

## Chapter 1

# Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice

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### 1. THE SCOPE OF THE STUDY

International arbitration seems to be perceived as a procedure in which parties seek monetary relief, mainly damages for breach of contract. There are important treatises on international arbitration which do not even discuss the variety of remedies which parties may pursue before arbitral tribunals and which such tribunals may grant. Where non-monetary relief is discussed as a remedy in arbitration this is done generally in the context of the question whether arbitrators have the power to grant such relief. The practice of such relief, the distinctions that may have to be made between different types of remedies, the particular issues which they raise are considered rarely if at all.<sup>1</sup>

The present book emerged from a conference organised by the Swiss Arbitration Association (ASA) and its preparatory research. It is intended as a first step in the direction of a better understanding of the questions which these remedies raise. Indeed, the manner in which the relief sought and possibly granted by courts and arbitral tribunals differs considerably from one legal system to another; so do such concepts as rights, remedies, causes of action and claims. The implications of these differences on international arbitration and the manner in which they should be dealt with internationally do not seem to be well understood. The entire subject of “remedies in international arbitration” does not seem to have received much attention in the international arbitration community.

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<sup>1</sup> Among the exceptions one may mention Sigvard Jarvin, Non-Pecuniary Remedies: The Practices of Declaratory Relief and Specific Performance in International Commercial Arbitration, in A.W. Rovine (ed) *Fordham Papers* (2007), Contemporary Issues in International Arbitration and Mediation, 167 - 183; Carol Malinvaud, Non-pecuniary Remedies in Investment Treaty and Commercial Arbitration, ICCA Congress Series, no. 14 (2009), 209 - 230; Christoph Schreuer, Non-pecuniary Remedies in ICSID Arbitration, 20 *Arbitration International* (2004), 325 - 332 and Troy E. Elder, The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes, 13 *Arbitration International* (1997) 1.

As a contribution to the development of a better understanding of this subject, the present book considers first of all arbitral practice. It does so by presenting the result of an enquiry with a number of arbitration institutions on the practice of non-monetary relief; and by examining the practice of such remedies in various types of contracts. The discussion is placed in its comparative legal context by two studies on the legal regime of specific performance. The study concludes with a discussion of problems at the enforcement level which are more complex and diverse as it often seems to have been understood.

This introductory chapter attempts to provide an overview of the issues that arise in the context of non-monetary relief, starting with an attempt to point out some of the distinctions that may have to be made between different types of remedies and the claims to which they respond. It summarises the arbitration practice as it emerges from the enquiry with arbitration institutions and then considers the practical and legal issues which arise when the different kinds of remedies are pursued in international arbitration.

Before discussing these practical points a few words seem to be called for on the principle of non-monetary relief in international arbitration, considering the most controversial remedy, specific performance.<sup>2</sup>

## 2. SPECIFIC PERFORMANCE AS AN ISSUE

Why specific performance as a remedy in arbitration? The answer is simple: this is what the parties have agreed. The parties to a transaction often take great care in defining their respective rights and obligations, the performance they expect from each other. One must assume that, unless substantial changes occurred, they wish to receive this performance.

A judicial system, which has its own priorities beyond those of the parties appearing before it, may take the position that the surrogate of monetary damages normally is all the parties can obtain. In a process, like arbitration, that rests on the agreement of the parties and serves the implementation of that agreement, such a position is less easy to justify. When the parties appoint arbitrators to settle their dispute it must be assumed that they expect these arbitrators to give effect to their contract when they are requested to do so. Indeed, the most frequently used arbitration rules make this an express requirement by providing that the arbitral tribunal “shall decide in

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<sup>2</sup> The topic of punitive damages is perhaps more controversial in international arbitration but, compared to the remedies considered in this chapter, it remains rather marginal.

accordance with the terms of the contract..."<sup>3</sup> or using similar wording.<sup>4</sup>

This is not just a theoretical position. As this study shows, there are numerous cases where parties seek as a remedy in the arbitration the performance of the contract which they have agreed and where arbitral tribunals award such a remedy. Although this is much more difficult to document, there is information that such awards are implemented by the party being ordered to do so and even that occasionally they are enforced through the machinery provided by the State to this effect where such awards are not complied with voluntarily.

Of course, there are situations in which the contract no longer corresponds to the parties interests or where, because of a breach or for other reasons, the party seeking redress must be offered or content itself with remedies other than specific performance. It also is recognised that specific performance gives rise to some particular issues and difficulties in the arbitration and at the level of the implementation of the award. But they are not insurmountable.

In particular, possible or real difficulties at the level of enforcement should not be taken as the sole or principal criterion for deciding on the admissibility or suitability of a remedy. Experience shows and some studies have confirmed that the parties comply voluntarily with a large part and probably the vast majority of the decisions made by the arbitrators.<sup>5</sup> Thus, possible difficulties at the level of enforcement should not deprive a party of obtaining from the arbitrator an order for performance if it so requests and is prepared to assume the risk of such difficulties.<sup>6</sup>

Objections have been raised against the principle of admitting performance as a remedy in arbitration. They have been raised by

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<sup>3</sup> Article 35 of the 2010 UNCITRAL Rules, insofar identical with Article 33 of the 1976 UNCITRAL Rules, Article 33 of the Swiss Rules; similarly many institutional rules based on the UNCITRAL Rules.

<sup>4</sup> Article 17 (2) of the 1998 ICC Rules of Arbitration requires the arbitral tribunal "to take account of the contract ...".

<sup>5</sup> See e.g. Redfern and Hunter on International Arbitration, 5th ed. 2009, paragraph 11.05, with further references; the study by the Queen Mary University and Price Waterhouse (International Arbitration: Corporate Attitudes and Practices 2008) reports at p. 3 that "84% of the participating corporate counsel indicated that, in more than 76% of their arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award; in most cases, according to the interviews, compliance reaches 90%".

<sup>6</sup> This is not contradicted by a requirement, as that in Article 35 of the ICC Rules, according to which the arbitral tribunal "shall make every effort to make sure that the Award is enforceable at law". These efforts must be placed in the context of the arbitration proceedings where the parties decide on the remedy they request. An arbitral tribunal may not deny a remedy because it believes that at the place of enforcement (which it often does not know) this remedy may give rise to difficulties.

reference to doctrinal considerations, for instance the limited availability of such a remedy in some legal systems. More thorough examinations of the subject have shown that specific performance is so widely available in legal systems that it can be considered as a general principle of law.<sup>7</sup> As professor Chappuis shows in this collection, the civil law and the common law systems are less far apart in this respect than they are often perceived to be; and the UNIDROIT Principles<sup>8</sup> have found a form of providing for performance as a remedy which seems acceptable also for lawyers from a common law background.<sup>9</sup>

Another line of argument seeks to exclude the performance remedy by reference to considerations relating to the enforcement of awards by foreign courts. Parties simply “should not have the option” to provide for specific performance even if the applicable law does provide for the remedy.<sup>10</sup> The reasons given are based on “systemic interests” and concerns for the proper functioning of the New York Convention.<sup>11</sup> It is argued that “a meaningful enforcement” would require an undesirable degree of court involvement.<sup>12</sup>

The availability of the enforcement machinery in States throughout the world is the great achievement of the New York Convention and one of the principal foundations of the remarkable success of international arbitration. The difficulties that may arise in the domestic and international enforcement of an award for performance are real; they will be addressed in this study. But in many cases they are not insurmountable. And even if in some cases they were, this would not be a justification for depriving the users of international arbitration of the means of having their rights and obligations determined by an arbitral tribunal.

In a system where decisions in their vast majority are complied with voluntarily, the proposal to refuse the performance remedy on “systemic grounds” is at least surprising. It would require arbitrators, appointed by the parties to decide disputes in accordance with their contract, to respond to the parties, “we do not care what is required under the contract; in deference of what we consider as ‘systemic interests’ we only grant monetary relief.” Such doctrinal postulates are

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<sup>7</sup> On this basis the Texaco/Calasiatic Award, after a thorough analysis of public international law and comparative law, concludes that “*restitutio in integrum*”, with its common law equivalent of specific performance, is the normal consequence of a breach of contract; see below Chapter 13, Case N° 3.

<sup>8</sup> Article 7.2.2 UNIDROIT Principles.

<sup>9</sup> See Chapter 2 below.

<sup>10</sup> Elder op. cit. 29.

<sup>11</sup> Ibid. 25.

<sup>12</sup> Ibid. 32.

not well founded in law and court practice as shown for instance below in chapter 3 by Professor Ramos Muños, considering the question primarily from the perspective of the forward looking nature of such relief, what he describes as “pro futura orders”. In any event such doctrinal postulates are not helpful for the development of arbitration and, as will become abundantly clear from this book, are removed from practical reality.

Therefore, the present study is concerned mainly with the practical issues which arise when arbitrators are faced with requests for non-monetary relief. In other words, the book is concerned less with the question whether such relief should be granted but how this is or should be done in practice.

The bulk of the materials in this book concern the practice in commercial arbitration. However, the practice of international arbitration between States and that between States and foreign investors has also been taken into consideration where appropriate. In these practice areas there is sometimes more reluctance towards the idea of relief in the form of performance orders. However, such reluctance overlooks that, since the Chorzow Factory judgment of the PCIJ in 1926,<sup>13</sup> restitution in kind is firmly established as the first available remedy which has been confirmed in recent cases.<sup>14</sup> The ILC draft articles on State Responsibility list “restitution, compensation and satisfaction”, in this order, as the forms of reparation for injury,<sup>15</sup> after having set out “cessation and non-repetition” as the obligation of a State responsible for an internationally wrongful act.<sup>16</sup> The availability of restitution or similar relief has been confirmed also in cases between States and private investors,<sup>17</sup> even if in such cases there is a greater reluctance towards this remedy.<sup>18</sup>

### 3. CATEGORIES OF CLAIMS AND REMEDIES

There is a variety of claims which a party can bring before a court or arbitral tribunal and a similar variety of decisions by which courts or arbitral tribunals can grant relief to such a party. The admissibility of such claims and relief in arbitration is not the same for all categories; there are also differences in the manner in which these claims may or

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<sup>13</sup> Permanent Court of International Justice, Judgment N° 13, 1928 PCIJ, Series A, No. 17.

<sup>14</sup> For instance the Rainbow Warrior arbitration, reported below in Chapter 13 Case 7.

<sup>15</sup> Draft articles on Responsibility of States for Internationally wrongful acts, adopted by the International Law Commission in 2001, Article 34.

<sup>16</sup> *Id.*, Article 30.

<sup>17</sup> See below the cases of *Texco v. Libya* and *Götz et al. vs. Burundi*, chapter 13, cases 3 and 8.

<sup>18</sup> See e.g. Malinvaud, *o.cit.* and Schreuer *op. cit.*

should be handled in the proceedings and under which conditions relief can be granted; and, as will be shown in particular in the contribution of Professor Schlosser, the issues that arise at the level of enforcement may differ according to the remedy which a judgment or an award may grant.

Considering categories of claims and relief and defining the relevant criteria, therefore, is not merely an academic exercise, but has important practical implications. Despite the practical differences, the variety of claims and relief and the differentiations that have to be made seem to have found little attention in the arbitration world. The situation is different in the law of civil procedure of a number of judicial systems where a variety of categories and criteria have been developed. A brief look at the distinction in judicial systems therefore may be of some help in the analysis of similar issues in arbitration.

### 3.1 Categories in judicial systems

The manner in which judicial relief is categorised differs considerably from one legal system to another. Like in many other aspects, especially in the field of civil procedure, the distinction is not just between common law and civil law; within the civil law systems, too, there are considerable differences. However, there are nevertheless some common features which result from the nature of things.

