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
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Part III: The Award, Chapter 16: The Award

16.1 Introduction

The ultimate mandate of a tribunal is to render a final and binding determination of the dispute through a single award or through a series of awards. Such a determination can also arise from an agreement between the parties where this is given tribunal imprimatur as an award. This is discussed in section 16.3.7 below.

It is important to distinguish between *awards* and other decisions of a tribunal. During the course of proceedings, a tribunal will make many determinations that would not properly be seen as awards. These include many of the procedural decisions or orders that frame the course of the process. Rights and obligations in relation to such decisions differ significantly from those in relation to an award. A tribunal needs to ensure that everything is done, both in process and form, to lead to a final and enforceable result where awards are concerned. There are a number of requirements. The first is that all members of a multi-person tribunal must take part in the decision-making process and there must be appropriate deliberations. Conversely, with many mere procedural matters, the chairperson is entitled to make decisions alone. Where some procedural decisions are concerned, such as determining whether confidentiality overrides document production obligations, a tribunal is even permitted to invite an independent expert to review the material so that confidentiality is not inherently breached by the evaluation itself. That delegation would not be possible if the decision was an award, as there is no entitlement to delegate an adjudicatory function.

For an award to be effective, it must also follow certain processes and meet certain form requirements, including signature, adequate reasoning and service. The award may be invalid if these obligations are not met. Institutional scrutiny may also be a requirement for validity. For example, in the ICC context, a determination that is in reality an award but which has not been sent for scrutiny to the  International Court of Arbitration, may be barred from enforcement under Article V(1)(d) of the New York Convention by reason of not following the agreed procedure as per the ICC Rules.

There are also important ramifications as well as requirements if a decision is by way of an award. An award decision will give rise to *res judicata* effects as between the parties. Entitlements to apply for annulment, requests for interpretation, correction or additional awards, or challenges to enforcement, depend on the prior determination being an award. Where a decision is an award, parties also undertake to carry out the award without delay and waive any rights to other forms of recourse insofar as such waiver can validly be made. (1) Once there is a final award, the tribunal's powers have also come to an end, save for any interpretation, correction or addition functions.

Decisions other than awards do not require reasons and would not need to be scrutinised by an institution. Procedural orders are generally not challengeable in the Seat of arbitration. Procedural orders can still be challenged at the enforcement stage but not in and of themselves. This is only possible if they involve procedural irregularities relating to something that truly is an award. (2)

16.2 What Is an Award?

Because of the abovementioned implications of finality, challenge and enforceability, it is thus important to determine when a decision of a tribunal truly constitutes an award. The important question is to distinguish between a procedural ruling or determination on the one hand and an award on the other. The description used by the tribunal will not be determinative. A suggestion that a procedural decision would be an award if termed so by the tribunal was rejected in the drafting of the Model Law. (3) The cases suggest that one should look at the 'function and ... effect rather than the form or qualification ...' of the tribunal's decision. A review court will thus look to the true nature of any decision reached. (4)

16.2.1 Substance versus Procedure

While the importance of the distinction between awards and other decisions is undoubted, there is no simple test that has been uniformly accepted. Attempts to define the nature of an award during the Model Law drafting were rejected, as there was no consensus on any particular definition. (5) Nor was a definition included in the New York Convention. Nevertheless, while there is no recognised definition, there is reasonable consensus as to the key distinguishing features. This can be discerned from arbitral statutes, cases and commentary. A number of Model Law countries have added definitions to their domestic arbitral statutes. Some statutes define an award as 'a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award'. (6) Arbitral rules tend to refrain from defining awards, although the SIAC Rules are an exception and

indicate that an award is 'a decision of the Tribunal on the substance of the dispute ...'. (7)

Commentaries and cases have also attempted definitions. 'Any decision which finally resolves a substantive issue affecting the rights and obligations of the parties is an award'. (8) To truly be final it 'must be final for all intents and purposes'. (9) An award decides all or part of a dispute as opposed to deciding how the proceedings are to be arranged. (10) Another test is to ask, does it settle a substantive issue between the parties? (11) Redfern and Hunter consider that 'the term "award" should be reserved for decisions that finally determine the substantive issues with which they deal'. The term 'award' is applied by arbitral tribunals to characterise their determination on any matter that may require judicial enforcement. (12) The *Verbiese* case (13) considered a general arbitral award to be one which finally determines, in whole or in part, the dispute referred, be it on the merits, on jurisdiction or on a procedural defence which might lead the tribunal to terminate the proceedings. These formulations all distinguish between awards that concern *issues* on the one hand, and procedural orders and directions that are concerned with *conduct* of the arbitration on the other. (14) The essential difference is not as to timing but as to nature. For example, a tribunal may make a preliminary award in relation to jurisdiction or in relation to applicable law as one of its earliest determinations. These are final determinations of one aspect of the dispute between the parties. (15) Conversely, decisions whether to have an oral hearing or as to whether written witness statements should be tendered are merely procedural.

While the reference to an award determining a *substantive* issue is commonly alluded to, one of the problems in using this criterion relates to classification uncertainties under conflict of laws. As noted throughout, different legal families characterise certain issues differently as either substantive or procedural. This can impact upon the way they describe or characterise awards, although ideally, this should not be a determinative factor in any definition. (16) Poudret and Besson conclude 'that an award on procedural matters can be defined as a decision ruling on an issue which may entail, depending on the solution adopted by the arbitral tribunal, the complete or partial end of the arbitral proceedings'. The authors suggest that 'a procedural order deals with the conduct of the procedure and evidentiary measures, and it has no impact on the possible termination of the arbitral proceedings'. (17) When discussing procedural or substantive awards, Poudret and Besson use the term 'procedural' award to cover decisions as to admissibility or *res judicata* and substantive decisions in relation to standing, statutes of limitation and preclusion, all of which the authors believe should be seen as awards. (18) Born argues for an even broader interpretation, suggesting that interlocutory decisions on disputed issues should generally be regarded as awards where they finally dispose of a request for relief by one of the parties by way of an application of legal rules to a factual record. (19) On this basis, decisions for interim relief and disclosure should be treated as awards. (20) He suggests that these decisions can be just as important as decisions on the merits of the substantive issues and should be deserving of the New York Convention's protection. While the efficiency argument is an important one, nevertheless, the New York Convention is unlikely to have been intended to cover such matters. To see provisional measures as automatically constituting awards would lead to some problematic results. For example, two countries that had adopted the New York Convention and UNCITRAL Model Law, where only one expressly accepted the interim measure modifications of the 2006 version of the Model Law, would both have provisional measures treated the same way from an enforcement perspective unless a view was taken that the measure imposed was beyond the tribunal's power.

As noted above, the description used by the tribunal is not determinative. In *Publicis*, part of a claim in a joint-venture dispute was the failure to hand over certain tax records. One tribunal member signed an 'order' which purported to be 'for and on behalf of the arbitrators' calling for the tax information to be handed over. The direction was not complied with and enforcement was sought, requiring consideration as to whether it constituted an enforceable award. A US Court of Appeal considered that the order was in fact a final award on a particular issue and was hence enforceable. (21) There has been criticism of *Publicis* by Pinsolle, (22) and by Poudret and Besson (23) but the distinguishing fact is that the case was about a joint venture with a *substantive* right to the documents. Decisions on substantive rights should presumptively be awards. In *Société Braspetro Oil Services Company (Brasoil)*, the Paris Court of Appeal had to consider a tribunal's procedural order which held that allegations of fraud did not justify an application to review a partial award. The court considered that such a procedural order was in fact a partial award and should have been submitted to the ICC International Court of Arbitration for scrutiny. Further, the failure to follow the institution's rules was a violation of the tribunal's mandate and/or violated due process rights under Article 1502(3) of the French New Code of Civil Procedure which is to similar effect.

Some situations may be difficult to classify, in part because of differences in view as to the essential nature of awards. For example, what about a challenge to the independence of an arbitrator where the tribunal itself makes the determination? Is a decision by a tribunal whether to extend the time period for an award itself an award? Garry Born argues that a stay of arbitration should be considered as an award. (24) In some cases, little may turn on how decisions on the margin are classified.

16.2.2 Final Determinations

Even if the subject matter is one that is naturally dealt with in an award by reason of being a

matter of substance, the determination must be a final decision on that issue if it is to be accepted as an award. (25) A final award is one which settles the dispute between the parties and is enforceable in a court of law. (26) Being final, it can be recognised, set aside, or refused recognition. (27) The concept of finality also means that if the arbitration agreement provides for a two-tiered or appellate mechanism, it might only be the second decision that has sufficient finality to constitute an award. Alternatively, the initial decision could become final once a time limit for triggering the second tier has expired. (28)

A number of courts in the US have taken differing views in both domestic and international arbitration matters as to when an award is final. Most cases seem to be consistent with those of supervisory courts in other jurisdictions, although some decisions have held atypically that a complete answer to one aspect of a damages claim was not final while there were still other damages elements remaining. (29)

The fact that an award connotes finality does not mean that it cannot be impacted upon by later decisions of the tribunal. In *Gulf Petro Trading Co v Nigerian National Petroleum Corp*, (30) a tribunal with the Seat in Geneva bifurcated proceedings and issued a partial award holding the respondent to be liable, leaving quantum to be determined later. At a later stage, respondent argued that claimant did not have standing. The final award accepted this assertion, which in substance overrode the partial award. The final award was confirmed by a Swiss supervisory court. The claimant nevertheless sought enforcement of the partial award or alternatively sought to set aside or modify the final award and assess damages or compel the respondent to arbitrate damages. A US court refused to interfere with the Swiss court's findings. (31) The better view is that standing and liability were separate albeit related issues. When the tribunal ruled on liability it was at a time when standing was not in issue, hence was final as to its terms. There will often be situations where a later award overrides the commercial effect of an earlier award. An example would be a later determination of a set-off claim after a determination of primary liability that goods purchased had not been paid for. If an arbitration is being run concurrently or ancillary to other proceedings, it may also be the case that it can finally settle some issue, but not resolve the dispute. This would still be finality as to the issue within arbitral jurisdiction.

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An award will also be enforceable, but it cannot simply be concluded that any enforceable decisions are necessarily awards. For example, a number of arbitral statutes allow for enforcement of provisional measures, (32) which many see as distinct, although as noted above, some argue that these constitute awards in any event. Some legal systems also allow for enforcement of disclosure orders. (33)

16.2.3 Decisions on Jurisdiction

Under the general test of what constitutes an award, namely dealing finally with a matter of substance or an issue in dispute, it might at first be thought that any decision on jurisdiction, both positive and negative, would naturally satisfy the test. The situation is more complex and there are some arguments to the contrary. It is important to distinguish between cases where a tribunal or an institution merely agrees to proceed to a final award on the basis of a *prima facie* belief that there is jurisdiction and those where actual decisions are made. For example, where there is a challenge to jurisdiction in an ICC case, the court will make a preliminary determination and will only allow a tribunal to be appointed where the matter is arguable. Such a decision is obviously not a decision of the tribunal itself and cannot be seen as an award. Similarly, if a tribunal considers jurisdiction as a preliminary matter and merely concludes that there is a tenable argument to proceed but leaves a final determination to a later date, it cannot be an award because the tribunal is indicating that it is still to make the final determination.

Even where a tribunal purports to make a final determination for or against arbitral jurisdiction the situation has still been open to some debate. Where a positive decision on jurisdiction is taken, most would see this as an award. Nevertheless, Laurence Boo has noted the unique treatment under the UNCITRAL Model Law which provides for judicial review under Article 16(3) under specified time limits, rather than a right to challenge the decision as an award under Article 34. (34) He, thus, questions whether it is properly treated as an award. Redfern and Hunter still describe a partial decision on jurisdiction as an award notwithstanding section 16 provisions. (35) Where a negative decision on jurisdiction is made, Boo asserts that such a ruling leaves all of the substantive claims unresolved, a view accepted by the Singapore Court of Appeal in *Persero*. (36) The Court held that such a decision cannot be an award, because it is, after all, a decision *not* to determine the substance of the dispute.



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In spite of these observations, it would be preferable to see both positive and negative decisions on jurisdiction as awards. A negative decision on jurisdiction deals with every substantive issue *under the arbitration agreement*. It is the final decision to the effect that the claimant has no valid substantive claims in arbitration (or that the respondent has no valid counterclaims or set-off rights in arbitration) as there was never a valid agreement to arbitrate. While a positive decision on jurisdiction may have more limited challenge rights under the UNCITRAL Model Law or similar *lex arbitri*, it should still have all of the other effects of a final award, including, applying as *res judicata* between the parties. (37) Poudret and Besson consider awards on jurisdiction to be just that, but also note their specific nature means that they can and must be challenged immediately under most arbitral statutes. (38) Born sees both positive and negative jurisdictional decisions as awards. (39)

16.2.4 Determinations other Than Awards

Any decision that is not intended to be binding would be contrary to the essential nature of an award regardless of its title. Numerous rules make clear that an award shall be final and binding as to an issue in dispute. Generally speaking, procedural determinations such as to timing, whether there is to be a hearing, number of witnesses or production of documents are not awards. A tribunal is not dealing with an issue in dispute and may always change a procedural determination where later circumstances suggest this is appropriate. While mere procedural decisions, therefore, cannot be enforced for that reason, in some cases a tribunal may have separate power to ensure compliance with such determinations.

16.2.5 Classification and Due Process

 P 1270 As noted above, an important reason to distinguish between an award and other determinations is to identify the impact and rights and obligations that flow from  each kind of decision. The distinction is also important in terms of the proper behaviour of the tribunal. If the tribunal has erred in its understanding of the essence of what it is deciding, it may also have failed to follow necessary processes in support of its intended decision.

If a tribunal wrongly treats what should have been an award as a mere procedural determination, it may fail to follow necessary form and content requirements of an award and hence the determination may be ineffective. For example, if a chairperson alone made the determination of what should have been treated as an award, there would be a failure of a multi-person tribunal to engage in deliberations and take at least a majority decision. There may also be a failure to provide an adequate opportunity for a party to argue the point, a failure to provide adequate reasoning, a failure of a scrutiny obligation with an institution and a failure of mandated form requirements.

16.3 Types of Award

Awards can be categorised in different ways although there is no clear consensus as to typology. (40) Some civilian scholars see classification as important, although it remains the case that to be properly treated as an award with all of the implications that flow, it needs to meet the criteria discussed in section 16.2 above. Exact terminology thus is less important than understanding the real nature of the determination made, which in turn can affect form and content requirements, rights to challenge, future impacts of the decision on the parties such as in relation to *res judicata*, and the ability of the tribunal or arbitral institution to review the determination. (41) However, many statutes and rules specifically refer to different terminology and these categories should be separately considered for that reason alone.

16.3.1 Final Awards

The term 'final award' is generally used to describe an award that resolves any outstanding issues within the reference to arbitration. This might occur in a single award dealing with all issues or in the last of a series of awards when the issues were dealt with sequentially. In part, it is an unfortunate expression simply because the essential nature of any award involves a final determination as to some issue at least, so all awards are final in that sense. Thus, in the current context, the notion of a final award is not the same thing as an award that is final. (42)

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A final award is one intended by an arbitrator to be the complete determination of every issue submitted. (43) In deciding whether an arbitral award is final, it has been held that where a substantive task remained for the arbitrator to perform, (44) where certain portions of the parties' dispute remained unresolved, (45) and significant issues still need to be determined, (46) an award cannot be final in the sense of being a complete award.

When used to refer to an award that is last in time, hence one that is dealing with all outstanding issues, a number of implications flow. Subject to entitlements to interpret, add to, or correct an award as identified in the arbitral rules or statute, the final award completes the tribunal's mandate and renders it *functus officio*. (47) Because of these implications, a tribunal should be wary of describing an award as the Final Award if there are any outstanding issues, for example as to costs or interest. Another issue with final awards is that if the tribunal does not cover everything required, the award might be attacked for failing to complete the mandate and thus being *infra petita*. (48) At times such an award may nevertheless be validly remitted to the tribunal for completion.

Arbitral statutes referring to final awards tend to use the phrase in the context of the last award. (49) Article 32(1) of the UNCITRAL Model Law indicates that 'the arbitral proceedings are terminated by the final award'. Some also refer to the concept of finality as it pertains to awards generally. For example, Article 19B of Singapore's International Arbitration Act contemplates the finality of all awards by stating that 'upon an award being made ... the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award'. (50) Rule 14.1 of the CPR International Rules allows a tribunal to indicate in the award whether it views the award as final for the purposes of any judicial proceedings. At times context will show that a particular award is not final in the preclusive sense. For example, the AAA Class Arbitration Rule 5 requires a tribunal to issue a 'partial final award' as to the class but indicates in Rule 5(e) that such an award may be altered or amended before a final award is rendered.



16.3.2 Partial or Separate Awards

This sub-section and the following sub-sections deal respectively with partial, interim, interlocutory and provisional awards. Judges and commentators may take differing views as to how broadly these phrases should be interpreted. Some rules speak of 'partial' awards while others speak of 'separate' awards. Many also refer to 'interim' awards, but these are discussed separately in section 16.3.3 below because they typically deal with the conceptually discrete topic of provisional measures.

It is important to understand whether phrases such as 'partial', 'separate' or 'interim' cover all determinations such as in relation to jurisdiction, applicable law, admissibility of a claim or counterclaim and liability in principle, as an arbitral statute will typically indicate when court review may apply. A partial award is an award that is a final determination of an issue between the parties where there are still outstanding issues to be determined. Alonso defines a partial award as 'an award that settles disputes between the parties but does not bring the arbitral proceedings to an end'. (51)

Separate or partial awards are expressly permitted in several arbitration statutes (52) and also in various institutional rules. (53) The power to issue partial or separate awards could also be given by agreement of the parties. As discussed below, it is strongly arguable that it is an inherent power in any event. Partial or separate awards may be made on a range of issues including jurisdiction generally, questions of statute of limitations, applicable law, allegations of breach, defences, quantum of damages or other relief, costs and interest.

Where the power to render partial or separate awards emanates from arbitral rules or a statute, it will always be discretionary, subject to any agreement of the parties. Hence, a tribunal can decide whether the circumstances make it appropriate to do so. The power is certainly desirable as it gives the tribunal a chance to try and handle the proceedings in the most efficient manner possible, although there may be contrary considerations in some circumstances. (54) In many cases, a partial award on one issue will make it easier for the parties to settle the balance of their dispute. In other cases, a partial award will remove uncertainty as to the way to best prepare the balance and will concentrate the parties' attention on relevant matters. For example, once the applicable law is known, counsel knows what law to research. Another example where a partial award would be useful would be where there is an exclusion clause or a provision limiting the nature of damages available, which itself is in contest, although that might at times lead to a final determination on the merits.

Redfern and Hunter also note some dangers in partial awards. Parties may alter their cases during the course of proceedings and a final partial award may be undesirably preclusive. A tribunal must be very clear that there is no possibility that it would wish to reconsider a decision in a partial award. Other concerns are the possibility of adversely affecting the confidence of the party against whom the partial award is made. (55) There are also costs involved in rendering a partial award. In some cases there might be duplicated costs flowing from separate hearings for separate awards. Another disadvantage of partial or separate awards is that because they are subject to annulment rights and may be subject to enforcement proceedings, disputes about the validity of the partial award could lead to delays in the arbitral proceedings. As a matter of principle, annulment proceedings as to partial awards or enforcement challenges do not require a halt in the arbitral proceedings, hence they do not mandate undue delay. Nevertheless, in some circumstances, a tribunal might feel that an adjournment is appropriate, in which case that might have been a factor to be taken into account when first determining whether to render a partial award.

If there is neither agreement between the parties nor express or implied provisions in the *lex arbitri* or arbitral rules, it has been doubted whether a power exists. (56) A contrary argument is that unless there is an express reference in an ad hoc agreement to rendering 'an' award in the singular, a grant of a mandate to arbitrate a dispute could be argued to encompass a power to do so in stages where that is thought to be fair and efficient. That could be seen as an implied term of the agreement to arbitrate in any event and/or an inherent adjudicatory power. Where the UNCITRAL Model Law applies, it does not expressly refer to partial awards but the entitlement to render such awards appears to have been intended by the drafters. (57) Lew, Mistelis and Kröll argue that in the absence of an agreement, a partial award may still be rendered where the tribunal considers it appropriate in the circumstances, citing a number of arbitral decisions. (58) Poudret and Besson suggest that there is no doubt that when the laws are silent, arbitrators can make interim, preliminary or partial awards unless the power has been excluded by the parties. (59) The authors suggest that this is a result of the general power to organise the proceedings. Nevertheless, because of the uncertainty, it is always better to provide for an express power. (60) Attention should also be given to the scenarios where the parties either demand a partial award on a particular issue or seek to bar a tribunal from doing so. If only one party requests a partial award, the views of each should be obtained before making a determination on this procedural question. (61)

An important question in the face of either a positive or negative agreement by the parties is whether a tribunal can ignore the parties' directions if it believes that it would be fair and/or efficient to do so. This was discussed generally in sections 2.10.3 and 6.2.4 above. In the specific context of partial or separate awards, the natural concern is that a failure to follow an

agreement of the parties is a failure to follow the mandate and could hence lead to annulment of the award. (62) However, if the parties' agreement comes after the tribunal has been appointed, in appropriate circumstances the tribunal could legitimately say that it would not be fair and reasonable to force it to make a partial determination. An example would be where the tribunal concludes that subsequent evidence is needed to properly determine the issue and that such evidence is not available within the time frame that the parties have set for the partial award.

Redfern and Hunter suggest that where both parties agree that an interim award should be made, this must be followed by the tribunal. (63) Subject to the above qualification as to overriding autonomy, this makes sense, as at worst, the agreement may needlessly add expense but in most cases, would be highly unlikely to ever have problems from a fairness perspective. Poudret and Besson see the parties as also having a power to exclude the making of partial or interim awards. (64) Conversely, if the parties seek to bar the tribunal from rendering an initial award, it is suggested that a tribunal may still render a partial award on jurisdiction or on the law applicable to the merits. (65) If the tribunal made a negative decision on jurisdiction, this is obviously a final award in any event. However, notwithstanding the above comments about overriding autonomy there seems no practical reason to make a preliminary positive decision on jurisdiction where the parties have asked the tribunal not to do so.

Where applicable law is concerned, even if the parties bar the tribunal from making a determination, because it is desirable to indicate the tribunal's thinking on issues that would affect efficiency, a tribunal that is convinced that a particular law should apply could at least notify the parties of its thinking and invite the parties to consider any reasons why that would not be so and make submissions accordingly at the earliest opportunity. If the parties are not happy with the tribunal's view they can always come to a binding agreement on applicable law.

Party agreement as to partial awards could arise from the outset but more typically this might occur under a submission agreement, terms of reference or under an ad hoc agreement as to a provisional timetable. Like any agreement of the parties, it can at times be ambiguous, which can give rise to challenges at a later stage as to whether the tribunal has properly followed its mandate and if so, what ramifications follow. For example, in the *Sodifis* case, a tribunal was asked to successively determine jurisdiction, admissibility of claims and their merits. After dealing with all in a sole award, a Paris Court of Appeal ruled that this was improper, although that decision was itself overruled by the Cour de Cassation. (66) A decision not to make a partial or separate award should not itself be challengeable as an award. (67)

There is also a question as to whether certain forms of preliminary determinations meet the criteria to constitute an award. Poudret and Besson question whether an award simply determining liability in principle would be a partial award or instead is merely a determination of a preliminary issue upon which the outcome of the claim depends. (68) Born describes partial decisions as 'arbitral decisions concerning preliminary substantive issues' (69) and considers that there must be some declaratory element to constitute an award. (70) Differences in view can also be complicated by the fact that some authors are only concerned with whether the term 'partial' is appropriate, and not whether the determination is something other than an award. (71) In some cases, if a tribunal is thought to have failed to cover sufficient issues in a partial award, it might be treated as less than a final determination and hence not be enforceable. Even if the concern is not valid, the possibility of an enforcement court taking a different view remains. The Philippines Supreme Court dealt with a partial award that held that a call on a performance guarantee was unjustified. Nevertheless, because the tribunal had not directed return of the proceeds, the Court chose not to enforce the partial award. (72)

16.3.3 Interim or Interlocutory Awards and Provisional Measures

The term 'interim award' is particularly misleading, sometimes used synonymously with partial awards, sometimes used to deal with a decision dealing with a key issue leading up to the disposition of a claim without disposing of the claim itself and sometimes referring to decisions in relation to provisional measures. It is thus difficult to identify their proper status when the phrase is used in such distinct ways. Partly for this reason, different courts have taken varying views as to whether such determinations can be subject to court application for recognition or annulment. It should not be the terminology that matters in such circumstances.

This chapter discusses the different meanings separately, simply because of these ambiguities and the potential for misclassification, including wrongly using the term 'award' in a determination that is not final as to an issue in dispute. It suggests that the phrase 'interim award' not be used unless mandated in an applicable statute or rules. Interim measures should be described as such where permitted. Other awards should best be described as 'partial' awards if not final in time.

Nevertheless, some books, rules and cases appear to use the term 'interim' awards synonymously with partial or provisional awards. (73) Others concentrate on the notion of finality. A comparison of comments shows how confusion has arisen. The Working Group for the UNCITRAL Model Law considered that an interim, interlocutory or provisional award was one that does not definitively determine an issue that the tribunal has before it. (74) The JAMS International Arbitration Rules allow a tribunal 'to make interim, interlocutory, or partial final

awards'. (75) It does not clarify whether the reference to 'final' is limited to partial awards or is intended to relate to all awards of an interim, interlocutory or partial nature. (76) The English Arbitration Act 1996 refrained from using the phrase 'interim award' which had been included in the earlier version of the legislation. (77)

The conceptual difference between partial and interim awards was also addressed by an ICC Working Party. The Working Party suggested that the term 'interlocutory award' should not be used as it would cause confusion with procedural directions. The Working Party noted that interim and partial awards are often used interchangeably. (78) It suggested that no valid distinction could be made but that, for practical purposes, it used 'interim award' to mean any award made prior to the last award in the case, and 'partial award' to mean a binding determination on one or more (but not all) of the substantive issues. (79) Craig, Park and Paulsson also suggest that partial awards be used for those which dispose of one or more substantive claims while interim awards would in addition cover awards on jurisdiction or on prejudicial questions. (80) There seems to be no reason to see this as a meaningful distinction. A partial award on jurisdiction or on substantive law is still an award, so there would have to be some merit in separately describing decisions on relief sought and decisions that are necessary elements of such dispositive decisions. Furthermore, where jurisdiction is concerned, a respondent's whole defence might only be as to jurisdiction and hence a decision will be as to its claimed relief in any event.

