

THE INVESTMENT
TREATY
ARBITRATION
REVIEW

SIXTH EDITION

Editor
Barton Legum

THE LAWREVIEWS

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CONTENTS

PREFACE.....	ix
<i>Barton Legum</i>	
Part I	Jurisdiction
Chapter 1	COVERED INVESTMENT 3
	<i>Can Yeğinsu</i>
Chapter 2	COVERED INVESTORS..... 18
	<i>Laura P MacDonald and Sebastian Canon Urrutia</i>
Chapter 3	REQUIREMENTS OF RATIONE PERSONAE IN A GLOBAL ENVIRONMENT 29
	<i>Huawei Sun and Xingyu Wan</i>
Chapter 4	RATIONE TEMPORIS OR TEMPORAL SCOPE 42
	<i>Barton Legum, Marta Cichomska and Catherine Gilfedder</i>
Part II	Admissibility and Procedural Issues
Chapter 5	ADMISSIBILITY 57
	<i>Michael Nolan, Elitza Popova-Talty and Kamel Aitelaj</i>
Chapter 6	BIFURCATION IN INVESTMENT TREATY ARBITRATION..... 67
	<i>Marinn Carlson and María Carolina Durán</i>
Chapter 7	OBJECTION OF MANIFEST LACK OF LEGAL MERIT OF CLAIMS: ICSID ARBITRATION RULE 41(5)..... 79
	<i>Alvin Yeo and Koh Swee Yen</i>
Chapter 8	PARALLEL PROCEEDINGS IN THE CONTEXT OF ISD ARBITRATION..... 96
	<i>Junsang Lee, Sungbum Lee and Myung-Ahn Kim</i>

Chapter 9	PROVISIONAL MEASURES105 <i>Ra'ed Fathallah and Marina Weiss</i>	105
Chapter 10	EVIDENCE AND PROOF139 <i>Martin Wiebecke</i>	139
Chapter 11	EVOLUTION OF THE THIRD-PARTY FUNDER146 <i>Iain C McKenny</i>	146
Chapter 12	CHALLENGES TO ARBITRATORS UNDER THE ICSID CONVENTION AND RULES.....160 <i>Chloe J Carswell and Lucy Winnington-Ingram</i>	160
Chapter 13	CHALLENGING ARBITRATORS IN INVESTMENT TREATY ARBITRATION.....178 <i>Colin Ong QC</i>	178
Chapter 14	FRAUD AND CORRUPTION200 <i>Sandra De Vito Bieri and Liv Bahner</i>	200
Part III Practical and Systematic Issues		
Chapter 15	THE ROLE OF PRECEDENT IN INVESTMENT TREATY ARBITRATION211 <i>Beata Gessel-Kalinowska vel Kalisz and Konrad Czech</i>	211
Chapter 16	TREATY INTERPRETATION IN INVESTMENT TREATY ARBITRATIONS...219 <i>Tom Sprange QC, Viren Mascarenhas and Julian Ranetunge</i>	219
Chapter 17	RES JUDICATA230 <i>Junu Kim, Sejin Kim and Yoo Joung Kang</i>	230
Chapter 18	SELECTION OF ARBITRATORS IN INVESTMENT ARBITRATION242 <i>Matthew Buckle</i>	242
Chapter 19	THE CHOICE OF THE SEAT IN INVESTMENT ARBITRATION250 <i>Evgeniya Rubinina</i>	250
Chapter 20	ATTRIBUTION OF ACTS OR OMISSIONS TO THE STATE272 <i>Oleg Alyoshin, Olha Nosenko and Ivan Yavnych</i>	272

Part IV Substantive Protections

Chapter 21	FAIR AND EQUITABLE TREATMENT	283
	<i>Andre Yeap SC, Kelvin Poon, Matthew Koh, David Isidore Tan, Daniel Ho and Mark Teo</i>	
Chapter 22	EXPROPRIATION	295
	<i>Qing Ren, Zheng Xu and Shuang Cheng</i>	
Chapter 23	RECENT TRENDS IN MOST FAVOURED NATION CLAUSES IN INTERNATIONAL INVESTMENT AGREEMENTS	304
	<i>Farhad Sorabjee, Shanaya Cyrus Irani, Siddhesh S Pradhan and Ananya Verma</i>	
Chapter 24	OBSERVANCE OF OBLIGATIONS	312
	<i>Anthony Sinclair and Hafsa Zayyan</i>	
Chapter 25	LEGAL DEFENCES TO CLAIMS	323
	<i>Eun Young Park, Matthew J Christensen, Seokchun Yun and Joonhak Choi</i>	
Chapter 26	POLITICAL RISK INSURANCE	330
	<i>Rishab Gupta and Niyati Gandhi</i>	

Part V Damages

Chapter 27	COMPENSATION FOR EXPROPRIATION	343
	<i>Konstantin Christie and Rodica Turtoi</i>	
Chapter 28	PRINCIPLES OF DAMAGES FOR VIOLATIONS OTHER THAN EXPROPRIATION	355
	<i>Ruxandra Ciupagea and Boaz Moselle</i>	
Chapter 29	OTHER METHODS FOR VALUING LOST PROFITS	364
	<i>Gervase MacGregor</i>	
Chapter 30	CAUSATION	370
	<i>Anthony Theau-Laurent and Edmond Richards</i>	
Chapter 31	CONTRIBUTORY FAULT, MITIGATION AND OTHER DEFENCES TO DAMAGES	379
	<i>Chris Osborne, Dora Grunwald and Ömer Kama</i>	

