

# UNCITRAL Model Law: Composition of the Arbitration Tribunal Re-considering the Case upon Setting Aside of the Original Arbitration Award

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*In this article, the author analyses the question whether it is possible for the arbitrators, after their original award had been annulled, to sit on the arbitration tribunal hearing the case again, to reconsider the case, and to issue a second award in the same case in light of the UNCITRAL Model Law regulations. This question is addressed from two basic perspectives. The first one relates to arguments rooted in the *functus officio* principle, especially in reference to rectification and remission proceedings, as laid down in relevant regulations. The second perspective, meanwhile, encompasses the ethical principles and usages concerning appointment of arbitrators in international commercial arbitration, including the concept of prejudgment. In her conclusions, the author rejects a blanket prohibition on re-appointment of arbitrators, arguing that it does not duly account for all the nuances of the notion of impartiality in the context of actual practice.*

## 1 INTRODUCTION

During one of the panel discussions deliberating on issues of *functus officio* of arbitrators,<sup>1</sup> the opinion was voiced that it is not possible for the arbitrators, after their award is annulled, to sit again on the arbitrators tribunal, reconsider the case and issue a second award in the same case. Considering, as Gary Born mentions, that:

[i]t was historically the case, under national legal systems, that an arbitral tribunal lost its capacity to act, including its power to reconsider, correct, interpret or supplement an award it had made after the arbitrators had rendered their final award<sup>2</sup>

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<sup>1</sup> The subject of this article was inspired by a panel discussion organized by AW in Vienna on 5 Oct. 2015, with the participation of Mark E. Appel, Samaa A. Haridi, Gabrielle Nater-Bass, Maxi Scherer, Irene Welsler, and Nassib Ziadé as well as the author of this article.

<sup>2</sup> Gary B. Born, *International Commercial Arbitration* 3114 (2d ed., Kluwer Law International 2014).

Such opinions are a continuation of this historical narration. Nowadays, however, the situation seems to be different and possibly requires a different approach. The UNCITRAL Model Law, as a body of law which sets the standard of the arbitration proceedings worldwide and is followed by a great number of national legislations, is a good ground for analysis. Also, the UNCITRAL Model Law is silent in this respect, so the question remains open to some speculation.

UNCITRAL Model Law<sup>3</sup> provisions do not regulate what composition of the arbitral tribunal after annulment of the award is acceptable. Its provisions are likewise imprecise as to the other practical effects if the original arbitration award is set aside. Basically, it is clear only that setting aside is the sole recourse against the arbitral award (Article 34(1))<sup>4</sup> and that, if the award is set aside by a court of the country in which, or under the law of which, that award was made, it cannot be enforced (Article 36(1)(a)(v)). Thus, the pertinent UNCITRAL Model Law provisions give rise to the following assumptions. Once it has been set aside, the award is annulled objectively and has no legal effect whatsoever. The object of proceedings for setting aside of an arbitration award lies neither in amendment of the ruling (the one exception being remission proceedings, as discussed further below) nor in overturn of the ruling and referral of the case for renewed consideration. Rather, quashing of an arbitration ruling causes the legal situation of the respective parties, at least as regards the claims to which such ruling refers, to revert to what it was before the arbitration tribunal ruled on the case.

A verdict setting aside an arbitration ruling does not have the nature of an extraordinary appeal (cassation) in the sense that it does not take the original case to another level; it simply eliminates the ruling from the legal environment. In the absence of any particular provisions in the Model Law, the only way for the dispute to continue is for the claimant in the arbitration proceedings to manifest a certain level of activity, first and foremost by initiating new proceedings. There is no clear statement that the arbitration clause expires with the termination of the proceedings, similarly to the termination of the arbitrators' mandate, as provided in Article 32(3), so it should, as a general rule, survive the setting aside of the award unless the parties provide otherwise.<sup>5</sup> This, however, does not preclude a scenario whereunder, if the arbitration ruling was annulled on the grounds of (1) lack of an arbitration clause or its invalidity/ineffectiveness (Article 34(2)(a)(i)); (2) departure beyond the ambit of the arbitration clause (Article 34(2)(a)(iii)); or (3) lack of

<sup>3</sup> UNCITRAL Model Law on International Commercial Arbitration, developed in 1985 by the United Nations Commission in International Trade Law (UNCITRAL), recommended to all Member States by the UN General Assembly, amended in 2006 (United Nations, Vienna 2008), [www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (accessed 10 Oct 2016).

<sup>4</sup> Articles with no reference will mean articles of the UNCITRAL Model Law.

