter.

3. In our view, Methanex’s Request does not fall within the scope of Article 35. Accordingly, we decline to treat it as such; and this response does not form part of the Partial Award. Nonetheless, it can do no harm and possibly some good if we were to address certain of the points raised by Methanex, albeit outwith Article 35 of the UNCITRAL Arbitration Rules.

(i) “Legally Significant Connection”

4. At paragraph 147 of the Partial Award (page 62), the Tribunal concluded that the phrase “relating to “ in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them. In its Request, Methanex queries this conclusion, addressing Paragraph 138 of the Partial Award (page 58). There the Tribunal decided that Methanex’s interpretation of the phrase “relating to” as “affected” would produce a surprising, if not absurd, result given that the possible consequences of human conduct are infinite; and by analogy the Tribunal noted that in a traditional legal context, both in the USA and Canada under the laws of contract and civil wrong, a limit is imposed restricting the consequence for which conduct is to be held accountable. This paragraph forms only part of the Tribunal’s reasons which, on this point, are set out in Chapter J of the Partial Award (pages 53 to 62).
5. Methanex seeks confirmation of its understanding that the Partial Award suggests that a NAFTA Party in breach of its Chapter 11 obligations will be liable only for those types of consequences that are actionable in analogous legal circumstances, such as where there is foreseeable, direct or intended injury, or competitive harm.

Alternatively Methanex seeks an interpretation of the phrase “legally significant connection”. It is said that without such an interpretation, Methanex is placed in the difficult and unfair position of marshalling evidence and arguments to meet an undefined standard. For two reasons, Methanex’s several requests are unfounded.

6. First, at Paragraphs 172(2) and (3) of the Partial Award (page 73), the Tribunal decided that Methanex’s Original Statement of Claim and its Amended Statement of Claim (as a whole) failed to meet the jurisdictional requirements of Article 1101(1) NAFTA. At paragraph 172(4), however, with respect to *part* of Methanex’s Amended Statement of Claim (as subsequently supplemented by its written and oral submissions), the Tribunal decided that certain allegations relating to the “intent” underlying the US measures could potentially meet the requirements of Article 1101(1) NAFTA.

7. As appears from Chapter K of the Partial Award (pages 63 to 71), the Tribunal postponed its ruling on jurisdiction in respect of that part of Methanex’s case and ordered a fresh pleading from Methanex because the Tribunal found it impossible to make such a ruling without such a fresh pleading, accompanied by evidential materials. It follows that the difficulties raised by Methanex are illusory. The Tribunal has already decided that insofar as it may have jurisdiction in respect of Methanex’s claim, such jurisdiction can exist only in respect of that part of the claim alleging an “intent” underlying the US measures to benefit the US ethanol industry and to penalise foreign methanol producers, such as Methanex. Accordingly, in this case, Methanex’s claim is not concerned with different factual circumstances (i.e. where that intent is absent).

8. Second, albeit related to this first reason, the interpretation of Article 1101(1) NAFTA in the Partial Award is to be read as a whole, as applied to this particular case. It serves no purpose for Methanex to isolate one particular paragraph in order to construct an ambiguity which does not in fact exist, or if it did, is irrelevant to the circumstances of this case. In our view, the legal requirements of Article 1101(1) are clear for this case, even though one Disputing Party might disagree with our interpretation and although there may be difficulties in defining for all

cases the exact dividing line between a legally significant and insignificant connection: see Paragraph 139 of the Partial Award (page 59). Nonetheless, such difficulties do not exist in this case for the remaining part of Methanex's claim, based on "intent".