Chapter 32	THE DETERMINATION OF FINANCIAL INTERESTS IN INVESTMENT ARBITRATION.....	390
	<i>Mikaël Ouaniche</i>	
Chapter 33	COUNTRY RISK PREMIUM	402
	<i>Ronnie Barnes and Phillip-George Pryce</i>	
Part VI Post-Award Remedies		
Chapter 34	ANNULMENT OF INVESTMENT ARBITRATION AWARDS.....	413
	<i>Claudia Benavides Galvis and María Angélica Burgos de la Ossa</i>	
Chapter 35	ENFORCEMENT OF AWARDS	423
	<i>Tom Sprange QC, Charlene Sun and Erin Collins</i>	
Chapter 36	REVISION, INTERPRETATION AND CORRECTION OF AWARDS, AND SUPPLEMENTARY DECISIONS.....	438
	<i>Hamish Lal, Brendan Casey, Tania Iakovenko-Grässer and Léa Defranchi</i>	
Part VII Multi-Lateral Treaties		
Chapter 37	ENERGY CHARTER TREATY	457
	<i>Patricia Nacimiento</i>	
Chapter 38	NAFTA AND USMCA: THE NEXT STAGE OF THE SAGA.....	472
	<i>Lisa M Richman</i>	
Chapter 39	INVESTOR–STATE ARBITRATION AND THE ‘NEXT GENERATION’ OF INVESTMENT TREATIES.....	507
	<i>Olasupo Shasore SAN, Orji A Uka and Teni Akeju</i>	
Chapter 40	THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP.....	520
	<i>Lars Markert and Shimpei Ishido</i>	
Part VIII Industries		
Chapter 41	EXPERT ROLE IN CAUSATION ANALYSIS FOR ENERGY TRANSITION RELATED ARBITRATION.....	535
	<i>Christopher J Goncalves and Alayna Tria</i>	
Chapter 42	INVESTMENT TREATY DISPUTES IN THE LIFE SCIENCES INDUSTRY.....	543
	<i>Gregory K Bell, Justin K Ho and Andrew Tepperman</i>	

Contents

Chapter 43	INVESTMENT TREATY ARBITRATION: CONSTRUCTION AND INFRASTRUCTURE PROJECTS.....	552
	<i>Simon Hughes QC</i>	
Appendix 1	ABOUT THE AUTHORS.....	559
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	591

PREFACE

This year's edition of *The Investment Treaty Arbitration Review*, like that of last year, goes to press under particular circumstances. Measures to contain the covid-19 pandemic around the world have confined many authors to quarters. Despite these constraints, the authors of this volume have delivered their chapters. The result is a new edition providing an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments over the past year.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This sixth edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume under the difficult conditions that continue to prevail today.

Barton Legum

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Part VI

POST-AWARD
REMEDIES

REVISION, INTERPRETATION AND CORRECTION OF AWARDS, AND SUPPLEMENTARY DECISIONS

*Hamish Lal, Brendan Casey, Tania Iakovenko-Grässer and Léa Defranchi*¹

I INTRODUCTION

Sadly, at the conclusion of some arbitrations, parties may review a Final Award and note that while there may not be serious legal errors or serious procedural issues with the Award – amounting to grounds for annulment or non-recognition – there are other shortcomings or imperfections that do not seem right or consistent with the parties’ submissions. This could be because the tribunal has made a fundamental typographical error (for example, referring to a party by the incorrect name or omitting negation from a sentence), made a mistake in arithmetic or has explained the tribunal’s finding on a particular issue in a manner that raises additional questions or that the parties cannot agree on its interpretation. It is also possible that the tribunal has failed to explicitly rule on a claim or discrete issue that was briefed fully by the parties. In all of these circumstances, the arbitral rules and national law governing the procedure of the arbitration may be able to ameliorate the final award to avoid controversy at the enforcement stage. However, caution is advocated. New arbitral rules – for example, the 2020 LCIA Rules – allow for tribunals after consulting the parties, to issue an addendum to the final award dealing with the request, including any arbitration costs and legal costs related thereto.

This chapter considers the parties’ abilities to seek corrections, interpretations, supplementations or additional awards and, in more limited circumstances, ‘revision’ of the arbitral award. These remedies are narrow in scope, but potentially important in impact. It would be imprudent to discuss any of these remedies against an arbitral award without discussing the *functus officio* doctrine. In broad terms, the *functus officio* doctrine explains that once an arbitral tribunal has rendered its final award in the arbitration, thereby disposing of the issues of which it was seized, it ceases to have power over the parties under the arbitration agreement. However, most arbitral rules and national laws smooth the transition from issuance of the final award, alleviating the need for parties to re-constitute an arbitral tribunal to deal with issues arising immediately out of the final award, by providing for limited instances in which the tribunal’s power survives for a short period beyond the date of the final award. In this way, many arbitral rules allow the tribunal to correct, interpret and supplement an arbitral award so that the tribunal can fully complete its remit, leaving an award that can be put into effect by the parties.

Regardless of the regime under which the parties are operating, the parties will not be able to change the substance of a tribunal’s decisions in the final award absent a showing of grounds

¹ Hamish Lal is a partner, Brendan Casey is counsel, Tania Iakovenko-Grässer is an associate and Léa Defranchi is an associate at Akin Gump Strauss Hauer & Feld LLP.

for 'revision' as described below or by showing grounds for annulment or non-recognition under the New York Convention. Given that a large number of investment arbitrations proceed under the Rules and Convention of the International Centre for Settlement of Investment Disputes (hereinafter the ICSID Rules and the ICSID Convention), this chapter deals first with the regime for interpretation, correction supplementation and revision under the ICSID regime. Next, the chapter considers the rules and practice applicable under other ad hoc or institutional rules and with the common national laws applicable.

II ICSID CONVENTION AND RULES

Users of international arbitration who have opted for the ICSID system will find slight variations on the procedure for correction, supplementation or interpretation than they might find under various institutional rules or national laws. The ICSID Convention, however, does provide for a number of post-award remedies (i.e., remedies after an award has been rendered similar to those found in other arbitral practice). Parties to the arbitral proceedings can request the supplementation and rectification (Article 49(2)), interpretation (Article 50), revision (Article 51) and annulment (Article 52) of the award under the ICSID Convention and corresponding provisions under the Rules.

i Rectification and supplementation

Article 49(2) of the ICSID Convention along with Rule 49 of the Arbitration Rules provides for a remedy for minor technical errors in an award.² It enables the arbitral tribunal to correct mistakes that may have occurred in the award's drafting. This remedy is only applicable to awards, it is thus not applicable to decisions or orders preliminary to awards. As such, depending on the form of the tribunal's decisions, it may not apply to decisions on jurisdiction or orders on provisional measures.³ Rectification can be requested in case of a clerical, arithmetical or similar error. The procedure for such rectification is contingent upon a request of one of the parties. The tribunal does not have the power to issue such decision on its own initiative.

Article 49(2) also provides for the possible 'supplementation' of an award when there are inadvertent omissions in the award because of an oversight on the part of the tribunal. This oversight should, however, deal with a 'question' before the tribunal (i.e., an issue that affects the award and is of sufficient importance to justify the procedure leading to a supplementary decision).⁴ Usually, supplementation concerns inadvertent omission of an item in the calculation of damages or of a factor in determining costs.⁵

2 Article 49(2) of the ICSID Convention provides that: 'The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.'

3 Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary*, Cambridge University Press, 2019, p. 850.