It has also been suggested that for clarity, 'the term interim award should be limited to those awards which do not settle a separate part of the proceedings finally'. (81) If that is the correct definition, it naturally raises the question of whether such determinations are in fact awards. (82) Some commentators suggest that a decision must deal with the claim itself and not merely a subset or gateway issue to constitute an award. (83) The paradigm example would be an interim measure granting certain relief pending the outcome of the hearing. The question of whether these are truly awards or not will typically come up in the context of an attempt to enforce a determination of that nature. In some countries, it is irrelevant whether a decision on an interim measure constitutes an award or not as other provisions may indicate that they may be executed and enforced as if they were final awards. (84)

Alonso questions whether determinations as to interim measures definitively decide any dispute and hence whether they can be subject to annulment or enforcement proceedings. Courts have differed on this question, in part because of differences in facts as to the nature of the interim relief granted and in part, differences in their willingness to re-characterise the determinations made. This might also be impacted upon by the view a court takes as to whether it should be consciously aiding the practical utility of arbitration, which might encourage a greater wish to enforce interim measures.


The balance of this section looks at the proper status of interim measures and whether these should be seen as awards. Born argues in favour of such characterisation by reason that they are final in that they dispose of a request for relief pending the conclusion of the arbitration; they should be complied with and it is important for the efficacy of the arbitral process that they be treated as awards. (85) There are contrary arguments that might prevail. While interim measures may be final in relation to such requested relief, if the relief sought is only temporary, then that argument should not be persuasive. Furthermore, there are many final procedural determinations that satisfy the same test such as in relation to requests for document production, but which are generally not treated as awards. Similarly, the fact that interim decisions are meant to be complied with puts them no higher than document production determinations. Describing them as different to 'interlocutory arbitral decisions' encompassing such things as liability and procedural timetables, brings together an unusual array under that term. A decision on liability is somewhat fundamental to the outcome between the parties. A timetable is not. The argument as to efficacy seems an argument about ends justifying means. Even assuming that arbitration requires meaningful interim measures of protection, the proper approach is to have consensus on this or at least have particular jurisdictions indicate what they wish to do on the issue. Modifications to the Model Law expanding on interim measure powers could have dealt with enforceability directly if they wished. Article 17H as included in the 2006 amendments to the UNCITRAL Model Law allows for enforcement of interim measures at the Seat of arbitration. (86) An individual jurisdiction can agree to enforce interim measure determinations. What is less desirable is an argument based on general efficacy being the basis of inviting the New York Convention to apply to determinations never intended.

Less clear are the implications of provisions in arbitral rules that expressly indicate that an interim measure may be rendered in the form of an interim award. (87) Just as erroneous classification by an arbitrator should not be determinative, if there is an inherent set of features in the concept of an award, the same may be argued if misclassification is contained in arbitral rules. Nevertheless, there may be a difference in that if parties have consented to the rules, they have consented to the descriptor, which should be an acceptance of finality and *res judicata* and may even be a waiver of a challenge to enforcement if that is required.

16.3.4 Provisional Awards and Determinations

As noted above, some arbitral statutes include reference to 'interim' or 'interlocutory' awards. Tribunals will often describe a determination in relation to an application for interim measures as a *provisional* award. In this book, such decisions are described as interim and interlocutory and were discussed in the previous section. Note should also be taken of the


English Arbitration Act 1996 which allows a tribunal to grant provisional relief if the parties agree and generally refers to tribunal 'orders' as opposed to awards. (88) While the notion of a provisional award is accepted under some *lex arbitri* and rules, it is again an undesirable descriptor as it is likely to confuse in terms of its implications. If it is not intended to be a final resolution of an issue it should not be described as an award. (89) If it is intended to be final, the term 'provisional' is misleading as its ordinary meaning conveys the impression that the decision will be revisited in due course. Nevertheless, tribunals may continue to use such descriptions from time to time, in which case the essential character of the decision may need to be identified.

While the phrase 'provisional award' is seen as unfortunate, the notion of a provisional determination capable of reconsideration can be perfectly acceptable. For example, a tribunal might wish to make a provisional decision on a key issue such as jurisdiction. In doing so a tribunal should carefully consider why it is necessary to make any form of determination, what reasons to give for the determination and what indication to give to the parties as to their involvement in the ensuing reconsideration in due course. For example, if there is a preliminary challenge on jurisdiction, a tribunal can merely determine to consider the jurisdictional and merits issues together and leave an award until that stage. It is not making a preliminary determination that it has jurisdiction, but instead, is simply  deciding to hear both issues at the same time. In many cases this will be sensible, for example, if there is a claim of lack of formation of the contract containing the arbitration clause where the tribunal will need to consider the nature of the contract for both jurisdictional and merits purposes. Conversely, if jurisdiction can be finally determined at an earlier stage, then it should normally be done through a separate award.

In some cases, a tribunal may form a view that it would be worth giving careful consideration to jurisdiction prior to deciding whether to hear all evidence on the merits. The parties may even have agreed to a preliminary determination on jurisdiction. If in either circumstance the tribunal believes that there is *prima facie* jurisdiction but wishes to revisit the issue after further evidence, the reasoning provided should explain why the tribunal has formed that view, why the tribunal is not able at that stage to form a definitive view, indicate what further submissions if any on the issue are required from the parties and indicate when a final determination will be made. If the tribunal provides too little in the way of direction, the parties are not helped to know what needs to be done to resolve the issue. If the tribunal provides too much in the way of the reasoning behind a *prima facie* jurisdictional decision, it could appear to the ultimate loser that it has prejudged the final determination.

16.3.5 Default Awards

Another potentially misleading category is that of a *default* award. This term is used by some to describe an award, (whether partial or final), rendered in proceedings where a party has failed to appear or otherwise failed to take part in the proceedings. It is another misleading descriptor simply because it is very different to default or summary judgments that are permissible in some jurisdictions in litigation proceedings when a defendant does not challenge the allegations made. It is certainly the case that a tribunal may render an award notwithstanding the failure of appearance or involvement of a party. This is made clear in virtually all rules (90) and statutes. (91) The power should also be considered to be inherent. If the two parties agree to arbitrate and one subsequently breaches its implied duty of cooperation, this should not interfere with the mandate previously granted.

Describing it as a 'default award' is misleading because in such circumstances, the tribunal must proceed to fully decide the case. There is no possibility of summary judgment arising simply from the failure to appear and respond. The tribunal must decide what evidence will be called for, the degree to which it chooses to test  it, make any necessary decisions as to applicable law or jurisdiction and apply the appropriate burden and standards of proof to the material before it.

There are particular procedural requirements that would be sensible where a tribunal intends to render an award in such circumstances. These are discussed more fully in section 6.15. First, a tribunal must ensure that the non-attending party is given adequate notice of every relevant stage and an adequate opportunity to attend in the future, notwithstanding a failure to do so in the past. As noted, the tribunal must also make a considered decision on the merits based on the evidence and arguments before it. All would agree that it would be improper to merely accept all of the contentions of the party in attendance, although it is less certain how active a tribunal should be in challenging these. A tribunal will have to consider the extent to which it will seek to challenge the evidence in lieu of the non-represented party. While there are some differences in view as to the degree of intervention of a tribunal in such circumstances, many commentators suggest that a tribunal should always consider questions of jurisdiction when there is no one there to raise them. (92) This is expressly dealt with in the ICSID Arbitration Rules. (93)

Where the award itself is concerned, it should be as well reasoned as any other award. In the context of potential challenges, the reasoning in such circumstances may also help to show that appropriate procedures have been followed.

16.3.6 Additional Awards

Most rules will allow a tribunal to provide an additional award to cover matters not previously

dealt with. (94) The term 'additional award' is applied to follow-up awards after a final award has been rendered. The typical case is where a tribunal has failed to address a key issue in its final award. Such awards are discussed further in section 16.16 below, after discussion of correction and interpretation powers. These raise similar questions as to entitlement, timing, form, due process obligations and fee entitlements.

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16.3.7 Settlement or Consent Agreements as Awards

If a settlement agreement is rendered as an award, it may be enforced as such. If instead it is a mere contractual agreement, failure to comply would require an action for breach of contract.

(95) Settlement agreements rendered as awards can also be described as consent awards.

Many arbitral statutes and rules allow for settlements to be recorded in the form of an award.

(96)

Considering whether consent awards should be treated as awards mixes a conceptual question with a question of practical utility. From the conceptual perspective, one could be disinclined to see them as awards, not being a reasoned decision by an adjudicator selecting between conflicting evidence and arguments. The practical perspective would wish to see the resolution as having *res judicata* effect and, in most circumstances, having the support of enforcement mechanisms. Other advantages of consent awards are that official imprimatur may make it easier for certain parties to honour the settlement agreement. This may be so where a State is involved, although if the State can agree to the settlement it can presumably agree to honour it. While these may be desirable effects, as noted in the discussion of interim measures above, it is important that the actions of the tribunal truly constitute an award in the sense of being an appropriate determination of an issue. That is obviously difficult when the agreement has been reached by the parties and not by a reasoned application of law to contested facts by the tribunal itself. Another problem with seeing a settlement agreement as an award may arise in States that require a dispute for arbitration to be valid. If there is a settlement prior to any adjudicatory determination, there may no longer be a dispute. (97)

The view that a purported award without an independent adjudication on the merits by the arbitrator is not in reality an award is not the accepted view. Nevertheless, the conceptual perspective suggests that an arbitrator should give proper consideration to whether the settlement agreement can be justified as a tenable conclusion of law in relation to the factual record as presented. Where this may not be the case, a question then arises as to an arbitrator's powers in such circumstances. This is discussed in the following sub-section.

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Various rules and statutes allow a settlement agreement to be recorded as an award made by consent. Many rules are to similar effect as Article 30(1) of the UNCITRAL Model Law, which indicates that if 'the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms'. Article 30(2) indicates that such an award has the same status and effect as any other award on the merits of the case. All such rules indicate that a tribunal has a right to decide whether to render such an agreement as an award. The ICC Rules use the mandatory term 'shall' but still indicate that it is dependent on the tribunal agreeing to do so. (98) Article 14 of the UNCITRAL Model Law on International Conciliation provides that 'if the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable....' Nevertheless it includes bracketed language to indicate that the enacting State may describe the method of enforcement.

A consent award still must meet all form requirements, save for the more controversial question as to the duty to give reasons, given that there is no separate tribunal determination in a consent award. The rules will typically indicate that an arbitral award in such circumstances does not require reasons. (99) There might also be jurisdictional issues worthy of consideration to ensure enforceability. For example, if the settlement goes beyond the ambit of the original arbitration agreement or the request for arbitration, the settlement can itself be argued to be an implied modification of that agreement allowing for a broader consent award. When in doubt, the parties might need to expressly authorise the broader jurisdiction. Where the parties purport to extend the agreement they cannot bind the arbitrators to accept this. Redfern and Hunter also make the very sensible observation that even if the parties do not wish to have a settlement agreement rendered into the form of an award, it makes sense to promptly advise the tribunal of the settlement as a failure to do so could impact upon future fee and expense obligations and possible entitlements to reimbursement. (100)

One impact of a settlement agreement is to bring to an end the tribunal's mandate. Because the tribunal has a separate agreement with the parties, including as to fees, the settlement agreement cannot adversely affect the arbitrators' contractual entitlements. In some cases this will be ambiguous and it is sensible to expressly cover the entitlement in the event of settlement. (101) In some cases there may be a dispute between the parties as to whether a settlement agreement has in fact been reached. In such circumstances a tribunal will need to rule on that question as part of a jurisdictional analysis if a party's right to pursue arbitration in the face of the alleged agreement is challenged. (102) If a particular arbitration is settled and there are disputes as to whether a party is validly complying with the terms of the settlement agreement, a new arbitration will need to be commenced. This is because the settlement agreement is itself a new agreement alleged to have been breached. There may be

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a question as to whether it comes within the initial arbitration agreement. In some cases the terms of the settlement agreement might be constructed in a way to allow immediate enforcement of an award under the original arbitration, although disputes about compliance with settlement may interfere with such a process.

16.3.8 Refusal to Adopt Settlement Agreements as Awards

The previous section noted that a question arises as to whether an arbitrator must always render a settlement agreement as an award when the parties invite this outcome even if there is simply a discretionary power to this end in all or most cases. The issue arises because of an arbitrator's duty to complete the mandate, act commercially, and provide an award that is justifiable both legally, factually and procedurally. Some assert that a tribunal should only refuse to render a settlement agreement as an award in clearly problematic cases such as fraud, corruption, and violation of statutory provisions, improper impact on third party or public interests or unfair treatment of one of the parties. (103) This response would obviously be recommended if the settlement agreement was illegal or otherwise was contrary to international public policy. (104) However, an arbitrator would be unlikely to refuse to adopt a settlement agreement on the basis of international public policy except in the most extreme examples where all potential enforcement countries would respect the relevant articulation of public policy. Poudret and Besson raise an important example of a settlement agreement that is itself anti-competitive. (105) Another example is where it would violate a mandatory provision of the law of the forum State. (106)

Hausmaninger suggests that the 'ability of the arbitrator to oppose the recording of a settlement in the form of an award arguably restricts the autonomy of the parties in an unjustifiable manner'. Nevertheless, he also acknowledges that an arbitrator arguably has a right to refuse if the settlement terms 'are in conflict with binding laws, public policy, fundamental notions of fairness and justice, or in a case of suspected fraud or illicit settlement'. (107) This implies at the least that a tribunal should consider whether the settlement reached is tenable on the material already placed before the tribunal. Poudret and Besson refer to a number of arbitral statutes and consider that they 'do not oblige arbitrators to review the contents of the settlement submitted for the record, but allow them to not endorse abusive or illegal agreements'. (108)

The more challenging situation is where a tribunal simply cannot see any logical basis for it to arrive at the result achieved by agreement if the dispute had proceeded to a binding determination. For example, a respondent might concede liability when the tribunal thinks the defence it raised is clearly applicable. This might also occur where a respondent concedes that goods sold were not of merchantable quality after an expert tribunal has inspected them and formed a view to the contrary. Even these two situations could lead to differing outcomes. A tribunal could form the view that in the first example, the respondent has effectively waived its defence and the settlement is otherwise consistent with the applicable law. In the second scenario the conclusion is contrary to the factual situation as the tribunal sees it. Conversely, that situation could also be looked at as one where the respondent has now conceded a fact to the point where it is agreed and hence binding on the tribunal. Another example would be where the damages claimed were excessive and without proof and where an ignorant respondent agreed to pay too high a percentage on any reasonable view. There are some good policy arguments in favour of an entitlement to refuse to render a settlement agreement as an award in appropriate circumstances. Enforcement under the New York Convention is supported because national legal systems are prepared to give appropriate deference to an adjudicated determination by an arbitrator. If the result simply flows from an agreement of the parties, this justification is somewhat removed. However, policy issues in arbitration can always be looked at from consent as opposed to jurisdictional perspectives. From the perspective of consent, parties that have expressly selected rules allowing for consent awards might argue that they have agreed to settlements being mandated as awards and hence being available for enforcement under the New York Convention. Conversely, it can be argued that they consented to the tribunal retaining discretion in such circumstances.

Importantly, an arbitrator who refuses is not interfering with the settlement. The arbitrator is simply refusing to give it the imprimatur of an award with the implications for enforcement or future res judicata arguments that this entails. Where the parties have on-going business relations, a tribunal might also not wish the decision to be treated as a guide to future arrangements. A settlement agreement between the parties is nevertheless a binding agreement which could be sued on in its own right and which could be shown to be a waiver of a right to bring other proceedings. If the parties are truly intent on such a settlement, there is no reason why voluntary compliance should not be the norm. When a tribunal refuses to render a settlement agreement as an award, it is also not questioning the reasonableness of the settlement, which could take many factors into account, most importantly, the wish to find a mutually agreeable solution without the transaction costs of an adjudicatory process. A tribunal should still legitimately be able to say in some circumstances that it could not see any reasoned way to come to that conclusion. Consider for example a case of an arbitration agreement that allows an arbitrator to grant specific performance but not damages. The proceedings are commenced and the parties settle for a sum of money. The tribunal simply could not have rendered a reasoned award of this nature in the event of the dispute proceeding and arguably could be entitled to refuse to render the settlement agreement as an award for that reason alone, although it is arguable as above that the agreement is an implied extension of the tribunal's remedy mandate.

If a tribunal chooses to refuse to adopt a settlement agreement as an award there should be no obligation to provide reasons. Giving reasons where the tribunal is troubled by the settlement agreement could undermine the agreement itself.

Redfern and Hunter point to another issue that tribunals might need to be alert to. This is where an arbitral process is being misused to hide a criminal purpose such as money laundering. The authors refer to a situation where parties might try and disguise an unlawful payment in the form of a consent award. The authors sensibly point out that where a tribunal has any reasonable suspicion of such a motivation, the parties should be given an opportunity to provide an explanation, after which the tribunal might terminate the proceedings or refuse to allow a consent award. The authors make the apt observation that if the parties simply seek an order for payment of money, they could effect this themselves with appropriate settlement agreements and do not need an enforceable award. (109)

An alternative to a consent award is an express term in the settlement agreement that if a debtor defaults in required payments, the arbitration can be proceeded with under an expedited time frame.

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16.3.9 Foreign Awards

It is important to consider the distinction between notions of foreign, international or domestic awards. For example, the UNCITRAL Model Law is concerned with 'international' commercial arbitration. The New York Convention is concerned with awards other than domestic awards. (110) Some arbitral statutes seek to define the notion of a foreign award. (111) Depending on the wording of enforcement provisions, an award must be foreign, non-domestic or international for enforcement purposes. The key implication is that the New York Convention is not available to support enforcement of awards in the Seat where rendered. Under the Model Law, annulment and enforcement can be sought in that Seat but only for awards in relation to 'international' commercial arbitration.

Because these questions impact upon enforceability, it is not surprising that some domestic courts have taken different views as to the nature of international or foreign awards. (112) The key test is to consider the place where the award is made and compare it to the place where enforcement is sought, although some domestic courts have taken the view that an overseas award dealing with two domestic parties on a local issue might not be properly seen as foreign.

16.3.10 Termination of Proceedings without an Award

In some cases, arbitral proceedings may be terminated without an award. For example, Article 32 of the UNCITRAL Model Law provides for the tribunal to issue an order terminating proceedings when the claimant withdraws the claim unless the respondent objects 'and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute'; the parties agree on termination; or the tribunal finds that continuation 'has for any other reason become unnecessary or impossible ...' (113) This is also reflected in some arbitral rules. (114) The power to terminate should be seen as inherent, regardless of any express provision in the rules. (115)

Where a claimant withdraws a claim, a respondent can typically ask for the proceedings to continue in the hope of receiving an award in its favour, including a cost determination. Where party agreement is concerned, this also covers cases where a tribunal refuses to render a settlement agreement as a consent award.

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16.4 Truncated Tribunals

As noted in Chapter 5, it is important to consider the impact on award powers if an arbitrator in a multi-person tribunal resigns, dies or refuses to cooperate. If an arbitrator resigns improperly in order to frustrate the process, the first question is whether the relevant rules indicate that a truncated tribunal may proceed or whether the arbitrator must be replaced. If there is no guidance in the *lex arbitri* or the rules, there is a difference in view between those who argue that the remaining arbitrators may continue as a truncated tribunal and those who argue that the arbitrator who has resigned must be replaced. (116) This is discussed in section 5.16. There is also the question of majority deliberations and voting if an arbitrator refuses to either cooperate or resign. This is dealt with in section 16.7 below.

16.5 Time Limits

A number of European systems provide for time limits in their *lex arbitri* as to when an award must be rendered. (117) Most other arbitral statutes generally do not impose time limits on the rendering of awards. Where time limits are contained in arbitration statutes, these are not considered mandatory rules, so they can be waived or modified by the parties. An agreement to rules that allow for extensions will ordinarily be seen as an implied variation or waiver. (118) In some cases the parties may impose time limits in their arbitration agreement, although this is not common, particularly as it would be hard to define an optimal time for all future disputes. If the parties impose time limits in their arbitration agreement, a tribunal should obviously comply or should seek an agreed extension where it would be impossible or

undesirable to meet the deadline.

There are also no time limits in most institutional rules. One reason why most rules do not impose limits is to support the right of a tribunal to withhold the award pending payment of the fees. (119) Another is the concern that a failure to meet the time limit can have problematic ramifications for jurisdiction. The ICC Rules are one of a number of exceptions. (120) Article 30 of the ICC Rules 2012 indicates that the tribunal must render its final award within six months from the date of the last signature by the tribunal or the parties of the terms of reference or, where Article 23(3) applies, the date of the Secretariat's notification to the tribunal of approval of those terms by the Court. The award is considered 'rendered' on the date the arbitrators or a majority of them sign the award. That time period must also include scrutiny and approval of the draft award by the Court. Some rules include special time limits in their expedited procedure rules. (121) The ICC Court may extend the time limit pursuant to a reasonable request from the tribunal or on its own initiative if it is necessary to do so. (122) Notwithstanding the strict language of the ICC Rules, the time limit is typically extended. The ICC will typically grant three-month extensions, six-months where there are convincing reasons presented by the arbitrator and twelve months in exceptional cases where the arbitrators and parties concur with reasons. (123) Where ICC arbitration is concerned, a tribunal should always be aware of the time limits and seek necessary extensions, notwithstanding Secretariat and court practice to manage this and grant extensions without a specific request of the tribunal.

There are advantages and disadvantages of either institutional rules or the parties imposing time limits on a tribunal. Where these are realistic and known in advance, only arbitrators able to comply should accept appointment. The parties can plan accordingly where there are known time limits. This can be particularly important when one or both parties would have significant cash flow concerns if a prompt decision is not rendered. Uncertainty in significant cases can also impact on other commercial activities or attitudes of investors on public stock exchanges. Conversely, too tight a deadline can impact on the quality of the submissions and deliberations. If they can be extended, this raises other policy questions as to when this should occur and how easy it should be for a successful request to be made. Time limits that are habitually extended may have little value. As Alonso suggests, 'there is no better target than one that can really be met'. (124) There is also a significant difference in practice between an overall time limit from commencement of the process or from some later stage such as drafting terms of reference and instead, a discrete time limit for the rendering of an award after the close of proceedings. Where a total time period involves the proceedings themselves, there is then a need to consider how to deal with behaviour by a party that may appear to frustrate the process. Extreme cases are easy to deal with, but in many instances, a party will raise tenable arguments as to why it needs more time than has been allocated.

Whether via statute rules or party agreement, if a tribunal fails to meet a designated deadline there is then the question as to whether it is still entitled to render a binding award. A failure to comply or to have an agreed extension could pose challenges for enforcement. Some courts might hold that consent was limited to being bound by an award rendered within the time limit and hence no later award is possible, the tribunal being *functus officio*. Other courts might hold that the obligation was not mandatory but merely hortatory. (125) Because a tribunal cannot know in advance, the scenario should not be allowed to arise without some agreed mechanism.

If an arbitrator is approached to take on a case where there is an express time limit without an extension mechanism, this should be raised with the parties at the appointment stage, ideally granting the tribunal a power to extend. Another possibility would be for the tribunal to clarify that the declaratory award itself could be rendered within the time period but the reasoned award provided at a later stage. Such options should always occur with the consent of the parties.

16.6 Process of Deliberations and Decision-Making

16.6.1 The Requirements to Deliberate for Multi-member Tribunals

A reasoned award must be a considered one. Where a multi-member tribunal is concerned, this involves the need for deliberations between the tribunal members. The duty to complete the mandate also includes a duty to participate in the deliberations. This should apply equally to partial awards as well as to final awards. National legal systems might expressly require all the arbitrators to take an active part in the deliberations. Even without such a requirement in the national law, the Swiss Federal Supreme Court has stated that the deliberations are 'essential', as it is an 'unwritten rule of international public policy applicable in all international arbitrations'. (126) Alonso suggests there are four subsidiary obligations in the requirement to deliberate: an obligation to fix a date to commence deliberations, an obligation to organise them, an obligation to participate and an obligation to deliberate on all key questions. (127)

While there is a duty, consideration needs to be given to cases where that duty is breached. If an arbitrator refuses to take part, the better view is that the majority can render a valid award. (128) Most institutional rules other than the ICC Rules expressly allow the majority to continue notwithstanding a recalcitrant arbitrator. This is discussed further in section 16.7.

16.6.2 Timing of Deliberations

Fixing a time to commence deliberations and determining the appropriate time frame for their completion involves a balance between the need for expediency and the need for an appropriate consideration of all of the issues. (129) That will in turn depend on such factors as complexity, geographical location of arbitrators, how familiar the tribunal was with all materials at the time of the hearings and how important review of transcripts may be to the ultimate determinations. Timing will also be affected if the tribunal calls for post-hearing submissions. To the extent that an arbitrator has any doubt as to the nature of the arguments or evidence, there would also be a duty to clarify this prior to the close of proceedings. (130)

It is desirable that deliberations as to witness veracity occur as soon as possible after the hearing while recollections are vivid. To the extent that there will be any delay, arbitrators need to make detailed file notes that will help jog their memory. Karl-Heinz Böckstiegel has suggested that witness photographs and even videotaping of witness testimony may be desirable in appropriate cases. Problems can typically arise in larger cases not only because of the fact that leading arbitrators have busy schedules but also because parties typically want one or two rounds of post-hearing briefs. David Rivkin argues strongly that tribunals should take no longer than three months to issue an award given that it is appropriate to do so as close as possible to when they have a full memory of the hearing and understanding of the material they reviewed prior to that event. If counsel had to work to tight schedules, so too should the tribunal.