(ii) "Fresh Pleading"

9. At Paragraph 172(5) of the Partial Award (page 74), the Tribunal ordered Methanex to submit within ninety days a fresh pleading, complying with Articles 18 and 20 of the UNCITRAL Arbitration Rules and conforming to the decisions contained in the Award. At paragraph 162 of the Partial Award (page 68), the Tribunal had earlier explained:

"Methanex's fresh pleading must take a form different from and more limited than its Amended Statement of Claim. Several material allegations made by Methanex as it developed its oral and written submissions do not appear in the Amended Statement of Claim (nor, of course in the Original Statement of Claim); and it will be for Methanex's careful consideration whether, to what extent and in what form these allegations will be formally pleaded. The fresh pleading must not exceed the limits of Methanex's existing case (pleaded and unpleaded); and we do not intend Methanex to make any new claim in its fresh pleading. It must comply with our decisions in this Award and Articles 18 and 20 of the UNCITRAL Arbitration Rules. As regards the statement of the facts supporting its claim under Article 18(2)(b), Methanex's fresh pleading must set out its specific factual allegations, including all specific inferences to be drawn from those facts."

10. In its Request for Interpretation, Methanex now seeks clarification of the scope and content of this fresh pleading, particularly as to what aspects of the Original and Amended Statement of Claim the Tribunal considers irrelevant. Methanex also seeks confirmation that once it has satisfied Article 1101's "threshold" requirements, it may then proceed to each of its separate claims under Articles 1102, 1105 and 1110 NAFTA.
11. The Tribunal considers that the directions contained in the Partial Award are clear and unambiguous, as to both the form and content of the fresh pleading to be

served by Methanex.

12. As to form, the meaning of the term “fresh pleading” is self-evident. The phrase is indeed absent from the UNCITRAL Arbitration Rules (as Methanex rightly comments); but that can scarcely be the cause of any practical difficulty in this case. As explained in the Partial Award, it will be a pleading “more limited” than the Amended Statement of Claim because that pleading asserts claims for which (as we decided in the Partial Award) the Tribunal has no jurisdiction; and it will be “different” because, as to the intent underlying the US measures, we anticipate that it will include allegations made by Methanex orally and in written submissions subsequent to (and therefore not included in) the Amended Statement of Claim. Accordingly, it will be a new pleading of part of an existing case, partly pleaded and partly unpleaded; and the term “fresh pleading” is a convenient description for that pleading, consistent with Articles 18, 20 and 22 of the UNCITRAL Arbitration Rules. If the position were otherwise, the Tribunal might have had no alternative but to reject Methanex’s Amended Statement of Claim *in toto*.
13. As to content, subject to the outward boundaries permitted by the Tribunal in the Partial Award, it cannot be for this Tribunal to instruct Methanex what should and should not be pleaded in its fresh pleading, as explained in Paragraph 166 of the Partial Award (page 76). Nonetheless, the Tribunal is prepared to reiterate the following guidelines, taken from the Partial Award.
14. As appears from Paragraphs 46-70 of the Partial Award (pages 18 to 24), Methanex’s factual case on “intent” is only comprehensible from certain parts of the Amended Statement of Claim, Methanex’s Rejoinder of 25th May 2001, the transcript of the Jurisdictional Hearing of July 2001 and Methanex’s Reply Submission of 27th July 2001. It is therefore essential for Methanex to reduce its case into one coherent, formal document, i.e. a fresh pleading to stand as its statement of claim in these arbitration proceedings.
15. The pleading requirements of that statement of claim are set out in Article 18(2) of the UNCITRAL Arbitration Rules. These do not call for extended argument,

whether factual or legal. Moreover, as to legal argument, only brief cross-references need be made to Methanex's existing legal materials. It is Methanex's factual case which needs to be pleaded, however succinctly. Inevitably, it will be an important pleading; possibly it may be difficult to draft; but given that it will plead a case Methanex has already advanced in these proceedings, the task should be relatively uncomplicated and achievable within a relatively short time. (It may be noted that the period of ninety days exceeds the maximum period of 45 days usually allowable under Article 23 of the UNCITRAL Arbitration Rules).