4 *id.*, p. 853.

5 *ibid.*

When making an application for rectification or supplementation, either party may file a request within 45 days after the award is rendered. Such request must be addressed in writing to the secretary-general and include various requirements as set forth in the in Rule 49(1) (reproduced below).⁶ The party's request must state exactly what points it wishes to be supplemented or corrected.⁷ The tribunal will typically allow each party to make observations on the request (in one or two rounds of submissions) and then provide its ruling. The arbitral tribunal's decision on a request for a supplementary decision or rectification becomes part of the award.⁸

The case of *RDC v. Guatemala* is an instructive example.⁹ In that case, the tribunal was seized with a request for supplementation of its award and a request for two 'rectifications' under Article 49(2). There were – as is common in these types of proceedings – disputes between the parties as to whether or not the claimant's requests for supplementation and rectifications fell within the scope of the tribunal's Article 49(2) power.¹⁰ The tribunal found that one of the two requests for rectification should be granted, but that the other request for rectification and the request for supplementation were not within the limited scope of Article 49(2). The tribunal's reasoning below illustrates the salient issues relating to requests for rectification or supplementation. It found as follows:

- a In respect of the accepted request for rectification: 'The Tribunal reached the conclusion that a discount rate of 17.36% would be appropriate. It is evident that the Tribunal misapplied the discount rate.'¹¹
- b In respect of the second request for rectification, the tribunal explained:

46. The power of the Tribunal to rectify the Award is limited. The threshold question is whether the rectification requested falls within the parameters of Article 49(2) of the ICSID Convention. The parties disagree on whether the request concerns a pure mathematical error or a change of methodological approach.

6 'Rule 49 Supplementary Decisions and Rectification: (1) Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall: (a) identify the award to which it relates; (b) indicate the date of the request; (c) state in detail: (i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and (ii) any error in the award which the requesting party seeks to have rectified; and (d) be accompanied by a fee for lodging the request. (2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith: (a) register the request; (b) notify the parties of the registration; (c) transmit to the other party a copy of the request and of any accompanying documentation; and (d) transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation. (3) The President of the Tribunal shall consult the members on whether it is necessary for the Tribunal to meet to consider the request. The Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the procedure for its consideration.'

7 Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary*, Cambridge University Press, 2019, p. 852.

8 *id.*, p. 864.

9 *Railroad Development Corporation (RDC) v. Republic of Guatemala (RDC v. Guatemala)*, Decision on Claimant's Request for Supplementation and Rectification of Award, ICSID Case No. ARB/07/23, 18 January 2013, para. 16.

10 *id.*, paras. 8–34.

11 *id.*, para. 43.

47. *The Tribunal first observes that Claimant benefited from expert advice in the approach it took to claim and quantify damages. The Tribunal accepted that approach to the extent that concerns us here. With hindsight Claimant has realized that the approach that informed its pleadings had certain unfavorable mathematical implications and has asked the Tribunal to correct them. The Tribunal considers that to do so would exceed the terms of its powers under Article 49(2). It was not for the Tribunal to go beyond what Claimant pleaded prior to the Award and consider the mathematical implications of Claimant's approach when Claimant itself did not take them into account. In these circumstances to rectify the Award as requested is not just a simple mathematical operation, it implies the Tribunal accepting a change of pleading in the context of a rectification request. This is beyond the power of the Tribunal under Article 49(2) of the ICSID Convention.*¹²

c In respect of the request for supplementation, the tribunal explained:

39. *The Tribunal observes that the parties are in agreement that the Tribunal has discretion as to whether or not to supplement an award under the terms of Article 49(2) of the ICSID Convention. The term "may" leaves no doubt that this is the case when the Tribunal has omitted to decide a question submitted to it. Hence the first issue to be addressed by the Tribunal is whether it omitted to decide in the Award a question submitted by Claimant. The parties disagree in this respect. Claimant alleges that the Tribunal omitted to deal with the question of discounting the sunk costs up to the date of Lesivo, Respondent considers that this matter was implicitly covered in the Tribunal's considerations underlying the damages calculation. [. . .]*

42. *[. . .] To conclude, the Tribunal considers that in its calculation of compensation on account of the breach of the fair and equitable standard it dealt with all questions needed to reach its decision. In the view of the Tribunal the request to supplement the Award has no merit.*

A common theme under both the ICSID procedure and the non-ICSID procedures relates to the narrow scope for which tribunals will decide to rectify or supplement an award. Minor agreed corrections will typically be accepted by the tribunal.¹³ However, requests beyond the most limited will face skepticism and challenges from the non-requesting party and the tribunal will interpret its ability to correct or supplement narrowly.

ii Interpretation and revision

Interpretation

Sometimes the award might be typographically and arithmetically correct, but the tribunal has incompletely or ambiguously expressed its reasoning or the decision. In such a case, parties can request interpretation of the award where there is a dispute about the meaning or scope of an award pursuant to Article 50(1) of the ICSID Convention.¹⁴ Only parties

12 Emphasis added.

13 See *Noble Ventures, Inc. v. Romania*, Rectification of Award, ICSID Case No. ARB/01/11, 19 May 2006, para. 7 (where the tribunal was requested by the respondent to amend the list of its counsel and the claimant did not object) or *Emilio Agustín Maffezini v. The Kingdom of Spain*, Rectification of Award, ICSID Case No. ARB/97/7, 31 January 2001, para. 21 (where the respondent requested the arbitral tribunal to substitute the word 'employee' for the word 'official' because of the different legal implications it has within Spain and the claimant did not object).