16.6.3 The Deliberative Process and Control by the Chair

▲ P 1292 There is as much a need for proactive management of the award stage as there is of the pre-award procedures. (131) The chair should manage the stages of deliberation, ▲ preparation of drafts, reviewing drafts, revisions, finalisation, signature and service. It makes sense to allocate time periods where all tribunal members are needed for any of these steps at the same time as designating hearing times otherwise delays are only to be anticipated for busy arbitrators trying to coordinate their spare time.

Where a multi-member tribunal is concerned, the tribunal chair will typically manage the process of deliberations, although it is also suggested that decisions as to how deliberations will occur can be taken by a majority of arbitrators. In each case this would obviously be subject to obligations of reasonableness and fair treatment of all of the arbitrators concerned. (132) A chairperson might distribute an agenda or list of topics or questions for discussion prior to the commencement of the deliberations. The chairperson might also draft a short note of the issues, or circulate a draft or drafts of an award as prepared by various members. Poudret and Besson have suggested as one option, separating consideration of the facts and legal issues, with submission of a written draft of the facts, then oral discussion of these, then oral deliberation of the issues in dispute and circulation of a draft reflecting such deliberations. (133)

The early discussion might indicate which matters the members agree upon, where there is disagreement and the key reasons for such disagreement. It would then be important to consider the proper order of dealing with the various matters. An experienced chair might be concerned to order the issues to promote efficiency so that a unanimous view on one matter may have necessary implications and save time for other outstanding issues. An alternative approach is to try and promote the greatest harmony and willingness to work towards a majority view and select an order that is thought to best promote this. It is sometimes desirable to change the order of discussion of each topic. Psychological studies show that the last person in a group who has a different view to preceding speakers will often feel intimidated and reluctant to speak out about their honest belief. Shifting the order so that they can sometimes speak first ensures that tribunal members feel that their views are equally important. In many cases, a chairperson might prefer to hear the views of other members before venturing their own opinion. Other chairpersons may prefer to have greater control and present their opinions at the outset, seeing where the fellow arbitrators agree or disagree.

▲ P 1293 An important question is the appropriate time to be devoted to deliberations and the willingness of a majority to accommodate minority arbitrators' reasonable time frames for debate. There is a range of permutations and the only overriding criterion is that arbitrators must behave reasonably. Each must be given an appropriate opportunity to engage in meaningful deliberations. A minority arbitrator must be heard by a majority predisposed to a particular view and given an opportunity to try to change their minds. However, a minority arbitrator cannot unduly ▲ delay finalisation of the award by asserting an on-going entitlement to do so. Where the tribunal are not all in clear agreement on key issues, particular skills are needed by the chair in balancing fairness and efficiency, fairness in terms of giving each member an opportunity to present their arguments to the best of their ability and to alter the views of other members, and efficiency in ensuring that no more time is devoted than is reasonably appropriate. The time to call it a day is when further discussion is fruitless. The position is particularly challenging as the chairperson has a legitimate entitlement to present his or her own view to the best of their ability and at the same time, a duty to make other members feel comfortable in presenting conflicting views.

At times the chair may need to consider how to deal with pathological behaviour of a co-arbitrator. One pathological tactic is to seek to resign at a late stage to frustrate the deliberations. Most rules allow for truncated tribunals in such circumstances. At times a tribunal chair will also need to deal with unreasonable advocacy by a party-appointed arbitrator. Another problem arises if a member simply refuses to take part in the deliberations

with a view to deliberately delaying the decision-making process. As long as the chair sets a reasonable time for deliberation, a majority should be able to proceed in such circumstances. If the remaining arbitrators intend to deliberate in the absence of the recalcitrant member, it is preferable that the parties be advised so that the person might be removed as a member or otherwise encouraged to participate. (134) Even if a party-appointed arbitrator displays no willingness to properly participate, every opportunity should be given for that person to do so including proper invitation to every meeting, offers to accommodate schedules to their reasonable request and provision of draft documents including the award. The important thing is to show that the person had the opportunity to participate even if this was not availed of. It also makes sense to keep careful records of the invitations made to the recalcitrant arbitrator to participate. This may help in the event of future challenges.

If the tribunal relationship is suboptimal, a chair might best conduct deliberations in a formal manner with written records. (135) A particularly sensitive situation arises if one arbitrator believes there is some unethical behaviour on the part of a fellow arbitrator. The better view is that such matters should first be raised amongst the arbitrators themselves and if necessary with an applicable institution. Only as a last resort should an arbitrator communicate with one of the parties to raise such misgivings. (136)

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16.6.4 Must There Be Oral Deliberations?

While the norm in multi-member tribunals is to at least begin to deliberate orally after the conclusion of the hearing where one is held, this is not a requirement. Furthermore, even where a tribunal sets aside some time after the conclusion of the hearing to discuss the matter, often there will be no clear agreement at that stage.

The Swiss Federal Supreme Court has considered that all that is required is that each arbitrator be allowed to submit his or her opinion and comment on the views of others. Deliberations can simply involve consideration of written award proposals presented by other members. (137) Deliberations must involve consideration of the reasons as well as the ultimate decision and relief awarded. In many cases each member is invited to draft a particular part of the award or present suggestions for consideration by fellow members.

There are many reasons why some meaningful oral deliberations are to be preferred, however. It is generally desirable to have a discussion, as debating differences in view is much more efficiently conducted orally than in an exchange of emails. It is much easier to develop an emerging view when persons can engage in a dynamic discussion. It is also easier to present preliminary thoughts absent a definitive conclusion as a first step, then invite each to reflect again on the plurality of views in indicating their likely ultimate conclusions. In this way it is easier for one member to question another as to the reasons for differences or pose questions the answers to which would help clarify the views of an undecided member. However, oral discussions mean that the person speaking first has to present their views without hearing the opinions of others. This would not be the case where tribunal members simultaneously present their views in writing.

In complex matters, the norm is to combine some oral deliberations with an on-going written procedure, perhaps with a final teleconference to resolve any outstanding matters. Often the deliberations will simply flow from prior discussions between tribunal members as the hearing evolves. The members might have informally discussed what they felt the key issues were and which testimony would prove to be crucial and which questions needed particular answers. Such informal discussions can be the background to directions to the parties towards the matters of greatest remaining uncertainty for the tribunal. At other times the interpersonal discussions between tribunal members can be highly influential in terms of the ultimate deliberations.

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16.6.5 Place of Deliberations

There is no requirement that deliberations occur in the Seat of the arbitration. At times, oral deliberations may occur wherever tribunal members are meeting on another occasion, such as at an international conference. With the ability of video conferencing or telephone conferences, oral discussions can now also occur in a number of forms.

16.6.6 Deliberations, Queries and New Evidence

While various statutes and rules indicate that once proceedings are closed, parties cannot introduce new material or arguments, the tribunal itself is generally not limited and may even seek further information or clarification from the parties during its deliberations. Due process should suggest that it should seek to do so where it is unclear as to any key matter, but it should also consider whether further submissions from each party would be necessary. (138)

16.6.7 Confidentiality of Deliberations

While the full ambit of confidentiality norms in arbitration is controversial and has not seen uniform consensus amongst a range of jurisdictions, virtually all agree that the tribunal's deliberations should remain confidential. (139) This is enshrined in Rule 9 of the IBA Rules of

Ethics for International Arbitrators:

The deliberations of the arbitral tribunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation. An arbitrator should not participate in, or give any information for the purpose of assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators.

Obviously the Ethical Rule cannot override a mandatory provision of some court procedure that makes an arbitrator compellable in challenge proceedings.

The justification for the *prima facie* norm of confidentiality is that this is an inherent aspect of the adjudicatory function and one that supports its optimal exercise. It has been suggested, 'that secrecy of deliberations is essential if the deliberation is to produce a true discussion and argument and not become a mere exchange of cautiously expressed and selected views'.

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(140) An additional reason is that such confidentiality 'is intended to ensure that each arbitrator is able to exercise his or her independent judgment in a collegial context free of any outside influence'. (141) Karrer suggests that confidentiality over deliberations aims to protect the serenity of the tribunal and the freedom of expression. (142) Secrecy is important to allow for a robust exchange of views, changes of opinion and compromise to form a majority. Lack of secrecy would be a strong incentive for party-appointed arbitrators to adopt a more persuasive approach in favour of their appointing party lest that party feels aggrieved. A further reason to support confidentiality of deliberations is to minimise spurious annulment or enforcement challenges based on matters raised in deliberations or differences between the deliberations and the final award. Improper disclosure of the nature of the deliberations could be a basis for a challenge as to independence. (143)

Confidentiality has implications for the right to dissent as a dissenting opinion can naturally divulge differences. Some even assert that dissenting opinions should not be permitted for this very reason. At the very least, it is important that any permitted dissent only deals with the express reasoning in the majority award and articulates contrary views without divulging the deliberations themselves. Dissenting opinions are discussed further in section 16.7.1.

Confidentiality also has implications for third parties from whom the tribunal seeks assistance. Because the deliberations are private and confidential, no other person should be allowed to be present. This should be so even if the parties have agreed on a tribunal secretary unless this is expressly agreed to by the parties. This principle should not prevent the tribunal from asking the secretary to undertake certain forms of assistance or for the tribunal to ask further questions of the parties or seek advice from a tribunal-appointed expert. As noted in section 12.13.3, inviting a tribunal-appointed expert to vet a draft award to check for errors in scientific terminology does not offend against the obligation to keep deliberations to tribunal members alone. Scrutiny of the draft award is not the same as scrutiny of deliberations.

A controversial recent decision in the Amsterdam Court of Appeal arose in the *Knowsley* case where the court directed that the tribunal secretary's notes should be disclosed. The decision was overturned by the Supreme Court. (144) The case dealt with a particular provision in the Dutch Code of Civil Procedure entitling persons with a legitimate interest to request disclosure of documents or records relating to legal relationships in which they are a party, in this case the argued relationship between a party and the tribunal. The case was concerned with notes generally and not particularly with notes as to deliberations.

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16.6.8 Institutional Scrutiny and Further Deliberations

Where there is institutional scrutiny, such as is the case with the ICC International Court of Arbitration, substantive comments might expressly or impliedly call for further deliberation by the tribunal. (145) This would be the case with matters of substance, although the chairperson alone could no doubt correct a mere typographical error. (146) The same may be so where a draft dissenting opinion causes further reflection by the majority.

16.6.9 Challenges as to Adequacy of Deliberations

While the deliberations are confidential, at times a tribunal member may breach this obligation and warn a party of the direction of the discussions. In other cases, an arbitrator may allege that he or she was denied an adequate opportunity to engage in the deliberations. Each arbitrator must be given a reasonable opportunity to have their views heard and considered by fellow arbitrators. A failure to afford such an opportunity would be a fundamental procedural error.

Supervising courts will be loath to entertain or at least accept such arguments, although such claims are always possible. (147) While deliberations are secret, if a challenge is made and the arbitrators are asked to give evidence, confidentiality is obviously breached. (148) The issues are not without controversy. In the CMEA case, all arbitrators were forced to give evidence in the Swedish court proceedings. (149) Poudret and Besson criticise the view of the Svea Court of Appeal that arbitrators should be treated as witnesses of fact and made to testify about their arbitral proceedings. (150) Whether they may be compelled to give evidence will depend on the law of the supervising court and the extra-territorial reach of that law. How an arbitrator will choose to behave may depend on an amalgam of express provisions in the law and general principles of confidentiality. If the supervising court seeking tribunal evidence is in a Seat selected by the parties, the duty to divulge can be traced to both party consent and the

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jurisdictional basis of the tribunals powers and duties. While an arbitrator should be reluctant to divulge information without compulsion, extreme situations are more complex. Most agree that there would be a duty to disclose gross breaches of propriety by fellow arbitrators. Yet an arbitrator wishing to disrupt the process can easily abuse such a power with false accusations if it was too readily afforded.

16.7 Majority Decisions

It is important for arbitral statutes and rules to give guidance as to whether unanimity is required and if not, how to deal with a range of situations where a multi-person tribunal does not reach consensus. While majority voting is generally allowed, this is separate to the obligation to first deliberate and attempt a consensus position. (151) Arbitral statutes and rules will generally allow for majority awards. (152) A majority opinion is also generally permitted if one arbitrator simply refuses to take part in the deliberations or in any vote. (153) Such provisions are generally not mandatory, hence parties could in theory agree to a requirement of a unanimous decision. In most cases this would be undesirable, as it would grant each arbitrator in a multi-person tribunal an effective veto power. Nevertheless, in some cases parties might wish to maintain the commercial status quo unless there was a unanimous view to the contrary.

Some situations are particularly complex even if majority voting is permitted and the chair is not given a determinative vote as is sometimes the case. One complex situation is where three tribunal members all have distinct views. This will typically occur on quantum questions. It is entirely conceivable that there may be no majority view in favour of any form of relief between a three-person tribunal. Consider, for example, a claim in damages for failure to pay for services. The claimant argues that there was a valid contract concluded or, alternatively, that there is an entitlement based on a restitutionary principle such as unjust enrichment or *quantum meruit*. One tribunal member might uphold the claimant's findings on contract alone. ▲ P 1299 A second member might uphold the claimant's findings ▲▼ on *quantum meruit* alone. The third member might reject the claimant's submissions entirely. A majority has found in favour of the claimant but there is a majority against each legal argument. Does the claimant deserve to win? Is there any obligation on the tribunal to reconsider its position? Legal systems may differ on these questions and arbitral rules and statutes give no guidance. Alonso notes the position in relation to Article 16 of the ICSID Arbitration Rules that if a proposal fails to achieve a majority it should fail. (154) This still depends on what is considered to constitute a 'proposal'. Absent any directive, the better view should be that if the majority considered that the claimant deserved to succeed, albeit for differing reasons, then this should arise if there is a consensus on quantum, even if only a consensus as to the minimum entitlement.

Some statutes and rules allow for a definitive award by the chairperson in circumstances where no majority exists. (155) Where the chairperson has the right to make a determination absent a majority view, it is thus possible that both co-arbitrators would dissent. (156) A further alternative approach is to require the chair to select among the differing positions of co-arbitrators. This may be a problem in that each of those views may have been disapproved of by the chairperson. (157) Fouchard suggests that there may be a transnational norm of public policy supporting such a chairperson's casting vote, (158) but Poudret and Besson point to the diversity of rules as a countering argument. (159) Alonso suggests that allowing the chairperson to make the decision if a majority is not obtained prevents ▲▼ deadlocks and protects the effectiveness of the arbitration proceedings. (160) While such a rule ensures that there will be no deadlock, it has important implications for the power of the chairperson and their ability to sway others to their views in deliberations. (161) A unilateral deadlock power may impact even sub-consciously upon the entire deliberations and not simply operate as a residual power.


One interpretative question concerns the ambit of a chairperson's powers if there is an agreement on some matters but not others. (162) Poudret and Besson suggest that unless the questions are necessarily linked, there ought to be a vote on each separate issue and that the chairperson should only exercise a casting vote when it is unavoidable. (163) In other cases, statutes and rules might require a majority decision. An abstention should be seen as a negative vote. (164) If there is no apparent majority position where a majority is required, the preferable view is that the duty to complete the mandate involves a duty to continue deliberations to try to form a majority. (165) Hausmaninger thus suggests that where there are three different legal opinions, arbitrators might arguably be under a duty to find a compromise. (166) A contrary argument would be that they have deliberated fully and the only question is where the majority opinion is in such circumstances. Once again there are advantages and disadvantages of any such obligation. The disadvantage is that some arbitrators may feel a need to reach a compromise that in their view could simply not be reached by any reasonable adjudicatory thought process. If they then provide honest reasons for their concurrence with the majority, that might even lead to challenges to the award on the basis that there is no true majority for a particular declaratory finding. (167)

▲ P 1301 There also needs to be some mechanism where there is an even number of arbitrators. This will usually be a casting vote of the chair. If there is no indication, ▲▼ a failure to achieve a majority in favour of any form of relief is again arguably rejection of that claim.


16.7.1 Dissenting Opinions


16.7.1.1 Permissibility and Utility of Dissent

Most arbitral statutes or rules do not expressly refer to dissenting opinions in arbitral awards although there are exceptions. It is widely accepted that such opinions are not part of the final award and should not be treated as a distinct award. Civil law jurisdictions have had the greatest concern with dissenting opinions, seeing them as being contrary to the collegial nature of the courts, (168) although a number of civil law jurisdictions have now expressly allowed for dissenting opinions. (169)

The divergent historical views meant that no specific provisions could be included in the UNCITRAL Model Law or the UNCITRAL Arbitration Rules. (170) The UNCITRAL Secretariat commented that 'the Model Law neither requires nor prohibits 'dissenting opinions'. (171) The Iran-US Claims Tribunal incorporated an amendment to the UNCITRAL Rules to allow for dissenting opinions. (172) Dissenting opinions are expressly allowed for under the ICSID Convention. (173) The express reference in the ICSID Rules and the modification by the Iran-US Claims Tribunal are based on the view that dissenting opinions are seen as particularly suitable where a State is a party. (174) In other cases, dissents are now expressly allowed for in some national laws or arbitral rules. (175) Where arbitral rules are silent as to the possibility of dissenting opinions, there has been debate about whether there is a general entitlement or not. The 2007 SCC Rules removed the reference to dissenting opinions but this was not intended as a change in  entitlement. (176) More generally, Karrer suggests that once the decision has been reached and the award issued, an arbitrator may rightly distance himself from a majority decision and voice a dissent. (177) Born argues that the right to provide a dissenting or separate opinion is a natural corollary of the adjudicative function and the obligation to provide a reasoned award. (178) That is certainly the better view although the argument is circular in that the contrary assertion would simply be that the duty is only to reach a *majority* reasoned award as this is the only outcome with dispositive effect.

Redfern presents a strong argument against the prevalence of dissents in arbitration although he accepts the reality that dissents are here to stay. (179) Arguments against the use of dissenting opinions include that it would disclose too much about the deliberative process, would identify a dissenter with the appointing party and would identify grounds for challenging the award. (180) They may undermine respect for the majority conclusions. Dissenting opinions can also add costs and delay the process. There are thus both theoretical and practical elements of the policy debate. Because it is widely accepted that the deliberations of the tribunal are confidential, some have questioned whether dissenting opinions are even permissible given that they would at least point to some disagreement emanating from those deliberations. While some eminent scholars support the view that any dissent breaches secrecy, (181) as noted, some rules take a different approach in expressly supporting the right to dissent at the same time as requiring secrecy of deliberations. (182)

The better view is that dissents do not breach confidentiality in any problematic way. Confidentiality is as to the deliberations, not the reasons for the decisions. Transparency as to reasons is a requirement itself. The duty to complete the mandate is an individual one, albeit encompassing duties of collegiality and deliberation. Each arbitrator should ultimately make a determination as to the way the applicable law applies to the facts as found and present that view  within the deliberations. The common practice of having an odd number of arbitrators implies that it can readily be contemplated that differing arbitrators may come to different conclusions. An odd number at least means that a majority decision can be identifiable in all but exceptional cases. (183) A dissenting opinion that merely presents the reasoning that was found compelling by that arbitrator is not divulging the nature of the deliberations. The contrary view often fails to distinguish between the deliberations themselves and the reasons why an individual arbitrator cannot concur with the majority's published reasoning. The only tenable aspect of the breach of secrecy argument is as to the voting process itself. To some, even a mere indication that there was a majority decision divulges an aspect of the vote and should not be allowed. The concern is even stronger when the identity of the dissenter is known. While it cannot be denied that disclosure of dissent shows a lack of consensus in deliberations, in essence, it simply shows that the reason for the decision is that a majority preferred a set of arguments over those preferred by the dissenter. That is best seen as an honest articulation of required reasons, with the corollary that inferences as to deliberations must be allowed to that extent at least. Even if a dissenting opinion is an improper breach of confidentiality, there is no reason why it should invalidate the award as the majority has made the decision and the dissent merely presents a different view. The ICC Working Party did not identify any country where an award might be challenged simply because of the inclusion of a dissenting opinion. (184)

Other arguments operate on a more practical level. There is a difference between what is permissible and what is desirable. While it may make sense to expressly indicate that dissenting opinions are permissible to avoid doubt, it has been observed that this may be undesirable in unduly encouraging such opinions. (185) An ICC Commission Report concluded that no active steps should be taken to encourage dissenting opinions. (186) There is some concern that dissents may increase the likelihood of challenge by providing criticisms of the majority from within. Whether a dissent encourages challenge depends on the matters addressed. If the dissenting arbitrator has taken a different view on a substantive issue whether as to fact or law, it ought not to justify any challenge to the award. The more difficult situation is where the dissent is based upon a difference in view as to procedure. The aggrieved party, regardless of whether there is a dissent, could  address such irregularities in any event and should have done so during the course of proceedings. The same is so if only the arbitrators know the irregularity.

Where an institution is involved, it might have been invited to intervene as to the irregularity. In an extreme case, an individual arbitrator might justify resignation on the basis of a procedural impropriety. To continue with the hearing and allude to procedural improprieties in a dissenting opinion is decidedly suboptimal as it gives grounds for challenging the award but no ideal evidentiary basis for making a determination. Nor is it desirable to call arbitrators as witnesses in dealing with these issues.

There may be a range of factual permutations that suggest differing solutions on a case-by-case basis. In some cases a dissent on procedural grounds might even make it easier to dispose of a challenge. This would be so where comments about procedural error in a dissent could be analysed as compared to the behaviour of the aggrieved party and the arbitrator prior to the award. In some cases this may bar a successful challenge by showing consent or waiver at an earlier stage. In one case, the contents of a dissenting opinion even allowed a supervising court to conclude that the majority had not overlooked a witness statement even though it was not referred to by them. The statement was referred to in the dissenting opinion and the court noted that such a written opinion could not contain anything not presented by the dissenter to the co-arbitrators. (187) However, an assertion in a dissenting opinion where there is no contemporaneous evidence may support some challenges that could not otherwise be successfully made. There is also the question of whether the dissenter could provide the information in other ways, such as by affidavit to be tendered in court.

When analysing the utility of dissents, it is important to understand the difference between dissenting opinions in courts and dissenting opinions in arbitrations. Where common law courts are concerned, a dissent provides a counterbalancing argument to the majority for the benefit of an appellate court. Other courts, for which the decision is merely persuasive, are given competing arguments through the dissent. Because arbitration does not have an appellate process and because there is no doctrine of precedent and only modest reporting of awards, a dissenting opinion must be justified on other grounds. While there is no doctrine of stare decisis in arbitration, nevertheless certain opinions are influential, particularly in the growing field of investment arbitration. Here we see many experienced commercial arbitrators coming to grips with complex and at times unfamiliar concepts such as national treatment, fair and equitable treatment, nondiscrimination, most favoured nation clauses and expropriation. Where such decisions are published, critically analysed and cited in other cases, they will obviously be influential. Having said that, the dissenter is not under the same duty as a publicly appointed judge in a common law jurisdiction to use individual cases as a mechanism to help develop the law for the benefit of a broader society or group.

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Some criticisms are based on presumed impact on behaviour. While some argue that the potential for a dissenting opinion will encourage party-appointed arbitrators to feel pressured to support their appointer, the same situation would arise with a simple refusal to sign an award. Even if dissents are invariably provided in favour of the party that appointed the dissenter, this does not necessarily show bias as the parties may have selected arbitrators with a particular approach to questions of law and fact that would be favourable to their case strategy. Alonso makes the observation that preventing dissenting opinions because a party-appointed arbitrator may wish to frustrate the process does not stop other forms of frustrating behaviour. Similarly, some of the key problems with dissenting opinions might arise in any event. An example would be a breach of the confidentiality in the deliberative discussions other than through an express written opinion. (188) There is even a contrary logic that the ability to provide a written dissent might even discourage the dissenter from continuing to press their views in deliberations, knowing that its distinct position can at least be identified to the appointing party. (189) If so, that might be a distinct problem arising from the entitlement to dissent.

One argument in favour is that the very essence of adjudication is to make the decision on the issues before the tribunal. If a particular tribunal member has made a decision, albeit a minority one, he or she ought to be able to reflect that in the award. To ask them to sign on to reasoning of the majority, to which they do not agree, is contrary to the decision they actually reached. (190) As noted, some argue that the right to dissent is an inherent power of the adjudicatory process. Such opinions may be the last resort to identify flaws in the majority and even fundamental procedural irregularities, although as to the latter, it has been observed that there are better avenues earlier on in the proceedings in all but extreme cases. Publication of dissents will also help scholarly analysis.

From the perspective of the parties, an important justification for reasoned awards is to explain to the loser why the particular result was arrived at. If there is dissent, the real reason for the decision is that the majority took a particular view contrary to the third tribunal member. An honest and comprehensive articulation of the reasoning would indicate contrary arguments that are tenable, albeit ones that have been rejected by the majority. If the reasoning is complete, the losing party not only benefits from knowing why it lost in the instant case, but in many circumstances of modern commerce, is then better able to modify its commercial transactions in the future to better protect its position.

Dissenting opinions may also assist in settlement negotiations and clarification of entitlements in future transactions. A very significant percentage of modern international trade is between parties with on-going commercial relationships. A dissenting opinion might show that there is at least some uncertainty in the terms and conditions of the parties' dealings that

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might require greater clarity to avoid future disputes. They also allow an arbitrator to maintain his or her reputation if the majority reasoning is thought to be of an inferior standard. (191) Another advantage is that a draft dissent that is well argued may alter the views of the majority. (192) A draft dissent is no different to a well-argued position communicated between arbitrators during deliberations. It may be more persuasive when articulated in writing, showing the majority that they will have to reject a powerful set of reasons to reach a contrary conclusion. (193) A dissent may also be useful for an ICSID annulment committee or to assist ICC Court scrutiny. While dissenting opinions are not scrutinised as such by the ICC Court, their very existence might call for greater scrutiny of the majority's view. (194)

While there are thus some potential benefits, given the potential problems, consideration should also be given to whether the suggested benefits could be achieved in less contentious ways. For example, the concern for robust analysis should arise with open and frank deliberations and can even have the dissentient's arguments included in the award as well-expressed alternative submissions that were nonetheless rejected, without needing to identify the voting pattern.