In the Germanic legal systems, the three principal categories of claims or actions (“Klagen”) or judgments (“Urteile”) are those which order a performance (“Leistung”), a declaration (“Feststellung”) and a transformation of rights or of legal status (“Gestaltung”). The most recent codification of the law of civil procedure is the Swiss Federal Code of Civil Procedure (Swiss CPC) of 2008, which entered into force on 1 January 2011. It defines these three categories as follows:

- “Leistungsklage”/“action condamnatoire”: a legal action in which the claimant seeks a decision by which the respondent is ordered to perform a certain act, abstain from an act or tolerate that the act is performed (“Tun, Unterlassen oder Dulden”/ “que le défendeur fasse, s’abstienne de faire ou tolère quelque chose”). The performance which may be required includes the payment of a sum of money.<sup>19</sup>
- “Gestaltungsklage”/“action formatrice”: a legal action by which the claimant seeks the creation, modification or

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<sup>19</sup> Article 84 Swiss CPC.

extinction of a right or legal relationship (“Begründung, Änderung oder Aufhebung eines bestimmten Rechts oder Rechtsverhältnisses”/”la création, la modification ou la dissolution d’un droit ou d’un rapport de droit déterminé”).<sup>20</sup> Completion of a contract by the judge, for instance according to Article 2 Swiss Code of Obligations, is considered as formative judgment.<sup>21</sup>

- “Feststellungsklage”/”action en constatation de droit”: a legal action by which the claimant seeks a declaration by the court that a certain right or legal relationship exists or does not exist (“die gerichtliche Feststellung, dass ein Recht oder Rechtsverhältnis besteht oder nicht besteht”/”faire constater par un tribunal l’existence ou l’inexistence d’un droit ou d’un rapport juridique”).<sup>22</sup>

In French law a variety of different distinctions are made, in particular those between personal, real and mixed claims (“actions personnelles, réelles et mixtes”) and those between claims concerning movables and immovables (“actions mobilières et immobilières”). Besides these classical distinctions, one finds others, described as more modern, such as that between the claim seeking a declaratory judgement (“action déclaratoire”) and a claim for performance (“action condamnatoire”), between declaratory and constitutive decisions (“jugements en décisions déclaratives et constitutives”).<sup>23</sup>

In common law the principal distinctions relevant for our subject are those between different remedies. The concern expressed by this distinction relates to the specific relief which a claimant may obtain from the courts, rather than the differences in the effect of the judgment. The remedy characterises the legal action and thus is essentially of a procedural nature, at least in its origin; or, as expressed by a modern English writer on civil procedure, “Substantive law, unless prescribed by statute, has emerged as an abstraction from the remedial responses of the courts to various groups of facts”.<sup>24</sup> But the substantive basis for the remedy is also recognised: the process by which the courts regularly grant remedies in similar situations leads to

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<sup>20</sup> Article 87 Swiss CPC.

<sup>21</sup> Habscheid, *Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht*. 2nd ed. 1990, paragraph 360.

<sup>22</sup> Article 88 Swiss CPC.

<sup>23</sup> Guinchard and Ferrand, *Procédure civile, Droit interne et droit communautaire*, 28th ed. 2006, paragraph 95.

<sup>24</sup> Andrews, *English Civil Procedure*, 2003, paragraph 1.46.

conclude that there is “entitlement to a particular remedy in a particular situation” and, in a final step, “to conclude that the grant of remedies is based upon substantive law”.<sup>25</sup> This somewhat ambiguous position will become of relevance when determining the applicable law to issues concerning remedies.

The principal remedies for breach of contract in English law originally differed in common law and in equity. This difference continues to have substantive implications but does no longer impact on the forum where the remedy may be granted. The remedies have been grouped as follows:

- Debt claims by which the claimant seeks payment of a specified sum of money (the price of goods, hire charges, insurance premium, rent etc.);
- Damages providing monetary compensation (in contract claims normally limited to compensatory damages, to the exclusion of punitive or exemplary damages);
- Specific performance and injunction;
- Declarations;
- Restitution.<sup>26</sup>

For the matter considered here, it suffices to note that, in common law countries, in addition to the distinctions according to the remedies, one can also find distinctions along the lines mentioned above. For instance, the English Civil Procedure Rules provide for judgments “for possession of land”, for “delivery of goods” and for judgments “to do or abstain from doing any act”.<sup>27</sup>

### 3.2 Categories in arbitration

In international arbitration various types of awards are distinguished. Arbitration laws and rules, as well as learned writers distinguish between final, interim, interlocutory or preliminary awards and a number of other categories such as awards on jurisdiction, by default and by consent.<sup>28</sup> Similarly, the 1976 UNCITRAL Rules, like many other arbitration rules, in its Article 32 distinguished between a final award and interim, interlocutory and partial awards. However,

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<sup>25</sup> Ibid.

<sup>26</sup> Andrews, *English Civil Justice and Remedies*, 2007, paragraph 11-03 et seq.

<sup>27</sup> See for instance RSC Order 45, *Enforcement of Judgments and Orders: General*.

<sup>28</sup> E. Poudret and Besson, *Comparative Law of International Arbitration*, 2nd ed. 2007, paragraph 731.

when the Rules were revised, the distinction was not found of any practical use and abandoned; the new Article 34 states more generally that the arbitral tribunal “may make separate awards on different issues at different times”.

Outside the world of the common law, and legal writers coming from that background, the distinction according to the relief or remedy which the award provides is rarely considered; the relief which arbitrators may grant as interim measures is a notable exception. A possible explanation for this absence is the position that the arbitral tribunal gives effect to the rights claimed by the parties under the applicable law. As long as these rights are arbitrable, the arbitral tribunal will give effect to them.

In the common law world, legislation, rules and legal writings also deal with the distinctions of civil procedure just mentioned.<sup>29</sup> In addition, one finds, especially under the influence of English common law, a description of the powers which the arbitrators have with respect to the remedies they may order.<sup>30</sup> The 1996 English Arbitration Act has focused the matter in Section 48 which provides:

- (1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.
- (2) Unless otherwise agreed by the parties, the tribunal has the following powers.
- (3) The tribunal may make a declaration as to any matter to be determined in the proceedings.
- (4) The tribunal may order the payment of a sum of money, in any currency.
- (5) The tribunal has the same powers as the court
  - (a) to order a party to do or refrain from doing anything;
  - (b) to order specific performance of a contract (other than a contract relating to land<sup>31</sup>);
  - (c) to order the rectification, setting aside or cancellation of a deed or other document.”

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<sup>29</sup> See e.g. Born, *International Commercial Arbitration*, 2009, vol II, 2428 et seq.; Redfern and Hunter *op. cit.* pp. 518 et seq. See also Peter F. Schlosser, *Right and Remedy in Common Law Arbitration and in German Arbitration Law*, 4 *Journal of International Arbitration* (1987) 27.

<sup>30</sup> Along a different line, and referring to French learned writers, V.V. Veeder writes that an “arbitrator exercises powers by virtue of his office, not limited by the powers delegated to him under a contractual relationship with the parties”, in *Specific Performance: the ‘Arbitration Imperium’ and the ‘Land Exception’ Of the English Arbitration Act 1996*, Dossier V: Interest, Auxiliary and Alternative Remedies.

<sup>31</sup> Veeder, *op.cit.* describes the exception as an “oddity” which can be removed by agreement of the parties.

While such a legislative enumeration of powers and remedies is rather unusual, legal writers from the common law world frequently describe in similar terms the remedies which international arbitrators may grant. The categories in which these remedies are presented resemble those which are used when describing the remedies in the courts of common law countries. Indeed, authors from these countries make a point to state expressly as the “prevailing view” “that every remedy that is available in litigation should be available in arbitration as well”.<sup>32</sup> A leading textbook on international arbitration grouped the remedies covered by arbitration awards as follows:

- monetary compensation;
- punitive damages and other penalties;
- specific performance and restitution;
- injunctions;
- declaratory relief;
- rectification;
- adaptation of contracts and filling gaps;
- interest; and
- costs.”<sup>33</sup>

The remedies in international law are grouped along different lines and, as mentioned above, have as starting point restitution or *restitutio in integrum*. The arbitral tribunal in the Rainbow Warrior case has discussed in detail this remedy in its distinction from “cessation of illegal behavior”.<sup>34</sup> That case also shows the variety and flexibility of remedies in public international law cases; apart from satisfaction and compensation, which can also be found in the ILC draft articles on State Responsibility, the award also makes a recommendation for the creation of a foundation.

In inter-State relations a special situation with respect to remedies prevails in the dispute settlement system of the World Trade Organisation (WTO) described by Brooks E. Allen in Chapter 18. In the WTO the main remedy which the Panels recommend is the restoration of conformity and, if that cannot be achieved, compensation and

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<sup>32</sup> Lew, Mistelis, Kröll, Comparative International Commercial Arbitration, 2003, paragraph 24-70.

<sup>33</sup> Redfern and Hunter, op.cit. paragraph 9.39.

<sup>34</sup> Chapter 13, case 7.

retaliation; it must be understood that “compensation” in this context does not mean payment for past losses but compensatory advantages which restore the “balance of concessions” between the parties.

In a very different field another form of restitution can be found. Professor Peter describes in Chapter 17 a remedy developed in sports arbitration and specifically contained in the Racing Rules of Sailing. The remedy is called “Redress” and seeks to restore the position of a sailing team which has been subject of an irregularity by another team without causing a disadvantage to the teams not involved in the irregularity.

When considering remedies in commercial arbitration, some authors emphasize that the arbitrators are not restricted to the remedies which are available to the courts at the seat. Authors outside the common law world see the need for such statements only with respect to the types of interim measures that can be ordered by arbitrators.<sup>35</sup> However, where authors list the remedies which arbitrators may grant, these remedies and their grouping is not very different from those which are available to the courts in common law countries. Redfern and Hunter, for instance, state that “the powers of an arbitral tribunal are not necessarily the same as those of a court”;<sup>36</sup> but the above list of remedies, which is taken from their book, is not very different from the remedies available to the courts of England. This applies also to the remedies listed by Born, subject to the more controversial question concerning punitive damages,<sup>37</sup> and to those listed by Lew, Mistelis and Kröll.<sup>38</sup>

Since remedies in international arbitration seem to be of interest primarily to writers and practitioners from the common law world, one might conclude that this issue deserves investigation and discussion only if one approaches the subject from a common law perspective. As most of the contributions in this book show, this is not correct. The remedy granted is of relevance for arbitration everywhere and irrespective of the legal framework applicable to it.

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<sup>35</sup> E.g. Berger, *International Economic Arbitration*, 1993, 339: “In selecting appropriate measures, the arbitrators are not limited to the remedies known in the procedural law of the country of the seat ...”. Significantly, in support of the statement that arbitrators can grant relief which the courts cannot, Born cites some cases from the United States and, as an example from the civil law world, a passage from a book on *Arbitration Law in Austria*, concerning specifically interim measures; Born, *op.cit.* vol II, p. 2479, FN 311.

<sup>36</sup> *Op.cit.* paragraph 9.43.

<sup>37</sup> *Op. cit.* p. 2478 et seq.

<sup>38</sup> *Op.cit.* p. 650.

It is suggested that, in addition to the classification of remedies in the common law world, and to some extent replacing it, the categories used in civil procedure of some of the civil law countries provide a useful reference. The following categories are suggested:

Performance can be understood in the wider sense of doing or abstaining from doing defined acts, as understood in the terms of *Leistungsklage* and *action condemnatoire* of the new Swiss Code of Civil Procedure. In this wide sense it includes the performance of a contractual obligation as well as the payment of damages replacing such performance. The latter type of performance has not been considered in the present study, where performance is understood in a narrower sense describing the implementation of a contractual obligation.

The contractual obligation may consist in the payment of a sum of money, such as an agreed contract price; this corresponds to the common law concept of the debt claim. It can give rise to specific issues relating to the modalities of this payment, such as the time and place of the payment, the currency and other matters. It remains nevertheless a monetary claim and therefore is not considered in the present study.

The performance considered here consists in acts and omissions other than the payment of money. There are further subdivisions that must be made for the analysis; for instance between performance which only the debtor can make and performance which can be substituted. We will see in the discussion about enforcement issues that there are acts where the performance by the debtor can be replaced by the award;<sup>39</sup> this is the case in particular in those cases where the debtor has to make a declaration, e.g. consent to a transfer, issue powers of attorney and the like.

Performance may also consist in an omission, in particular in the cessation of a conduct which is in breach of a legal obligation. As mentioned above, the remedy has received particular attention in public international law.

Besides claims and remedies for performance as considered here, a party may seek from the arbitral tribunal a *declaratory award*. Such awards deploy their effect by themselves and do not require enforcement. In some jurisdictions they raise issues relating to judicial efficiency, as they shall be discussed presently. These will be discussed in section 4.3 of this chapter.