14 Article 50 of the ICSID Convention provides that: '(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in

to the original proceedings can issue a request for interpretation. It is noteworthy that Article 50(a) requires a dispute between the parties as to the interpretation of a provision – general complaints about the award’s lack of clarity would not suffice. The requirement for a dispute also necessitates a certain degree of communication between the parties so that they have ‘actually exposed their divergence of views on definite points in relation to the award’s meaning or scope’.¹⁵

Neither Article 50, nor Rule 50 provide a time limit for an application requesting an interpretation. The absence of a time limit is taken by many practitioners to mean that a request for interpretation may be submitted at any time after the award has been rendered. It also means that successive requests may be made at different times without any limitation. The request for interpretation must concern the meaning or scope of an existing award. The purpose of the request should be the clarification of points that had been settled with binding force. It must not relate to new points that go beyond the limits of the award or facts arising subsequent to an award.¹⁶

Revision

Article 51 of the ICSID Convention deals with revision that implicates a substantive alteration of the original award on the basis of newly discovered facts that were unknown during the issuance of the first award.¹⁷ It states:

- (1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence.*
- (2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.*
- (3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.*
- (4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.*

In short, the revision process is contingent upon the discovery of new facts that could potentially impact the award ‘decisively’. The request for revision must relate to an award.

writing addressed to the Secretary-General. (2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.’

15 Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary*, Cambridge University Press, 2019, p. 868, citing to *Wena Hotels v. Egypt*, Decision on Interpretation, 31 October 2005, para. 81.

16 *Wena Hotels v. Egypt*, Decision on Interpretation, 31 October 2005, para. 91.

17 ICSID Convention, Article 51.

Revision is not available in respect of orders or decisions preliminary to awards such as a decision on jurisdiction or on provisional measures unless these are eventually incorporated into the award.¹⁸

The new fact must be able to impact the award decisively such that it could lead to a different decision had it been known to the tribunal.¹⁹ A new fact with no decisive effect on the award will not allow the reopening of the case for revision. The new fact can relate to jurisdiction or to the merits. By way of illustration, discovery of a new set of documents impacting the calculation of damages may constitute a new fact fulfilling this requirement.²⁰ However, the fact has to be new (i.e., it was unknown by the tribunal and to the party making the application).²¹ The applicant's initial ignorance of the new fact must not be because of negligence (e.g., in the case of careless preparation and presentation of the case).²² Ignorance by the non-applicant is not required.

ICSID procedure for interpretation and revision

Rule 50 of the ICISD Rules governs the procedure for filing an application for interpretation, revision or annulment. In terms of interpretation and revision the salient points are as follows.

Filing

An application for revision or interpretation shall be filed by one of the parties – the tribunal cannot raise such issues *sua sponte*. For interpretation, the application must state in detail the precise point in dispute. For revision, the change sought, the fact newly discovered and 'evidence that when the award was rendered the fact was unknown to the tribunal'.

Time limit

Applications for revision must be made within 90 days of the discovery of a new fact, but in any event within three years from the date on which the award was rendered.²³ There is no such time limit for an interpretation.

Tribunal

Upon filing an application for revision or interpretation, ICSID will transmit to the members of the tribunal a notice of the application and request the tribunal members whether they are willing to take part in consideration of the application. If all members agree, the tribunal shall be re-constituted.²⁴ If all members do not agree to hear the application, the parties will be invited to form a new tribunal appointed commensurate with the same procedure as used for the first tribunal.

A party applying for interpretation or revision may request a stay of the award's enforcement pending the application in justified circumstances.²⁵

18 Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary*, Cambridge University Press, 2019, p. 880.

19 *id.*, p. 883.

20 *ibid.*

21 *id.*, p. 884.

22 *id.*, pp. 884–885.

23 ICSID Rule 50.

24 ICSID Rule 51.

25 ICSID Rule 54.

III NON-ICSID ARBITRATIONS

Readers will appreciate that if the parties have elected not to use the ICSID system of arbitration or such system as not available, then issues of correction, supplementation, interpretation or revision will be governed by the applicable arbitral rules and national law. The following provides a review of the key arbitral rules and jurisdictions implicated in various investment disputes. One will recognise that in broad terms, most arbitral rules share similar provisions with respect to these issues. National laws, however, take different approaches to such issues with a particular note relating to the possibility for ‘revision’ or ‘revocation’ of arbitral awards in France and Switzerland.

i Arbitral rules and party agreements

Typically, any agreements of the parties with respect to correction, interpretation or supplementation will come in the form of agreement on a set of arbitral rules. To the extent the parties have also included in their agreement explicit provisions on such issues, those agreements would in most circumstances take precedence over the arbitral rules. Most arbitral rules allow for the interpretation,²⁶ correction²⁷ and supplementation²⁸ of the arbitral award. These remedies represent limited exceptions to the ‘finality of an award’, the principle according to which the tribunal’s mandate ceases upon the rendering of the final award.²⁹ As in the ICSID setting, the requests for interpretation or correction of the award are not meant to provide parties with an opportunity to submit additional evidence, advance new arguments or obtain a review or reconsideration by the tribunal of its reasoning or the decision.³⁰

Arbitral rules are typically divided into three categories:

- a Correction: An application for correction seeks to rectify ‘any error in computation, any clerical or typographical error, or any error or omission of a similar nature’. The wording is similar in most other arbitral rules. While there is no definition of what may comprise such errors, commentators agree that this captures unintentional errors or omissions, such as a misplaced decimal point, misspelled names, incorrect dates or

26 Article 35 of the 1976 UNCITRAL Rules, Article 37 of the 2010 UNCITRAL Rules, Article 36 of the 2021 International Chamber of Commerce (ICC) Rules, Article 47 of the 2017 Stockholm Chamber of Commerce (SCC) Rules. Note that Article 27 of the 2020 London Court of International Arbitration (LCIA) Rules allows the Tribunal to correct ‘any ambiguity or any mistake of a similar nature’ which can be assimilated to an interpretation of the award.

27 Article 36 of the 1976 UNCITRAL Rules, Article 38 of the 2010 UNCITRAL Rules, Article 36 of the 2021 ICC Rules, Article 47 of the 2017 SCC Rules and Article 27 of the 2020 LCIA Rules.

28 Article 37 of the 1976 UNCITRAL Rules, Article 39 of the 2010 UNCITRAL Rules, Article 36 of the 2021 ICC Rules, Article 48 of the 2017 SCC Rules and Article 27 of the 2020 LCIA Rules.

29 Article 34(2) of the 2010 UNCITRAL Rules provides that ‘All awards shall be made in writing and shall be final and binding on the parties’. See Article 32(2) of the 1976 UNCITRAL Rules. See Article 46 of the 2017 SCC Rules and commentary by Jakob Ragnwaldh, Fredrik Andersson et al., *A Guide to the SCC Arbitration Rules*, Kluwer Law International 2019, at pp. 141 and 145.