16.7.1.2 Process for and Treatment of Dissenting Opinions

The debate has generally moved from an initially polarised discussion as to whether dissent should be permitted and/or is an inherent right of an adjudicator, to consider the way dissenting opinions should be handled in practice to minimise disruption and promote any perceived advantages. Arroyo identifies a range of possibilities for the treatment of a dissenting opinion. If the majority agree on incorporation of the dissenting opinion in the award, they could include it in full; include a summary of the dissentient's views or intersperse particular aspects of the dissent throughout the majority reasoning. Where reference is made to the dissent, the majority can then decide whether to give reasons why they disagree with the dissenter, or simply provide a brief summary of those reasons or give no indication of its content.

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Where the rules are silent, it is left to the majority or agreement of the parties to determine whether a dissenting opinion may be joined to the award. (195) Poudret and Besson support this power, although they acknowledge the potential conflict in such a power and sensibly recommend that such a decision be taken at the opening of deliberations before divisions in views are known. (196) However, even raising it for discussion may encourage greater use of the possibility. If an arbitrator indicates an intention to provide a dissenting opinion, the chair should call for its submission before the final award so its contents can be adequately considered. (197) If there are two dissents, there will also need to be an opportunity for each to comment on the other's views. (198) In cases where a well-argued dissent might conceivably cause reflection by the majority, some time ought to be granted to allow this to occur. This would not be necessary in a simple case where there was a dispute of fact between conflicting witnesses and different arbitrators simply took a different view as to which witness to prefer.

The Working Session of the International Court of the ICC adopted the following approach to dissents in September 2000:

... the dissenting arbitrator should be invited to indicate if his document constitutes a dissenting opinion which he wants to have communicated to the parties or just comments for the benefit of the Secretariat and the Court. The majority should then be invited to consider whether in view of the dissenting opinion, they want to change anything in their award. At the same time the arbitral tribunal shall be informed that the dissenting opinion will be communicated to the parties when notifying a signed award. They should not be asked whether they agree or disagree with the communication of the dissenting opinion. If the arbitrators take the initiative and request that the dissenting opinion not be communicated by the Secretariat, they are to be invited to state good reasons why the communication could endanger the validity and execution of the majority award ... All comments, etc. will be submitted to the Court Session when approving the award. In the absence of valid reasons the opinion will be sent to the parties. (199)

The ICC Court will also consider whether to attach the individual opinion to the award and pursuant to Article 41 of the ICC Rules 2012 will seek to ensure enforceability in making such determinations. (200)

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Some take the view that a dissenting opinion can only explain the reasons for disagreement with the majority award and hence cannot be circulated prior to the majority award being known. (201) The better view is that prior dissemination is of a *draft* dissenting opinion. As noted, the majority might incorporate the views or even change their views, making publication of the dissent unnecessary. Conversely, if the dissenter feels that the majority has attempted to cover the minority views in its final award but has done so inadequately, a revised final dissenting opinion might be utilised. The key issue is whether to simply include the dissenting reasons in a unified award. If the majority award includes the arguments of the dissentient, this can ensure that the views are expressed objectively and without rancour. This also helps show that all arguments were properly considered. Where the dissent is based on a tenable difference in view, the position might well have been covered in any event in a unanimous decision, given that the losing party would have presented the arguments

ultimately rejected. A well-reasoned award would explain why those arguments were rejected.

Where all signatures are required for award validity, it would be far preferable to include the dissident's view in the actual award to ensure that there is no valid ground to refuse to sign. (202) In some cases this may be impractical if the dissenter wishes to have the primary role in articulating his or her arguments but cannot meet a reasonable deadline for completion of the draft award. There may also be problems if the dissenter takes issue with the way the majority deals with the minority view in the draft award.

There is also the question whether the dissenting arbitrator can demand that his or her opinion be attached to the award regardless of the views of the majority. As noted, in the absence of an express direction, one view is that a dissenting opinion might only be permitted if the majority of the tribunal allows. (203) Article 53 of the Chinese Arbitration Law indicates that the opinion of the minority arbitrator shall be recorded in writing. A refusal to allow a dissenter to attach a dissenting opinion should not lead to challenge to the award unless such an entitlement is expressed in party agreement, the *lex arbitri* or the arbitral rules. (204) Even if there was a right to include a dissenting opinion, this is only a matter of form and should not affect the enforceability of the award itself, particularly as the minority arbitrator can notify the dissenting opinion to the parties separately. While most believe that the majority can determine whether a dissenting opinion will be attached to the award, the majority cannot bar the dissenter from separately presenting his or her opinion to the parties and any relevant institution. (205)

While the better view is that dissents do not breach principles of confidentiality over deliberations, and in any event, should not ground successful enforcement challenges, if the country where the arbitration is held took a different view, a dissent should not be included with the award. A tribunal might consider a similar response if a known enforcement country also would have concerns with dissenting opinions. Care should also be taken in the contrary situation where a failure to include a dissent would be seen by an enforcement court as improper.

If the award does not contain the dissent, the tribunal may choose to organise service of the dissent simultaneously with the award. Arroyo suggests that this should occur through separate mail. (206) If the dissent is separately served, the tribunal will then need to decide whether to refer to the dissent in the award. A tribunal might also choose to indicate that the dissenting opinion is not part of the award. Most institutions will distribute dissenting opinions to the parties where they are provided to the institution. (207) Institutions will tend to have the dissenting opinion sent to the parties simultaneously with the award if not already included, but would justifiably not wish to hold up delivery of the majority award if the dissenting opinion is delayed. Where the ICC invites the majority to consider whether the dissenting opinion should be communicated, arguments presented against might relate to the invalidity of a dissent under the applicable law or a potential adverse impact on enforceability. (208) Another question is whether to disclose the name of the dissenting arbitrator. The ICC Working Party recommended that dissenting views be presented on an anonymous basis. (209)


It has been suggested that if an award is annulled, a dissenting opinion might provide grounds for challenging the dissenting arbitrator on the basis of independence (210) although if an award is annulled it is the majority view that has been overturned. The dissenter might be challenged on the basis that the opinion is so unreasonable that it shows bias, but this would be rare and would require extreme facts. If the award is annulled, *a priori* the majority view should at least be equally open to such scrutiny.

16.7.1.3 Content of Dissenting Opinions

The IBA Rules of Ethics for International Arbitrators do not address the issue of dissenting opinions. (211) Lévy suggests a code of ethics covering the need to warn colleagues of dissenting intentions, submissions of a draft dissent, limiting the statement to appropriate matters and not unduly delaying the award. The ethical position of the dissenter should ensure that the aim is to promote reflection by the majority and if no changes are made, to promote the optimal articulation of the conflicting arguments. If included in any form, a dissent should not be described as an award. It should be set out in a way that is clear to the reader that it is a separate opinion and not dispositive in any manner. Arroyo suggests that it might appear in italics or be added after the signatures under the heading 'dissent'. (212)

Even where a dissent is permissible, an arbitrator should not use this power to unduly criticise the majority opinion and undermine the award. Just as the parties have agreed to be bound by a majority decision, so too has an arbitrator in the minority agreed to work within that framework and respect the decision-making procedures leading to a binding award. The dissenting arbitrator should never use the process to try and demonstrate why the dissent is the only position that is reasonable except in the most extreme cases where the majority decision itself could not be reached on reasonable analysis. As James Carter has argued cogently '(t)he arbitrator's right to dissent should be exercised with the due respect for the integrity of the process'. (213) A good faith dissent merely explains the reasons for the difference in view. On this basis, it should not deal with arguments that were not presented in the deliberations. A dissenting opinion can address the contrary reasoning in the majority and explain why a different view is held but should ensure that this is done respectfully, objectively and impartially. At times, an arbitrator may simply wish to indicate dissenting

reasons but nevertheless indicate a willingness to concur in the conclusion. (214) A dissent should not include personal attacks on co-arbitrators, breach of confidential aspects of deliberations or a mechanism to assert grounds for annulment or challenges to enforcement. If there were such legitimate grounds, an individual arbitrator should already have raised them, or have even resigned.

Some Swiss commentators have argued that a dissent may not even be a critique of the award and should be limited to questions of law. There is no reason it should be narrowed in this way or why a respectful explanation of the differing reasons and conclusions from that of the majority, which by definition is a critique,  cannot occur. (215) It may be more a question of semantics as some commentators suggesting that dissenting opinions should be limited to questions of law nevertheless include rules of evidence and even appreciation of facts within that concept. (216)

It may also be that the opinion is not truly a dissent. For example, section 16.7 looked at the situation of differing views of arbitrators where it may be uncertain whether there is a majority for any proposition. What about a separate opinion that merely has differing reasons for the same relief as granted by the majority? In such circumstances there is in fact a unanimous view of relief and the better view would be that properly articulating the reasoning of all members should indicate the alternative views.

16.8 Content and Formalities of the Award

As noted in section 2.7.14.1 above, a number of rules require a tribunal to make every effort to ensure that the award is enforceable at law. A contentious question is whether an award needs to comply with each and every special requirement for enforceability in particular jurisdictions that may be thought to be relevant. There is no automatic obligation to this effect but the more the parties bring the requirements to the attention of the tribunal and the less onerous they are, the more sense it makes to comply.

A number of national legal systems impose strict form requirements on awards. These may require awards to be in writing, indicate the date and place of the award, name the parties and arbitrators and be signed by the majority. Some rules and statutes require particular matters to be dealt with in the award. For example, ICC Rules 2012 Article 37(4) states that the final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. The Swiss PIL indicates that an award must be signed and dated and indicate if unanimity was not achieved. (217) Conversely, Section 52(1) of the English Arbitration Act 1996 indicates that the parties are free to agree on the form of the award. Content, form and structure are addressed in the following sections.


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16.8.1 Awards in Writing

While conventions do not expressly call for awards to be in writing, this is implied, for example, through Article IV(1)(a) of the New York Convention requiring a 'duly authenticated original award or a duly certified copy thereof for the purposes of recognition. Most arbitral statutes require an award to be in writing. (218) Article 31(1) of the UNCITRAL Model Law requires the award to be in writing, which is said to be mandatory. (219) If it is not mandatory, there seems no reason why parties could not agree to an oral award, perhaps with written reasons presented at a later stage. While this is conceivable, there could be a range of problems including the process of enforcement under the New York Convention, and the practicality of challenges against an award with no documented reasons. Other rules simply indicate that the arbitrators must sign the award, which implies a writing requirement.

Just as the writing requirement for arbitration agreements has been expanded to include electronic forms, it may be that over time, awards may also be treated as being in writing when submitted electronically, although at present this should only be so where expressly allowed. (220) In such circumstances, particular laws dealing with electronic signature would need to be complied with.

16.8.2 Who Drafts the Award and When?

There is no express rule as to the way awards should be drafted. It is generally accepted that the chairperson is in charge of the drafting process. Some chairs prefer to draft the entire award themselves and then invite comments from co-arbitrators. At other times, a chair might delegate different sections to each arbitrator based on their preferences or particular expertise. In a more complex matter and if the working relationship between tribunal members is at a sufficient level, various parts may be allocated to each for preliminary drafts, particularly where one tribunal member has special expertise. (221) For example, in a construction dispute, an engineer arbitrator may be allocated the task of synthesising the expert evidence while a lawyer may deal with questions of applicable law or contractual standards for applicable remedies. Such division of labour should not entail delegation of decision-making but should follow full deliberations by the arbitrators on each issue. If one has particular expertise, then they may have an educative function with their co-arbitrators during such deliberations to allow the others to  truly have an independent view notwithstanding their relative lack of expertise. Each arbitrator must by the end become sufficiently expert in any key area to make the decisions of law and fact that are required in an

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adjudicatory process. If different parts are delegated to different members of the tribunal, the tribunal might first agree on the key principles and decision, leaving it to individual members to simply draft the reasoning behind it. (222)

As to timing, there is a need to comply with time limits overall, which in the extreme could render the tribunal without power if not complied with. This was discussed in section 16.5. Another issue is whether the drafting must only begin after proceedings are closed. While a tribunal must keep an open mind until after the close of proceedings and then evaluate the conflicting evidence and arguments, there is nothing improper in preparing parts of the award in draft on an ongoing basis, particularly in relation to the description of the parties, counsel, appointment of the tribunal, procedural history, outline of the written submissions of the parties and summaries of documents and witness statements tendered. In many cases, setting out a succinct outline of the written submissions prior to the oral hearings in draft form will be an excellent way to ensure sufficient familiarity with the key issues so that the tribunal is best able to understand and manage the oral stages.

A chair may need to deal with circumstances where the majority is happy with the draft award but the third arbitrator demands numerous changes before he or she would be willing to sign. The changes might be agreed but the arbitrator then refuses to sign. For those changes that the majority did not feel were truly warranted but were still seen as a legitimate compromise in the hope of reaching unanimity, it is desirable that it is made clear at the outset which changes are accepted as such and which are only conditional on the third arbitrator signing the award and not dissenting. Proposed changes could be in tracked form and identified as such. (223)



16.8.3 Structure of the Award

The award should outline a number of key elements, although there is no strict ordained order accepted by all. Typically an award will begin with an outline of the parties, counsel and the tribunal. Reasons will need to be given in a later section if the parties subject to any order as to relief are not identical to the parties in the arbitration agreement, perhaps as a result of claims of extension to non-signatories, such as via agency or application of the group of companies notion.

 P 1314 The award should contain particulars of the arbitration agreement and of the relevant commercial contracts or other activities in relation to which the dispute arises. If the arbitration agreement contains preconditions, the award should  indicate whether these have been met or waived. (224) If terms of reference are utilised, such as in ICC arbitration, these should be set out. In some cases there may have been a revised list of issues, in which case that might best be set out and frame the structure of the award.

An award will separately outline the procedural history and the facts of the case. The procedural history should aim to show that an adequate process occurred with input from all parties. Because the grounds for challenge are based on lack of procedural due process, it makes sense for an award to go to sufficient lengths to adequately set out the procedural background. Providing the reasoning for any contentious procedural orders previously made is also useful, as any reviewing court will typically look at the award as a self-contained document. (225)

As to the factual background, if the case is not too complicated, the introduction can set out what the case is essentially about. (226) If a summary of facts is contained at the outset by way of background, it is important that this does not distort the position, pre-empt later factual determinations or lead the losing party to believe that some prejudgment has occurred. Where preliminary factual matters are concerned, the aim is to set out the facts in a non-controversial way as background to the dispute rather than give an indication of the factual determinations made as part of the award. At times it may nevertheless be desirable to articulate a finding that has been made in the award even at this early point, if this is needed in order to promote a better understanding of the award's reasoning and structure.

 P 1315 An award will then outline the key claims, defences and counterclaims, including the key arguments of each of the parties. It will identify the relief sought by each party. These issues can be separated into claim, response, and reply stages or can be grouped by issue. The award will then contain the evaluation by the tribunal. This will outline the key evidence presented, the factual decisions made by the tribunal and the views on legal questions. It must provide a sufficiently reasoned enunciation of the conclusions reached. Where an award summarises arguments and evidence, it is important that the right balance is struck in terms of the detail and coverage. As with most forms of writing, it is important that the award is neither too long nor too short. If too short, there is likely to be an inadequacy of reasons. If too long, business persons concerned may find it too difficult to comprehend the gist of the decision. (227) Where key factual matters are  concerned, it is appropriate to summarise the evidence and separately indicate why the tribunal came to particular conclusions about disputed facts.


Finally, the award must contain the directions, orders and other remedies that have been determined to apply. An award must include a section clearly indicating the relief granted by the tribunal.

The duty to complete the mandate requires an arbitrator to deal with all claims, counterclaims and defences in the award, not make findings beyond the matters raised and contain a definitive dispositive part. (228) A related concern is not to engage in obiter dicta for

educational or diplomacy reasons. (229) Article 47 of the ICSID Rules is an example of a highly prescriptive list of formal requirements for an award. Even where this does not apply, it forms a useful guide to the matters that might be covered. Article 47 states that:

1. The award shall be in writing and shall contain:
 - a. A precise designation of each party;
 - b. A statement that the Tribunal was established under the Convention, and a description of the methods of its constitution;
 - c. The name of each member of the Tribunal, and an identification of the appointing authority of each;
 - d. The names of the agents, counsel and advocates of the parties;
 - e. The dates and place of the sittings of the Tribunal;
 - f. A summary of the proceedings;
 - g. A statement of the facts as found by the Tribunal;
 - h. The submissions of the parties;
 - i. The decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
 - j. Any decision of the Tribunal regarding the cost of the proceeding.
2. The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated.
3. Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

16.8.4 Language of the Award


Selection of the language of the arbitration generally extends to the appropriate language for the award itself. Some national laws have at times required awards to be rendered in the official language of the Seat, although this would be rare in modern times. The parties can agree on a different language for the award to that of  the arbitration. Alonso also suggests that the tribunal can decide whether a more appropriate language is to be utilised. (230)

Where recognition and enforcement is concerned, an award needs to be translated into the language of the relevant jurisdiction where recognition and enforcement is sought under the terms of the New York Convention. (231)

16.9 Reasoning in the Award

16.9.1 The Requirement for Reasons

Two issues arise in relation to reasons. The first is what level of reasons should be contained in an award. The second is what challenges can be made where reasoning is asserted to be inadequate. Section 16.7.1.2 above dealt with the separate question as to whether dissenting reasons can or should be included. Historically, arbitrators in common law countries refrained from providing reasons at a time when courts were more likely to intervene in response to reasoning thought to be defective, while some civilian scholars considered the duty to give reasons to be a matter of public policy.

The requirement to provide adequate reasons is a disincentive to arbitrariness, allows participants to feel that justice is seen to be done and in some cases even leads the adjudicator to conclude that the initial inclination simply cannot be justified on any reasoned basis. (232) The provision of reasons also supports the entitlement to call for corrections, interpretations and additional awards. (233) Many arbitral rules and statutes indicate that for other than consent awards, reasons must be given subject to contrary agreement of the parties. (234) An agreement that reasons are not necessary might be taken for cost-saving purposes. It would be a waiver of a right to challenge the award on that ground alone, although it ought still to be possible to raise other challenges. Waiver may be controversial in that the entitlement to reasons may also be affected by other laws such as Article 6.1 of the European Convention on Human Rights which could be  asserted to be mandatory, (235) and by the civilian view that it is a matter of public policy.

As to the ramifications for lack of sufficient reasoning, a distinction needs to be made between the general requirements in arbitration and specific cases where a certain degree of reasoning is specifically required under the relevant rules. In the latter case, a lack of reasons can be argued to be a failure to follow agreed procedures and hence be more susceptible to challenge. For example, awards rendered under the English Arbitration Act 1996 can only be challenged for 'serious irregularity'. (236) Section 52(4) provides a general obligation to give reasons and section 70(4) allows a court to remit an award where reasons are insufficient. Section 70(4) allows a party seeking to appeal on a question of law or set aside an award to request an order from the court calling for further reasons from the tribunal so that the court can properly consider the application. The English Court of Appeal considered that the Arbitration Act 1996 allowed confidential reasons to be provided which were not part of the

award but the court considered that these could be examined in relation to serious irregularities. (237) One English case considered that an ambiguity can arise as a result of 'inadequate rationale or incomplete reasons'. (238)

In most jurisdictions, a failure to provide reasons when required may allow the award to be set aside on public policy grounds. (239) There is no express provision in the New York Convention in relation to reasons underlying awards, although this could also come under the public policy exception in Article V(2)(b). (240)

16.9.2 Adequacy of Reasons

A number of cases have considered the adequacy of reasons in the context of arbitral awards. It is desirable to consider the policy issues in determining the nature and ambit of reasons that ought to be provided. The value of reasoned argument was touched on in the previous section. The benefits are thought to be to ensure that the adjudicator gives appropriate consideration to reasoning, provides a transparent mechanism for the parties to consider whether all relevant factors were taken into account and all irrelevant factors were excluded, to ▲▼ similar effect ensure that the parties can see that their contentions were properly considered even if the result was not in their favour, helps the parties determine whether there are any errors or gaps needing correction, interpretation or additional awards, allows for a consideration as to whether annulment proceedings should commence and gives guidance to the parties in relation to their future behaviour.

These objectives then provide guidance as to the degree of reasoning required. Reasoning must be sufficient as to breadth, covering all claims, and depth, indicating the logic behind each decision. Conventional wisdom suggests 'that a losing party should by the terms of an award understand clearly and unequivocally why its case was not accepted by an arbitral tribunal'. (241) Born suggests that '(t)he essential requirement is that the tribunal identify the issues that were dispositive in the dispute and explain, concisely, the thought-process underlying its decision'. (242) An award should thus indicate each step in the reasoning and the reasons why individual issues were determined, such as why a particular choice of law was made. (243) The award should also indicate why alternative submissions have been rejected. Reasons must be able to be understood, be sufficient and deal with the key points. They must also not be internally inconsistent. (244) However, the requirement for a reasoned award is not a requirement for logical or well-argued awards, albeit that these are the ideal. The important distinction is that a party should not be able to challenge an award for lack of adequate reasons simply because it finds some logical flaw in the reasoning itself. If it could do so, that would be tantamount to allowing for appeals. In some cases, tribunals have used contradictory language in describing this aspect of the adequacy of reasons. (245) In *Klöckner*, (246) and ICSID tribunal considered that statement of reasons needed to be 'sufficiently relevant'. (247) There is a fine line distinguishing between an irrelevant reason which is illogical per se and tantamount to an appeal, and an irrelevancy that means that there is no reason whatever in relation to the decision as reached. There remains a ▲▼ live debate as to whether challenges should be limited to form or conversely, the extent to which they can enter into matters of substance. (248)

Karrer suggests that it will often be good practice to include subsidiary reasoning supporting the same conclusion if the primary reasoning is incorrect. (249) Of course such reasoning should be independently valid and should not be strained simply so as to diminish the success of attacks against primary reasoning. One advantage of valid subsidiary reasoning is to obviate the need for a remittance back to a tribunal or worse, disputes about the availability of a residual forum if recourse cannot be had to the original tribunal. (250) In jurisdictions where a court may hear appeals on questions of law, it may be appropriate for an arbitrator to indicate what view would have been taken of the facts if a different legal position pertained, again so that costly remittance is not required. (251)

While due process suggests that each of the parties' arguments ought to be considered, there is no commensurate duty to address each argument in the final award. On one view, reasons are only needed for the decision in relation to each and every claim and counterclaim, which could mean that there is no need to address the weakest arguments. However, the ultimate decision was dependent on rejecting those weak arguments so the reasons for the decision should logically cover the latter as well, albeit briefly. In a practical sense, investment arbitrations tend to address such issues because of a concern for deference to a sovereign nation State as a party. If the sovereign raises an argument, an arbitrator will naturally be disposed to at least address it. Where private parties are concerned, an arbitrator might feel more comfortable in simply ignoring a specious argument. Nevertheless, Karrer even suggests that attention be given to arguably irrelevant submissions. Counsel has typically presented the results of expensive research in support of such arguments. Failing to give them any careful attention can simply increase the chances of challenges to the award. (252) In terms of guidance for the future, it may help if the tribunal explains why the arguments were without merit.

In some instances reasoning is difficult to articulate. It can often be particularly difficult to provide clear reasons as to why certain factual assertions are preferred. An expert trade arbitrator asked to evaluate whether a commodity is of appropriate quality or not can rarely provide much in the way of meaningful reasoning, save to say that a particular view was formed on inspection. (253) At other ▲▼ times a tribunal will simply indicate which of conflicting witnesses was found to be more reliable. It is difficult to provide objective reasons

for such a view if there is no contemporaneous evidence showing that one witness is untruthful, for example, where statements in documents conflict with the testimony and where there is no adequate explanation for this. Where expert evidence is concerned, the tribunal's reasoning may need to enter into complex theoretical and factual elements.

Often an award will contain little in the way of reasoning on the level of interest chosen, whether simple or compound interest is applied or the reasons for the allocation of costs. To a lesser extent, reasons tend to be suboptimal in many quantum assessments. In each case, clear reasoning is still to be preferred. Another question is whether arbitrators who came to a unanimous view as to relief but for differing reasons should state this clearly in the award. All other things being equal, a duty to provide reasons should be a duty to provide the true reasons, including the differing reasons in such circumstances. The only contrary argument is in relation to confidentiality of deliberations. That should not be a concern. If after those deliberations, different arbitrators truly have different reasons for their conclusions, this could be articulated but without identifying the individuals in the award.

Landau argued that investment arbitration calls for more carefully and fully reasoned awards in view of the inherent public interest in most investment arbitrations and the ongoing ramifications through the interpretation of complex international investment law norms. (254) Yet many senior commercial arbitrators may show a decided reluctance to make definitive comments about complex public international law norms. (255)

16.9.3 Challenges to Adequacy of Reasoning

It is important to consider the likely result of a challenge as well as any articulation of principle as to adequacy suggested by tribunals, reviewing courts or scholars. Some courts hold that a failure to give reasons, while breaching a form requirement, does not constitute sufficient grounds for annulment. (256) Courts in France will not support annulment on the basis of inadequate reasons. (257) From a policy perspective, if reasons are inadequate it is better for a supervisory court to remit the matter back to the tribunal rather than set aside the award. (258) It should only be where there are separate grounds for annulment that this should arise. A failure to give adequate reasons was seen as one factor in an American court setting aside an award for 'manifest disregard of the law', (259) a uniquely American criterion.