Immediate effectiveness occurs also in cases of awards creating or transforming a right or a status. Although this type of legal action is

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<sup>39</sup> See below Chapter 20.

known in the common law legal systems, there does not seem to exist an English legal term describing these actions as a category. The term *formative claim and award* is proposed here, corresponding to the terms *Gestaltungsurteil* or *jugement formateur* in Swiss civil procedure.

Formative awards may affect third parties. Therefore, a claim for terminating a partnership, for invalidating a shareholder decision or for excluding a member of an association can be subject to arbitration, if at all, only if all parties concerned by the relationship also are party to the arbitration.

The difference between declaratory and formative awards is not always immediately apparent. The nature of the legal relationship and the applicable law may be decisive. Where a party exercises a contractual right to terminate a contract, the award which decides that this right was validly exercised and the contract is terminated is a declaratory award. If, however, the relationship may not be terminated by the declaration of a party but requires the decision of a court or arbitral tribunal, the decision is constitutive for the transformation of the relationship.

#### **4. NON-MONETARY RELIEF IN THE PRACTICE OF INTERNATIONAL ARBITRATION**

When non-monetary relief is discussed by learned writers the principal reference are court cases relating to such relief in arbitration. These are, of course, important references. However, they concern only a fraction of arbitral practice. In many if not most cases, arbitration proceedings are conducted and awards are made and performed without any trace in the courts and published decisions. One of the principal purposes of the present book is to enlarge the basis for the discussion of the subject by providing information about arbitration practice.

This information is provided first of all by the experience of the authors in this book. They have experienced in their arbitration practice cases where non-monetary relief was requested and granted. Other examples can be found in publications where arbitral decisions are reported as well as in court cases dealing with arbitral awards for non-monetary relief.

In order to provide a broader basis for the investigation, an enquiry was sent to the principal arbitration institutions, requesting information about cases of non-monetary relief. Most of them responded.

#### 4.1 The enquiry with arbitral institutions

The enquiry and the reports received from the institutions are presented in further detail in Part III of this book. In the present chapter we attempt to present the results in a more systematic fashion and draw some conclusions.

The reports collected show a great variety of circumstances in which a claimant (or a respondent in making a counterclaim) finds it necessary to seek non-monetary relief. This alone is an important information, indicating that the availability of non-monetary relief is a need felt by the users of international arbitration.

The materials also show an important number of cases where, in the reports of the institutions, arbitrators granted the requested relief. This information is important since it shows that international arbitral tribunals first of all accept that, as a matter of principle, they have the power to grant such relief and that, in the right circumstances, they are prepared to exercise these powers.

However, the materials provide (directly or by deduction) only rather general information about the considerations which prompted the arbitrators to grant the relief requested. The materials are even more deficient when it comes to determining the meaning of those cases where the non-monetary relief has been denied. In particular, they show only in rare cases whether the relief was denied because the arbitral tribunal was of the view that, as a matter of principle, such relief was not available or whether the arbitral tribunal, without denying the availability of the relief in principle, found that, in the specific circumstances of the case, there was no justification for granting it.

Practically no information about the fate of the awards granting non-monetary relief was made available: Did the parties comply with the awards, were the awards set aside and, if not, were they enforced – at the place of arbitration or abroad, and, if not, did the failure to grant enforcement relate to the relief which the award provided?

It follows that the enquiry made in preparation of this book is only a start. More thorough studies must follow. Such studies should not be limited to examining the relief granted. They should consider also the submissions of the parties and, in particular, the manner in which the relief requested was framed and the reasons in fact and in law which were put forth in support of these requests.

The three Libyan nationalisation cases are a good example for the need of such differentiation between cases according to the specific circumstances: the starting position in all three cases was quite similar,

nationalisation of certain concession agreements;<sup>40</sup> but one of the three awards stated that Libya had to perform the concession while the two others awarded only damages for breach of the concessions. The differences in the awards have a variety of reasons; the difference which is relevant here consists in the form in which the relief was framed in each of the three cases.

Despite the reservations that must be made about the scope and depth of the enquiry one may nevertheless mention a possible differentiation according to the prevailing legal culture of the institution. The practice reported by the London Court of International Arbitration (LCIA)<sup>41</sup> might be taken as an indication that, in the arbitration practice reflected in this institution or by the arbitrators appointed in its cases, declaratory awards are commonly available, while there is much more reluctance to order specific performance. No such reluctance can be seen from the results reported by other institutions, including the ICDR/AAA which also has its base in the common law world.<sup>42</sup> One of the examples provided in the ICC report concerns a case under English law, where the arbitrators granted a request for specific performance, ordering the delivery of shares against payment of the balance of the purchase price.<sup>43</sup> Thus, the impression of a more reserved position which may be caused by the LCIA report should not be generalised and taken as an indication that common law arbitrators are unwilling to grant performance remedies.

Apart from the important number of requests for and awards of non-monetary relief in international arbitration, the most important information that can be drawn from the enquiry is the wide variety of remedies that are requested and in many cases awarded in arbitration proceedings. Considering this variety gives an impression of the colourful world that lies beyond the grey routine of the claims for monetary damages

The following pages present some of many different claims for relief which have been made in international arbitration cases.

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<sup>40</sup> Although the time and context of the nationalisation differed in some respect, especially between the BP nationalisation and that of the two other cases, for the purpose of the issue considered here this difference is probably not material.

<sup>41</sup> See below Chapter 11.

<sup>42</sup> See below Chapter 9.

<sup>43</sup> Chapter 8, Case N° 2.

## 4.2 Cases of requests and orders for performance

In the reports from the institutions one finds a wide range of obligations of which parties to an arbitration require performance and which arbitral tribunals often order to be performed.

A first group of such obligations concerns the *transfer of property*. This may concern physical property, such as items of equipment, commodities or goods sold,<sup>44</sup> shares,<sup>45</sup> or other documents;<sup>46</sup> or the obligation may relate to intellectual property or other rights such as internet domain names.<sup>47</sup> A particularly important case for specific performance is the delivery of spare parts for a plant sold.<sup>48</sup> Such spare parts often are indispensable for the continued operation of a plant and only the seller of the plant may be in a position to provide them.

An important number of cases concern claims for the return of property or rights in the case of failed transactions or incorrectly performed contracts. In a patent license dispute under the WIPO Rules the inventor claimed return of the prototypes, plans and documents communicated in the context of a license agreement;<sup>49</sup> in an ICC case the seller claimed the return of unpaid machinery;<sup>50</sup> in another ICC case the return of marketing materials, product samples and related documents was ordered upon termination of a distribution agreement;<sup>51</sup> in a case under the rules of the Vienna Chamber, the seller claimed the return of a technical device for which the buyer had failed to pay the contract price;<sup>52</sup> in several cases before the Milan Chamber, a claimant sought restitution of the leased business when the respondent failed to pay the rent;<sup>53</sup> in another case the bookkeeper of a company had to return the company's accounting records;<sup>54</sup> and in a DIS case a party to a joint venture claimed from another party to the

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<sup>44</sup> Chapter 7, Vienna Chamber, case N° 13.

<sup>45</sup> Chapter 8, ICC, cases N° 2 and 3.

<sup>46</sup> Chapter 8, ICC, case N° 13, delivery of a "Special Certificate" serving as collateral for a loan; see also ICC Case No. 7453 of 1994, in YEARBOOK COMMERCIAL ARBITRATION vol. XXII - 1997, 107.

<sup>47</sup> Chapter 9, ICDR/AAA, case N° 1.

<sup>48</sup> See e.g. Chapter 8, ICC, Case N° 11,

<sup>49</sup> Chapter 12, WIPO, Case N° 8.

<sup>50</sup> Chapter 8, Case N° 11.

<sup>51</sup> Chapter 8, Case N° 7.

<sup>52</sup> Chapter 7, Case N° 10.

<sup>53</sup> Chapter 4, Cases N° 1 (concerning six cases) and N° 3; in a case before the Iran-United States Claims Tribunal, the claimant was ordered to return to the respondent radios that the respondent had loaned to it; Case N° 370, Award 28 July 1989, in 4 Journal of International Arbitration (1987), 147.

<sup>54</sup> Chapter 4, Case N° 5.

joint venture that it procure the return of shares that had been transferred to a third party in breach of its obligations.<sup>55</sup>

Another group of cases concerns claims for *injunctions prohibiting certain acts of conduct*. In a case of the Vienna Chamber the prohibited conduct concerned the distribution of products competing with those of the claimant, in breach of a distributorship agreement,<sup>56</sup> in another case it concerned activities of unfair competition;<sup>57</sup> in yet another case the transfer of certain data to third parties.<sup>58</sup> In an ICDR case a terminated distributor continued selling products in the territory and interfered in the relations with a particular client and was ordered to cease these activities;<sup>59</sup> in another ICDR case the arbitrator enjoined and barred the respondent from commencing, prosecuting or maintaining any lawsuit relating to a settlement agreement that had been concluded between the parties.<sup>60</sup> In other LCIA cases orders were sought that the respondent refrain from withdrawing a country code for services,<sup>61</sup> prohibiting the respondent from taking control of another company<sup>62</sup> or ordering an inspection.<sup>63</sup>

Interim measures often concern the call on bank guarantees or the disposal of funds or other assets. An example for the latter is found in an order by an LCIA tribunal prohibiting the disposal of funds from an escrow account;<sup>64</sup> and an LCIA interim award ordering the respondent to refrain from disposing of its assets and to place the certificates of the disputed shares under the control of the tribunal.<sup>65</sup> Interim measures sought in support of a claim for delivery may be framed in the form of an injunction prohibiting the disposal of the goods to a third party.<sup>66</sup>

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<sup>55</sup> Chapter 6, Case N° 1.

<sup>56</sup> Chapter 7, Case N° 25; similarly interim measures ordered by an LCIA tribunal, Chapter 11, Case N° 14; in ICC Case N° 7895 the arbitral tribunal ordered the claimant producer to refrain from selling products that were subject to the exclusive distribution arrangement, subject to a penalty in case of violation of the injunction (French law applicable to the procedure); 11 ICC Court Bulletin (2000), No 1, p. 67.

<sup>57</sup> Chapter 7, Case N° 5; *ibid.* Case 23 (brokering certain types of contracts), *ibid.* Case N° 25.

<sup>58</sup> Chapter 7, Case N° 20.

<sup>59</sup> Chapter 9, Case N° 4; similarly Chapter 11 (LCIA), Case N° 20 (prohibition to sell branded goods) and N° 23.

<sup>60</sup> Chapter 9, Case N° 2.

<sup>61</sup> Chapter 11, Case N° 16.

<sup>62</sup> Chapter 11, Case N° 18.

<sup>63</sup> Chapter 11, Case N° 22 (granted).

<sup>64</sup> Chapter 11, Case N° 10.

<sup>65</sup> Chapter 11, Case N° 12; similarly Cases 13 and 15 and Chapter 13, Case N° 2.

<sup>66</sup> Chapter 11, Case N° 9 (request denied).

In a WIPO case, the arbitrator ordered the respondent to abstain from a trademark infringement;<sup>67</sup> other prohibiting injunctions concerned the use of a certain designations in a corporate name,<sup>68</sup> or the wrongful use of the claimant's business name;<sup>69</sup> defamatory declarations;<sup>70</sup> attempts to induce personnel to take employment elsewhere;<sup>71</sup> or the use of intellectual property rights.<sup>72</sup>

The largest group of cases relating to performance concerns *injunctions requiring the positive performance of specified acts or actions*. The act may consist in the delivery of some goods or an act related to that of transferring property discussed above. The reported cases concern the continued supply of contractual products,<sup>73</sup> the delivery, installation and commissioning of a printing machine and the performance of an "acceptance protocol";<sup>74</sup> the restoration of leased premises to their original state;<sup>75</sup> the granting of access to an industrial plant;<sup>76</sup> the continued performance of a distributorship agreement;<sup>77</sup> or the delivery of raw material as an interim measure,<sup>78</sup> the confirmed operation of a facility,<sup>79</sup> the publication of the award in a specified newspaper;<sup>80</sup> the delivery of documents collected in the preparation for writing a book;<sup>81</sup> the return of expired bank guarantees,<sup>82</sup> the supply of a movie channel to cable television subscribers<sup>83</sup> and the performance

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<sup>67</sup> Chapter 12, Case N° 7.