16. As to the "threshold matter" raised by Methanex, there seems to be a curious misunderstanding. As already noted above, the Tribunal decided in the Partial Award that one part of Methanex's Amended Statement of Claim (as subsequently supplemented), relating to the alleged "intent" underlying the US measures, could potentially meet the requirements of Article 1101(1) NAFTA. The Tribunal decided that it has no jurisdiction in respect of Methanex's other claims. It follows that, insofar as the fresh pleading is concerned, the Tribunal can have no jurisdiction to consider any allegation originally found in Methanex's Original or Amended Statement of Claim advancing any claim other than the claim based on "intent".

17. Accordingly, these jurisdictional limits apply to the breaches of the substantive provisions of Chapter 11 NAFTA, as alleged by Methanex (i.e. Articles 1102, 1105 and 1110). It cannot be open to a claimant to establish jurisdiction by reference to a specific claim under Article 1101 and then allege breaches of the substantive provisions of Chapter 11 unrelated to that claim and in respect of which the Tribunal would not otherwise have any jurisdiction. In other words, Methanex may now only allege breaches of Articles 1102, 1105 and 1110 NAFTA (as it chooses) insofar as these alleged breaches are related to the alleged "intent" underlying the US measures to favour the US ethanol industry and to penalise foreign methanol producers, such as Methanex.

(iii) "Evidence"

18. At paragraph 172(5) of the Partial Award (page 74), the Tribunal decided that Methanex's fresh pleading should be accompanied by the evidential materials described in the Award, particularly in Paragraphs 163-165 (page 69).
19. At paragraph 163, the Partial Award stated:

"As regards the USA's alleged liability, Methanex must file with that pleading copies of all evidential documents on which it relies (unless identified as documents previously filed with the Tribunal), together with factual witness statements and expert witness reports of any person intended by Methanex to provide testimony at an oral hearing on the merits. For the time being, we exclude evidential materials relating to the alleged quantum of the USA's liability."

At paragraphs 164 and 165, the Partial Award set out further requirements for such factual witness statements and expert reports.

20. In its Request for Interpretation, Methanex seeks confirmation that it is not now required to produce all evidence on which the presentation of its case on the merits will rely, thereby foreclosing the development and presentation of additional evidence at a later stage. Methanex also seeks clarification as to whether it is required to produce "essentially final reports from all its experts" within the ninety day time limit imposed by the Tribunal; and it seeks confirmation now that the Tribunal is not planning to proceed directly to a hearing on the merits.
21. It is difficult for the Tribunal to follow Methanex's apparent difficulties. As the Partial Award states in Paragraph 163 (page 69), Methanex must file with its fresh pleading copies of all evidential documents on which it relies. This direction is clear both as to the ambit of the evidence required ("as regards the USA's alleged liability"; but "we exclude evidential materials relating to the alleged quantum") and the extent ("all evidential documents"). Similarly, there is no ambiguity with respect to the Tribunal's direction on the submission of expert reports, and there is no suggestion that these should be draft reports or reports that are otherwise

incomplete: see Paragraphs 163 and 165 of the Partial Award (pages 69 & 70).

22. Nonetheless, insofar as Methanex may find insuperable difficulty in complying with the ninety day limit imposed by the Partial Award, it remains open to Methanex to seek an extension of that deadline from the Tribunal. Moreover, if for good cause shown, Methanex is unable timeously to complete its filing of all relevant evidential materials, it remains equally open to Methanex to seek dispensation from the Tribunal in regard to missing materials; e.g. an outstanding application against a third person under 28 U.S.C. § 1782 (if applicable), as raised at page 6 of Methanex's letter.
23. It is the Tribunal's intention, both in the Partial Award and now, that Methanex and its legal advisers should have the best opportunity to advance Methanex's best case. It is not the Tribunal's intention to deprive either Disputing Party of its procedural rights under Article 15(1) of the UNCITRAL Arbitration Rules, or otherwise. However, as regards Methanex's present exercise, given the long history of this arbitration (on which Methanex rightly comments at page 7 of its letter), that can only be a reasonable opportunity. There must therefore be a reasonable deadline. In all the circumstances, from the Tribunal's current perspective, ninety days is a reasonable period of time. It could be extended by the Tribunal if necessary; but an extension should be sought by means of a reasoned application to the Tribunal and not by a request for interpretation of the Partial Award.
24. There is no suggestion in the Partial Award that if, at a later stage Methanex sought to submit further relevant evidence, it would be debarred automatically from doing so - nor could there be. This would be a matter for consideration by the Tribunal in the future, if and when that issue arose and after hearing both Disputing Parties.
25. As to Methanex's request for confirmation that the Tribunal is not planning to proceed directly to a hearing on the merits, the answer is obvious from the Partial Award. At Paragraph 168 (page 70), the Tribunal stated that after considering Methanex's fresh pleading and accompanying evidential materials, and subject to