Reviewing courts will generally limit themselves to determining whether there is reasoning and whether the reasoning is adequate. They will not concern themselves with the correctness of the decision although if the reasons are internally contradictory, some challenges have been upheld. Where reasoning is internally contradictory, not only is it illogical but it can become impossible to know just what the reasons were. Hence, in substance it is as if there was no reasoning provided. As to adequacy, a distinction is made between coverage of issues and coverage of all of the arguments pertaining to the issues. A reasoned decision is required on each issue but the tribunal is not bound to address every argument raised by each party.

In a widely criticised decision, an Australian court in *BHP Petroleum* held that an arbitrator must give reasons commensurate to that provided by judges in their determinations. This was a case dealing with the domestic Arbitration Act where historically there were broader grounds for judicial review than contained in the UNCITRAL Model Law. The judgment considered that the degree of reasons would vary depending on the facts and nature of the dispute, the procedures adopted, the conduct of the parties and the qualifications and experience of the tribunal. In a large-scale matter with a retired judicial officer as arbitrator, a judge considered that a tribunal was 'under a duty to give reasons of a standard which was equivalent to the reasons to be expected from a judge deciding a commercial case'. (260) The view has not been followed in subsequent decisions. (261) It is unhelpful to define principles by reference to judicial standards, particularly as there is no common approach worldwide that would be a yardstick for international arbitration.

16.10 Signature

It is normally the case that all arbitrators must sign the award, although this should not allow one arbitrator to delay its completion. If one arbitrator is refusing to sign a common award, most rule systems allow for signature by a majority or even by the chair alone. (262) If the chairperson refuses to sign, the majority will suffice. (263) If an arbitrator refuses to sign, many rules also indicate that reasons must be given. (264) Care needs to be taken to deal with cases where there is a difference between the *lex arbitri* and selected rules as there may be arguments as to which applies. In most cases this will not be a problem but in some, one or other has a unique requirement in such circumstances. Normally the rules would prevail but it might be arguable that the *lex arbitri* provision, if more exacting, is mandatory. This would require analysis and interpretation of the particular law's intent.

If that arbitrator is dissenting, the person's view is not part of the majority and hence they are not signing the majority award in any event, although they are entitled to do so. A dissenter should be prepared to sign an award in any case, as signature by a dissenter does not constitute consent to the majority reasoning but merely shows that all tribunal members were involved in the process. If a statute or rule required all members of the tribunal to sign an award, each arbitrator is contractually bound to do so. (265) Signature by all is apparently still required under Article 41 Saudi Arabian Law on Arbitration. (266) If the applicable law requires the signature of all tribunal members, a dissenting arbitrator cannot refuse to sign simply

because a majority refused to allow inclusion of the dissenting opinion. (267) Born suggests that a refusal to sign in such circumstances would allow for challenge and removal of the arbitrator. (268) It might also be that there would be personal liability and any immunity would not cover a wilful refusal to comply with the mandate. In a converse scenario, there is even the potential that in a multi-member tribunal subject to overriding liability, one arbitrator might seek an indemnity from the majority. (269)

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P 1323
If a draft award is submitted to the ICC for scrutiny, it may be signed to ensure that arbitrators will not change their view although they may need to do so depending on the court's recommendations. (270) It is also necessary to consider whether the particular jurisdiction requires the signature to be witnessed and if so, whether ▲▼ there are any particular qualifications required of the witness. In some jurisdictions, the award may need to be notarised. (271)

16.10.1 Place and Date of Signature

Arbitrators need not all sign the award in the same place or at the same time. (272) Many arbitral statutes and rules indicate that an award is deemed made at the place of arbitration. (273) Previously, there had been some concern that the physical place of signature could affect the notion of the place where the award was 'made' for New York Convention purposes. Older and contrary decisions (274) holding that an award was made where an arbitrator physically signed it have been widely criticised and modern statutes and rules have sought to prevent this from applying. Section 53 of the English Arbitration Act 1996 was enacted to overcome the judgment of the House of Lords in *Hiscox v Outhwaite* (275) which had held that an award was foreign simply because it had been signed in Paris when the dispute was between English parties with an English arbitrator and a Seat in London.

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P 1324
Legislative provisions and arbitral rules commonly require that an award be dated. (276) Because the date is important for commencement of time limits for confirmation, annulment, correction or interpretation, it is important that this is an accurate date and that the award be promptly communicated to all relevant parties. If there is more than one arbitrator signing, there is a question as to whether each should date when they sign, or whether the date should be that of the last signature, as this is the only time when the tribunal as a whole has complied with signature obligations. Article 47 of the ICSID Rules indicates that each signatory should indicate the date of the signature. (277) More normally, an award should be considered rendered on the date of the last signature. Typically the chairperson will sign last. In any event, presumably it is the last date of the majority that is ▲▼ determinative for commencing time periods for correction, interpretation, additional awards, annulment and enforcement.

Arbitrators are not obliged to all sign the same copy of the award. (278) One reason to allow arbitrators to sign different copies is so that a recalcitrant arbitrator cannot frustrate the process by holding on to the originals and not signing them or forwarding them on to co-arbitrators.

16.10.2 Non-compliance with Form Requirements

If there are such form requirements as to date, signature and designation of place of the award, a question arises as to what is the effect of the award if there has been some failure to comply by the tribunal. A failure to follow a form requirement may not necessarily invalidate the award. There is a range of permutations depending on whether the form requirements are in the *lex arbitri*, the arbitral rules, a stipulation of the parties or are required by an enforcement court. The first question should always be whether the form requirements are mandatory. Even where this is so, statutes and rules will typically allow for correction.

In other circumstances it is necessary to determine whether annulment is possible on the grounds of form defects. (279) Even where challenges are possible, another question is whether a court will allow for substantial compliance or would differentiate between serious or minor form defects. This may also depend on whether a late challenge could be barred on the grounds of estoppel or waiver. As noted, a failure to provide adequate reasons has been seen as grounds to block enforcement in some jurisdictions. Some national systems seek to provide a rule of reason test. For example, section 58(2)(h) of the English Arbitration Act 1996 allows for enforcement to be blocked where form errors in the award cause or will cause substantial injustice to an applicant.

16.11 Scrutiny of Awards

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A number of institutional rules call for scrutiny by the institution's Secretariat. ICC Rules call for scrutiny by the Court of Arbitration. (280) Such scrutiny is limited, in particular to ensure that there are no demonstrable errors or gaps in coverage. In practice, the ICC Court is seen as reasonably intrusive, concerned to ensure the highest quality of awards rendered under its control. (281) Derains and Schwartz noted that some 30% of awards reviewed by the ICC Court in 1997 were returned ▲▼ with comments as to either form or substance. (282) The ICC Court does not provide reasons when reviewing awards. (283) The ICC supports this approach on the basis that it aims to reach a consensus and that articulation of reasons would encourage court challenges. (284)

Where the ICC is concerned it has also been noted above that it does not scrutinise or approve a dissenting opinion as a required element vis-à-vis the award itself, but does take the


contents into account in scrutinising the draft majority award. There is also a difference between the matters that the ICA Court can require and instead the matters of substance that can simply be drawn to the attention of arbitrators. A question then arises if the tribunal does not wish to adopt the suggestions of the Court.

At times parties themselves will include the possibility of some form of scrutiny in the arbitration agreement itself, either a second tier arbitral tribunal or purport to call for judicial review of arbitral awards. In most cases they would not truly be matters of scrutiny.

16.12 Service and Notice

16.12.1 Communication Requirements


It is important to consider what notice obligations there are in relation to an award and what powers a tribunal has to modify an award up until such time. Proper communication has a number of ramifications. An award can only be said to be binding when it is brought to the attention of the relevant parties. Subject to rights to correct, clarify, interpret or produce additional awards, proper notice is the final act in the arbitrator's mandate and may thus render the tribunal *functus officio*. Time periods also begin in terms of challenges to the award, although that is not always so. Time limits for correction, clarification or additional awards may also be dependent on the date of communication. These powers are considered in sections 16.13 to 16.17.

A tribunal generally has a duty to deliver the award to the parties or at least notify the parties of its completion. (285) Different arbitral statutes and rules use different terminology in terms of notification or delivery or the like. Different statutes refer to the award being communicated, notified, delivered, rendered or served. In some cases it may even suffice that the parties are notified that the award  is available for collection. Generally speaking, the award must be delivered promptly or without delay after it is made. (286) Another issue is whether delivery should be directly to the parties or may occur via counsel. It is also important to determine whether relevant time periods begin on receipt by counsel where that is considered appropriate. Attention would need to be given to the *lex arbitri* and to any agreement of the parties, which may be included in notice provisions contained within terms of reference or articulated in procedural directions. (287)

In ad hoc arbitration, the tribunal or its chairperson generally makes notification. Where an institution is involved, the tribunal may have to submit the award to the institution which then notifies the parties. (288) In some cases the tribunal is itself directed to distribute the award. (289) The award itself should not be distributed without permission of the parties. (290) There is no longer a general obligation to deposit an award with a judicial authority in the Seat to allow for enforcement. The New York Convention changed this historical position.

16.12.2 Form of Delivery

Some laws and rules indicate that an original of the award must be sent to each party. (291) In these circumstances, enough originals must be signed so that all can receive an appropriate document. (292) Others simply provide that copies are to be delivered. (293) Some are silent, in which case it would be better to provide originals.

As to the method of delivery, attention should again be given to any special requirements in the *lex arbitri*, rules or party agreement. In some cases intergovernmental agreements on service of judicial and extrajudicial documents may apply. (294) Van Houtte argues that this should apply to arbitral awards notwithstanding that these are not expressly mentioned because they should be seen as coming within the phrases 'extra-judicial document' and 'civil and commercial matters ...' It is also arguable that an award is a 'judicial document' for the purpose of the regulation. Germany has taken this view, but not other EU  Member States. (295) Arbitration institutions are not transmitting agencies for the purpose of the regulations.


Some legal systems might require an award to be translated in the language of the country where the award is served or a language understood by the addressee. (296) Care should be taken where the parties agree on a different manner of delivery than is required under the arbitration statute as it could have implications for its legal effect, although there may be principles of waiver were a party to try and rely unfairly on such an agreement. (297) Even if informal delivery is agreed upon, a tribunal should ensure that it complies with any delivery obligations that commence relevant time periods for challenge. (298) In some cases a formal time period will simply not run if a required mode of delivery has not been adopted. An example would be where the parties agreed to receive the award electronically where the arbitral statute does not contemplate this mode of delivery.

Attention also needs to be given to guerrilla tactics and the possibility that the losing party may seek to evade notification or at least argue that notification never occurred. In such circumstances it would be appropriate to ensure the best possible evidentiary record such as registered mail.

16.12.3 Time for Delivery

As noted, the time of delivery is important in establishing starting time periods for requests to correct or interpret, requests for additional awards or annulment proceedings. (299) Delivery of the final award is also generally the time at which a tribunal becomes *functus officio*. (300) An

award should be delivered to all parties, including the institution where one is involved. It is then important to determine the exact date on which this can be said to have occurred.

As is often the case with time periods that have serious repercussions, attention needs to be given to concepts such as communication and delivery. It is necessary to indicate how a factual determination will be made in the event of a dispute and whether any deeming provisions apply. Older rules simply refer to the notion of receipt without any further guidance. That is not the case with UNCITRAL Rules 2010 Article 2 and ICC Rules 2012 Article 3 which have detailed tests. It should be understood that because of the possibility of differing times of delivery  and receipt, different time periods may apply to different parties. (301) There may also be conflicts questions as to the timing of receipt. While the arbitral statute in the Seat may specify a term such as 'receipt', it does not necessarily purport to apply domestic concepts in the Seat. (302) Receipt should be actual receipt, not deemed receipt, unless there are specific statutory or rule provisions in that regard.

16.12.4 Advance Notice

In some circumstances, the parties may wish to know the outcome before a reasoned award is provided. Given the prevalence of emails and faxes, tribunals will often provide advance notice of an award prior to formal delivery of a signed copy. That is an accepted practice but should not trigger the time periods for correction, interpretation or annulment. This could be made clear. Advance notice of the decision should not be seen as breaching the confidentiality of the deliberations. (303)

Any such announcement should only come after the deliberations are complete and the tribunal has identified the reasoning to be employed in the written award. The ICC takes the view that because of the required scrutiny by the International Court of Arbitration, prior notification should only be given with the consent of both parties. (304)

16.12.5 Publication of Awards

There is a difference in approach between various institutions as to whether to assist in the publication of awards. The primary rule is that these are confidential and may only be published with the permission of the parties. The ICC does publish redacted versions of some awards. Article 48(5) of the ICSID Convention indicates that awards may not be published unless both parties agree. (305)

16.12.6 Registration

While it remains rare, some statutes require arbitration awards rendered within the Seat to be deposited or registered with a notary or local court. (306)

16.12.7 Fees as Conditions of Service

Once an award is completed and available an arbitrator may be entitled to a lien on the award to secure payment of fees or costs of the arbitration. Poudret and Besson suggest that notification may only be withheld pending payment of fees 'if recognised by law, the arbitration rules or the parties' agreement'. The authors do not consider that the contract with the arbitrator implies simultaneous performance. (307) That may well be so but that does not indicate whether one could imply a term granting arbitrator discretion to withhold the award in preference to calling for the arbitrator to sue on the contract. It would be better to specify this right in any contract. Some arbitral rules expressly deal with whether the tribunal can withhold delivery of the award until payment of fees has been effected. An institution may generally withhold notification until such time as its costs have been provided.

16.13 Further Actions, Correction, Interpretation and Additional Awards

16.13.1 Introduction and General Principles

While rules typically distinguish between corrections, interpretations and additional awards and while there is a history of significant debate between scholars and practitioners from differing legal families on these matters, the policy issues are largely identical. Hence, this section deals with some general issues pertaining to all forms of further action. Subsequent sections add specific commentary as to each power. There are questions as to whether these are inherent powers or are dependent on an agreement of the parties or powers to that effect in the statute or rules. There may also be an issue as to whether the tribunal has lost its jurisdictional mandate through some statutory or contractual time limit over its powers. This may be more of a concern with additional awards as these have added dispositive effects. The concern may not as readily apply to corrections and interpretations which merely explain or rectify decisions already made within the time period and do not add further items of relief. (308)

An arbitrator's duty to complete the mandate and act with due care suggests that if a particular claim was not addressed, an application should be permissible to invite the tribunal to do so. If an obvious clerical error has been made, the duty of care has not been satisfied and it would be better to have this rectified efficiently rather than undermine the

entire award or invite a court not privy to the proceedings to take action in the circumstances. The same is true where interpretation is concerned. Hence, the emerging view is to provide such powers within arbitral statutes and rules. Key policy issues in the drafting of such provisions include whether the right can be varied by agreement, the extent to which a tribunal can undertake such actions on its own volition, applicable time limits, whether the decisions both positive and negative constitute awards and can be separately challenged, whether the tribunal can charge further fees and the ramifications if a tribunal does not accede to the request.

It is entirely possible that an application for correction, interpretation or addition may flow from a corrective decision itself. In principle there is no reason why a corrected or interpreted award or additional award should not also be subject to further requests for correction, interpretation or addition. (309) Because a correction, interpretation or addition is a separate determination by the tribunal, it is conceivable that it could be separately challenged by way of annulment or by way of challenging enforcement.

If there is a multi-person tribunal, the decision whether to make a correction, interpretation or addition should be based on the same deliberation obligations and the same majority voting powers as apply generally. There is also the question of the appropriate time limits for completion of these tribunal tasks of correction, interpretation or addition. Poudret and Besson suggest that the time limits tend to be too short given that there is often a need for adversarial proceedings and proper notification to the parties affording them an opportunity of presenting their views. (310) Some national committees objected to the tightness of the time limits when Article 29 was first introduced into the ICC Rules 1998. (311)

There is also the question of whether the time limits are mandatory or can be extended or overlooked. It seems reasonable that if a time limit for correction has elapsed, either in terms of a late application or tribunal determination, a competent court should, if necessary, be able to rectify errors that are obvious on the face of the award. Given that many commentators are of the view that the power to correct is inherent in any event, they might suggest that the inclusion of an express power in a statute or rules together with a time limit, should see the latter as directory, without aiming to set the outer limits of competence. It is of course always preferable to comply or seek agreed extension.

Rules as to correction, interpretation or addition simply refer to awards and do not seek to distinguish between interim, partial or final awards. Nevertheless, if it is truly an award, an interim or partial determination should be subject to such applications. This also means that the time limits should run from that stage, although that may depend on the wording of particular rules. From a policy perspective, it would be inappropriate for there to be a mismatch between the entitlement to challenge the partial award and the entitlement to seek its correction or interpretation. (312)

16.14 Correction or Rectification of Awards

16.14.1 The Power to Correct

Virtually all legal systems allow for corrections of typographical or computational errors in awards. The power to correct awards would first be determined under the *lex arbitri*. (313) Almost all procedural rules also contain clear provisions allowing for corrections of an award. (314) To the extent that provisions in rules vary from the *lex arbitri*, they ought to take precedence unless the latter is seen as containing a mandatory norm. If the institutional rules give the due process right to correct, then the better view is that they maintain the entitlement and at most vary the timelines. Care would need to be taken where there is a mismatch between time periods. It obviously makes sense to be safe and comply with the shorter of the two time limits, whether that is in the institutional rules or the *lex arbitri*.

Article 33 of the UNCITRAL Model Law provides for a thirty-day time period for such a request for correction. The time runs from the receipt of the award and applies unless the parties have agreed upon another period of time. It goes on to state that the interpretation shall form part of the award. Errors can be fixed on the tribunal's own initiative. (315) Article 38 of the UNCITRAL Rules 2010 also provides a thirty-day time limit after receipt of the award for a party to request a correction, with a further forty-five days for the tribunal to comply if it believes the request is justified. Alternatively, the tribunal itself may make a correction within thirty days after 'communication of the award'. Care should be taken with the possible differences in timing between 'receipt of the award' by a party and 'communication of the award' by the tribunal, although these could be interpreted to be identical. (316)

Even where the *lex arbitri* and rules are silent, it would also seem reasonable to imply consent to changes of obvious errors as an inherent element of the parties' consent to arbitration, or arising via the duty to complete the mandate and/or the duty to act with due care. There has been a lively debate amongst scholars on this point. Poudret and Besson suggest that if the rules are silent the power can be implied from the will of the parties to exclude the jurisdiction of the courts on such matters. (317) The authors also believe that such a power is a general principle of civil procedure. (318) The power to correct is described by Moreau as a 'residual power'. (319)

The view that this is an inherent right is supported by the approach in Switzerland where there

is no express power in the Swiss Private International Law but this has occurred in a number of cases and Swiss courts and scholars have accepted that the power should be seen as inherent. (320) There are differences in view in various legal systems as to whether there is statutory power to refer matters back to a tribunal where the award is *infra petita*. (321) The inherent entitlement was also supported by ICC practice prior to an express power of correction being included in the 1998 Rules. (322) While that should be so, it is preferable for a national statute to set out appropriate time limits as specific limits would not be easy to discern under broad implied consent analysis.

There is also some debate as to whether parties are entitled to exclude a tribunal's power to correct errors in an award. General party autonomy might suggest that this should be possible. (323) A contrary argument might be that the parties have awarded a tribunal a mandate that comes with an inherent right to correct obvious errors. If the parties sought to prevent a tribunal after the appointment stage, the tribunal could also form the view that a subsequent agreement cannot change the original mandate. Conversely, if the tribunal accepted the appointment knowing that the parties did not want any corrections, party autonomy ought to prevail. Born suggests that party agreement to bar corrections should be given effect, but also argues for an inherent power on the basis that 'it is contrary to basic conceptions of procedural fairness for a mistaken award to be given binding effect'. (324) To the extent that the latter proposition is valid, it would seem to be a mandatory norm of procedure that overrides the first proposition.

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16.14.2 The Ambit of the Power to Correct

It is important to limit the matters that can be addressed in a correction request to stop parties seeking to effectively make an appeal application calling for a change of reasoning and result. Carefully circumscribing the nature of permitted corrections could address the type of corrections or their effect. The Model Law chooses to describe the type of corrections. Article 33 limits the right to requests 'to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature ...' Another approach which has been suggested is to limit corrections to matters that do not alter the meaning of the award. That would be an undesirable approach as it would be virtually impossible to not see this impacting upon any corrected error. (325)

Courts have uniformly interpreted the basis for correction narrowly to prevent aggrieved persons trying to re-argue key elements. (326) In *Panacaviar, SA v Islamic Republic of Iran*, (327) the aggrieved party argued that the tribunal had mischaracterised the nature of the underlying dispute and sought a 'correction' in relation to such alleged mischaracterisation. The tribunal rejected the request, considering that the respondent was instead seeking to re-argue the case and disagree with the conclusions. On this basis, if for example the tribunal completely misread the terms of the parties' contract, this cannot be corrected. The only possibility is to seek to annul the award or block enforcement but this can only occur on limited grounds that would not cover an error in analytical reasoning.

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Typical examples of simple errors include putting the decimal point in the wrong place, inverting the description of parties (describing claimant as respondent), or an error of calculation where the methodology is properly articulated (e.g., identifying the percentage profit share but making an inappropriate calculation into applicable currency of the award). (328)

One question is whether the power to correct awards could deal with form omissions. Using the UNCITRAL Rules 2010 as an example, this raises the *ejusdem generis* principle because of the reference to specific types of errors and then 'any error of a similar nature'. Peter Sanders makes the point that the generic phrase is difficult to understand as the three stipulated areas of errors in computation and clerical and typographical errors are not of a similar nature. (329) It is only fair and efficient to see a correction power as covering an error of form that would otherwise render the award subject to challenge where correction does not alter the true dispositive intent. The English Arbitration Act 1996 refers to the power on application or on a tribunal's own initiative, to 'remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award.' (330) The time limits are twenty-eight days for the application and for the correction. It is not clear what is intended by the phrase 'accidental slip or omission' and whether this goes beyond mere clerical errors to matters of analytical error. (331)

16.14.3 Due Process and Corrections

Unless the correction is clear and obvious, the tribunal should give the parties an opportunity to have an input. An example might be complex calculations of damages where one party has noted an arithmetical error. The tribunal might revise the computations but it still could be the case that the revised figure is itself inaccurate or would at least benefit from party input. If a request for a correction is made, it seems appropriate to hear the other party's view as is the case with most unilateral applications for tribunal orders and awards. (332) While the other party's view should be sought, it would generally be unnecessary to hold a hearing for such a purpose (333) and such a request should not allow a recalcitrant party to delay the process. Situations might be more complex if a tribunal has had to be reconstituted between the time of an award and the time of a requested correction.

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16.14.4 Form Requirements and Challenges

Article 33(5) of the Model Law indicates that the form and content obligations under Article 31 apply to a correction of an award. This should also be so in relation to any clerical errors. The English Arbitration Act 1996 calls for an application for rectification to first be made to the tribunal and only allows for judicial challenge after the section 57 options have been exhausted. (334) A court has held that a direct court challenge can be brought on matters that the tribunal could not have corrected. (335)

A positive decision on rectification or correction is itself an award open to challenge. (336) A refusal to rectify an award is considered by French courts to be a decision appropriate for challenge. (337) The Note by the Secretariat of the ICC on Correction and Interpretation of Awards considers that for corrections, where a request is acceded to, it should take the form of an Addendum while a refusal should be taken as a Decision. (338) Both addenda and decisions need to have reasons and be presented for scrutiny to the ICC Court.

It is not immediately clear whether a request for a correction suspends the time limit for a challenge to the award. The Italian Code of Civil Procedure Article 828(3) expressly holds that it does not suspend the time limit. (339) The same view was taken by the Swiss Federal Supreme Court in relation to a request for a correction under Article 29 of the ICC Rules 1998. (340) On this view, a separate challenge could be made against a rectified award but only against the corrected parts. A well-drafted *lex arbitri* will make it clear that any time limit for setting aside the award does not run pending a request for correction, interpretation or an additional award. That is made clear under Article 34(3) of the UNCITRAL Model Law. Poudret and Besson wisely suggest that if the law is not clear, it would be advisable to simultaneously file a request for correction and an application to set aside the award within the stipulated time frames. (341)

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16.14.5 Timing of Corrections

Time limits in governing statutes are typically twenty-eight or thirty days. (342) Where there is no express provision, some commentators have recommended a particular limit within which to apply for correction, although it would be difficult to set a hard and fast rule. (343) From a policy perspective, some deadline supports finality and supports the view that a party should be vigilant in analysing an award to look for errors that apply against its interests. However, it might be argued that any error identified up until the time the award must be honoured should be allowed on the basis that no harm is caused in such circumstances. If the entitlement to correct is under a general inherent power, then the tribunal ought to be able to look at all relevant circumstances and decide on a case-by-case basis.

16.14.6 Other Modes of Correction

Another approach to correction is through scrutiny by institutions. Scrutiny under the ICC Rules is much broader than the correction powers, as Article 33 allows for points of substance to be drawn to the attention of the tribunal. Other possibilities for correction might include remittance by a court (344) or correction by the court itself when the tribunal cannot be reconstituted. (345) Some US courts have also held that the power to correct errors is inherent. (346) The US situation may be problematic in that it may deny arbitrators their own entitlement to correct the award. Born criticises the breadth of the section 11 criteria, suggesting that this invites inappropriate applications and has allowed some courts to correct matters of substance. He cites as an example *Eljer Mfg Inc v Kowin Dev Corp*, (347) but the facts may not be controversial.