30 UNCITRAL Arbitration Rules, Section IV, Article 37 [Interpretation of the award], in Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, Kluwer Law International 2017, at p. 339. See also the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (ICC Note), 1 January 2021, at para 205: ‘Parties should be mindful of the limited scope of Article 36(2) which does not allow to revise or vary determinations that have been finally made in the award’.

the omission of a signature.³¹ As discussed above, there will be arguments between the parties about whether or not the request for a correction is properly framed as such or whether it is an attempt to re-open merits points. See, for example, the Addendum to the Final Award in ICC Case No. 9908.³²

- b* Interpretation: An application for interpretation seeks the tribunal's clarifications as to parts of the award it rendered. This provides the opportunity for the tribunal to address any obscurities or ambiguities by clarifying the terms of the award and resolve any uncertainty as to the exact meaning and scope of an award and therefore the manner in which it is to be performed.³³
- c* Supplementation: An application for supplementation (usually in the form of an additional award) relates to the tribunal's powers to issue an award or additional award on claims presented in the proceedings but not decided by the arbitral tribunal. No guidance exists with regard to the meaning of 'claims'. It has been suggested that 'claims' is limited to when a tribunal has overlooked a prayer for relief properly before it. In other words, 'claims' does not include circumstances where the tribunal has failed to consider a legal ground or argument.³⁴ Put shortly, the scope of such additional award should be limited to claims that were in fact presented in arbitral proceedings and this remedy is not intended to apply where the tribunal deliberately elects not to address a particular claim or issue because it regards it as unnecessary to do so.³⁵

31 UNCITRAL Arbitration Rules, Section IV, Article 38 [Correction of the award], in Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, Kluwer Law International 2017, at pp. 345-346.

32 Addendum to Final Award in ICC Case No. 9908 dated October 2000 ('14. Nevertheless, ICC Rules Article 29 allows correction of an error that is "clerical, computational or typographical" or "of a similar nature". In this case, Claimants and Respondents now both agree that the amount actually withheld was less than the amount presented to the Tribunal in Exhibit 701. Therefore the Tribunal accepts recalculation of interest by reference to the amount withheld now accepted by all parties, but according to its original methodology. Thus the amount due Respondents is reduced by . . .')

33 Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin J. Hunter, *Redfern and Hunter on International Arbitration*, 6th edition, Oxford University Press 2015, para. 10.18. See also UNCITRAL Report of the Secretary General on the Draft UNCITRAL Arbitration Rules, 12 December 1975, UN Doc A/CN.9/112/Add.1, at p.180

34 Jakob Ragnwaldh, Fredrik Andersson et al., *A Guide to the SCC Arbitration Rules*, Kluwer Law International 2019, at p. 145 referring to Section 32 of the Swedish Arbitration Act which provides that arbitrators can supplement the award if 'by oversight [they] have failed to decide an issue which should have been dealt with in the award'. See also UNCITRAL Report of the Secretary General on the Draft UNCITRAL Arbitration Rules, 12 December 1975, UN Doc A/CN.9/112/Add.1, at p.180 'the tribunal may issue an award or additional award on each part of every claim raised during the arbitral proceedings'. The ICC to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (ICC Note), 1 January 2021, at para 210 explains that 'a claim that the arbitral tribunal has omitted to decide is a claim that was made in the arbitration and that the arbitral tribunal, based on the parties' submissions, should have decided in the award'.

35 UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional award], in Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, Kluwer Law International 2017, at pp. 354-355.

The key terms of the process relate to the following:

- a* Party driven or spontaneous process: Under many rules, while the tribunal may make corrections on its own initiative,³⁶ interpretations and additional awards may only be made at the request of a party. The LCIA Rules give broader powers to the tribunal as they allow it to interpret and supplement its award on its own motion.³⁷
- b* Strict time limits: Due to the implications on the finality of the award, the parties' requests are time-limited: usually to 30 days³⁸ from the receipt of the award to ask for a correction, interpretation or additional award. Most rules also include a specified time frame (usually 30–45 days from application or award notification) in which the tribunal must render its decision on correction or interpretation. Time periods for supplemental awards are usually longer.³⁹
- c* Reasoned process: Requests for correction and supplementation of the award should be explicitly 'justified' under a number of arbitral rules.⁴⁰ Unsurprisingly, along the same lines, most of the arbitral rules also specify that the other party should be notified by the requesting party⁴¹ and should be granted the opportunity to comment by the arbitral tribunal.⁴² The same requirements typically apply when the tribunal acts on its own motion.⁴³

36 Article 38(2) of the 2010 UNCITRAL Rules, Article 36(1) of the 1976 UNCITRAL Rules, Article 47(2) of the 2017 SCC Rules, Article 36(1) of the ICC Rules.

37 Article 27.2 of the 2020 LCIA Rules allow the Tribunal to interpret the award on its own motion: 'correct any error (including . . . any ambiguity or any mistake of a similar nature) upon its own initiative'. This is a key update as the 2014 LCIA Rules did not allow the Tribunal to 'interpret' the award on its own initiative. Article 27.4 provides that: 'As to any claim, counterclaim or cross-claim presented in the arbitration but not decided in any award, the Arbitral Tribunal may also make an additional award upon its own initiative within 28 days of the date of the award, after consulting the parties'.

38 Or 28 days according to Article 27 of the 2020 LCIA Rules.

39 Within 60 days after the receipt of the request under Article 37(2) of the 1976 UNCITRAL Rules and Article 39(2) of the 2010 UNCITRAL Rules and Article 48 of the 2017 SCC rules with a possible extension, 56 days of the receipt of the request under Article 27.3 of the 2020 LCIA Rules. The ICC Rules allow only for a short-time limit of 30 days (Article 36(4)).

40 Article 38(1) and 39(1) of the 2010 UNCITRAL Rules, Article 47(1) and 48 of the 2017 SCC Rules and Article 27.1 and 27.3 of the 2020 LCIA Rules.

41 The ICC Rules do not specify such notification.

42 Note that even if the UNCITRAL Rules Article do not specifically provide for such opportunity, it is widely accepted that the other party should be able to comment according to the general provisions of equal treatment under Article 15(1) of the 1976 UNCITRAL Rules and 17(1) of the 2010 Rules. With regard to comments on the additional award request, the ICC Note explains at para. 212 that because such application refers to claims that were made in the arbitration and that the arbitral tribunal omitted to decide, it is expected that the parties will have already made submissions on said claims in the arbitration, and there should be no need for lengthy additional submissions. The Note further specifies that although assessing an application for an additional award would normally not require the taking of additional evidence, the arbitral tribunal may decide to allow the production of additional evidence as appropriate.