consultation with the Disputing Parties, its present intention is to decide *then* how to proceed further. It follows that the Tribunal has so far made no decision as to the future procedure for the arbitration and is awaiting Methanex's pleading and evidential materials; and that the Tribunal does not intend to make any decision on future procedure without also hearing both Disputing Parties. It may be that Methanex and the USA will then wish to argue that the claim should (or should not) proceed directly to a hearing on the merits; but all that lies in the future.

(iv) "Future Proceedings"

26. In its Request for Interpretation, Methanex expresses its concern that without a more concrete plan for the number, form and content of future pleadings and/or proceedings, the arbitration could become unnecessarily extended. It requests that the Tribunal clarify the nature and timetable for future proceedings.
27. This is not a request for interpretation of the Partial Award but a request that the Tribunal now make an order that it has not yet made - for good reason. As stated in the Partial Award and as here re-stated above, the future procedure in this arbitration cannot be decided by the Tribunal before Methanex's fresh pleading and evidential materials and a procedural hearing with the Disputing Parties. That too lies in the future.

B - Certain Further Matters

28. *NAFTA Documentation:* In the Partial Award, we made no order regarding Methanex's application for documentary production of NAFTA negotiations relating to Article 1105 NAFTA: see Chapter G (page 31). Methanex now makes an application for similar documentation relating to Article 1101 NAFTA. We invite Methanex to clarify two matters.
29. First, is it correct for Methanex to describe its current application as the re-submission of its earlier application, given that these requests are apparently different? Second, after the Tribunal's decisions in the Partial Award on the

meaning of Article 1101, what is the relevance of these documents to any outstanding issue in these arbitration proceedings?

30. The Tribunal, at present, is not minded to decide this application before a procedural hearing with the Disputing Parties. Accordingly, it should not delay Methanex's compliance with the deadline for its fresh pleading and accompanying materials.
31. *Expedited Telephone Conference:* If necessary, the Tribunal will hold an expedited hearing with the Disputing Parties. Its necessity and usefulness may depend, however, on the deadline to be met by Methanex, a point to which we return below
32. *Tolling:* In the Tribunal's view, there should be no tolling. The solution is much more simple: Methanex should make, as soon as practicable, a reasoned application for an extension of time beyond the ninety day deadline. Subject of course to hearing the USA, the Tribunal would receive such an application from Methanex's legal representatives with measured sympathy.

In conclusion, it follows that for the time being the deadline of ninety days imposed on Methanex under the Partial Award stands, expiring on 5th November 2002. If Methanex requires any extension of that deadline for any part of its fresh pleading and accompanying materials, the Tribunal invites it to make a reasoned application in writing as soon as possible. The USA will then be asked to comment in writing on Methanex's application; and thereafter the Tribunal will decide whether it can rule on Methanex's application on paper or with a procedural hearing, whether by telephone conference-call or a meeting in Washington D.C.

This decision was made by the two members of the Tribunal signing this letter. Mr Christopher resigned as arbitrator on 20th September 2002; he played no part in making this decision; and he is not a party to it.

Yours Sincerely,

V.V.Veeder

William Rowley

cc Ms Margrete Stevens: by fax 00 1 202 522 2615.

cc Canada and Mexico.