<sup>68</sup> Chapter 7, Vienna Chamber, Case N° 7.

<sup>69</sup> Chapter, 8, Case N° 9.

<sup>70</sup> Chapter 7, Vienna Chamber, Case N° 20 (relief granted), Chapter 9, ICDR/AAA, Case N° 6 (relief granted);

<sup>71</sup> Chapter 7, Vienna Chamber, Case N° 23 (case settled).

<sup>72</sup> In an Italian case, the arbitrators found that they did not have jurisdiction to make an order in this respect; Chapter 4; Milan Chamber, Case N° 9.

<sup>73</sup> Chapter 11, Case N° 7.

<sup>74</sup> Chapter 7, Vienna Chamber, Case 8.

<sup>75</sup> Chapter 4, Milan Chamber, Case N° 2 (the tribunal ordered that premises that had been used as a gym be restored to their original state).

<sup>76</sup> Chapter 8, ICC, Case N° 10 (request granted).

<sup>77</sup> Chapter 8, ICC, Case N° 8 (the arbitrator ordered the respondent to perform under the terms of the distributorship agreement and to enable the claimant to sell, market and distribute products covered by that agreement).

<sup>78</sup> Chapter 11, Case N° 11.

<sup>79</sup> Chapter 11, Case N° 21.

<sup>80</sup> Chapter 8, ICC, Case N° 14 (denied as unjustified in the circumstances).

<sup>81</sup> Chapter 5, Geneva Chamber, Case N° 2.

<sup>82</sup> Chapter 13, Case N° 5 ; see also Case N° 370 of the Iran-US Claims Tribunal in which the Tribunal decided that the performance guarantees and the corresponding stand-by letters of credit had no further purpose and that Iran had to withdraw its demands for payment and refrain from further demands; YEARBOOK COMMERCIAL ARBITRATION vol. XV - 1990, 220

<sup>83</sup> Chapter 8, ICC, Case N° 1.

of an accounting by an independent auditor.<sup>84</sup> In the latter case, the contract was subject to English law and the tribunal accepted as a matter of principle that specific performance was available as a remedy but not appropriate in the case at hand.

In other cases, the arbitrators ordered that promissory notes be issued as security for future deliveries of goods;<sup>85</sup> or that two respondents jointly open a bank account into which the claimant would make its contractual payments.<sup>86</sup>

A number of cases concerned confidentiality obligations. In two of these cases, the arbitral tribunal ordered that the respondent comply with the confidentiality obligation of a settlement agreement;<sup>87</sup> in another case the protection of business secrets was ordered;<sup>88</sup> in yet another case the confidentiality obligations under a license agreement were upheld.<sup>89</sup>

An area where the performance of specific obligations is of particular importance concerns the maintenance, technical support and supply of spare parts for equipment delivered; ICC case N° 11 provides a useful example. In that case, the arbitrator ordered that the respondent who had supplied items of machinery (in addition to the spare parts to which reference has been made already) had to provide services and technical support to the claimant within the limits of prevailing market conditions with respect to price, availability and quality.<sup>90</sup>

As in this ICC case, the purchaser of industrial plant and machinery often depends on the continued availability of maintenance services and spare parts from the supplier or, as in a case before the Vienna Chamber, simply the documentation required for the operation and maintenance of the equipment;<sup>91</sup> in some cases the spare parts are covered by intellectual property rights so that the purchaser of the equipment cannot obtain them from third party suppliers, even if this would be technically possible. The losses which the owner of the plant may suffer can be far out of proportion to the value of the spare parts which the supplier of the machinery may fail to provide. Although the supply of spare parts often is a lucrative part of the supplier's business,

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<sup>84</sup> ICC case N° 8528 of 1996, YEARBOOK COMMERCIAL ARBITRATION vol. XXV - 2000

<sup>85</sup> Chapter 7, Vienna Chamber, Case N° 2.

<sup>86</sup> Chapter 7; Vienna Chamber, Case N° 15

<sup>87</sup> Chapter 9, ICDR, Cases N° 2 and 6.

<sup>88</sup> Chapter 12, WIPO, Case 2.

<sup>89</sup> Chapter 12, WIPO, Case 8.

<sup>90</sup> Chapter 8, Case N° 11. For a similar case see Chapter 3, Milan Chamber, paragraph 7.3.

<sup>91</sup> Chapter 7, Case N° 12.

this may not be the case when the supplier ceases to manufacture a certain product line and with it certain components which the purchasers of the machinery may continue to need for the operations of their plants.

It seems obvious that the owner of the plant has a justified interest in the performance by the suppliers of their obligation to supply technical support and spare parts. In cases where the supplier has a reputation to lose, the simple award requiring the supplier to continue providing the technical support and the spare parts may be sufficient. However, the conditions at which such support and spare parts are provided may give rise to new controversies and, if the supplier fails to comply with the award, even more serious difficulties may arise. The ICC case referred to above, resolved the matter by reference to market prices.

Similarly, the performance of remedial work by the supplier of equipment is an important area for performance claims: thus an arbitral tribunal granted the requests for performing remedial work in order to ensure the proper functioning of machinery supplied.<sup>92</sup> A particularly interesting example is the ICC case concerning the construction of an industrial installation; the arbitral tribunal found that there were defects in the design of the works supplied and ordered the re-performance of parts of the contract, giving specific directions with respect to this re-performance.<sup>93</sup>

Another example for indispensable performance of an obligation concerns the project documentation. Plant, machinery and other installations, but also buildings and their fit-out may be used only if they meet certain regulations and standards. For this purpose technical tests are necessary but also the presentation of documentation about the manufacturing process and testing. Thus a missing certificate for an item of equipment may prevent the entire plant from being used or the building from being occupied. In an ICC case, the supplier of the steel structure for a power plant had delivered the steel and the steel was incorporated but the supplier had failed to deliver the certificates that documented the manufacturing process; the arbitral tribunal ordered the production of this documentation as a matter of urgency.<sup>94</sup>

Among the cases seeking performance of a contract, one can find occasionally claims by the party having to make the non-monetary performance that the other party be ordered to receive this

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<sup>92</sup> Chapter 7, Vienna Chamber, Cases N° 24 (relief granted), N° 22 (relief denied for undisclosed reasons).

<sup>93</sup> Chapter 13, Case N° 1.

<sup>94</sup> Chapter 13, Case N° 5.

performance and pay for it; one such case concerned a long term delivery contract for roasted coffee, where the seller sought an order that the respondent take and pay for the coffee over that period;<sup>95</sup> among the available material there is no example for an award granting such relief.

Another category of cases of particular interest are those where the arbitral tribunal orders a complete action plan. In an ICC case, for instance, the parties were engaged in a trade mark dispute. The resolution of this dispute required from the arbitral tribunal an order for a number of steps, including the withdrawal by the respondent of oppositions to certain applications by the claimant, to cancel a series of its own registrations for certain trade marks and in specified countries, to cease the use of certain trade marks and to assist the claimant with the registration in certain other countries.<sup>96</sup> Similarly, some of the cases which concern the termination of a contract required the order of a variety of measures resulting from the termination, such as in a case mentioned already, return of marketing materials, product samples and related documents, return of unsold products, non-compete clauses and prohibition of using specified trade marks.<sup>97</sup>

When the arbitral tribunal orders the continued performance of a contract, as an interim measure or as the final remedy, it may be necessary to order a variety of measures by which this continued performance is adjusted to the new circumstances. At the level of interim measures arrangements may have to be made by which matters are kept in abeyance or by which the settlement of the accounts between the parties can be prepared. In Chapter 19 Charles Kaplan describes some of the arrangements by which the conduct of the parties is regulated during the course of the arbitration.

In one case, where reaching a minimum level of production seems to have been a condition for certain payments, the supplier of the technology requested that the purchaser be ordered to use the technology. The claim was dismissed.<sup>98</sup> In such a case where the recipient of the performance, by not requesting or accepting the goods or services to be supplied under the contract, prevents having to make payment or prevents the supplier from reaching a certain level of turnover which conditions other rights, the interests of the claimant might be adequately protected if the applicable law assumes that in

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<sup>95</sup> Chapter 7, Vienna Chamber, Case N° 18 (the case was terminated by a consent award in undisclosed terms).

<sup>96</sup> Chapter 8, Case N° 6.

<sup>97</sup> Chapter 8, Case N° 7.

<sup>98</sup> Chapter 7, Vienna Chamber, Case N° 19.

such cases the condition of which the occurrence has been prevented against good faith, is treated as having occurred.

Finally, there are cases where the performance which the claimant seeks to enforce concerns the conclusion of a contract, the granting of a right or other acts which consist in the declaration of intent by the respondent. These acts shall be considered in the category of formative actions.

### 4.3 Cases of declaratory relief

Declaratory relief, as understood here, consists in recording a situation of fact or law; it is a “Feststellung” in the Germanic civil procedure practice or a “constatation de droit” as the term is translated in the French version of the Swiss Code of Civil Procedure.<sup>99</sup> The “declaration” considered here is that of the court and distinct from the declaration of intention which is a constitutive element of the formation of a contract.<sup>100</sup>

Quite a number of requests and awards in LCIA proceedings sought a declaration about the rights and obligations of the parties or about the question whether a breach of the contract had occurred. As expressly pointed out in one of these cases, such declarations can be helpful for the parties to settle their dispute.<sup>101</sup> In some of these cases, a negative declaration was sought and granted, stating that the claimant was not liable or was not in breach.<sup>102</sup>

Similar cases can also be found in the report of the ICDR<sup>103</sup> and some other arbitration institutions.<sup>104</sup> As shall be discussed below, some arbitral tribunals have difficulties with claims of this nature.

In a number of cases, the arbitral tribunal made declarations about certain factual or legal situations: a classical example is the award in the ARAMCO arbitration, where the parties had made a point in limiting the scope of the arbitration to a definition of the parties’ legal position.<sup>105</sup> In an ICC case the tribunal declared that the claimant had a right of way granting access to an industrial plant.<sup>106</sup> In

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<sup>99</sup> Article 88 Swiss CPC.

<sup>100</sup> Such declarations are considered in the context of formative actions and awards, below in Sections 4.4 and 7.

<sup>101</sup> See Chapter 11, the table in section II A, Case T.

<sup>102</sup> Chapter 11, section II. A, cases K and M, and Case N° 24; and Chapter 7, Vienna Chamber, Case N° 17.

<sup>103</sup> Chapter 9.

<sup>104</sup> E.g. Chapter 7, Vienna Chamber, Case N° 11, seeking a declaration that a contract was null and void and Case N° 17 concerning the termination of a contract.

<sup>105</sup> See below section 5 of this Chapter.

<sup>106</sup> Chapter 8, Case N° 10.

a case before the Vienna Chamber the arbitral tribunal made a declaration identifying costs of a water company, thereby laying the basis for the calculation of an increase in its rates;<sup>107</sup> and in another case the tribunal declared that the claimant had validly exercised a call option and determined the basis of the option price.<sup>108</sup> Similarly, in a case before the DIS, the arbitral tribunal made a declaration about the increase in the exchange value of the shares of the claiming minority shareholder.<sup>109</sup>

In a case before the Milan Chamber the tribunal declared that a company held a controlling stake in another company.<sup>110</sup>

#### **4.4 Formative actions, including declarations of intention and instructions**

Formative actions, as they have been defined above, concern the creation, transformation or termination of a right or a legal relationship.

Some of the reported cases concern simple declarations. In a case before the Vienna Chamber the claimant requested that the tribunal permit the use of an industrial plant as a reference and for purposes of demonstration, replacing the permission which the respondent had refused to grant.<sup>111</sup> In a case concerning the assignments of debtors, the respondent had failed to give notice to the assigned debtors, thereby preventing the assignment to become effective; the tribunal ordered the respondent to draw up the form by which such notice was given to all assigned debtors.<sup>112</sup> In other cases the tribunal ordered that the respondent issue a declaration required to release a frozen account;<sup>113</sup> or the release of a guarantee.<sup>114</sup>

In one case the arbitral tribunal ordered a party to issue powers of attorney in terms prescribed by its decision.<sup>115</sup>

In other cases the arbitral tribunal was requested to go a step further and to order the completion of a contract: such requests concerned the conclusion of a contract providing industrial property rights;<sup>116</sup> to conclude an agreement for the transfer of shares on the

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<sup>107</sup> Chapter 7, Vienna Chamber, case N° 1.