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16.15 Interpretation of Awards

16.15.1 Power to Interpret

Some national statutes expressly allow for interpretation. (348) Where national legislation is silent, courts will typically see the power to clarify or interpret as inherent, may allow a court to refer back to the tribunal or in some cases may allow the court itself to resolve the ambiguity. (349)

If the arbitral statute and rules are silent on the question of interpretation, the better view is that this is either an inherent adjudicator's power or an implied element of a duty to complete the mandate, although not all support this view. (350) The argument in favour is that a tribunal has to provide dispositive directions that are capable of being implemented and enforced. To the extent that they are so ambiguous as to lead to disputes about the implications of the award, the tribunal should simply be able to explain what it meant. If an ambiguity is such that the parties cannot understand how to implement the award, the better view is that a tribunal nonetheless has an inherent power to resolve the ambiguity. (351) ICC practice was to allow for interpretation of awards even prior to an express power to do so being included in the 1998 Rules. (352) Lew, Mistelis and Kröll also seem to support an inherent power. (353) The inherent right to interpret an award has been accepted by an arbitral tribunal in the *Delimitation of the Continental Shelf (United Kingdom v France)*. (354)

Some have still debated whether there is an inherent power to interpret awards given that the

award already has res judicata effect. (355) Poudret and Besson point out that judges are entitled to interpret and arbitrators should have no different powers. The key issue is not whether the award has res judicata effect but who is  best placed to determine just what effect it has when its terms are inherently ambiguous.


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Some rules may also be limiting. The Model Law limits interpretation to cases where the parties have agreed, (356) Article 33(1)(b) indicating that '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'. Even this articulation does not indicate whether the tribunal itself may provide an interpretation absent a party request. The English Arbitration Act 1996 does not refer to interpretation but allows for clarification of 'ambiguities' which should amount to the same thing. (357) Section 57(3)(a) does not call for consent of the other party before a tribunal can be asked for clarification.

16.15.2 The Ambit of the Interpretation Power and Due Process Obligations

Poudret and Besson suggest that interpretation 'means to restore the true meaning of the original decision where it was badly expressed in the holdings, be it because the latter seem to be at odds with the reasons or contain obscurities or ambiguities. Interpretation does not modify or supplement the original decision'. (358) Merkin goes further and considers that the power would allow a tribunal 'to rethink inconsistencies in the award'. (359)

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In any event, interpretation should be limited to ambiguities in the rulings or the means of execution, (360) and not simply address the reasoning underlying the final dispositive provisions. (361) On this view the notion of an interpretation is instead more akin to a clarification. (362) In some cases a final award might also interpret a prior ambiguous partial award. (363) On this approach it does not seem that a tribunal would need to afford the parties an opportunity of being heard on the  matter other than simply articulating what aspects of the award they find ambiguous in the context of implementation. Unlike a correction, which might require actual recalculations by a tribunal, an interpretation is merely a better explanation of what the historical decision actually was and does not seek to change the nature of the remedies awarded.


However, in some cases the remedy is so unclear that the interpretation nevertheless has to select between two conflicting views. In such cases, requests for interpretation are really more akin to requests for completion of the mandate. For example, if a tribunal awards interest but does not indicate whether it is simple or compound interest, it is not clear on the face of the award that the tribunal actually turned its mind to this question in the first instance. Similar issues arise where there might be an award of royalties without an indication of the time period for calculation or geographical coverage. (364) If this is the case, an opportunity to be heard may be necessary.

In some cases there will be an important question of classification as to whether the award simply needs interpretation or whether there is a gap. In the latter event, that can be a ground for setting aside the award where the tribunal has not completed the mandate. The same may be so where it is a question of interpretation as to whether the tribunal has gone beyond its mandate. Such a situation might be dealt with via remittance to the tribunal or instead, under a presumption that a tribunal has not purported to exceed its mandate and hence annulment and enforcement courts should read down the dispositive parts under that presumption.

A request for an interpretation will typically be rejected if it is not necessary to implementation or enforcement of the award. A tribunal also needs to ensure that such requests are not used to unduly delay implementation or enforcement. Peter Sanders recommended that the UNCITRAL Rules be amended so that requests for interpretation cannot be used for delaying purposes or to obtain revisions under the guise of requests for interpretation. (365)

16.15.3 Form of Interpretation

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Again the interpretation shall form part of the award and the form requirements of provisions such as Article 31 of the UNCITRAL Model Law must be met. The Note by the Secretariat of the ICC on Correction and Interpretation of Awards considers that for interpretations as well as corrections, where a request is acceded to, it should take the form of an Addendum while a refusal should be taken as a Decision. (366) Both addenda and decisions need to have reasons and be presented for  scrutiny to the ICC Court. As with corrections, situations might be more complex if a tribunal has had to be reconstituted between the time of an award and the time of a requested interpretation.

16.15.4 Time Limits for Interpretation

There is a difference in time limits as to interpretation of an award between various rules and statutes. Under Article 38 of the UNCITRAL Rules 2010 and Article 33 of the Model Law the tribunal has a thirty-day time period, although under Article 33(4) of the latter, the tribunal may extend if necessary the period of time for the making of a correction, interpretation or an additional award. Once again, it may be sensible to comply with the shorter period for safety purposes, although provisions in the rules selected would be expected to prevail.

16.15.5 Challenge

An English case has held that a failure to respond to a requirement to interpret an award can constitute a serious irregularity for challenge purposes. (367) That would obviously depend on the circumstances.

16.16 Additional Awards

Because additional awards must have added dispositive effect, they need to be rendered within any applicable time period that limits the tribunal's powers. (368) They also need to be promulgated subject to the due process rights of the parties to be heard and the deliberation obligations on the tribunal. Article 33(3) of the UNCITRAL Model Law indicates that unless otherwise agreed by the parties, a party may with notice to the other, request an additional award as to presented claims that were omitted from the award. (369) There is a thirty-day time limit for the request and if the tribunal considers it justified, sixty days for the making of the additional award. Article 39 of the UNCITRAL Rules 2010 allows for a request for awards on claims presented but not decided within thirty days of receipt. (370) If the tribunal considers the request justified it has sixty days to comply but may extend if necessary.

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Neither the 1998 nor the 2012 ICC Rules include such a provision. However, the ICC accepts that this is at least permissible where it is provided for by the *lex arbitri*. (371) A specific rule for additional awards was not thought appropriate to the ICC Rules simply because of the court scrutiny, which would hopefully identify such matters in any event. (372) While the hope of the ICC Working Party was that scrutiny would obviate the need for additional awards, no one is infallible and in any event the Secretariat and the court have not had the benefit of being at the proceedings. The parties may have orally agreed to clarification of the ambit of a term of reference, which might then have not been adequately addressed in the award. This omission would not be obvious to someone comparing the terms of reference with the actual award to determine whether all matters were adequately covered. There is also the possibility of human error. It would be unfortunate if the result was that a need for an additional award not picked up by the court would force an annulment application. That would be particularly problematic in terms of those aspects of the award which were properly concluded.

There is generally no express provision in rules for the tribunal to provide an additional award of its own volition. If the tribunal has simply forgotten to cover something that should have been dealt with in an award it declares to be final, one view is that it would be *functus officio* under a provision such as that of the Model Law. That should not be so where the rules or statute expressly indicate that an additional award may be rendered after an award purporting to be a final award. A contrary view is that it should be an inherent power or an implied term in its duty to complete its mandate. In any event, it is subject to contrary agreement by the parties who may, therefore, bar the entitlement to additional awards. Even a later agreement by the parties should not be a problem in terms of imposing on the tribunal as it would only be reducing the potential workload of the tribunal not adding to it and hence could not be seen as an improper interference with contractual rights agreed to on appointment. (373)

Civilian jurisdictions have tended to allow tribunals to subsequently deal with omissions without any express basis in the statute or rules, while some common law jurisdictions have considered the tribunal to be *functus officio*. The better view should be to see the *functus officio* doctrine as having exceptions to correct mistakes, clarify ambiguities and decide matters which have been inadvertently omitted. (374) If a tribunal itself cannot render an additional award unless requested to do so by a party, this may unfortunately mean that the award might be set aside if a party preferred that approach, at least in a jurisdiction that does not require a request for an additional award as a gateway to annulment.

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A further policy issue is the implication for any annulment or challenge proceedings where such rectification or interpretation applications have been made or can be made. It would be wasteful to force parties to take appeal proceedings where one would obviate the need for the latter. Section 70(2)(b) of the English Arbitration Act 1996 indicates that a challenge or appeal cannot be brought until remedies provided under section 57 as to correction or additional awards have first been exhausted. (375) Nevertheless in legal systems where there is no such express provision, the parties may need to simultaneously file to ensure that their rights are clearly protected. (376) In France a failure to decide on an aspect of the claim does not constitute a breach of the mandate or a ground for setting aside, hence the proper remedy is to require an additional award. (377)

There is a difference between situations where a tribunal has simply failed to address a matter that should have been dealt with and instead a situation where a tribunal has impliedly rejected a claim but not addressed it in the award. As to the latter, because of the requirement to provide reasons, a tribunal should always address rejected claims and explain the reason for the rejection. Due process and natural justice issues should commonly arise with additional awards if the tribunal has not already ensured that each party has had an adequate and equal opportunity to present its argument on the matters not covered in what purported to be the final award. If a tribunal needs to afford parties an opportunity to make submissions in relation to an additional award, it would seem reasonable to impose strict time limits so that the tribunal itself can meet its required deadlines, although it is equally the case that where the tribunal has a power to extend a time period, it should ensure that both the tribunal and

the parties have an adequate opportunity to present relevant material. (378)

Additional awards are not merged with previous awards and may thus be the subject of discrete annulment or enforcement applications. They again must comply with all of the form requirements for an award.

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16.17 Remission of Awards

Another mechanism for follow-up action by a tribunal is where an annulment application has been made and the relevant court has a power to remit the award to the tribunal. Article 34(4) of the UNCITRAL Model Law indicates that:

The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

This provision does not establish a typical remittance power where a court might direct a tribunal to behave in a particular way. Instead it is merely a power to suspend setting aside proceedings and must be based on a presumption that the tribunal has a separate entitlement to take some further action that might eliminate the grounds for setting aside.

16.18 Fees and Expenses for Corrections, Interpretations or Additional Awards

Another question is whether a tribunal may seek fees or expenses where correction, interpretation or additional awards are involved. The policy issue of concern is that the need for correction, interpretation or additional awards might often arise because of tribunal error.

Where an institution sets the final fee it might well take this into account in any event. Where the parties have agreed on an hourly or daily rate, and the tribunal has no indemnity or exclusion for negligent behaviour, if the error is clearly that of the tribunal, seeking a fee might simply lead to a claim for reimbursement under the contract with the parties. Some laws expressly indicate that the tribunal is not entitled to receive fees for such purposes. If a case is clearly one of tribunal error, one would normally expect that a tribunal would not seek payment for that purpose. More problematic are cases where the tribunal believes the award is sufficient but the parties have sought clarification nonetheless. It will obviously be a question of judgment on a case-by-case basis whether a tribunal could justify fees in such circumstances. Article 40(3) of the UNCITRAL Arbitration Rules 2010 makes clear that where interpretation, correction or completion arises the tribunal may charge specified costs but no additional fees. A tribunal's broad powers to award costs as between parties should also apply to any contest in relation to correction applications. While there is a strong argument to the effect that a tribunal ought not to be entitled to fix errors or ambiguities and receive fees as well, (379) nevertheless Article 2(10) of Appendix III to the ICC Rules 2012 allows an advance to cover additional fees and expenses where appropriate in relation to Article 29(2) applications.

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It certainly seems reasonable that a tribunal should be entitled to fees and expenses where it legitimately rejects such an application. The difficulty arises where the tribunal accepts that it has made a typographical or computational mistake or has failed to clarify an ambiguous matter or has failed to deal with a claim. A blanket rule either way would be problematic. For example, where additional awards are concerned, if the tribunal should have dealt with a matter and did not, the original fee may be less than it ought to have been. Hence, when the tribunal completes the mandate, some entitlement to extra fees seems appropriate. The same may be true with certain interpretations that in reality invite a tribunal to address a particular issue such as whether interest awarded should be on a compound or simple basis. Even here there may need to be a legitimate discount for the extra costs occasioned to the parties by reason of the tribunal's oversight.

16.19 Effect of an Award

16.19.1 Impact of the Award on an Arbitrator's Powers

As noted at the outset, the key effects of an award are that it is enforceable as between the parties, it has res judicata effect in relation to future actions, parties themselves have duties to comply and not to act in a contrary manner, and potential rights to seek correction, interpretation, annulment or enforcement are triggered.

Once a final award is rendered, another important question is as to the impact on the tribunal's own powers. Generally speaking, the rendering of a final award renders a tribunal *functus officio*, save for express correction and interpretation powers, although the concept is to some degree subject to debate and is discussed further in the following section. The *functus officio* concept may have important practical implications where a tribunal omits to cover certain aspects that ought to have been dealt with. An example would be interest and costs. Save for express powers to provide additional or corrective awards, the possibility exists that a tribunal which purports to render a final award not covering all matters can no longer repair

the oversight. A converse argument is also highly tenable. A tribunal has a duty to complete the mandate. The parties never consented to an award that was *infra petita*. Consequently, once the oversight is noticed, the tribunal should be seen as having power to complete that which it was originally asked to do. There are thus desirable exceptions to the *functus officio* principle which can be provided for in a range of ways. In addition to the inherent powers argument, most rules allow for correction, interpretation and at times revision of an award. Second, an annulment or enforcement court might remit the matter back to a tribunal for reconsideration. Third, the tribunal's own award might provide the parties with liberty to apply for variations of the orders, for example where one party fails to respect a particular direction in the award.

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Where arbitral statutes address the issue, they typically follow the structure of Article 32 of the UNCITRAL Model Law. This provides that 'the arbitral proceedings are terminated by the final award' subject to the provisions relating to correction, interpretation and additional awards. Article 32(3) indicates that '(t)he mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings'. (380) Article 32(2) also indicates that the proceedings may be terminated by order of the tribunal without necessity for a final award where the claimant withdraws the claim unless the respondent objects and the tribunal agrees that the respondent is entitled to an award, the parties agree on termination, or the tribunal finds a continuation is unnecessary or impossible.

Where ICSID arbitration is concerned, an ad hoc committee may consider a request for nullification under Article 52(1) of the ICSID Convention. If the award is annulled, either party can request that the matter be brought to a new tribunal. (381) Article 51(1) of the ICSID Convention allows reconsideration of an award based on subsequently discovered evidence 'of such a nature as to decisively affect the award'. An UNCITRAL tribunal under Judge Schwabel considered that this was an inherent element of a tribunal's power. (382)

While an arbitrator would generally be seen as *functus officio* after rendering an award and after the appropriate time periods for rectification are concluded, this only relates to the adjudicatory function itself. An arbitrator certainly has ongoing duties of confidentiality. A related question is whether there are then any commensurate rights or powers in relation to any matters over which there is a duty. Schwartz alludes to a complex dispute as to whether an arbitrator was entitled to release material in its possession at the request of a party. (383)

In addition to duties of confidentiality, there may be duties to conserve documents, assisting the parties in complying with further formalities, (384) the duty to correct errors, interpret where necessary and at times supplement an award and the duty not to interfere with or adversely affect enforcement of an award. Most do not see any positive obligation to actively support enforcement, although this has been argued by Bedjaoui in the context of helping sovereign States to come to terms with adverse determinations in investment arbitrations. (385) Identifying such duties after the award is completed is further complicated where there are multi-member tribunals. Added to the conceptual question there is also the problem of what remedy could possibly apply if an arbitrator breaches post-award obligations. Removal or loss of fees cannot be applicable. Damages would be difficult to prove even where immunities do not apply.

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One residual uncertainty is the degree of control a tribunal may have over certain forms of relief. In some cases, a tribunal might see valuable practical reasons to try and maintain such an ongoing function but would need to consider whether it is unable to do so, *being functus officio*. This is discussed further in the following section.

16.19.2 The Nature of the *Functus Officio* Concept and Implied Exceptions

The logic behind the concept of *functus officio* is that if parties consent to a tribunal having a mandate to do certain things, once they are completed the jurisdictional authority no longer exists. The notion that a tribunal is *functus officio* has a strong relationship to other concepts clearly applicable, namely that an award gives rise to res judicata effects between the parties and that awards are binding. The notion of *functus officio* in common law is simply to the effect that an arbitrator may not revisit the merits of an award once it has been issued. (386) Because of this, the concept must be looked at alongside the doctrine of finality. (387) The *functus officio* concept would also mean that even where partial awards are rendered, that is the final word of the tribunal on that matter and the tribunal cannot change its view even if the balance of the proceedings are ensuing. As noted previously in relation to *Gulf Petro Trading Co v Nigerian National Petroleum Corp*, (388) later stages can still impact on earlier ones.

Jurisdictions such as the US that do not expressly refer to anything akin to a *functus officio* doctrine, still support it under common law principles, with similar exceptions to deal with mistakes and ambiguities. (389) All legal systems would agree that while a tribunal may correct obvious errors, fill gaps and resolve ambiguities, the functions are not there to support a change in view that a tribunal might have come to on further reflection. The policy reasons against this are that the parties wanted a speedy and final resolution of their dispute, there would be too much concern with the possibility of ex parte submissions after the award trying to have the tribunal change its mind and the concern that if the tribunal felt disposed to change its mind on one occasion, why might it not do so again on even further representations being made.

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There is a debate as to whether a tribunal nonetheless has an inherent power to revise an

award in cases of fraudulent or similar behaviour. A number of tribunals and commentators have considered the possibility and not rejected it outright, although language used is very mindful of the question of whether the tribunal still has potential jurisdiction. The French Cour de Cassation considered that this would be possible 'if the arbitral tribunal remains constituted after the rendering of the award (or can be reconstituted)'. (390) If the tribunal is aware of fraud prior to *becoming functus officio*, it seems reasonable to allow it to reopen its proceedings. All arbitration agreements are properly presumed to be agreed to in good faith. This would suggest an implied term that if one party acts fraudulently and misleads the tribunal, at least as long as the tribunal has some remaining duties, these can include correction of determinations induced by fraud. (391) Brower supports the view that the tribunal itself ought to be able to review such awards. (392)

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References

- 1) For example, ICC Rules 2012 Art. 34(6).
- 2) If a party is aggrieved by a mere procedural order or determination, a protest should be made at the time as this may be considered relevant by an enforcement court in exercising its discretion: Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 516, n. 12.
- 3) Aron Broches, 'Recourse against the Award; Recognition and Enforcement of the Award', in *UNCITRAL's Project for a Model Law on International Commercial Arbitration*, ICCA Congress Series No. 2, ed. Pieter Sanders (The Hague: Kluwer Law International, 1984), 208–209.
- 4) See, e.g., Judgment of 13 April 2010, Swiss Federal Supreme Court, *ASA Bulletin* 28, no. 3 (2010); Judgment of 1 July 1999, *Brasol v. GMRA*, Cour d'appel de Paris, *Revue de l'Arbitrage*, (1999), no 3: 834; *Publicis v. True North*, 206 F. 3d 725. See also Andrea Carlevaris, 'La qualificazione delle sentenze arbitrali', *Rivista dell'arbitrato* 12, no. 3 (2002).
- 5) Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the Uncitral Model Law on International Commercial Arbitration: Legislative History and Commentary* (The Hague: Kluwer Law International, 1995), 153–154 and 867–868.
- 6) Singaporean International Arbitration Act s. 2(1). See also Malaysian Arbitration Act 2005 s. 2(1); New Zealand Arbitration Act s. 2(1).
- 7) SIAC Rules Art. 1.3.
- 8) Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröil, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 631.
- 9) James M. Gaitis, 'The Federal Arbitration Act: Risks And Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations', *The American Review of International Arbitration* 16 (2005): 70.
- 10) See Judgment of 17 May 1990, *Commissariat à l'énergie atomique v. Iran*, Swiss Federal Supreme Court, *ASA Bulletin* 8, no. 3 (1990): 288.
- 11) Judgment of 1 July 1999, *Brasol v. GMRA*, Cour d'appel de Paris, *Revue de l'Arbitrage* (1999): 834. For other cases where designation by the tribunal was not determinative see *Resort Condominiums International Inc. v. Bolwell* (1993) 118 ALR 655, in Albert Jan van den Berg (ed.), *Yearbook Book of Commercial Arbitration Volume XX* (The Hague: Kluwer Law International, 1995), 628, para. 40; *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2006] SGCA 41, para. 70; *Tang Boon Jek Jeffrey v. Tan Poh Leng Stanley* [2001] 3 SLR 237.
- 12) Custodio O. Parlade, 'Arbitral Awards', in *The Asian Leading Arbitrators' Guide to International Arbitration*, ed. Michael Pryles & Michael Moser (Huntington: JurisNet LLC, 2007), 377.
- 13) *Verbiese v. SEE*, Judgment of 10 November 1995, Cour d'appel de Paris (Paris Court of Appeal), *Revue de l'Arbitrage* (1997): 583–595.
- 14) Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 516.
- 15) There is some debate on this, discussed below.
- 16) The Philippines legislation uses a test of whether it resolves an 'issue in controversy', which at least avoids the use of the term 'substantive' with its comparative law overtones, but which may be interpreted too broadly, as on plain meaning it could be asserted to apply to some procedural disputes: Philippines Alternative Dispute Resolution Act 2004 s. 3(f).
- 17) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 642.
- 18) *Ibid.*, 645.
- 19) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2357.
- 20) *Ibid.*, 2358.
- 21) It also rejected the defence on the basis that signature by one arbitrator alone was insufficient. *Publicis Communication & Publicis SA v. True North Communications Inc.*, 206 F. 3d 725 (7th Cir, 14 March 2000).
- 22) Philippe Pinsolle, 'La Convention de New York peut-elle permettre l'exequatur d'un order par lequel un Tribunal arbitral enjoint a une partie de produire des pieces', *Revue de l'arbitrage* (2000): 657.

- 23) Jean-François Poudret & Sébastien Besson, *Comparative law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 643.
- 24) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2358.
- 25) Note, however, that the New York Convention 1958 does not expressly require an award to be final, but instead that it be binding.
- 26) Custodio O. Parlade, 'Arbitral Awards', in *The Asian Leading Arbitrators' Guide to International Arbitration*, ed. Michael Pryles & Michael Moser (Huntington: JurisNet LLC, 2007), 378.
- 27) UNCITRAL Model Law Arts 35 and 36.
- 28) See, e.g., Judgment of 7 July 1995, Paris Cour d'appel, *Revue de l'Arbitrage* (1996): 270.
- 29) For a detailed discussion see James M. Gaitis, 'The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations', *The American Review of International Arbitration* 16 (2005): 1.
- 30) Judgment of 23 October 2003, United States District Court, Northern District of Texas, Dallas Division, Civil Action No. 3:03-CV-0406-G in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration Volume XXIX* (The Hague: Kluwer Law International, 2004): 1114–1128.
- 31) Rau questions what would have happened if the partial award had been first presented for confirmation in the US. Alan Scott Rau, 'Provisional Relief in Arbitration: How Things Stand in the United States', *Journal of International Arbitration* 22 (2005): 59, n. 264.
- 32) English Arbitration Act 1996 ss 38, 39 and 42(1); German Code of Civil Procedure Art. 1041(2).
- 33) English Arbitration Act 1996 ss 42, 138; Swiss Private International Law Art. 184(2).
- 34) Laurence Boo, 'Ruling on Arbitral Jurisdiction – Is That an Award?', *Asian International Arbitration Journal* 3, no 2. (2007): 125.
- 35) Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 516.
- 36) *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2006] SGCA 41 at para. 66.
- 37) The fact that the UNCITRAL Model Law treats certain situations differently ought not to be determinative. For example, if a respondent, after losing an arbitration commenced legal proceedings in a Model Law country, the arbitral claimant would seek to invigorate Art. 8 of the Model Law, which should naturally apply even if some courts might take a different view to that of the tribunal outside of the context of enforcement proceedings.
- 38) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 644.
- 39) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2359.
- 40) José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 145.
- 41) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 644.
- 42) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2429.
- 43) *Ameritech Services, Inc. v. Local Union No. 336*, NO. 95 C-5897 WL 222439 (N.D Ill., 30 April 1997).
- 44) *Ibid.*
- 45) *Olsen v. Wexford Cleaning Services Corp.* (7th Cir, 3 February 2005).
- 46) *Local 36, Sheet Metal Workers Int'l Assoc, v. Pevely Sheet Metal Co.*, 951 F.2d 417 (8th Cir 1993).
- 47) See sections 16.13–17 and 16.19 below.
- 48) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2430.
- 49) For example, UNCITRAL Model Law Art. 32(1).
- 50) There are however many exceptions to the notion that a tribunal is *functus officio* after rendering a final award. Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 687–697.
- 51) José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 146.
- 52) English Arbitration Act 1996 s. 47; Swiss Private International Law Art. 188; Swedish Arbitration Act s. 29.
- 53) LCIA Rules Art. 26.7; SIAC Rules Art. 1.3; Swiss Rules 2012 Art. 32.1; SCC Rules Art. 38; ACICA Rules Art. 33.1; HKIAC Rules Art. 30.1; UNCITRAL Rules 2010 Art. 34.1; ICDR Rules Art. 27.7.
- 54) Previously, Art. 21.4 UNCITRAL Rules 1976 indicated that a tribunal should generally rule on jurisdiction as a preliminary matter. This presumption was not repeated in the 2010 Rules.
- 55) W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn (New York: Oceana Publications, 2000), 362–364; Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 743.
- 56) Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 522.

