

President's Message

There is life after *functus officio*

There was a time when signing and delivering the award was the end of an arbitrator's activity; at least this is what the proponents of the *functus officio* theory seem to have presumed.¹ The position now has been described in a more nuanced manner by stating "that the arbitral tribunal's mandate will be completed, and the tribunal's powers will terminate, with the delivery of a final award, subject only to limited exceptions concerning the correction, interpretation and supplementation of that award".² This definition, in almost identical terms, can be found in many other treatises.

The manner in which these "limited exceptions", or "*Restobliegenheiten*",³ are defined probably does not vary much according to the applicable law or arbitration rules. Variations and uncertainties occur, however, with respect to the role and duties of the arbitrators when they are called upon to act in such "exceptional" situations; they also occur with respect to the status and result of such post-award exceptions, in particular their relationship to the award.

Some systems see the role of arbitrators after the award as a question of powers: the arbitrators' mission, their "*officium*", is rendering an award; once this mission is accomplished and the award is rendered, there is nothing left of their mission.⁴ In those systems where the arbitrators' mission is expressed primarily in terms of "powers", *functus officio* has the dramatic effect that the arbitrator's powers are exhausted, and he⁵ becomes powerless like Samson when Delilah cut his hair.

But the concept that reduces arbitrators to makers of awards appears as too limited; it does not capture the full scope of an arbitrator's role – not before the award is rendered nor thereafter. Indeed, the life of an arbitral

¹ For some old English cases see Mustill and Boyd, *Commercial Arbitration*, 2nd ed. P. 405; further examples at Born, *International Commercial Arbitration*, 2009, p. 2513.

² Conclusion reached by Born, *op.cit.* p. 2519, after a comparative examination of the law and practice in various countries, including the UNCITRAL Model Law and arbitration rules.

³ Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*, 2nd ed. 1998, N487, also „eng begrenzte Restkompetenzen“, N627.

⁴ For a discussion of the subject see Giovannini, *When do arbitrators become *functus officio*?* in Mélanges Lazareff, Paris (ICC publications) 2010.

⁵ It would be politically correct to make allowance also for women in arbitration and to say "he or she"; but then the image would not fit any more. I apologise to arbitral women and hope that they accept as justification for the incorrectness the choice of the image, which shows female intelligence prevailing over male force.

tribunal is not necessarily at its end when it has rendered its award. Even beyond the “limited exceptions” mentioned above, arbitrators may face other duties and functions upon completion of the award.

Arbitrators may have duties with respect to the notification of the award; they may have to account for the funds they have collected as an advance to their costs and fees and may even have to return some funds; and they may be entitled to claim from the parties reimbursement of VAT paid on their fees. The revised UNCITRAL Arbitration Rules indeed now provide for a procedure whereby, possibly after the delivery of the final award, the decision on the arbitrators' fees can be reviewed. A recent Swedish court decision found that fees paid by an arbitration institution to arbitrators may be reviewed with the possible consequence that, years later, the arbitrators, or possibly their heirs, may have to make a refund;⁶ and in an English decision an arbitrator had to bear the costs of court proceedings which had been caused by him in an amount exceeding his fees.⁷

Arbitrators may also be invited to comment on their award in setting aside proceedings or they may be called as witnesses in judicial proceedings related to the arbitration. Arbitrators also have, beyond the completion of the arbitral procedure, an obligation of confidentiality. A recently concluded treaty of the European Union even specifically provides that former members of arbitral panels “must avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantages from the decision or ruling of the arbitral panel”.⁸

If their award is set aside or if so ordered by a court in setting aside proceedings, arbitrators may have to resume their activity and render a new award.⁹ In other situations arbitrators may be requested to remain constituted as a tribunal to resolve possible follow-up disputes arising out of the same contractual relationship; or they may be called upon when difficulties arise

⁶ Svea Court of Appeal, 25 September 2006 in *Stockholm International Arbitration Review* 2008, 225 et seq. Decision in Case No. O 4227-06 of the Swedish Supreme Court, rendered on December 3, 2008, as cited in Sigvard Jarvin & Carroll S. Dorgan, *Sweden's Supreme Court Expands Right to Review Arbitrators' Fees*, 24(3) *INT'L ARB. REP.* 1 (2009).

⁷ *W v. BB*, referred to as unreported 2001 by Dundas, *Alphabet Soup*, *Foreign Law and Dissenting Opinions in International Arbitration in London*, *Arbitration* November 2010, 757, 763.

⁸ Free Trade Agreement between the European Union and the Republic of Korea, Annex 14 C, Article 6.

⁹ E.g. UNCITRAL Model Law, Article 34 (4).

during the implementation or enforcement of an award granting non-monetary relief.¹⁰

One can see from these examples that the role of arbitrators, their “*officium*”, is far from being accomplished once they have rendered their award. Arbitrators are confronted with a variety of duties and responsibilities and may also retain certain rights long after the arbitration itself has been completed. In recent times, the arbitrators’ duties and responsibilities seem to have in fact increased and the time frame in which they apply seems to have become open-ended at least in some respects.

Such developments justify a closer look at the many facets of the post-award period of an arbitration and the role and status of arbitrators in it. It may also justify a reconsideration of the very concept of *functus officio*.

ASA proposes to examine these issues at its next annual conference to be held on 28 January 2011 in Basel. The conference is prepared by Professor Pierre Tercier and will offer analyses and discussions on many aspects of these “Post-Award Issues”. The programme and the registration form can be found on the ASA Website. You are cordially invited to join us for this event.

Geneva, November 2010

MICHAEL E. SCHNEIDER
ASA PRESIDENT

SAVE THE DATES

ASA/DIS Practice Building Seminar
Badenweiler, 21-23 January 2011

ASA Conference January 2011: “Post-Award-Issues”
Basel, 27-28 January 2011

For more information see www.arbitration-ch.org

ICCA 50th Anniversary Conference “Arbitration the next 50 years”
Geneva, 19-21 May 2011
For more information see www.icca50.org

¹⁰ The subject is discussed by Schlosser in the ASA Special Series N° 30: *Performance as a Remedy: Non-Monetary Relief in International Arbitration*, Chapter 20: Peter Schlosser, *Trans-Border Enforcement of Non-Monetary Arbitral Awards* (to be published in Dec. 2010).