43 The ICC Note, 1 January 2021, at para 201 explains that: 'If the arbitral tribunal decides to correct the award on its own initiative it should inform the parties and the Secretariat of its intention to do so and grant a time limit to the parties to comment in writing'.

- d Form of decision: Under most arbitral rules, both corrections⁴⁴ and interpretations⁴⁵ of the award explicitly ‘form part of the award’ and thus have the same binding and enforceable effect as the final award. The result of a request for supplementation is also an award (either free-standing or forming part of the final award).

As can be seen from the above, the procedures are largely defined in similar terms and with similar contours, subject to various procedural wrinkles under the specific applicable arbitral rules.

ii National law

Unlike arbitral rules, there are broad divergences under the national laws that apply to the regime for correction, interpretation or award supplementation. There are even wide divergences in terms of the concept of ‘revision’ or ‘revocation’ of an arbitral award in France and Switzerland. Below is a survey of the position in the common seats of arbitration to investment disputes.

Switzerland

Switzerland recently amended its statute governing international arbitrations seated in Switzerland, the Swiss Private International Law Act (PILA).⁴⁶ Two main provisions of the PILA are applicable.

Article 189a: correction, interpretation or additional award

Within 30 days of the notification of the award, upon a request of either party, or at the arbitral tribunal’s own initiative, the arbitral tribunal may correct, interpret or supplement the award within the same time-limit. The scope of correction is limited to ‘any clerical or computational errors in the award’. Jurisprudence predating the current version of the PILA took the view that that the purpose of the correcting award is to allow the correction of a substantive error (miscalculation, clerical errors, typing errors, etc.) affecting an original award, contrary to an error of reasoning or a legal error, which does not affect the binding effect of the award.⁴⁷ The correcting award is an accessory decision to the original award that forms part of it, and therefore follows the legal regime of the original award.⁴⁸ Interpretation should only concern specific ‘parts of the award’. Finally, the tribunal enjoys the power to issue an additional award ‘on claims which were raised in the arbitral proceedings but not

44 Article 38(3) of the 2010 UNCITRAL Rules, Article 27.5 of the 2020 LCIA Rules, Article 36(4) of the 2021 ICC Rules.

45 Article 35(2) of the 1976 UNCITRAL Rules, Article 37(2) of the 2010 UNCITRAL Rules, Article 27.5 of the 2020 LCIA Rules, Article 36(4) of the 2021 ICC Rules.

46 Note that Article 189a is a codification of the case law of the federal court and so the law that was applicable prior to the revision has not changed. Article 189a should therefore apply even though the contract was concluded or the award rendered before 1 January 2021. See ‘Message concernant la modification de la loi fédérale sur le droit international privé’ (Chapter 12: Arbitrage international), FF 2018 7153 p. 7191. For a comprehensive review of the case law of the federal court on correction, interpretation and additional awards, prior to the revision of the Swiss PILA, see, in particular Müller Christoph, Pearson Sabrina, *Swiss Case Law in International Arbitration*, Schulthess Editions Romandes, 3rd revised edition, 2019 at pp. 305–308 and 593–597.

47 ATF 131 III 164 [168].

48 ATF 131 III 164 [166–167 & 170], Decision 4A_486/2010 c. 2.2, Decision 4A_433/2009 c. 1.3.

dealt with in the award'.⁴⁹ Under paragraph 2 of Article 189a, a request for correction or interpretation of the award does not interrupt the time limit for the challenge of the award with the Swiss federal Supreme Court.⁵⁰

Article 190a revocation:

Revocation is an extreme remedy against a final award which thus can only be sought;

- a* if a party subsequently discovers material facts or conclusive evidence which, despite having exercised due diligence, it was unable to invoke in the previous proceedings; facts and evidence which postdate the award are excluded;
- b* if criminal proceedings have established that the award was influenced, to the detriment of the challenging party, by a crime or misdemeanour, even in the absence of any conviction; if criminal proceedings cannot be pursued, proof can be furnished by other means; or
- c* if, despite having exercised due diligence, a ground for challenge under Article 180(1)(c) was not discovered until after the conclusion of the arbitration and no other remedy is available.⁵¹

Requests for revocation must be filed within 90 days of the discovery of the grounds giving rise to the application.⁵² Article 190(a)(2) further specifies that a right to revocation expires 10 years from the date on which the award has come into force unless the award was influenced to the disadvantage of the requesting party by a serious or minor crime (Article 190a(1)(b)).⁵³ Article 192(1) provides that revocation may be waived in advance for all grounds for revocation save where the ground invoked is that the award is tainted by criminal conduct (Article 190a(1)(b)).⁵⁴

Sweden

Section 32 of the Swedish Arbitration Act provides for the correction of an 'any obvious inaccuracy as a consequence of a typographical, computational, or other similar mistake by the arbitrators or any another person' and supplementation if the tribunal 'by oversight have failed to decide an issue which should have been dealt with in the award'.⁵⁵ An application for correction should take place within 30 days of announcement of the award with the correction

49 See also ATF 131 III 164 [166], Decision 4A_666/2012 c. 3.2

50 See also ATF 137 III 85 [87].

51 PILA, Article 190a (1).

52 PILA, Article 190a (2).

53 The provision is in line with Article 124(2)(b) of the Swiss Federal Supreme Court Act (FSCA): see also Decision 4A_596/2008.

54 The new provision has clarified the position under Swiss Law as the Swiss Federal Court had left the question unresolved, except from the specific circumstances in ATF 143 III 589 (4A_53/2017), in which the Swiss Supreme Court had to examine whether a waiver of the right to challenge the award pursuant to Article 192 PILA extended to its revision. The requesting party claimed to have discovered a ground for challenging one of the arbitrators after the award was rendered and argued that, on its plain terms, the waiver contained in the arbitration agreement ("There shall be no appeal") only applied to the challenge of the award, not its revision. The court considered that where parties have expressly excluded any right to challenge the award, it would 'breach the rules of good faith' if a party could then still challenge the irregular composition of the tribunal by way of a revision request.