<sup>108</sup> Chapter 7, Vienna Chamber, case N° 3.

<sup>109</sup> Chapter 6, Case N° 3.

<sup>110</sup> Chapter 4, paragraph 8.

<sup>111</sup> Chapter 7, Case N° 21.

<sup>112</sup> Chapter 4; Milan Chamber, Case N° 7.

<sup>113</sup> Chapter 7, Vienna Chamber, Case N° 9.

<sup>114</sup> Chapter 4, Milan Chamber, Case N° 6.

<sup>115</sup> Chapter 13, Case N° 4.

<sup>116</sup> Chapter 7, Vienna Chamber, Case N° 14 (case settled on undisclosed terms).

basis of a draft agreement submitted to the arbitral tribunal,<sup>117</sup> to bring about closing of a transaction on the basis of the agreement concluded,<sup>118</sup> to grant a license;<sup>119</sup> and to provide a bank guarantee.<sup>120</sup> Not always such requests are granted. In a case concerning an international tender and the decision by which the contract was awarded, the claimant requested that the decision be annulled and the contract be awarded to the claimant. The tribunal decided that it had jurisdiction to determine whether the law had been respected and the consequences for the parties rights; but did not have jurisdiction to replace one decision about the attribution of the contract by another.<sup>121</sup>

Finally, cases must be mentioned where the arbitral tribunal was requested to modify or terminate an agreement. Tschäni mentions a case before the Zürich Chamber of Commerce in which the arbitral tribunal dissolved a joint venture (in the form of a partnership under Swiss law) and appointed a liquidator.<sup>122</sup> In an ICC case one of the members of a joint venture was excluded and its shares were transferred to another member of the joint venture.<sup>123</sup> In another ICC case the rights of a defaulting joint venture member were transferred to the other members of the joint venture.<sup>124</sup>

Other forms of modification concern the pricing in long term delivery contracts, which often contain provisions by which a party can seek price revision by an arbitral tribunal. While the subject is discussed frequently, reported cases seem to be rare.<sup>125</sup>

## 5. DECLARATORY RELIEF AS A REMEDY IN ARBITRATION

In the common law world, granting declaratory relief is often cited among the powers of an arbitral tribunal. Authors who refer to such powers speak of “a declaratory award or an award which contains a declaration about the rights of the parties”.<sup>126</sup>

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<sup>117</sup> Chapter 6, DIS, Case N° 2.

<sup>118</sup> Chapter 13, Case N° 2.

<sup>119</sup> Chapter 12, WIPO, Case N° 1 (request granted).

<sup>120</sup> Chapter 12, WIPO, Case N° 4 (request granted).

<sup>121</sup> Award of 1994 in ICC case N° 7081, in *Clunet* (2003) 599, 605.

<sup>122</sup> Chapter 14, III, A, 1, c, second case.

<sup>123</sup> Chapter 8, Case N° 3.

<sup>124</sup> Chapter 13, Case N° 10.

<sup>125</sup> For an example see Chapter 13, Case N° 6.

<sup>126</sup> LEW/MISTELIS/KRÖLL, *Comparative International Commercial Arbitration*, 2003, para 24-76 ; similarly REDFERN and HUNTER on *International Arbitration*, 5th ed. 2009, para. 9.61.

REDFERN and HUNTER even say that this is a feature for which “modern arbitration legislation” often makes express provision.<sup>127</sup> But the only example quoted is that of the English Arbitration Act 1996. While declaratory relief, as shown above, is a useful criterion when categorising claims and remedies, one wonders why the powers of granting such relief would have to be specifically granted by the legislator. Indeed, BORN finds it “unusual” that the English Act provides that an arbitral tribunal has power to make declaratory and injunctive relief.<sup>128</sup>

Article 48 of the English Arbitration Act 1996, entitled “Remedies” contains the following paragraph (3):

The tribunal may make a declaration as to any matter to be determined in the proceedings.

One notes with interest that the provision does not speak merely of a declaration about the rights of the parties, but more generally of “any matter to be determined in the proceedings”.

Formal declarations by an arbitral tribunal, as they are mentioned in the quoted provision of the English Act, may be the only relief which the parties seek in an arbitration. An often quoted example is the award in the ARAMCO arbitration,<sup>129</sup> mentioned already, where the parties had expressly agreed that the arbitrators should make a declaratory award only and should not award damages to either side. The arbitral tribunal made an express statement about this restriction in its mandate:

There is no objection whatsoever to Parties limiting the scope of the arbitration agreement to the question of what exactly is their legal position. When the competence of the arbitrators is limited to such a statement of the law and does not allow them to impose the execution of an obligation on either of the Parties, the Arbitration Tribunal can only give a declaratory award.<sup>130</sup>

It is interesting to note that the tribunal in this case did not reason in terms of “powers” of the tribunal but referred to the “scope of the

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<sup>127</sup> Loc. cit.

<sup>128</sup> BORN, *International Commercial Arbitration*, 2009, vol. II, FN 321.

<sup>129</sup> *Saudi Arabia v. Arabian American Oil Co. (Aramco)*, ad hoc Award, Geneva 1958, ILR 117 (1963).

<sup>130</sup> Loc. cit. p. 145.

arbitration agreement” and the limitations in the “competence of the arbitrators”. The effect is probably the same.

Cases where the “powers” of the arbitrators or the “scope of the arbitration” are limited to making a declaration do not seem to be frequent. More often formal declarations of the arbitral tribunal are steps in the tribunal’s process leading to an award on damages or other form of performance. For instance the tribunal may decide that the respondent (i) breached the contract and (ii) must pay damages in a specified amount. In such a case one may doubt that the declaration of the breach of contract can truly be considered as “relief” and not just part of the tribunal’s reasoning. Indeed, the finding of the tribunal could also be expressed by a decision which orders the respondent to pay damages for breach of contract.

In such cases where the tribunal includes declarations in its award which are intermediary steps of the type just mentioned, the declaration can have a legal effect in itself, especially if it is made in a partial award. The declaration forming part of the award takes part in the *res judicata* effect of the award and, within the limits of this effect, binds both the arbitral tribunal itself for the subsequent steps in the proceedings and other tribunals or courts that may be concerned with the dispute.

While there can be no doubt that international arbitrators may make declaratory awards, restrictions have occasionally been imposed with respect to the circumstances in which they may make such awards. The origin of such restrictions seems to lie in considerations intended to protect the judiciary against unnecessary claims. The underlying idea is that it is not the role of the court to give legal opinions.

In France for instance, Article 31 of the New Code of Civil Procedure (NCPC) requires that the claimant shows a justified interest (“*intérêt légitime*”) in bringing the action. This includes the requirement that the dispute brought before the court must have arisen and must be alive (“*né et actuel*”). A claimant who seeks a declaratory judgement must show that there is some risk or threat to the rights invoked.<sup>131</sup>

Similarly, the German Code of Civil Procedure (ZPO) provides in Section 256 that a legal action seeking a declaration about the existence or non-existence of a legal relationship requires that the claimant has a legal interest (“*ein rechtliches Interesse*”) that the legal relationship be determined in the near future (“*alsbald*”).<sup>132</sup> The provision also allows a party to pending judicial proceedings to request a declaration about

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<sup>131</sup> See e.g. GUINCHARD and FERRAND, *Procédure civile*, 28th ed. 2006, para. 129 b).

<sup>132</sup> The provision also applies to the determination whether a document is genuine or false.

the existence of a legal relationship which became disputed during the course of the dispute and which is decisive for its outcome. Actions for a declaration may concern only existing legal relationships; neither abstract legal questions nor factual issues are admissible. If the claimant is in the position to claim performance (“Leistung”) a declaratory action normally is not admitted for reasons of procedural economy.<sup>133</sup>

The principle is accepted also in Switzerland where the legal interest in the declaratory judgment is treated as a requirement for the admissibility of the action (“Prozessvoraussetzung”).<sup>134</sup> The new Swiss Code of Civil Procedure, which entered into force in 2011, does not prescribe the requirement specifically for the declaratory action, regulated in Article 88, but prescribes in a general manner that the claimant must have a justified interest (“intérêt digne de protection”).<sup>135</sup> The principle that the availability of an action for performance excludes a declaratory action<sup>136</sup> also applies under the new code.<sup>137</sup>

Occasionally these principles have been applied also in international arbitral proceedings. In ICC case N° 4<sup>138</sup> for instance the arbitral tribunal sitting in Zurich dismissed a counterclaim which sought a declaration that the respondent was entitled to exercise a call option; since the option could have been exercised and the resulting rights claimed in the arbitration, the tribunal found that there was no legal interest in a declaratory award.

Similarly an ICC tribunal sitting in Paris relied on principles of French law of civil procedure in order to determine whether a request for a declaratory award was admissible. It explained:

a declaratory action is admissible if two conditions are met: the claimant must establish that there is a grave and serious threat creating a present disturbance and the requested declaration must be such that it affords to the claimant not merely a purely theoretical satisfaction but a concrete and specific usefulness ....<sup>139</sup>

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<sup>133</sup> For details see e.g. BAUMBACH/LAUTERBACH, *Zivilprozessordnung*, 62nd ed. 2004.

<sup>134</sup> Swiss Federal Supreme Court in ATF 116 (1990) II, 196, cons. 1 b). For details see in particular GULDENER, *Schweizerisches Zivilprozessrecht*, 3rd ed. 1979, 207 - 211.

<sup>135</sup> Article 59 (2) a.

<sup>136</sup> Swiss Federal Supreme Court in JdT 1996 I 274, 277.

<sup>137</sup> See e.g. HALDY, *La nouvelle procédure civile suisse*, 2009, 46.

<sup>138</sup> Below Chapter 8.

<sup>139</sup> Award of 1999 in Case N° 9617, *Clunet* 2005, 1291, also in *Collection of ICC Awards 2001 - 2007*, 711.

By reference to these principles, the arbitral tribunal found the request for a declaratory award justified.

The published part of the award does not provide any explanations to justify why these principles of French law of civil procedure should be applied in an international arbitration under the ICC Rules. The commentators of the award, JARVIN and TRUONG-NGUYEN, approve the decision and add that French law does not admit a “pure declaratory action”, i.e. an action which seeks merely “a simple legal opinion totally removed from the concept of interest”.<sup>140</sup> The learned authors, just like the arbitral tribunal, seem to believe that these principles of French civil procedure are applicable in international arbitration.

The application of such principles of domestic civil procedure without specific justification must appear as regrettable. It is now widely accepted that the procedure before international arbitral tribunals is governed by the *lex arbitri* and that the law of civil procedure at the place of arbitration is applicable neither by analogy nor subsidiarily. Of course, there are rules and principles in civil procedure which can serve as a useful and relevant source of inspiration for international arbitrators. But their application is not automatic and such application should be justified in each case.

Concerning the principle which requires the justification of a legal interest for a declaratory action, there are good reasons why this principle has been developed in the proceedings before State courts. One of the considerations is that the resources of the judiciary should be put to efficient use and should not be wasted. This consideration does not apply in the same manner in international arbitration, where the parties pay for the process and are entitled to fashion it. As the ARAMCO arbitral tribunal explained in the passage quoted above, there is no justification for precluding parties to an arbitration from limiting their requests to the arbitral tribunal to a declaration about their legal rights. Similarly, in ICC case N° 7453, the arbitrator determined that in a situation where the parties were in disagreement about the existence of an obligation continuing in the future he had the power and indeed the obligation to make a declaratory award about this obligation.<sup>141</sup>

Thus one concludes that declaratory actions must be admissible in international arbitration without the claimant having to show a legal interest in the manner in which this is prescribed in some countries by the domestic law of civil procedure.

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<sup>140</sup> Clunet 2005, 1291, ICC Awards 2001 – 2007, 715.

<sup>141</sup> YEARBOOK COMMERCIAL ARBITRATION vol. XXII – 1997, 107.

This being said, there may be circumstances where a claimant brings a declaratory action without serious justification for the sole purpose of creating nuisance to the respondent. Such cases may be dealt with through the decisions on costs or, more generally, by reference to principles of abuse of rights. Whether and to what extent such principles allow or require restrictions in the right of a party to bring an arbitration may deserve some further consideration in another study.