- 57) Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer: Kluwer Law and Taxation Publishers, 1989); 868.
- 58) Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 633; ICC Case No. 3790 (1983), in Albert Jan van den Berg (ed.), *Yearbook of Commercial Arbitration Volume XI* (The Hague: Kluwer Law International, 1986); *Wintershall AG v. Government of Qatar*, in Albert Jan van den Berg (ed.), *Yearbook of Commercial Arbitration Volume XV* (The Hague: Kluwer Law International, 1990).
- 59) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 632. Other leading commentators agree. See Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 431; Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 743.
- 60) Poudret and Besson also suggest the advisability of consulting the parties: Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 636.
- 61) Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 523.
- 62) Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 634.
- 63) Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 523.
- 64) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 635.
- 65) Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 634.
- 66) *Sodifis Case*, Judgment of 8 March 1988, *Sociétés Sodifis v. Oiaeti*, Cour de cassation, *Revue de l'Arbitrage* (1989): 481 with a note by Jarroson.
- 67) *The Angelic Grace* [1980] 1 Lloyd's Rep 288 (CA). See however *Trade Fortitude* [1992] 1 Lloyd's Rep 169.
- 68) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 633. Conversely, see Klaus Peter Berger, *International Economic Arbitration* (The Hague: Kluwer Law and Taxation Publishers, 1993), 691.
- 69) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2359.
- 70) *Ibid.*, 2360.
- 71) See, e.g., Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 640, fn. 52.
- 72) *Transfield Philippines v. Luzon Hydro Corporation, et al.*, 19 May 2006, Supreme Court, Special Second Division, G.R No. 146717.
- 73) See the cases cited in Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 635, n. 29.
- 74) Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer: Kluwer Law and Taxation Publishers, 1989), 867.
- 75) JAMS International Arbitration Rules Art. 30.3.
- 76) James M. Gaitis, 'The Federal Arbitration Act: Risks And Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations', *The American Review of International Arbitration* 16 (2005): 68. Gaitis sees it in the first manner.
- 77) Section 14 of the English Arbitration Act.
- 78) Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration, 'Final Report on Interim and Partial Awards', *ICC International Court of Arbitration Bulletin* 2 (1990): para. 5.
- 79) *Ibid.*, para. 11.
- 80) W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn (New York: Oceana Publications, 2000), 359–360.
- 81) Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 635.
- 82) There is a debate as to whether interim awards are enforceable under the New York Convention. See UNCITRAL Working Group II, 'Preparation of uniform provisions on interim measures of protection', UN Doc. A/CN.9/WG 119.
- 83) Judgment of 10 May 2007, Oberlandesgericht Frankfurt (Higher Regional Court of Frankfurt), *Schieds VZ* (2007): 278. See also Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2360.
- 84) See, e.g., the Spanish Arbitration Act 2003 Art. 23. In *Polydeskis Corp. v. Transcontinental Fertiliser Co.* a US District Court considered it could confirm an order directing deposit of a sum into escrow by way of an interim measure: (1996) WL 683629, No Civ. A. 95-0242 (E.D.Pa. 26 November 1996) cited in James M. Gaitis, 'The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations', *The American Review of International Arbitration* 16 (2005): 62.
- 85) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2023.

- 86) Article 17H has been incorporated in Schedule 1 to New Zealand Arbitration Act 1996. The Hong Kong Arbitration Ordinance (2011) also provides for the enforcement of interim measures.
- 87) See, e.g., ICC Rules 2012 Art. 28(1); SIAC Rules Art. 26.1; HKIAC Rules Art. 24.2; ACICA Rules Art. 28.1; SCC Rules Art. 32(3); Swiss Rules 2012 Art. 26.3.
- 88) English Arbitration Act 1996 s. 39.
- 89) Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 516, n. 11.
- 90) See, e.g., ICC Rules 2012 Arts 6(3) and 26(2); LCIA Rules Art. 15.8; ICDR Rules Art. 23; SIAC Rules Art. 21.3; HKIAC Rules Art. 26.2; SCC Rules Art. 30(2); Swiss Rules 2012 Art. 28; ACICA Rules Art. 29.3; UNCITRAL Rules 2010 Art. 30.2 and 30.3.
- 91) See, e.g., UNCITRAL Model Law Art. 25; English Arbitration Act s. 41(4); Swedish Arbitration Act Art. 24.
- 92) Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 524.
- 93) ICSID Arbitration Rules 42(f)).
- 94) See, e.g., ICDR Rules Art. 30; LCIA Rules Art. 27.3; SCC Rules Art. 42; SIAC Rules Art. 29.3; HKIAC Rules Art. 35; UNCITRAL Rules 2010 Art. 39; Swiss Rules 2012 Art. 36; ACICA Rules Art. 38. For statutes expressly referring to additional awards, see UNCITRAL Model Law Art. 33; English Arbitration Act s. 57; Swedish Arbitration Act s. 32; Austrian Code of Civil Procedure Art. 610; German Code of Civil Procedure Art. 1058(1). While both the 1998 and 2012 versions of the ICC Rules allow for corrections for clerical errors, they do not expressly allow for an additional award for omissions.
- 95) There may even be conflict of law issues with such a contract if it has a different applicable law to the underlying dispute.
- 96) For statutes, see UNCITRAL Model Law Art. 30(1); English Arbitration Act s. 51; Austrian Code of Civil Procedure Art. 605; German Code of Civil Procedure Art. 1053; Swedish Arbitration Act s. 27. For arbitral rules, see ICC Rules 2012 Art. 32; LCIA Rules 1998 Art. 26.8; ICSID Arbitration Rules Art. 43(2); ICDR Rules Art. 29.1; ACICA Rules Art. 35.1; HKIAC Rules Art. 32.1; SIAC Rules Art. 28.8; SCC Rules Art. 39(1); Swiss Rules 2012 Art. 34.1; UNCITRAL Rules 2010 Art. 36.1.
- 97) James H. Carter, 'Part I – Issues Arising from Integrated Dispute Resolution Clauses', in *New Horizons in International Commercial Arbitration and Beyond*, ICCA International Arbitration Congress Series No. 12, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2004), 446, 468.
- 98) ICC Rules 2012 Art. 32. See also ICDR Rules Art. 29(1); WIPO Rules Art. 65(c).
- 99) UNCITRAL Model Law Art. 30(1); English Arbitration Act s. 51(2); LCIA Rules Art. 26.8; UNCITRAL Rules 2010 Art. 36.1; ACICA Rules Art. 35.1; Swiss Rules 2012 Art. 34.1; HKIAC Rules Art. 32.1; ICDR Rules Art. 29.1. The LCIA Arbitration Rules requires that the award contain an express statement that it is an award made by the parties' consent: Art. 26.8.
- 100) Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 526.
- 101) There may be a question as to whether a cancellation fee is excessive and abuse of a tribunal's ethical obligations. See section 5.17.12.
- 102) See, e.g., the Singapore High Court decision in *Doshion Ltd v. Sembawang Engineers and Constructors Pte Ltd* [2011] SGHC 46. See also *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40.
- 103) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2437–2438; David D. Caron, Matti Pellonpää & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd edn (Oxford: Oxford University Press, 2006), 859. See also *Islamic Republic of Iran v. United States of America* (1981–1982) 1 Iran-US Claims Tribunal 144, 153. This case suggested that an arbitrator 'should not attempt to review the reasonableness of the settlement in the place of the arbitrating parties'. Fouchard presents the strongest argument that an arbitrator must generally render such an award: Emmanuel Gail-lard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 1365.
- 104) Simon Greenberg, Christopher Kee & J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge: Cambridge University Press, 2011), 399.
- 105) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 637.
- 106) Custodio O. Parlade, 'Arbitral Awards', in *The Asian Leading Arbitrators' Guide to International Arbitration*, ed. Michael Pryles & Michael Moser (Huntington: JurisNet LLC, 2007), 381.
- 107) Christian Hausmaninger, 'Rights and Obligations of the Arbitrator with Regard to the Parties and the Arbitral Institution – A Civil Law Viewpoint', in *The Status of the Arbitrator, ICC International Court of Arbitration Bulletin: 1995 Special Supplement*, ed. Jean-François Bourque (Paris: ICC Publishing, 1995), 44.
- 108) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 637.
- 109) Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 338.
- 110) New York Convention Art. I(1).
- 111) See, e.g., Australian International Arbitration Act s. 3.

- 112) See, e.g., *Ascom Electro AG v. PT Manggala Mandiri Sentosa* cited in Michael Hwang & Shaun Lee, 'Survey of South East Asian Nations on the Application of the New York Convention', *Journal of International Arbitration* 25 (2008): 876.
- 113) Similar provisions are contained in UNCITRAL Rules 2010 Art. 36.
- 114) UNCITRAL Rules 2010 Art. 36; ICDR Rules Art. 29; ACICA Rules Art. 35; HKIAC Rules Art. 32; SCC Rules Art. 30.
- 115) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2442.
- 116) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 657.
- 117) Article 1456 French Code of Civil Procedure; Art. 820 Italian Code of Civil Procedure; Art. 37 Spanish Arbitration Act 2003.
- 118) Judgment of 16 June 1976, *Dame Krebs et autre v. Milton Stern et autre*, Cour de cassation, *Revue de l'Arbitrage* (1977): 272–275.
- 119) Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer: Kluwer Law and Taxation Publishers, 1989), 841.
- 120) The KCAB Rules Art. 33, fix the shortest period, just forty-five days. See also SIAC Rules Art. 28.1; the Milan Rules Art. 21(1); SCC Rules Art. 37; KLRCA Rules Art. 6.
- 121) See HKIAC Rules 38.2(d); ACICA Expedited Arbitration Rules Art. 27; SIAC Rules Art. 5.2(d); Swiss Rules 2012 Art. 42.1(d).
- 122) ICC Rules 2012 Art. 30(2).
- 123) W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn (New York: Oceana Publications, 2000), 356–357.
- 124) José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 157.
- 125) In *Hasbro, Inc. v. Catalyst USA Inc.* (7th Cir, 10 May 2004) Docket No. 02-4301, the losing party sought to vacate the award on the ground that the arbitrators exceeded their powers by issuing an award beyond the period for the making and release of the award. The district court vacated the award, however their decision was reversed on appeal. The US Federal Circuit Court of Appeals found that the arbitrators did not exceed their authority by issuing an untimely award: time was not of the essence in the arbitration, despite the fact that the AAA Rules that governed the arbitration specify a thirty-day deadline for the making of the arbitral award.
- 126) Judgment of 16 October 2003, *X S.A.L et al. v. Z Sâri*, Swiss Federal Supreme Court, *ASA Bulletin* 22, no. 2: 372.
- 127) José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 157.
- 128) V.V. Veeder, 'Laws and Court Decisions in Common Law Countries and the UNCITRAL Model Law', in *Preventing Delay and Disruption of Arbitration*, ICCA Congress Series No. 5 (Stockholm, 1990), ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 1991), 277–278, 321–322; Stephen N. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge: Cambridge University Press, 1987).
- 129) Article 1468 of the French New Code of Civil Procedure provides that the arbitrator is to set the date on which the case will be adjourned for deliberation.
- 130) Allan Philip, 'The Duties of an Arbitrator', in *The Leading Arbitrators' Guide to International Arbitration*, ed. Lawrence W. Newman & Richard D. Hill (New York: Juris Publishing, Inc., 2008), 79.
- 131) Professor Doug Jones, 'International Dispute Resolution in the Global Financial Crisis', *The Arbitrator and Mediator*, October 2009, 49.
- 132) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 651.
- 133) *Ibid.*, 652.
- 134) This is mandated by para. 1052(2) of the German Code of Civil Procedure.
- 135) Karl-Heinz Böckstiegel, 'Case Management by Arbitrators: Experiences and Suggestions', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 126.
- 136) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1623.
- 137) Swiss Federal Court in Judgment of 23 October 1985, *SEFRI SA v. Komgrap*, Swiss Federal Supreme Court, *ASA Bulletin* 4, no. 2 (1986): 81. This was in the context of one arbitrator being unable to personally attend meetings due to poor health, but this did not seem to affect the Court's reasoning. See also Judgment of 16 October 2003, *X S.A.L et al. v. Z. Sârl*, Swiss Federal Supreme Court, *ASA Bulletin* 22, no. 2 (2004): 372.
- 138) See, e.g., ICC Rules 2012 Art. 27; UNCITRAL Rules 2010 Art. 31.2; ICDR Rules Art. 24.2; SCC Rules Art. 34; SIAC Rules Art. 28.1; HKIAC Rules Art. 27; ACICA Rules Art. 30.
- 139) See *Noble China Inc. v. Lei* 42 OR (3d) 69, which rejected a dissenting arbitrator's affidavit as to the deliberations.
- 140) Decision of the Appointing Authority to the Iran-US Claims Tribunal, 7 May 2001, *Mealeys International Arbitration Report* 16, no. 5 (2001).

- 141) *Himpurna Calif Energy Ltd v. Republic of Indonesia*, Interim ad hoc Award, 26 September 1999, in Albert Jan van den Berg (ed.), *Yearbook of Commercial Arbitration Volume XXV* (The Hague: Kluwer Law International, 2000), 152.
- 142) Pierre Karrer, 'Responsibility of Arbitrators and Arbitral Institutions – Let Sleeping Dogs Lie', in *The Leading Arbitrators' Guide to International Arbitration*, ed. Lawrence W. Newman & Richard D. Hill, 2nd edn (New York: Juris Publishing, Inc., 2008), 618.
- 143) Decision of the Appointing Authority to the Iran-US Claims Tribunal, 7 May 2001, *Mealeys International Arbitration Report* 16, no. 5 (2001).
- 144) Supreme Court decision of 29 January 2010, LJN BK 2007, discussed by Eelco Meerdink & Niels Dekker, 'Supreme Court Rules Arbitral Tribunal Not Required to Disclose Hearing Notes', 15, no. 1 IBA Arb News 131.
- 145) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 650.
- 146) *Ibid.*
- 147) The Svea Court of Appeal considered the need to balance fairness and efficiency and rejected such an argument in *Czech Republic v. CME Czech Republic BV*, Svea Court of Appeal, Case No. T8735-01 (2003).
- 148) Alan Redfern, 'The 2003 Freshfields Lecture: Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly', *Arbitration International* 20, no. 3 (2004): 238.
- 149) *Ibid.*, 229.
- 150) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 654.
- 151) *Ibid.*, 649. The DIS (German Institution for Arbitration) Arbitration Rules s. 33.4, provide that where an arbitrator refuses to take part in the vote on a decision the remaining arbitrators may decide without him and decide by majority vote. However, the parties need to be given advance notice of the intention to make an award without the arbitrator who refuses to participate in the vote.
- 152) UNCITRAL Model Law Art. 29; German Code of Civil Procedure Art. 1052; UNCITRAL Rules 2010 Art. 33.1 and 34.4 LCIA Rules Art. 26.3 and 26.4; Austrian Code of Civil Procedure Art. 604; Swiss Private International Law Art. 189(2); English Arbitration Act s. 52(3); French New Code of Civil Procedure Art. 1480. Some Latin American countries previously required unanimity.
- 153) See section 5.16 which deals with truncated tribunals in more detail.
- 154) José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 139.
- 155) English Arbitration Act s. 20(4); Swiss Private International Law Art. 189(2); ICC Rules 2012 Art. 31(1); LCIA Rules Art. 26.3. Arts 30-31 of Swedish Arbitration Act of 1999 Art. 176a(2) and Art. 189(2) of the New Swiss International Arbitration Law provide a casting vote to the chair. Similarly, see LCIA Arbitration Rules 1998 Art. 26.3 and 26.4; Milan Chamber of Commercial International Arbitration Rules Art. 18.1; WIPO Arbitration Rules Art. 61; Rules of Procedure of the Inter-American Commercial Arbitration Commission Art. 28; Singapore International Arbitration Centre Arbitration Rules, rule 28.3. Note that under the SCC Arbitration Rules Art. 36.3 the chairman may sign the award where there is no majority.
- 156) See, e.g., ICC Case No. 7365, *Mealey's International Arbitration Report*, 13 (1998): G-5; ICC Case No. 3881 (1984), in *Collection of ICC Arbitral Awards, 1986-1990*, ed. Sigvard Jarvin, Yves Derains & Jean-Jacques Arnaldes (Deventer: Kluwer Law, 1994), 257; ICC Case No. 4567 in Albert Jan van den Berg (ed.), *Yearbook Book of Commercial Arbitration Volume XI* (The Hague: Kluwer Law International, 1986), 143-147; Francis Patrick Donovan, 'Dissenting Opinions', *ICC International Court of Arbitration Bulletin* 7, no. 2 (1996): 77.
- 157) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 660. The Swedish Arbitration Act s. 30 and Swiss Private International Law Art. 189(2) provide a casting vote to the chair. Section 20(4) of the English Arbitration Act follows the ICC model.
- 158) Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 747.
- 159) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 661. UNCITRAL Model Law Art. 29 only deals with issues of procedure. Likewise, the German Code of Civil Procedure Art. 1052(3) does not provide a mechanism for dealing with deadlocks.
- 160) José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M. Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 139.
- 161) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2461.
- 162) See Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 371. The authors suggest that the chair might decide alone on all issues.
- 163) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 661.
- 164) *Ibid.*, 659; ICSID Rules Art. 15.1.

- 165) See, e.g., Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, UNCITRAL, 9th Session, UN Doc. A/CN.9/112/Add.1, VII *UNCITRAL Yearbook* 166, 178 (1976); Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2461. See the Notes to Art. 47 of the ICSID Arbitration Rules 2006 and the possibility of sequential voting systems.
- 166) Christian Hausmaninger, 'Rights and Obligations of the Arbitrator with Regard to the Parties and the Arbitral Institution – A Civil Law Viewpoint', in *The Status of the Arbitrator, ICC International Court of Arbitration Bulletin: 1995 Special Supplement*, ed. Jean-François Bourque (Paris: ICC Publishing, 1995), 46.
- 167) See generally Stephen Schwebel, 'May the Majority Vote of an International Arbitral Tribunal Be Impeached?', *Arbitration International* 13, no. 2 (1997).
- 168) Laurent Lévy, 'Dissenting Opinions in International Arbitration in Switzerland', *Arbitration International* 5, no. 1 (1989): 35.
- 169) See the list in Manuel Arroyo, 'Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal', *ASA Bulletin* 26, no. 3 (2008): 442.
- 170) Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer: Kluwer Law and Taxation Publishers, 1989), 837.
- 171) UNCITRAL Secretariat, 'Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration as Amended in 2006', <<http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf>>.
- 172) Iran-US Claims Tribunal, Rules of Procedure Art. 32.
- 173) Article 48(4).
- 174) Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 766; Manuel Arroyo, 'Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal', *ASA Bulletin* 26 (2008): 443.
- 175) CIETAC Rules Art. 47.5.
- 176) Annette Magnusson & Patricia Shaughnessy, 'The 2007 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce', *Stockholm International Arbitration Review* (2006): 33-66, available at <http://www.sccinstitute.com/filearchive/2/21223/2007_scc_magnusson_shaughnessy_siar_2006_3.pdf>.
- 177) Pierre Karrer, 'Responsibility of Arbitrators and Arbitral Institutions – Let Sleeping Dogs Lie', in *The Leading Arbitrators' Guide to International Arbitration*, ed. Lawrence W. Newman & Richard D. Hill, 2nd edn (New York: Juris Publishing, Inc, 2008), 618.
- 178) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2466.
- 179) See Alan Redfern, 'The 2003 Freshfields Lecture: Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly', *Arbitration International* 20, no. 3 (2004).
- 180) James H. Carter, 'The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness', in *The Status of the Arbitrator, ICC International Court of Arbitration Bulletin: 1995 Special Supplement*, ed. Jean-François Bourque (Paris: ICC Publishing, 1995), 32.
- 181) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 675.
- 182) ICSID Rules Arts 15(1) and 47(3); Peter J. Rees & Patrick Rohn, 'Dissenting Opinions: Can They Fulfil a Beneficial Role?', *Arbitration International* 25, no. 3 (2009): 337.
- 183) Section 16.7 dealt with complex situations where it is hard to identify any majority position as a result of differing reasons and quantum amounts.
- 184) ICC Commission on International Arbitration, Working Party on Dissenting Opinions and Interim and Partial Awards 'Final Report on Dissenting and Separate Opinions', *ICC International Court of Arbitration Bulletin* 2, no. 1 (1991): 36.
- 185) Pieter Sanders, 'Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?', *Arbitration International* 20, no. 3 (2004): 253.
- 186) ICC Commission on International Arbitration, Working Party on Dissenting Opinions and Interim and Partial Awards 'Final Report on Dissenting and Separate Opinions', *ICC International Court of Arbitration Bulletin* 2, no. 1 (1991): 32.
- 187) Decision of 19 June 2006, *X v. Z*, Swiss Federal Supreme Court, *ASA Bulletin* 24, no. 4 (2006): 761.
- 188) Peter J. Rees & Patrick Rohn, 'Dissenting Opinions: Can They Fulfil a Beneficial Role?', *Arbitration International* 25 (2009): 338.
- 189) *Ibid.*, 336.
- 190) For an argument in favour of the right to dissenting opinions see Jacques Werner, 'Dissenting Opinions: Beyond Fears', *Journal of International Arbitration* 9, no. 4 (1992): 29.
- 191) Similarly, others will be warned about an arbitrator whose dissent is unreasonable.
- 192) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2469.
- 193) This is a corollary of Lord Bingham's observation that, at times when a judge sits down to write a reasoned argument in favour of a decision already reached, the process leads to the inevitable conclusion that a contrary decision is the only legitimate one. Lord Bingham, 'Reasons and Reasons for Reasons', *Arbitration International* 4, no. 2 (1988): 143.

- 194) ICC, 'Final Report on Dissenting and Separate Opinions', *ICC International Court of Arbitration Bulletin* 2, no. 1 (1991): 32; José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 141.
- 195) *Cargill International v. Sociedad Iverica de Molturación* [1998] 1 Lloyd's Rep 489; Judgment of 11 May 1992, Swiss Federal Supreme Court, *ASA Bulletin* 10, no. 3 (1992): 381.
- 196) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 675.
- 197) Manuel Arroyo, 'Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal', *ASA Bulletin* 26, no. 3 (2008): 462.
- 198) *Ibid.*
- 199) See Alan Redfern, 'The 2003 Freshfields Lecture: Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly', *Arbitration International* 20, no. 3 (2004): 241.
- 200) José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 141.
- 201) For example, Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 768.
- 202) Inclusion in the majority award is the preferred option of Peter J. Rees & Patrick Rohn, 'Dissenting Opinions: Can they Fulfil a Beneficial Role?', *Arbitration International*, 25 (2009): 342.
- 203) Christian Hausmaninger, 'Rights and Obligations of the Arbitrator with Regard to the Parties and the Arbitral Institution – A Civil Law Viewpoint', in *The Status of the Arbitrator, ICC International Court of Arbitration Bulletin: 1995 Special Supplement*, ed. Jean-François Bourque (Paris: ICC Publishing, 1995), 47.
- 204) See, e.g., Judgment of 11 May 1992, Swiss Federal Supreme Court, *ASA Bulletin* 10, no. 3 (1992): 381.
- 205) Manuel Arroyo, 'Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal', *ASA Bulletin* 26, no. 3 (2008): 452.
- 206) *Ibid.*, 462.
- 207) Peter J. Rees & Patrick Rohn, 'Dissenting Opinions: Can they Fulfil a Beneficial Role?', *Arbitration International* 25 (2009): 323.
- 208) *Ibid.*, 334.
- 209) ICC Commission on International Arbitration, Working Party on Dissenting Opinions and Interim and Partial Awards, 'Final Report on Dissenting and Separate Opinions', *ICC International Court of Arbitration Bulletin* 2, no. 1 (1991): 35.
- 210) Laurent Lévy, 'Dissenting Opinions in International Arbitration in Switzerland', *Arbitration International* 5, no. 1 (1989): 40.
- 211) An early draft did allow for the right to present dissenting opinions. Laurent Lévy, *ibid.*, 42.
- 212) Manuel Arroyo, 'Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal', *ASA Bulletin* 26, no. 3 (2008): 460.
- 213) James H. Carter, 'The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness', in *The Status of the Arbitrator, ICC International Court of Arbitration Bulletin: 1995 Special Supplement*, ed. Jean-François Bourque (Paris: ICC Publishing, 1995), 33.
- 214) *Government of Kuwait v. American Independent Oil Company (Aminoil)*, 24 March 1982, in Albert Jan van den Berg (ed.), *Yearbook Book of Commercial Arbitration Volume IX* (The Hague: Kluwer Law International, 1984), 71.
- 215) See Manuel Arroyo, 'Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal', *ASA Bulletin* 26, no. 3 (2008): 456 and the authors cited.
- 216) Laurent Lévy, 'Dissenting Opinions in International Arbitration in Switzerland' *Arbitration International* 5, no. 1 (1989): 39. La prestation caractéristique en droit international privé des contrats: l'influence de la Suisse, in *Essays on the occasion of the 75th Anniversary of the Swiss Association for International Law*, Zurich 1989.
- 217) Article 189.2. It seems that in the Philippines arbitrators who make an award must acknowledge or verify the award (by confirming its correctness, truth or authenticity) as a separate juridical act. *Grogun, Inc. v. National Power Corporation*, G.R. No. 156259, Philippines Supreme Court, 18 September 2003.
- 218) See, e.g., UNCITRAL Model Law Art. 31(1).
- 219) Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer: Kluwer Law and Taxation Publishers, 1989), 827.
- 220) That is expressly covered in Art. 37.3 of the Spanish Arbitration Act.
- 221) Karl-Heinz Böckstiegel, 'Case Management by Arbitrators: Experiences and Suggestions', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 126.
- 222) Neil Kaplan & Karen Mills, 'The Role of the Chair in International Commercial Arbitration', in *The Asian Leading Arbitrators' Guide to International Arbitration*, ed. Michael Pryles & Michael Moser (Huntington: JurisNet LLC, 2007), 142.
- 223) *Ibid.*, 143.
- 224) Geoffrey M. Beresford Hartwell, 'The Reasoned Award in International Arbitration' available at <<http://www.hartwell.demon.co.uk.intaward.htm>>.