55 Swedish Arbitration Act Section 32.

begin decided within 30 days of the application. The tribunal has 60 days to supplement the award.⁵⁶ Interestingly, the Swedish Arbitration Act also contains a self-standing provision if the arbitral tribunal has ‘concluded the proceedings without ruling on the issues submitted to them for resolution’.⁵⁷ In such a case the award may be amended upon application within two months from receipt of the award.

England and Wales

The English Arbitration Act contains provisions in Section 57 as to the correction of arbitral awards which applies in the absence of party agreement on the subject. Section 57 allows the tribunal on its own initiative or after an application to:

*(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.*⁵⁸

Applications for correction must be made within 28 days of the date of the award, unless the parties have agreed to a longer time limit and the tribunal must issue the correction within 28 days of the application.⁵⁹ The correction forms part of the award.⁶⁰ Additional awards must be made within 56 days from the date of the original award unless the parties have agreed otherwise.⁶¹

The recent case of *Rees v. Windsor-Clive* and others illustrates the potentially broad power an arbitral tribunal enjoys in terms of correction of ‘slips’ in the award. In *Rees*, the arbitrator:

said in his letter of 21 January 2020 accompanying the corrected award that when reading the notice to quit served in respect of the 1965 tenancy land he ‘overlooked and did not consider the wording’ of the notice insofar as it related to the extent of the land and the subject of the notice. He describes this as an accidental slip or omission.

...

*36. I do not accept . . . that what the arbitrator did in this case was to review his original decision. He overlooked and did not consider the wording of the notice as to the extent of the land to which it related. In my judgment that was an accidental slip within the meaning of section 57(3)(a) of the 1996 Act which empowered him to correct it in the way that he did*⁶²

Commentators have noted that the result in *Rees* may be different in other cases where a ‘slip’ in the consideration of the evidence has resulted in an easily correctable error in the award. In this context, it is worth recalling that the wording of Section 57 which allows for ‘correct[ing] an . . . error arising from an accidental slip or omission’. In this context, parties

56 *ibid.*

57 *id.*, Section 36.

58 English Arbitration Act Section 57(3).

59 *id.*, Section 57(5).

60 *id.*, 57(7).

61 *id.*, 57(6).

62 *Rees v. Windsor-Clive and others* [2020] EWHC 2986 (Ch).

seeking correction of arbitral awards under the Arbitration Act 1996 might have a broader ability to correct compared to other legislation which restrict correction simply to clerical or typographical errors.

France

Article 1485 of the French Code of Civil Procedure (CCP) applicable to international arbitrations provides that although the arbitrators' jurisdiction ends when the award is rendered,⁶³ they remain empowered to interpret the award, correct errors and omissions or make an additional award if they omitted to decide a head of claim.⁶⁴ Paragraph 2 of Article 1485 specifically provides that the tribunals can only correct, interpret or make an additional award 'on application of a party' and so, *a contrario*, not on its own initiative. The tribunal will rule on the application having heard the parties or having given them the opportunity to be heard. The correction of the arbitral award is restricted to 'rectify[ing] clerical errors'; in other words, arbitrators have the power to rectify a purely material error⁶⁵ so long as the correction does not change the meaning of the decision.⁶⁶ In order for the request for interpretation to be admissible, it is necessary that the award is obscure or ambiguous and the arbitrators' power of interpretation is limited by the absolute prohibition on restricting, extending or modifying the rights resulting from the decision.⁶⁷ Similarly, the request for interpretation cannot relate to a part of the dispute which was not the subject of the previous debate.⁶⁸ Pursuant to Article 1486 of the CCP,⁶⁹ applications for correction, interpretation or additional award must be made within a three-month time limit starting from the notification of the award and the decision amending the award or the additional award has to be made within three months from the date of application to the arbitral tribunal. This time limit may be extended.⁷⁰

63 Paragraph 1 of Article 1485 CCP provides: 'Once an award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award'. The Paris Court of Appeal on 30 May 1995 specified that once the award has been made, the arbitral tribunal may not rule on a point in dispute which it has already decided, nor may it rule on an application which has not been submitted to it in good time before the final award (Rev. arb. 1996, p. 533).

64 Paragraph 2 of Article 1485 CCP provides: 'However, on application of a party, the arbitral tribunal may interpret the award, rectify clerical errors and omissions, or make an additional award where it failed to rule on a head of claim. The arbitral tribunal shall rule after having heard the parties or having given them the opportunity to be heard.'

65 Such as a miscalculation (Civ. 2, 4 January 1978, Rev. arb. 1978, p. 466), an error arising from the naming of a person (Civ. 2, 18 January 2001, No. 99-11163), or an error in date. An error in date cannot be assimilated to a lack of date and may give rise to a rectification of a material error. (Civ. 2e, 30 September 1999, Rev. arb. 2000, p. 267). Similarly, a contradiction between two dates is merely a material error (in a case where the date on which the award was made was apparent from the entries in the body of the decision). (Paris, 12 September 2002, Rev. arb. 2003, p.173).

66 Civ. 2e, 16 June 1976, Rev. arb. 1977, p. 269 (2nd case).

67 Paris Court of Appeal, 28 May 1998, Rev. arb. 1999, p. 858.

68 Cass, 1er Civ, 8 July 2009, Cah. Arb. 2010, p. 213.

69 Article 1486 CCP provides: (1) applications under Article 1485, paragraph 2, shall be filed within three months of notification of the award; (2) unless otherwise agreed, the award amending the award or the additional award shall be made within three months of application to the arbitral tribunal. This time limit may be extended in accordance with Article 1463, paragraph 2; and (3) the award amending the award or the additional award shall be notified in the same manner as the initial award.

70 As provided by Article 1463 para. 2, which applies to international arbitration pursuant to Article 1506 and provides: 'The legal or contractual deadline may be extended by agreement of the parties or, failing

Like in Switzerland, parties can also bring a more drastic – ‘revision’ action – before the arbitral tribunal to review allegedly fraudulent awards.⁷¹ The application should be made to the arbitral tribunal; and in the event that the tribunal cannot be reconvened, a new tribunal will have to be constituted.⁷² An application for revision may only be made in four precise cases⁷³ and is admissible only if the only where the applicant was not able, through no fault of his or her own, to raise such objection before the award became *res judicata*.⁷⁴ The time limit to apply for a revision is two months from the day on which the party became aware of the revision action ground, and all parties must be present at the proceedings, failing which the application shall be inadmissible.⁷⁵ Parties cannot renounce to such revision action.⁷⁶

iii Other jurisdictions

Germany

Section 1058(1) of the Code of Civil Procedure (Zivilprozessordnung – ‘ZPO’)⁷⁷ gives the possibility to parties to request a correction, interpretation or the rendering of an additional award from the arbitral tribunal. Pursuant to Section 1058(1), No. 1 ZPO, the arbitral tribunal may at the request of a party or at its own initiative, correct any errors in computation, any clerical or typographical errors or any errors of a similar nature.⁷⁸ The

that, by the supporting judge’.