However, as can be seen by ICC case N° 4, some tribunals (in particular in the Germanic procedural tradition) require a legal interest in the declaration and deny the existence of such an interest if the claimant can seek performance or damages; such awards then include the finding that the contract has been breached or that some other ground for liability has been established. In this respect positions taken by tribunals vary, as can be seen by cases in N° 3 of the Vienna Chamber where the arbitral tribunal granted the request for a declaration according to which a call option had been validly exercised.<sup>142</sup>

## 6. ORDERS FOR SPECIFIC PERFORMANCE

Among the types of relief considered here, the most frequent and probably also the most complex arbitral relief is that by which the arbitral tribunal orders a party to perform its contractual obligations. The contractual obligation may consist in the payment of certain amounts,<sup>143</sup> in specified currencies and at agreed times; or it may consist in a certain conduct, by acting in a certain manner, by refraining from certain acts or by tolerating a certain conduct or situation. Often only the performance of the second type of obligation is described as “specific performance”. The performance of an obligation expressed in monetary terms is different in some respect from the performance of other obligations; in others there is no substantial difference. It is therefore justified to treat both under the heading of “specific” performance, even though the performance of a monetary obligation sometimes is distinguished from “specific performance” as understood in common law. Unless a distinction is required in a particular context, we will simply speak of “performance”.

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<sup>142</sup> Chapter 7, Case N° 3.

<sup>143</sup> See Chapter 11, Case N° 8.

### 6.1 Interim and final orders for performance

The performance of contractual obligations may be ordered by an arbitral tribunal as a final determination in an award or it may be ordered as an interim measure. Although the performance may be identical in both cases, there are some differences which must be borne in mind. Interim measures ordering performance are discussed in greater detail below by Charles Kaplan in Chapter 19. The comments here concern in particular these measures in comparison and their relationship with the performance ordered as an award on the merits.

An interim measure, by definition, is ordered on a provisional basis; it may be revoked at any time by the arbitral tribunal and comes to an end at the latest at the completion of the arbitration. This has important consequences:

First of all, the arbitral tribunal is still available; if the addressee of the order does not comply with it, the beneficiary of the order can address itself to the tribunal and can obtain additional measures or strengthening of the original measure. Moreover, the addressee of the order must count with the risk that non-compliance with the order for interim measures may be held against it by the arbitral tribunal when it makes its award on the merits.

The continued presence of the arbitral tribunal has the further advantage that the arbitral tribunal may correct, adapt or complete the measure at any time so as to make it more responsive to the needs of the circumstances; and it may revoke the measure when it finds it no longer justified.

A very telling example of the progressive adjustment of an order for performance in successive steps can be seen in Case N° 4 in Chapter 13: the arbitral tribunal ordered that one of the parties issue powers of attorney to the project manager of a large infrastructure project. Several successive orders were required until the addressee eventually issued the power of attorney as it was required under the circumstances.

A question of particular importance concerns the relationship between the measures ordered on an interim basis and those which the tribunal may order in its decision on the merits. In this respect the practice reported by the LCIA seems particularly interesting. In this report the number of cases in which tribunals ordered performance of contractual obligations on an interim basis is far greater than those where performance was ordered on the merits. Indeed, the report shows an impressive variety of interim measures being ordered by LCIA tribunals; many of them of far reaching effect. The report does not state whether any of the measures ordered on an interim basis also

were ordered in the final award. However, since during the same period only very few awards are reported as having ordered specific performance, one may presume that in most of the cases where performance was ordered on an interim basis the case was settled before the final award was issued or the final award did not order such performance; the claim must have been dismissed or only damages were awarded.

The pattern of the LCIA may be reflective of a more general difference in approach in the common law world. Indeed, Elder who otherwise condemns specific performance as causing “damage to the international commercial system”, accepts that the remedy “may enjoy a minor existence as a provisional measure”.<sup>144</sup> He considers interim measures ordering specific performance as “qualitatively different from a final award ordering specific performance”, because, as long as they continue to appear before the arbitrator, the “rational parties will realize that disobeying an interim order will result in a loss of favor with the arbitrator”. Such interim decisions therefore, in the eyes of Elder, are “largely self-enforcing”.<sup>145</sup>

It is submitted that this position is fundamentally flawed. If a party may not obtain from the arbitral tribunal a final award which orders the delivery of the shares sold, the return of the premises leased, the abstention from using a trade mark or access to a building, what justification is there for the arbitral tribunal to order such performance during the course of the arbitration? It would be quite irresponsible for an arbitrator to order the respondent to refrain, during the course of the arbitration, from delivering the shares to another buyer in full knowledge that, at the end of the arbitration, the respondent cannot be ordered to make such delivery and only has to pay damages.

Indeed, it is a widely accepted principle at least in some parts of the world that interim measures must be related to the claims on the merits.<sup>146</sup> Sometimes it is also expressed by the Latin expression of *fumus boni juris*.<sup>147</sup> Indeed, as required by the new Article 17 A of the UNCITRAL Model Law on International Commercial Arbitration, a party requesting an interim measure

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<sup>144</sup> Elder, *op.cit.* p. 31.

<sup>145</sup> Elder, *op.cit.*, p. 30.

<sup>146</sup> E.g. Besson, *Arbitrage international et mesures provisoires*, 1998, p. 143 who speaks of “le principe selon lequel les mesures provisoires doivent se rapporter aux prétentions émises à titre principal”; with further references to writers who require a link between the measure ordered and the subject matter of the dispute.

<sup>147</sup> See e.g. Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd ed. 2010, N 1145.

... shall satisfy the arbitral tribunal that:

- (a) ...
- (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim....<sup>148</sup>

The same provision now is included in Article 26 (3) of the revised UNCITRAL Arbitration Rules.

In other words, to the extent to which it is required that there is at least a reasonable chance for the interim measures applicant to prevail on the merits, an arbitral tribunal which orders interim measures of performance or measures protecting the continued performance of the contract cannot exclude as a matter of principle that it may order such measures in the award on the merits.

## 6.2 How much “specificity” is required?

Orders for performance must specify the action which the respondent must perform, from which it must abstain or which it must tolerate. The question which the party claiming performance must face and which the arbitral tribunal eventually must answer is how specific the description of the specific performance must be and how much detail must be regulated.

The question is addressed in some rules of civil procedure<sup>149</sup> and discussed by some legal writers.<sup>150</sup> Based on the comments by Wirth, Berger and Kellerhals insist on the need for clear definition of the relief sought. They do so first of all in the interest of the respondent who must know what claim he has to meet. They also insist on the need for the arbitral tribunal to know what precisely it should order. And they insist on the need to provide clarity for the enforcing authorities.<sup>151</sup>

When it comes to performance of contractual obligations as a remedy, the matter, obviously, is related to the terms of the contract from which the dispute arose and which is at the basis of the performance ordered by the tribunal. But it is also a question of methodology: an arbitral tribunal, when drafting an award ordering performance, may take its inspiration from the drafting methods which

<sup>148</sup> Amendment of the Model Law adopted in 2006.

<sup>149</sup> See e.g. Tschäni in below Chapter 14, section II, E.

<sup>150</sup> Markus Wirth, Rechtsbegehren in internationalen Schiedsverfahren – wie bestimmt müssen sie sein? in Greiner/Berger/Güngerich (eds.) *Rechtssetzung und Rechtsdurchsetzung*, Festschrift für Franz Kellerhals zum 65. Geburtstag, Bern 2005, 145.

<sup>151</sup> Berger and Kellerhals, N 1096; see also below Tschäni in Chapter 14, section II, E and Hürlimann in Chapter 16, section III, C.

the parties adopted when they drafted their contract. It is not certain that this is the most suitable and the wisest approach.

In contract drafting different methods can be adopted, ranging from generic descriptions of the obligations to the greatest possible specificity. Traditional contract drafting in civil law traditions probably tended more to the former approach; business men, if they are allowed to draft their own contracts, often limit themselves to the essentials of the transaction, leaving the rest to an implementation of the transaction in the spirit of cooperation between "commercial men". A different type of drafting originated especially in the United States, spread to England and now has gained large parts of the world, especially in certain types of transactions: large numbers of lawyers and volumes of "boiler plate" language, seek to regulate every possible and impossible eventuality.

In reality, it must be assumed that the parties often implement their contract on the basis of their business understanding of the transaction, relying on business sense and cooperation in good faith. However, once the parties get into a dispute and end up before an arbitral tribunal reliance on good faith and common sense interpretation of contractual obligations becomes more precarious. The critical question for a party seeking performance of an obligation and for a tribunal prepared to grant such a request is then whether the requested relief should specify all details of the performance or whether such details should be left to the implementation by the parties.

Insofar as the request is concerned, excessive detail may confuse the issues and may reduce the chances of persuading the arbitrators to grant the requested performance. On the side of the arbitrators, the difficulty results from the fact that they do not draft a contract which both parties adopt because they are reasonably satisfied with the terms. The arbitral tribunal, in most cases in which it does not simply rely on the wording of the contract, will have to adopt a wording which only one party has proposed, which the tribunal may or may not have modified to respond to objections of the other party but which normally has not been accepted by it. Great caution must therefore be used by the tribunal in drafting the operative part of the order for performance.

The degree of specificity which the tribunal adopts probably depends more on its expectations concerning the future of its award. If there is a reasonable chance that, once the issue submitted to the tribunal has been decided, the parties will continue in reasonable business relations, the more prudent approach is probably for the

arbitral tribunal to set out the principles of the performance clearly but without too great detail. This approach appears as preferable even if the contract itself follows a very detailed drafting method.

Although it is risky to generalise, the mere fact that one of the parties requires performance of an obligation, rather than damages for non-performance, often might be taken as a sign that some common basis remains between them.

The approach is particularly suitable in cases where the tribunal does not disappear immediately after the publication of the award. The continued availability of the tribunal is normally ensured in the case of interim measures. It may also be ensured in the case of phased decisions, as they will be discussed below.

Such a more generic drafting of the provisions of the award describing the required performance becomes problematic when one must expect enforcement proceedings. In such a case, great care must be taken to meet the requirements of the law and practice at the place where enforcement will be sought. In the case of monetary awards, it is often unknown where exactly the award creditor will seek enforcement. When it comes to awards ordering performance, the place of performance also may be unknown; but often it is more predictable.

The award then must meet the requirements of specificity of the place of enforcement. At that level such specificity is essential. It is not the function of the enforcement officer to interpret the contractual obligations of the parties nor to make similar interpretations with respect to the terms of an arbitral award. The explanations given by Professor Schumacher about the situation in Austria,<sup>152</sup> therefore, are of a general relevance, even if the modalities may vary from country to country. These explanations describe a situation which is inherent in the relationship between the decision ordering performance and its enforcement. They demonstrate the need for a very high degree of specificity if the relief is to be enforced through the channels of enforcement officers of the public authorities.

### **6.3 The process of defining the performance ordered by the tribunal**

When an arbitral tribunal is requested to order performance of a contractual obligation its award may simply consist in identifying the relevant provision of the contract and order the respondent to perform it. Cases where performance is ordered in this manner are probably the

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<sup>152</sup> See below Chapter 21.

exception. Cases where the tribunal first defines the contested obligation, reserving for a second phase of the proceedings how best this obligation is to be performed<sup>153</sup> are perhaps more frequent; in complex disputes in which performance is sought this approach may be quite suitable.

In most cases the situation is likely to be more complex and the arbitral tribunal may have to define, in varying degrees of precision, what exactly has to be performed. These definitions and the process by which they are reached can be among the most complex issues from a procedural and practical perspective.

In some cases the obligation which must be performed has not been defined clearly in the contract: for instance, the joint venture contract may contain general obligations of cooperation and the arbitral tribunal may find that these obligations include the obligation to issue powers of attorney for the project manager; but the contract does not contain the exact terms of these powers.<sup>154</sup> Or the arbitral tribunal concluded that the parties have agreed on the essential terms of their contract and now has to complete the points of secondary importance.<sup>155</sup> Or the tribunal orders that certain works must be re-performed.<sup>156</sup> Or the tribunal decides that the contract remains in force but must be adapted to the changed circumstances which may result from the conduct of one or both of the parties or may be independent from them.

In all of these situations, and many others that may arise in cases where performance is sought, the precise content of the obligation to be performed must be defined.