- 225) Pierre Karrer, 'Must an Arbitral Tribunal Really Ensure that its Award is Enforceable?', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 431.
- 226) Lord Bingham, 'Reasons and Reasons for Reasons', *Arbitration International* 4, no. 2 (1988): 143.
- 227) Judge Howard Holtzmann criticised the tendency to length in awards in his Dissenting and Concurring opinion in *Mohsen Asgari Nazari v. Islamic Republic of Iran* (24 August 1994) cited in Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2454, n. 168.
- 228) Robert M. Merkin & Louis Flannery, *Arbitration Act 1996*, 3rd edn (London: Informa, 2005), 139.
- 229) Pierre Lalive, 'On the Reasoning of International Arbitral Awards', *JIDS* 1, no. 1 (2010): 55, 57.
- 230) José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 152.
- 231) New York Convention Art. IV.2.
- 232) Lord Bingham, 'Reasons and Reasons for Reasons', *Arbitration International* 4, no. 2 (1988): 142–143.
- 233) For arguments in favour of reasons, see Thomas E. Carbonneau, 'Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions', *Columbia Journal of Transnational Law* 23, no. 3 (1985): 579–614.
- 234) See, e.g., UNCITRAL Model Law Art. 31(2); English Arbitration Act s. 52(4); Austrian Code of Civil Procedure Art. 606(2); German Code of Civil Procedure Art. 1054; Swiss Private International Law Art. 189(2); ICC Rules 2012 Art. 31(2); UNCITRAL Rules 2010 Art. 34.3; LCIA Rules Art. 26.1; ICDR Rules Art. 27.2; SCC Rules Art. 31.2; ACICA Rules Art. 33.3; ICSID Convention Art. 48(3).
- 235) José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 156.
- 236) English Arbitration Act s. 68. See also *World Trade Corp. Ltd v. C Czarnikow Sugar Ltd* [2004] EWHC 2332 at [20]; *Margulead Ltd v. Exide Technology* [2004] EWHC 1019 at [42].
- 237) *The Easy Rider* [2004] 2 Lloyd's Rep 626 (QB).
- 238) *Al-Hadha Trading Co. v. Tradigrain SA* [2002] 2 Lloyd's Rep 512, 526.
- 239) Christian Hausmaninger, 'Rights and Obligations of the Arbitrator with Regard to the Parties and the Arbitral Institution – A Civil Law Viewpoint', in *The Status of the Arbitrator, ICC International Court of Arbitration Bulletin: 1995 Special Supplement*, ed. Jean-François Bourque (Paris: ICC Publishing, 1995), 47.
- 240) For example, *Mut Shipping Corp. v. Bayshore Shipping Co, The Montan* [1985] 1 Lloyd's Rep 189.
- 241) A.A. de Fina, 'The Party Appointed Arbitrator in International Arbitrations – Role and Selection', *Arbitration International* 15, no. 4 (1999): 387.
- 242) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2454.
- 243) Pierre Karrer, 'Must an Arbitral Tribunal Really Ensure That Its Award Is Enforceable?', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 432.
- 244) *Mahon v. Air New Zealand Ltd* [1984] AC 808, 821 per Lord Diplock; *Minister for Immigration & Ethnic Affairs v. Pochi* (1980) 44 FLR 41, 67–68 per Deane J; *Westminster City Council v. Great Portland Street Estates PLC* [1985] AC 661, 673 per Lord Scarman.
- 245) Pierre Lalive points to the inconsistency between the ad hoc committee in *MINE v. Guinea* stating on the one hand that 'the adequacy of the reasoning is not an appropriate standard of review', but also saying that the minimum requirement for adequate reasons 'is in particular not satisfied by either contradictory or frivolous reasons'. Pierre Lalive, 'On the Reasoning of International Arbitral Awards', *JIDS* 1, no. 1 (2010): 55, 65.
- 246) *Klöckner v. Cameroon* case (3 May 1985) 2 ICSID Rep 95 (1994).
- 247) ICSID No. ARB/82/1, Decision on Annulment, 3 May 1985, ICSID Review (1986), 126.
- 248) Pierre Lalive, 'On the Reasoning of International Arbitral Awards', *JIDS* 1, no. 1 (2010): 55, 65.
- 249) Pierre Karrer, 'Must an Arbitral Tribunal Really Ensure that Its Award Is Enforceable?', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 432.
- 250) *Ibid.*
- 251) Michael J. Mustill & Steward C. Boyd, *The Law and Practice of Commercial Arbitration in England* (London: Butterworths, 1982), 548.
- 252) Pierre Karrer, 'Must an Arbitral Tribunal Really Ensure that its Award is Enforceable?', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 433.
- 253) Lord Bingham, 'Reasons and Reasons for Reasons', *Arbitration International* 4 (1988): 145.
- 254) T.T. Landau, 'Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration', ICCA Congress Series No. 14, Dublin Conference, 2008 (The Hague: Kluwer, 2009), 187; see also G.-A. Alvarez & W.M. Reisman (eds), *The Reasons Requirement in International Investment Arbitration* (Leiden: M Nijhoff 2008).

- 255) Pierre Lalive also suggest that leading arbitrators too often take on too much work and provide for superficial reading in complex cases of this nature. Pierre Lalive, 'On the Reasoning of International Arbitral Awards' *JIDS* 1, no. 1 (2010): 55, 58.
- 256) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2456.
- 257) Judgment of 14 June 2000, *Inter Arab Investment Guarantee Corp. v. Banque Arabe et Internationale d'Investissement*, Cour de cassation, 2000 IR 195.
- 258) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 671.
- 259) *Halligan v. Piper Jaffray*, 148 F. 3d 197 (2d Cir 1998), *Cert denied*, 526 US 1034 (1999).
- 260) *BHP Petroleum Pty Ltd v. Oil Basins Ltd* [2006] VSC 402 at [23].
- 261) *Westport Insurance Corporation v. Gordian Runoff Ltd* [2011] HCA 37.
- 262) UNCITRAL Model Law Art. 32(4); English Arbitration Act s. 52(3); Austrian Code of Civil Procedure Art. 606(1); German Code of Civil Procedure Art. 1054(1); French New Code of Civil Procedure Art. 1480; Swiss Private International Law Art. 189; Swedish Arbitration Act s. 30. See also ICDR Rules Art. 27.
- 263) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 681.
- 264) UNCITRAL Model Law Art. 32(4). It is important to ensure that this is not abused to allow a potential dissenter to provide reasons which might aim to undermine the award itself. See David D. Caron, Matti Pellonpää & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd edn (Oxford: Oxford University Press, 2006), 826 et seq.
- 265) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2460.
- 266) Cited in José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 154.
- 267) *Cargill International v. Sociedad Iverica de Molturación* [1998] 1 Lloyd's Rep 489.
- 268) *Ibid.*
- 269) Pierre Karrer, 'Responsibility of Arbitrators and Arbitral Institutions – Let Sleeping Dogs Lie', in *The Leading Arbitrators' Guide to International Arbitration*, ed. Lawrence W. Newman & Richard D. Hill, 2nd edn (New York: Juris Publishing, Inc., 2008), 619.
- 270) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 682.
- 271) In centrally planned economies there may be a need to have a witness in an official position affixing an appropriate stamp or authorisation. Geoffrey M. Beresford Hartwell, 'The Reasoned Award in International Arbitration' available at <<http://www.hartwell.demon.co.uk.intaward.htm>>.
- 272) Pieter Sanders, 'Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?', *Arbitration International* 20, no. 3 (2004): 253. See also Explanatory note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration.
- 273) UNCITRAL Model Law Art. 31(3); English Arbitration Act s. 53; German Code of Civil Procedure Art. 1054(3); ICC Rules 2012 Art. 31(3); LCIA Rules Art. 26.1; ICDR Rules Art. 27.3; SCC Rules Art. 20.3; ACICA Rules Art. 19.4.
- 274) *Hiscox v. Outhwaite* [1991] 2 WLR 1321.
- 275) [1991] 2 Lloyd's Rep 435, HL.
- 276) See UNCITRAL Model Law Art. 34(3); English Arbitration Act s. 70(3); French New Code of Civil Procedure Art. 1481; Swedish Arbitration Act s. 31; UNCITRAL Rules Art. 34.4; LCIA Rules Art. 26.1; ICDR Rules Art. 27.3; HKIAC Rules Art. 30.4; ACICA Rules Art. 33.4.
- 277) Individual dates of signature for each arbitrator are still required under ICCP 2006 Art. 823(2) No. 8. However, an award signed only by the majority is still valid if all arbitrators took part in the deliberation, and one arbitrator was unable or unwilling to sign.
- 278) José María Alonso, 'Deliberation and Drafting Awards in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 154.
- 279) See, e.g., UNCITRAL Model Law Art. 34(2).
- 280) ICC Rules 2012 Art. 33.
- 281) Günther J. Horvath, 'The Duty of the Tribunal to Render an Enforceable Award', *Journal of International Arbitration* 18, no. 2 (2001): 149.
- 282) Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* (The Hague: Kluwer Law International, 1998), 290.
- 283) Katherine Gonzalez Arrocha, Director, ICC Dispute Resolution Services, Latin America, Welcoming Remarks at International Commercial Arbitration in Latin America: The ICC Perspective Conference (5 November 2007) cited in Nana Japaridze, 'Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration', *Hofstra Law Review* 36, no. 4 (2008): 1428.
- 284) Arrocha, *ibid.*
- 285) See, e.g., German Code of Civil Procedure Art. 1054(4); Swedish Arbitration Act s. 31(3).
- 286) For example, English Arbitration Act s. 55(2).
- 287) Hans van Houtte, 'The Delivery of Awards to the Parties', *Arbitration International* 21, no. 2 (2005): 181.
- 288) See, e.g., ICC Rules 2012 Art. 34(1); ICDR Rules Art. 27; LCIA Rules Art. 26.5.
- 289) Swiss Rules 2012 Art. 32; SCC Rules Art. 36.4.

- 290) ICC Rules 2012 Art. 34(2); ICDR Rules Arts 27.4 and 34; LCIA Rules Art. 30.1; ICSID Rules Art. 48(4); Swiss Rules 2012 Art. 44.1.
- 291) Article 32.6 of the Swiss Rules provides for originals to be communicated to the parties. Art. 34.4 of the ICC Rules 2012 requires originals to be deposited with the Secretariat.
- 292) See, e.g., German Code of Civil Procedure Art. 1054(4); DIS Rules 1998 Art. 36; Swiss Rules 2012 Art. 32.6.
- 293) See, e.g., English Arbitration Act s. 55; Swedish Arbitration Act s. 31; UNCITRAL Rules 2010 Art. 34.6; LCIA Rules Art. 26.5.
- 294) An example is EC Council Regulation 1348/2000 [2000] OJ L 160/37; Hans van Houtte, 'The Delivery of Awards to the Parties', *Arbitration International* 21, no. 2 (2005): 182.
- 295) Hans van Houtte, *ibid.*, 183. One of the most important such agreement is the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which has sixty-four contracting States. There is also the 1954 Hague Convention on Civil Procedure, which has forty-seven contracting States.
- 296) Hans van Houtte, 'The Delivery of Awards to the Parties', *Arbitration International* 21, no. 2 (2005): 184.
- 297) *Ibid.*, 180.
- 298) *Ibid.*, 182.
- 299) See, e.g., UNCITRAL Model Law Art. 33(1). This provides a time limit of thirty days to apply for correction, interpretation or an additional award.
- 300) UNCITRAL Model Law Art. 32(1).
- 301) Hans van Houtte, 'The Delivery of Awards to the Parties', *Arbitration International* 21, no. 2 (2005): 182.
- 302) *Ibid.*
- 303) Judgment of 10 November 2005, Swiss Federal Supreme Court, Swiss Federal Supreme Court, *ASA Bulletin* 24, no. 1 (2006): 113.
- 304) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2353, n. 135.
- 305) Individual countries may vary this. For example, the US and Canada are given the right to unilaterally publish ICSID awards between themselves under NAFTA.
- 306) See, e.g., Netherlands Code of Civil Procedure Art. 1058(2).
- 307) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 683.
- 308) *Ibid.*, 697.
- 309) Brooks W. Daly, 'Correction and Interpretation of Arbitral Awards under the ICC Rules of Arbitration', *ICC International Court of Arbitration Bulletin* 13, no. 1 (2002): 61.
- 310) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 697.
- 311) Carlos Henrique de C. Frôes, 'Correction and Interpretation of Arbitral Awards', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 288.
- 312) James M. Gaitis, 'The Federal Arbitration Act: Risks And Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations', *The American Review of International Arbitration* 16 (2005): 87.
- 313) Horacio Grigera Naón, 'Choice of Law Problems in International Commercial Arbitration', *Recueil des Cours* (2001) 289: 166–167.
- 314) See ICC Rules 2012 Art. 35; ICDR Rules Art. 30; Swiss Rules 2012 Art. 36; LCIA Rules, 27; CIETAC Rules 2005 Art. 51; HKIAC Rules Art. 34; SIAC Rules Art. 29; SCC Rules Art. 41; ACICA Rules Art. 37.
- 315) UNCITRAL Model Law Art. 33(2).
- 316) Other similar institutional rules include Art. 35 Swiss Rules 2012; Rule 50(1) ICSID Arbitration Rules. Art. 56 of the ICSID Additional Facility Rules Schedule C, allows a party to request the Secretary-General to obtain a correction of clerical, arithmetical or similar errors from the tribunal within forty-five days of the award. A tribunal may also make such changes on its own initiative. The ICC Rules (Art. 35.1) provide for a thirty-day limit and also require scrutiny by the ICC Secretariat and the International Court of Arbitration. The ICC Secretariat has also published a Note regarding Correction and Interpretation of Arbitral Awards in ICC, *International Court of Arbitration Bulletin*, 10, no. 2 (1999): 4. The Note makes clear that even a decision to reject a correction request should itself be subject to scrutiny by the Secretariat and the International Court of Arbitration.
- 317) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 688.
- 318) *Ibid.*, 686, but compare Klaus Peter Berger, *International Economic Arbitration* (The Hague: Kluwer Law and Taxation Publishers, 1993), 643.
- 319) See Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 696.
- 320) See Judgment of 2 November 2000, Swiss Federal Supreme Court, *ASA Bulletin* 19, no. 1 (2001): 88. See generally Gabrielle Kaufmann-Kohler & Antonio Rigozzi, 'Correction and Interpretation of Awards in International Arbitrations Held in Switzerland', *Mealey's International Arbitration Report* 16, no. 4 (2001): 25. The Swiss PILA does not include an equivalent provision to Art. 39 of the Concordat which allowed awards to be remitted to the tribunal to rectify errors of fill gaps.
- 321) Compare *Eco v. Eurotech SA Paris Court of Appeal*, 1re Ch. C 12 September 2002 and *Hussman (Europe) Ltd v. Ahmed Pharaon* [2003] EWCA Civ 266.

- 322) Brooks W. Daly, 'Correction and Interpretation of Arbitral Awards under the ICC Rules of Arbitration', *ICC International Court of Arbitration Bulletin* 13, no. 1 (2002): 61. A possible drafting gap in the French New Code of Civil Procedure appears to have been filled by the January 2011 amendments. Art. 1500 now makes it clear that the power to interpret and correct which exists in domestic arbitration extends to international arbitration.
- 323) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2524. See also English Arbitration Act s. 57(1).
- 324) *Ibid.*, 2531. See also Draft on Arbitral Procedure prepared by the International Law Commission at Its Fourth Session, 1952, UN Doc. A/CN.4/59, in *Yearbook of the International Law Commission* II (1952), Art. 26.
- 325) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2523, n. 59 criticising David Williams & Amy Buchanan, 'Corrections and Interpretations of Awards under Article 33 of the Model Law', *International Arbitration Law Review* (2001): 121 and Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 1416. The broader formulation in Caron et al. is also less helpful. The authors state 'Article 36 permits correction of errors in the award that the arbitral tribunal made unintentionally or heedlessly': David D. Caron, Matti Pellonpää & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd edn (Oxford: Oxford University Press, 2006), 895.
- 326) For cases seeking correction see ICC, 'Extracts from ICC Addenda and Decisions Rendered under Article 29 of the ICC Rules of Arbitration', *ICC International Court of Arbitration Bulletin* 13, no. 1 (2002): 72.
- 327) (1987) 14 Iran-US CTR 100, 101.
- 328) For cases seeking correction see ICC, 'Extracts from ICC Addenda and Decisions Rendered under Article 29 of the ICC Rules of Arbitration', *ICC International Court of Arbitration Bulletin* 13, no. 1 (2002): 72.
- 329) Pieter Sanders, 'Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?', *Arbitration International* 20, no. 3 (2004): 253.
- 330) English Arbitration Act s. 57.
- 331) *Al Hadha Trading Co. v. Tradigrain SA* [2002] 2 Lloyd's Rep 512 (QB); *Torch Offshore LLC v. Cable Shipping Inc.* [2004] 2 All ER (Comm) 365 (QB).
- 332) This seems to be the intent of the Working Party to the UNCITRAL Model Law. See Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer: Kluwer Law and Taxation Publishers, 1989), 889.
- 333) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2525. See also Judgment of 17 May 2004, Oberlandesgericht Frankfurt (Higher Regional Court of Frankfurt) *SchiedsVZ* (2005): 311.
- 334) English Arbitration Act s. 72(b).
- 335) *Gbangbola v. Smith & Sheriff* [1998] 3 All ER 730, QB.
- 336) See Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 692.
- 337) See *ibid.*
- 338) Note of the Secretariat of the International Court of Arbitration of the International Chamber of Commerce Regarding Correction and Interpretation of Arbitral Awards in ICC, *International Court of Arbitration Bulletin* 10, no. 2 (1999): 4.
- 339) See also Dutch Code of Civil Procedure Art. 1060(7).
- 340) Judgment of 12 January 2005, Swiss Federal Supreme Court, *ASA Bulletin* 23, no. 2 (2005): 356.
- 341) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 693.
- 342) English Arbitration Act s. 57; UNCITRAL Model Law Art. 33; German Code of Civil Procedure Art. 1057(2); Austrian Code of Civil Procedure Art. 610(1); Chinese Arbitration Law Art. 56; Singapore Arbitration Act s. 43(1); Swedish Arbitration Act s. 32.
- 343) Suggestions have ranged from thirty days to a year. See Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2527, n. 79. See also B. Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtbarkeit in der Schweiz* (Bern: Stämpfli, 2006), para. 1406.
- 344) See, e.g., English Arbitration Act s. 56.
- 345) French New Code of Civil Procedure Art. 1485(3). See also US Federal Arbitration Act, 9 USC § 11 which allows the court rather than the tribunal to modify or correct the award if 'there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award' or the award 'is imperfect in matter or form not affecting the merits of the controversy'.
- 346) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2529, n. 89.
- 347) 14 F. 3d 1250 (7th Cir 1994).
- 348) Singapore Arbitration Act s. 43; French New Code of Civil Procedure Art. 1485; German Code of Civil Procedure Art. 1058(1); Swedish Arbitration Act s. 32.
- 349) For Switzerland, see Judgment of 2 November 2000, Swiss Federal Supreme Court, *ASA Bulletin* 19, no. 1 (2001): 88. For the US, see *US Energy Corp. v. Nukem Inc.*, 400 F. 3d 822 (10th Cir 2005).

- 350) In Norway, the arbitration statute is silent, and arbitrators presented with a request for interpretation do not have to reply. See Anders Ryssdal & Kristian S. Myrbakk, 'National Report for Norway', in *International Handbook on Commercial Arbitration*, ed. Jan Paulsson (The Hague: Kluwer Law International, 2009), 29. Likewise, the Dutch Code of Civil Procedure provides no mechanism for interpretation.
- 351) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2537–2538.
- 352) Wolfgang Kühn, 'Rectification and Interpretation of Arbitral Awards', *ICC International Court of Arbitration Bulletin* 7, no. 2 (1996): 78.
- 353) Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 659.
- 354) See Decision of 14 March 1978, Interpretive Decision, *International Law Reports* 54 (1979).
- 355) See, e.g., Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 400–401; Klaus Peter Berger, *International Economic Arbitration* (Deventer: Kluwer Law and Taxation Publishers, 1993), 640–644.
- 356) Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer: Kluwer Law and Taxation Publishers, 1989), 890–891.
- 357) English Arbitration Act, 57.
- 358) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 693–694.
- 359) Robert M. Merkin & Louis Flannery, *Arbitration Act 1996*, 3rd edn (London: Informa, 2005), 126.
- 360) Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 658.
- 361) Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 776. For a contrary view see Brooks W. Daly, 'Correction and Interpretation of Arbitral Awards under the ICC Rules of Arbitration', *ICC International Court of Arbitration Bulletin* 13, no. 1 (2002): 61.
- 362) See *Pepsi Co., Inc. v. Islamic Republic of Iran* (1986) 13 Iran-US CTR 328, 329–330.
- 363) See, e.g., *Wintershall AG v. Government of Qatar* (5 February 1988 and 31 May 1988), in Albert Jan van den Berg (ed.), *Yearbook of Commercial Arbitration Volume XV* (The Hague: Kluwer Law International, 1990), 30.
- 364) See, e.g., ICC Addendum in Case No. 10189, *ICC Bulletin*, 15, no. 1 (2002): 81.
- 365) Pieter Sanders, 'Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?', *Arbitration International* 20, no. 3 (2004): 255.
- 366) Note of the Secretariat of the International Court of Arbitration of the International Chamber of Commerce Regarding Correction and Interpretation of Arbitral Awards, *ICC International Court of Arbitration Bulletin* 10, no. 2 (1999): 4.
- 367) *Novel Assurance Co. v. Gerling-Konzern General Insurance Co.* [2007] EWHC 253 at [46].
- 368) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 697.
- 369) For similar statutes to the UNCITRAL Model Law, see English Arbitration Act 1996 s. 57(3) (b); French New Code of Civil Procedure Art. 1485; German Code of Civil Procedure Art. 1058(1) and (3); Singapore Arbitration Act s. 43(4); Swedish Arbitration Act s. 32.
- 370) To similar effect are ICSID Rules Art. 49; ICDR Rules Art. 30.1; LCIA Art. 27.3.
- 371) Note of the Secretariat of the ICC, 'Correction and Interpretation of Arbitral Awards' (1999); Yves Derains & Eric A. Schwartz, *Guide to the ICC Rules of Arbitration*, 2nd edn (The Hague: Kluwer Law International, 2005), 323–324.
- 372) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 695.
- 373) Even that is debatable as an arbitrator might argue that it always expected to be able to repair an oversight in the interests of justice and the arbitrator's reputation.
- 374) See, e.g., *Brown v. Witco Corp.*, 340 F. 3d 209, 219–220 (5th Cir 2003).
- 375) See, e.g., *Torch Offshore v. Cable Shipping* [2004] 2 Lloyd's Rep 446 QB.
- 376) Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 696.
- 377) *Ibid.*
- 378) See, e.g., Judgment of 20 December 2006, Oberlandesgericht München (Higher Regional Court of Munich) *SchiedsVZ* 34 (2007) which supported the imposition of a three week limit so that the tribunal could comply with a sixty-day deadline. Peter Sanders appeared to suggest that former Art. 37(2) of the UNCITRAL Rules limited the tribunal from having further hearings on evidence if an additional award is called for because of the incorporation of the words 'without further hearings or evidence': Pieter Sanders, 'Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?', *Arbitration International* 20, no. 3 (2004): 256. A preferable reading of Art. 37(2) is that it simply put a time limit on the tribunal in cases where further hearings on evidence will not be called for. Where they are, it would be difficult to impose a time limit without knowing the availability of witnesses and the like. In any event, Art. 39 UNCITRAL Arbitration Rules 2010 does not.
- 379) Note the ICC Working Party's view to that effect, Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* (The Hague: Kluwer Law International, 1998), 301.
- 380) For similar provisions to the UNCITRAL Model Law, see French New Code of Civil Procedure Art. 1485; German Code of Civil Procedure Art. 1056.
- 381) ICSID Convention Art. 52(6).

- 382) *Antoine Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, Award of 30 June 1990, in Albert Jan van den Berg (ed.), *Yearbook of Commercial Arbitration Volume XIX* (The Hague: Kluwer Law International, 1994), paras 59–62 filed in *Antoine Biloune et al. v. Ghana Investments Centre, et al.*, Case No. 90–2109, United States District Court for the District of Columbia. See also Charles H. Brower, ‘Correction and Completion of Awards; Enforcement of Partial and Final Awards; Collaboration by Courts for an Award to Be Effective; Impact of “International Public Policy” on Arbitration’, in *International Arbitration in a Changing World*, ICCA Congress Series No. 6, ed. Albert Jan van den Berg (Deventer: Kluwer Law and Taxation Publishers, 1994), 214.
- 383) Eric A. Schwartz, ‘The Rights and Duties of ICC Arbitrators’, in *The Status of the Arbitrator, ICC International Court of Arbitration Bulletin: 1995 Special Supplement*, ed. Jean-François Bourque (Paris: ICC Publishing, 1995).
- 384) See, e.g., ICC Rules 2012 Art. 34(5).
- 385) Mohammed Bedjaoui, ‘The Arbitrator: One Man-Three Roles: Some Independent Comments on the Ethical and Legal Obligations of an Arbitrator’, *Journal of International Arbitration* 5, no. 1 (1988): 18–19.
- 386) James M. Gaitis, ‘The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations’, *The American Review of International Arbitration* 16 (2005): 7083 citing *Office & Professional Employees Int’l Union v. Brownsville Gen Hosp* 186 F. 3d 326, 331 (3d Cir 1991).
- 387) James M. Gaitis, ‘The Federal Arbitration Act: Risks And Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations’, *The American Review of International Arbitration* 16 (2005): 7083.
- 388) 288 F. Supp. 2d 783 (N.D. Tex. 2003).
- 389) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2516–2517; see also Judgment of 2 November 2000, Swiss Federal Supreme Court, *ASA Bulletin* 19, no. 1 (2001): 88, allowing a further tribunal award to explain that interest awarded meant compound interest.
- 390) Judgment of 25 May 1992, *Fougerolle v. Procofrance*, Cour de cassation, *Revue de l’Arbitrage* (1993), no. 1: 91–92. See also Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 919; Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), para. 846. Both criticise the decision.
- 391) See, e.g., *Antoine Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability (27 October 1989) in Albert Jan van den Berg (ed.), *Yearbook of Commercial Arbitration Volume XIX* (The Hague: Kluwer Law International, 1994), 21.
- 392) Charles H. Brower, ‘Correction and Completion of Awards; Enforcement of Partial and Final Awards; Collaboration by Courts for an Award to Be Effective; Impact of “International Public Policy” on Arbitration’, in *International Arbitration in a Changing World*, ICCA Congress Series No. 6, ed. Albert Jan van den Berg (Deventer: Kluwer Law and Taxation Publishers, 1994), 215.

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