71 Article 1502 CCP is applicable by virtue of Article 1506(5) CCP and provides: (1) an application for revision of an arbitral award may be made in the circumstances provided in Article 595 for court judgments and under the conditions set forth in Articles 594, 596, 597 and 601 through 603; and (2) the application shall be made to the arbitral tribunal. [Paragraph 3 is not applicable in international arbitration]

72 Christophe Seraglini, Jérôme Ortscheidt, *Droit de l’arbitrage interne et international*, L.G.D.J., Précis Domat, November 2019, at para. 967. In domestic arbitration, the court of appeal that would have had jurisdiction to hear other challenges against the award will handle the application if the tribunal cannot be reconvened (Article 1502(3)).

73 Article 595 CCP provides that an application for revision of a judgment may be made only where: (1) it comes to light, after the judgment is handed down, that it was obtained fraudulently by the party in whose favour it was rendered; (2) decisive evidence that had been withheld by another party is recovered after the judgment was handed down; (3) the judgment is based on documents that have since been proven or have been held by a court to be false; and (4) the judgment is based on affidavits, testimonies or oaths that have been held by a court to be false.

74 Article 596 CCP.

75 Article 597 CCP.

76 Christophe Seraglini, Jérôme Ortscheidt, *Droit de l’arbitrage interne et international*, L.G.D.J., Précis Domat, November 2019, at para. 966.

77 ‘§ 1058 – Correction and interpretation of award; additional award: (1) Any party may request the arbitral tribunal 1. to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature, 2. to give an interpretation of specific parts of the award, 3. to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. (2) Unless otherwise agreed by the parties, the request shall be made within one month of receipt of the award. (3) The arbitral tribunal shall make the correction or give the interpretation within one month and make an additional award within two months. (4) The arbitral tribunal may make a correction of the award on its own initiative. (5) § 1054 shall apply to a correction or interpretation of the award or to an additional award.’

78 Fabian von Schlabrendorff and Anke Sessler, ‘Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter VI: Making of the Award and Termination of the Proceedings, § 1058 – Correction and Interpretation of Award; Additional Award’, in Patricia Nacimiento, Stefan Michael Kroll et al. (eds), *Arbitration I Germany: The Model Law in Practice*, 2nd edition, Kluwer Law International 2015, p. 379.

list contained in Section 1058(1), No. 1 ZPO makes clear that the arbitral tribunal is only limited to minor mistakes and should not affect the actual substance of the award.⁷⁹ The award may only be corrected if it contains an ‘obvious mistake’.⁸⁰ Obvious clerical mistakes can also be corrected by the local courts in the context of enforcement proceedings of the award.⁸¹ Section 1058(1), No. 1 ZPO also allows parties to request for an interpretation of the award. The requesting party must refer to a specific ambiguous portion of the award and cannot request the interpretation of the whole award.⁸² The interpretation of an award may not be used to supplement or change the reasons of the award. For both correction and interpretation of the award, unless otherwise agreed, the request must be submitted within one month of receipt of the award. The arbitral tribunal must then make the correction or give the interpretation within one month (Section 1058(3) ZPO). Pursuant to Section 1058(1), No. 3 ZPO upon the request of a party, the tribunal also has the power to make an additional award as to claims presented in the arbitral proceedings but omitted in the award. The request must be submitted within one month after the receipt of the award and the arbitral tribunal then has two months to issue the additional award. The arbitral tribunal cannot render an additional award upon its own initiative.⁸³

United States

The Federal Arbitration Act (FAA), Section 11 is an outlier in terms of correction or supplementation. It provides that the US District Court where the award was rendered retains jurisdiction such that it:

may make any order modifying or correcting the award upon the application of any party to the arbitration: (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.⁸⁴

The purpose of the court correction is to ‘effect the intent thereof and promote justice between the parties’. The FAA does not contain provisions on supplementation or interpretation of an arbitral award. Given that most arbitral rules contain provisions on correction, interpretation and supplementation, the gaps in FAA Section 11 rarely have an impact on parties’ rights to seek these remedies when an arbitration is seated in the US.

79 BeckOK ZPO/Wilske/Markert ZPO § 1058 Rn. 2-6.

80 *ibid.*

81 *ibid.*

82 Fabian von Schlabrendorff and Anke Sessler, ‘Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter VI: Making of the Award and Termination of the Proceedings, § 1058 – Correction and Interpretation of Award; Additional Award’, in Patricia Nacimiento, Stefan Michael Kroll et al. (eds), *Arbitration I Germany: The Model Law in Practice*, 2nd edition, Kluwer Law International 2015, p. 381.

83 Stefan Michael Kroll, ‘National Report for Germany (2007 through 2020)’, in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International 2020, Supplement No. 109, February 2020, p. 47.

84 Federal Arbitration Act, Section 11.

IV CONCLUSION

While parties may have a number of issues which they subjectively do not agree with in terms of the tribunal's reasoning, there are only limited grounds to displace the *functus officio* doctrine and allow the tribunal to review and revise or supplement the award rendered. One of the main battlegrounds in such cases will be the difference between 'substantive' changes which are not permissible under the applicable rules and laws or those issues because of a 'slip' of the arbitrators which affect their expression of their decision, but not the substance of the decision itself. However, parties to such substantive applications must proceed with caution. New arbitral rules, like the 2020 LCIA Rules now allow for tribunals to issue costs orders against unsuccessful applications for correction or supplementation.⁸⁵

85 2020 LCIA Rules, Article 27.3, 'If, after consulting the parties, the Arbitral Tribunal considers the request to be justified, it shall make the additional award within 56 days of receipt of the request. If, after consulting the parties, the Arbitral Tribunal does not consider the request to be justified it may nevertheless issue an addendum to the award dealing with the request, including any Arbitration Costs and Legal Costs related thereto.'

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