As to the *substantive content of the performance obligation* which the arbitral tribunal has to define, it might find it in the contract itself, taking account of other defined terms of the contract and possible adjustments in them. It may identify principles underlying the contract or implied terms. To use again the example of the powers of attorney for the project manager, the arbitral tribunal might refer to his functions and, if he is appointed in replacement of another project manager, the powers which had been issued for his predecessor may serve as reference.

Where the tribunal is called upon to complete a contract, this must be done in a manner that takes into account the balance of the

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<sup>153</sup> See for instance the approach of the tribunal in the *Götz v. Burundi* case, below Chapter 13, Case N° 8.

<sup>154</sup> E.g. Chapter 13, Case N° 4.

<sup>155</sup> E.g. Chapter 13, Case N° 2.

<sup>156</sup> E.g. Chapter 13, Case N° 1.

contract, considering the exchange of reciprocal advantages as provided by the contract and the agreed terms of this exchange. In such cases the arbitral tribunal may even create rights which are not provided in the contract.<sup>157</sup>

The arbitral tribunal also may have to refer to business practices or standards of the industry. In ICC case N° 11, the arbitral tribunal referred to “prevailing market conditions”.

The procedural approach of the arbitral tribunal when defining the performance obligations may vary according to the circumstances but also according to the disposition of the parties and the tribunal.

In some cases, the performance obligation may be defined in general terms, leaving it to the parties or to one of them to specify the details. In the Avena case, for instance, the International Court of Justice ordered the United States to implement its direction “by means of its own choosing”.<sup>158</sup> Similarly, the arbitral tribunal may direct one party to offer to the other modalities from which it could choose.<sup>159</sup>

In other cases the tribunal may indicate the principle of the obligation and invite the parties to resolve the details by negotiations, or direct the parties to settle the modalities within a framework determined by the arbitral tribunal.<sup>160</sup>

Other forms of progressive definitions of the obligations can be found in the WTO proceedings where an important role is left for the negotiations of the parties.<sup>161</sup>

Finally, the tribunal may seek to determine itself the precise terms of the performance which it requires the respondent to perform. However, this requires precautions, in particular interaction with the parties in order to avoid erroneous or impractical directions.<sup>162</sup>

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<sup>157</sup> See for instance the *Advanced Micro Devices (AMD) v. Intel Corporation* case, discussed in Chapter 3 (at FN 86) where the arbitrator ordered a party to grant to the other a free license.

<sup>158</sup> Van Aaken, *Primary and Secondary Remedies in Investment Arbitration and State Liability: A Functional and Comparative View*, Paper for the Inaugural Conference of the Society of International Economic Law, p. 9.

<sup>159</sup> Chapter 8, ICC, Case N° 11: the respondent was ordered to designate a location in three specified countries to which the claimant could return the machines which the respondent claimed.

<sup>160</sup> E.g. Chapter 9, ICDR, Case N° 1, where the sole arbitrator ordered the parties to confer for the purpose of scheduling a closing, or some other mutually agreed-upon arrangement or Chapter 13, Case N° 2 where the arbitral tribunal determined that the respondent was “obliged to join the Claimant in good faith efforts to bring about Closing under the XX Agreement”; it remained seized of the matter until the parties reported on the outcome of their efforts to reach Closing.

<sup>161</sup> See below Chapter 18.

<sup>162</sup> Chapter 13, Case N° 9 provides an example for such interaction.

An example of such interaction with the parties is the progressive definition of the obligation by the arbitral tribunal, as it was applied in the case of the powers of attorney discussed above: the claimant applied to the tribunal requesting that it order the respondent to issue the powers. After having heard the respondent the tribunal made the order in general terms. The powers which the respondent issued were qualified; the claimant expressed its dissatisfaction and requested that powers be issued in the terms of a form which it submitted to the tribunal. The order which the tribunal, again after having heard the respondent, issued referred specifically to this form. The respondent issued the powers according to the form but introduced modifications. It was only in the third round, when the tribunal threatened sanctions in the form of “astreinte”<sup>163</sup> that the powers were issued in the specific form ordered by the tribunal.

A different approach consists in the tribunal notifying the parties of its decision in principle and inviting them to negotiate the remaining details. If they fail to settle these details the dissatisfied party may revert to the tribunal, report the points agreed and identify the remaining points of difference, explaining the reasons for their difference. The tribunal can then settle the remaining differences in terms which the parties have considered in detail. In one such case the tribunal confirmed the obligations of the parties to negotiate in good faith certain points and announced that it would remain seized of the case until the parties had reported of the outcome of their negotiations.<sup>164</sup>

Variations to such interactive and progressive definition of the details of performance can be found in practice.<sup>165</sup> The essential point is that the definition is made in consultation with the parties. The parties must be given the opportunity of expressing their views on the modalities of the future performance, correcting modalities which are not practicable in the circumstances of their cooperation or reaching agreement once they have seen that the tribunal is firmly minded to require performance. Errors of the tribunal with respect to the modalities of future performance often are potentially more problematic than errors in the amount of an award.

There are various forms in which the tribunal may proceed in the progressive definition of the modalities of the performance which it orders. This can be done in meetings between the parties and the tribunal in which the solution is elaborated in a consultative manner,

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<sup>163</sup> See below Chapter 22.

<sup>164</sup> Chapter 13, Case N° 2.

<sup>165</sup> E.g. Chapter 13, Case N° 9.

supported by the demonstrated intention of the tribunal to decide those points on which the parties cannot agree. It may also be done through successive decisions, taking the form of orders or partial awards. In such successive decisions the tribunal defines the stage of the process reached at the end of each phase and invites direct negotiations for the next phase or argument for its decision.

In many cases it may therefore be desirable for the tribunal to remain available beyond the award by which it decides all issues before it in a manner which it considers final. In this manner it can avoid some of the post-award difficulties at the enforcement stage which are discussed below by Peter Schlosser and Hubertus Schumacher.<sup>166</sup> The continued availability of a tribunal in this form, may meet with difficulties in some jurisdictions on the grounds of the *functus officio* doctrine.<sup>167</sup> However, these difficulties probably can be resolved simply by the tribunal declaring that it continues to be seized of the matter until the parties have reported on the implementation of the award.

In conclusion on this chapter, the definition of the performance to be ordered and its modalities must take place in an interactive process in which the tribunal assures itself that the performance which it intends to order meets the framework set by the parties' contract and can be implemented in its future performance.

## **7. FORMATIVE OR CONSTITUTIVE AWARDS: MODIFICATION OF RIGHTS OR LEGAL RELATIONS**

In the law of judicial procedure in some civil law countries one of the categories of judgments (and actions leading to them) concerns the modification of rights, of legal relationships or of a status. Examples are the judgment declaring a divorce, the liquidation of a corporation, annulment of the decision of a shareholders assembly,<sup>168</sup> annulment of a patent etc. Where a contract may not be terminated by the parties but

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<sup>166</sup> Chapters 20 and 21.

<sup>167</sup> See in this respect Born, op. cit. vol. II, p. 2483; see also, Pierre Tercier (ed.): Post Award Issues, ASA Special Series N° 38 (forthcoming).

<sup>168</sup> The issue has been exemplified in a recent case where the Swiss Federal Supreme Court annulled an award of the Court of Arbitration for Sport (CAS) concerning a decision of the FIFA based on FIFA Transfer Regulations. The FIFA denied a claim by Benfica Lisbon against Atletico Madrid; but on appeal the CAS annulled this decision and awarded part of the claim; the Supreme Court held that this award disregarded an earlier decision by the Zurich Commercial Court which had annulled the Transfer Regulation and that this annulment had constitutive effect (Decisions of the Swiss Federal Supreme Court, ATF 136 (2010) III 345.

requires the decision of a court, such termination also falls in this category of judgments.

Such actions and the judgments which they seek are described in France as constitutive (“*jugements constitutifs de droit*”)<sup>169</sup> or in Germany as formative (“*Gestaltungsklage*” or “*Gestaltungsurteil*”). The new Swiss Code of Civil Procedure describes them in Article 87 as “*action formatrice*” and defines them as seeking “the creation, the modification or the dissolution of a right or a specific legal relationship”. The term “formative” may be the most suitable one to describe this category.

A judgment of this category does not confirm or implement a right but creates or transforms it. Therefore it is constitutive. It has effect on all those concerned by the right or the relationship.

It is in particular this latter characteristic of formative actions which renders arbitration unsuitable for many of them. It is in the nature of an award that it binds only the parties to the arbitration. Unless special exceptions were provided, it is only in those cases where all possibly affected persons can be and are made party to the arbitration that the formative request can be brought in an arbitration.

In addition to this limitation inherent in the nature of arbitration there are restrictions which result from the law governing the substance of the matter. Where this law designates the courts or a specific court or some other public authority and does so with exclusive jurisdiction, there is no room for arbitration. For instance, bankruptcy normally is declared by such an authority, generally a court; while claims against the bankrupt may be subject to arbitration, the declaration of bankruptcy itself is reserved to the authority designated by law.

Insofar one may speak even in civil law countries of restrictions in the powers of arbitrators.

However, there remain a number of situations in which arbitral tribunals may make awards with a formative effect. A number of such cases are referred to above in section 4.4 of this Chapter:

Examples of such formative awards can be found for instance in the context of the formation, modification or termination of a contract. Contract modification or adaptation is a regular feature of arbitration proceedings, when it comes to applying contract clauses to this effect such as price adjustment clauses or other mechanisms of this type.<sup>170</sup> Where the law provides that the courts may complete a contract when

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<sup>169</sup> For France see e.g. GUINCHARD/FERRAND, *op. cit.* para 216 a.

<sup>170</sup> See e.g. Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, paragraph 33 et seq. For an example see Chapter 13, Case N° 6.

the parties have agreed on its essential terms, or where the law provides that the termination of a contract cannot be simply declared by one of the parties but requires the intervention of a court, the decision of the arbitral tribunal also has formative effect.

A more problematic issue concerns the law of corporations and the question whether decisions of the corporate bodies can be subject to arbitration. The matter has been the subject of an intensive debate especially in Germany where the DIS provides special arbitration rules for corporate disputes. It is only in a recent decision that the German Federal Supreme Court (BGH) decided that disputes concerning the regularity of corporate decisions can be submitted to arbitration.<sup>171</sup>

Different issues arise in terms of competition law when “behavioral commitments” may be required in the context of a merger. Third parties may avail themselves of such commitments and require that certain rights, in particular rights of access and use, be granted.<sup>172</sup>

Finally, mention must be made of those decisions where the arbitral tribunal decides that the respondent must make a declaration which is constitutive of a legal situation (“Willenserklärung”, “déclaration de volonté”), such as expressing consent to an assignment, giving notice, granting a release etc. Decisions of this nature raise special questions in the context of their implementation, as they shall be discussed below in the section on enforcement.

## 8. THE LAW APPLICABLE TO THE REMEDY

The difficulty in determining the law applicable to the remedies in arbitration is first of all one of characterisation. In the common law world the matter is conceived as one concerning the powers of the arbitral tribunal. In civil law countries some aspects concerning remedies are of substantive nature, others are procedural.<sup>173</sup>

Common law jurisdictions conceive the matter as a question of the arbitrator’s powers, an approach which mirrors that with which remedies are considered by the courts. The English Arbitration Act 1996, for instance, specifically lists in Article 48 the “powers” which an arbitral tribunal has under the Act. The Article is entitled “Remedies” and first states that the “parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies”. It then lists such powers, some of which are expressly stated to be the same as those of the courts.

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<sup>171</sup> BGHZ 180, 221-235, see also Kröll in *SchiedsVZ* 2010, 144.

<sup>172</sup> For details see *Elsing* in Chapter 15.

<sup>173</sup> See above *Ramos Muños*, Chapter 3, Section II; and below *Tschäni* in Chapter 14, section II B - E; *Malinvaud*, p. 211 (favouring substantive law).

In civil law countries the rights and the remedies that flow from them, as a matter of principle, are regulated in the substantive law. For instance the sanctions for the breach of a contract, including the claim for performance of that contract, are regulated in the law governing the contract or in the contract itself. Similarly, a question such as the effect of a termination, by virtue of the declaration of a party or by decision of the court, is governed by the law of the contract. While as a matter of principle an arbitral tribunal in a civil law approach is not restricted in its powers with respect to the remedies it may apply, restrictions arise from the rules on arbitrability, rules which in their own way restrict the powers of an arbitrator.

The question then arises as to the principles which determine whether, in a given case, the matter is characterised as procedural and thus governed by the *lex arbitri* or must be seen as substantive and would be seen as governed by the *lex causae*. Take for example an arbitral tribunal sitting in Switzerland and applying English law to the merits of the dispute: does it determine the availability of specific performance (in particular in a contract relating to land) according to Swiss arbitration law (which does not contain any provision comparable to Article 48 of the English Arbitration Act); or does it determine the matter according to English law of contract (which might be seen as not including the provision on remedies in the Arbitration Act).

The issue here is not different from that concerning characterisation in some other areas, such as statutory interest or periods of limitation. In judicial proceedings, the solution first developed by Rabel seems to be applied generally: the courts characterise issues according to their own *lex fori*. Thus a Swiss court, in the example just given, would treat the question of available remedies as an issue of substantive law and would look to English law; it would apply the English rule, even though in English law the question of remedies is a matter of the powers of the courts and hence of procedural law. This principle is now enshrined in Article 13 of the Swiss Federal Act on Private International Law of 1987 (PIL Act) which provides that a choice of law designates all rules of the chosen law which are applicable to the matter, irrespective of the classification or characterisation in the chosen legal order.<sup>174</sup>

In international arbitration the matter is, in theory at least, more complicated, since an international arbitral tribunal (at least in the Swiss conception) does not or not necessarily apply the conflict rules of the seat. In Switzerland Article 187 PIL Act contains an independent conflict rule for international arbitral tribunals subject to Chapter 12 of

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<sup>174</sup> In this sense expressly, HEINI in Zürcher Kommentar, 2<sup>nd</sup> ed. 2004, N3 at Article 13.

that Act, i.e. essentially international arbitral tribunals having their seat in Switzerland. This is generally understood to mean that the conflict rules applied by Swiss courts are not applicable as such.<sup>175</sup> Article 187 PIL Act merely states that the arbitral tribunal applies the rules of law<sup>176</sup> chosen by the parties and, in the absence of a choice by the parties, the law with which the case has the closest connection. This choice of law is understood in the sense of a substantive choice; all relevant rules of the chosen law are applied, irrespective of the classification in that law. In other words, the principles developed in the context of Article 13 PIL Act are applied.<sup>177</sup>

In practice the question of the law governing the remedies which an arbitral tribunal may apply, and the characterisation of the issue, are likely not to be of great importance, except in those cases where there are restrictions in the powers of the arbitrator, for instance with respect to specific performance concerning land or formative actions. In most modern arbitration laws, the arbitrators have wide powers to choose the appropriate remedies, whether this is stated specifically or results from the general understanding of the role of the arbitrator. A proper understanding of the differences in the approach between different legal systems nevertheless is important in order to address correctly the issues which may arise with respect to remedies and powers of international arbitral tribunals.

## 9. ENFORCEMENT

An agreement to arbitrate normally implies the commitment of the parties to carry out the award without delay. Many arbitration rules state this commitment in express terms. The 2010 UNCITRAL Rules provide in Article 34 (2) that “The parties shall carry out all awards without delay.” Similar provisions can be found in other arbitration rules.<sup>178</sup>

It is difficult to know how rigorously this rule is complied with in practice. However, the statistics which are available concerning compliance with arbitral awards “suggest that most arbitral awards are in fact carried out voluntarily”.<sup>179</sup>

<sup>175</sup> See LALIVE/POUDRET/REYMOND : *Le droit de l'arbitrage interne et international en Suisse*, 1989, N 16 at Art. 187 ; KARRER, in *Basler Kommentar, Internationales Privatrecht*, 2nd ed. N 81 at Art. 187.

<sup>176</sup> “Règles de droit » in the French version, « Recht » and « diritto » in the German and Italian version.

<sup>177</sup> In this sense KARRER, *loc. cit.* N 112.

<sup>178</sup> E.g. Article 32 of the 1976 UNCITRAL Rules, Article 32 (2) Swiss Rules ; Article 28 (6) ICC Rules, Article 26.9 LCIA Rules.

<sup>179</sup> Redfern and Hunter, *op. cit.* paragraph 11.02, with further references.

In their response to the enquiry for this book, most institutions explained that normally they are not informed about the fate of an award. Therefore, the enquiry did not provide much information about the question whether non-monetary awards are complied with to the same extent to which awards ordering payment are fulfilled; nor did it provide information about the difficulties that non-monetary awards faced at the enforcement stage. There are, however, a few exceptions.

The report of the DIS mentions two cases concerning the transfer of shares, increase of capital and related operations; the cases were completed by awards on agreed terms which were immediately performed upon receipt of the awards.<sup>180</sup> Obviously, these cases do not provide information about the enforcement of non-monetary awards. However, the information provided is of interest insofar as it shows that, in that case, the parties saw a need to continue the performance of the contract; the availability of the performance remedy enabled the claimant to seek performance which eventually produced the desired result: continuation of the contract rather than its termination and replacement by an award for damages.

The Milan Chamber reported that, in one case, it had information about the enforcement of one of its awards. In that case, the sole arbitrator granted the claimant's request for a formal note that the agreed works were completed and an order for the performance of the painting work as agreed in the contract. The successful claimant addressed itself to the competent State court and obtained an Exequatur. The report states that the arbitrator's decision was performed, but it does not state how the claimant obtained performance of the painting works through the intervention of the courts.<sup>181</sup>

In a case of the Vienna Chamber the arbitral tribunal granted claims arising from a call option to acquire shares in a third company. When the successful party applied to the courts in the respondent's home country, recognition and enforcement of the award was denied. However, the report does not state whether enforcement was denied because of the nature of the remedy or for other reasons.<sup>182</sup>

In a case before WIPO a party was ordered to provide a bank guarantee and did indeed provide this guarantee.<sup>183</sup>

In another case, the arbitral tribunal found that the industrial installations delivered by the contractor, in some respect were not fit

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<sup>180</sup> Chapter 6, Cases N° 1 and 2.

<sup>181</sup> Chapter 4, Case N° 4.

<sup>182</sup> Chapter 7, Case N° 3.

<sup>183</sup> Chapter 12, Case N° 4.

for purpose. At the request of the employer it ordered re-performance of the defective work, providing indications about the scope of the re-performance. The contractor carried out the work which was accepted by the employer. The installations then functioned without complaint by the employer.

In the Texaco/Calasiatic case concerning the nationalization of the Libyan concession, the Sole Arbitrator found that the Libyan Government had breached the Concession Agreement. He fixed a time within which the Government could inform the Sole Arbitrator of the measures taken to comply with the award and reserved further proceedings.<sup>184</sup> The Libyan Government did not restore the contractors' rights in the concession. However, it entered into negotiations with the contractors and in relatively short time a settlement was made and paid. This outcome is often cited as a failure of an award for performance. This is correct only in part. In fact, the award as made by Professor René-Jean Dupuy, opened the way to negotiations which led after a relatively short period to a settlement between the parties. In two other parallel cases, the claimants were awarded substantial amounts of money as damages. However, the monetary awards in these other cases travelled the world in attempts for enforcement with little success. It seems that it was only after a considerable time that the companies were able to collect some money in a settlement which is said to have been much less favorable than that obtained following the Texaco/Calasiatic Award.

Concerning the procedures for the enforcement of awards for non-monetary relief it must first of all be noted that the New York Convention, providing for enforcement of foreign arbitral awards, does not distinguish according to the relief provided by the award. Consequently, awards providing non-monetary relief and in particular awards for specific performance are enforceable according to the New York Convention.<sup>185</sup>

As to the practical implementation a distinction must be made according to the type of the relief granted.

An award which grants *declaratory relief* by recording a situation of law or fact does not need any enforcement. If any action is necessary at all, it would be recognition.

With respect to awards granting *formative relief*, the situation is more complex. Insofar as such an award creates a new legal situation, for instance dissolves a partnership or annuls a shareholders'

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<sup>184</sup> See Chapter 13, Case N° 3.

<sup>185</sup> Born, op. cit. Vol. II, p. 2481, with further references in FN 323; see also Schlosser below Chapter 20, paragraph 9.

resolution, all that is required to give it effect is recognition. Insofar, when it comes to giving effect to such awards, they do not differ from declaratory awards.

The complexities arise with respect to awards concerning the *expression of intention* or *instructions*. Section 4.4 above included a number of examples where the arbitral tribunal ordered a party to express an intention (“*Willenserklärung*” or “*déclaration de volonté*”) by consenting to an assignment, giving notice, granting a release etc. In some legal systems a court decision which orders a party to express its intention in such a manner replaces the expression itself. Schlosser describes the case in which a person was ordered by a court in Germany to consent to a rectification of an entry in the land register. According to the “immediate replacement doctrine” the judgment itself was taken as the declaration. In Switzerland the new Code of Civil Procedure now provides this effect expressly. Article 344 (1) provides:

If the decision orders that a declaration of intention be made, the declaration is replaced by the decision, once it has become enforceable.<sup>186</sup>

This immediate replacement effect also applies to arbitration awards. The question now is when this effect occur and where. Does it result from the award itself and occurs as soon as the award is rendered or does it require an act of recognition in the country where it is expected to cause its effect? In countries which recognize the constitutive effect of the award, the former solution applies, in others not. The difficulties which can arise when the two systems clash and suggested solutions are discussed by Schlosser in Chapter 20.

A related but different type of question concerns commitments about voting rights and their exercise, as they are contained in particular in shareholder agreements. Some of the issues arising in the context of the admissibility of such commitments and their enforcement are discussed below by Tschäni.<sup>187</sup>

The enforcement difficulties which normally are cited in the context of non-monetary relief concern *orders for performance*; these difficulties often are invoked among the principal objections to granting non-monetary relief.<sup>188</sup> A wide range of questions arise here.

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<sup>186</sup> Translation by the author; the German original reads: “Lautet der Entscheid auf Abgabe einer Willenserklärung, so wird die Erklärung durch den vollstreckbaren Entscheid ersetzt” and in French: “Lorsque la condamnation porte sur une déclaration de volonté, la décision tient lieu de déclaration dès qu’elle devient exécutoire”.

<sup>187</sup> Chapter 14, section IV.

<sup>188</sup> E.g. Jarvin, *op.cit.* p. 183.

They start with the definition of the performance that is ordered and the methods for completing and correcting ambiguities, errors and omissions. Schumacher discusses these issues in the context of Austrian law.

Particular difficulties arise in this context when it comes to awards which require simultaneous performance from both parties, for instance delivery against payment. Some national systems of enforcement, applicable also to the enforcement of foreign arbitral awards, contain provisions to this effect. In Switzerland the matter is regulated in Article 242 of the new Code of Civil Procedure. However, since this is not the case in all countries where an award may have to be enforced, it would be prudent of the arbitral tribunal to provide the necessary clarification in the award itself.

One of the questions that arise in this context concerns the jurisdiction for resolving disputes in the context of enforcement. Some matters by necessity must be resolved by the courts at the place of execution. But there are other matters which may well be resolved in arbitration by a new tribunal or by the tribunal having made the award, unless it were prevented by the *functus officio* doctrine. With respect to questions whether the award debtor has indeed correctly performed the award or whether certain acts remain to be performed, the most suitable solution would indeed be to have the original tribunal decide such disputes.

A wide and complex range of issues concerns sanctions for non compliance with the award. The principal form is that of a penalty or "*astreinte*". The judicial systems for the enforcement of awards provide for such sanction. In Switzerland this is regulated in Article 343 of the new Code of Civil Procedure.

However, there are only few legal systems which grant such powers to the arbitrators to impose sanctions for the failure to comply with their award; in some countries the question is controversial. The parties or the rules of the institution chosen by them may provide for such sanctions; but they rarely do. These issues are discussed in detail by Mourre in Chapter 22 and, insofar as awards providing for penalties are concerned, Schlosser in Chapter 20.<sup>189</sup> These chapters provide valuable insight into the complexities of these issues but they also show what remains to be done to resolve all practical issues which arise when performance remedies are awarded and have to be enforced internationally.

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<sup>189</sup> See also Chappuis in Chapter 2, section III B and D, Elsing, Chapter 15, section III and Malinvaud *op. cit.* p. 216.