<sup>5</sup> See Born, *supra* n. 2, at 3391. See also, Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* 618 (5th ed., Oxford University Press 2009).

arbitrability of the subject matter (Article 34(2)(b)(i)), the ‘new’ claim is brought before a state court. If the annulment was based on the fact that another decision had already been handed down in the same case, the *res judicata* principle, which is not specifically mentioned in the Model Law (which, however, might fall under the public policy principle set forth in Article 34(2)(b)(ii), or may be derived from the binding character of the award), comes into play and the parties have no further recourse at all because this particular case cannot be relitigated.<sup>6</sup> In other cases, the claimant must once again submit its statement of claim, and the arbitration tribunal must be convened again. This is because the parties continue to be bound by the original arbitration clause, unless they agreed otherwise, but the arbitrators who had handed down the subsequently quashed ruling are *functus officio*: other than in certain exceptional circumstances, as discussed below, their mandate expires upon pronouncement of their award as provided in Article 32(3). Questions arise as to how the fact of the original award’s annulment might influence appointment of the arbitrators, the criteria of their selection, and, in particular, as to the implications from the perspective of the concept of the arbitrators’ impartiality. The key question is whether the parties or appointing authority, as the case may be, must necessarily appoint an arbitration panel with a different composition; in other words, whether, and absent specific stipulations in the arbitration agreement, there is any legal impediment to re-appointment of the original one.

The doctrine has not formulated too many opinions in this respect. In the context of interpreting Polish law, which follows the UNCITRAL Model Law almost to the letter, contradictory opinions were voiced, on the one hand accepting potential re-appointment of the original arbitration panel as long the arbitrators involved in formulation of the decision which has subsequently been annulled do feel impartial,<sup>7</sup> and on the other rejecting such re-appointment, citing the universally accepted rule that an arbitrator may not disclose his position as to the outcome, or even his tentative assessment of the claims, at any stage prior to announcement of the actual award (referring in this respect to the Waivable Red List and Standard 3.1.5 of the Orange List of the IBA Guidelines as well as a slew

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<sup>6</sup> The question of *res judicata* in arbitration has been debated, leading to various conclusions, namely referring the issue towards the problem of admissibility or jurisdiction or the problem of *res judicata* as a separate ban category. For a presentation of the various concepts, see Gretta Walters, *Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?*, 29 J. Intl. Arb. 651, 655 et seq. (2012). As far as the author is concerned, the last concept – that the claim, once validly resolved, is barred from arbitration or relitigation only because of the *res judicata* principle – is the most convincing.

<sup>7</sup> Maciej Łaszczuk & Justyna Szpara, *Postępowania postarbitrażowe*, in *System prawa handlowego. Arbitraż handlowy* vol. 8 559, 641 (Andrzej Szumański ed., 2d ed., C.H. Beck 2015). Also, such a possibility is *prima facie* approved by Andrzej Zieliński, *Kodeks postępowania cywilnego. Komentarz* 1841 (Andrzej Zieliński ed., CH Beck 2014).

of Polish regulations, including Article 48 § 1.5 of the Civil Process Code where—under a judge may not rule on a case in which he had already been involved at a lower instance).<sup>8</sup>

For the purposes of further analysis, it is proposed to identify two groups of possible arguments, which could be raised in this respect: one group relating to broad interpretation of the *functus officio* principle, and the other group relating to ethical assumptions of arbitrators' impartiality.

## 2 FUNCTUS OFFICIO: FINALITY OF THE ARBITRAL RULING VS THE POSSIBILITY FOR ITS ADJUSTMENT

In order to assess the value of the arguments rooted in the *functus officio* principle, it is important to understand how this rule is understood now and that the strict notion mentioned at the beginning of the article is no longer recognized as universally valid. In very basic terms, arbitrators are *functus officio* when they have made a final award. Once the award is made, the arbitral tribunal has nothing more to do with the dispute, unless it is called upon to issue an additional award or to correct or interpret their original award.<sup>9</sup> This has a strong relationship to other concepts, in particular that the award, once issued, should have a *res judicata* effect so the merits of the award should not be revisited once the award is issued.<sup>10</sup> The rationale behind such thinking refers to the parties' need for fast and final resolution of disputes, which could drag on indefinitely if the arbitrators are free to reconsider their original decisions. Also, it prevents abuse of process through possible *ex parte* contacts after the award had been issued but prior to its amendment. In other words, the values which underlie the *functus officio* rule are linked to the parties' expectations to have arbitrators for a particular dispute and not as long-term mentors; to have expeditious and final resolution; and also not to create a possibility for potential abuse of authority by prolonging the arbitrators' mandate subsequent to issue of the award.<sup>11</sup>

*Functus officio* means that the arbitral tribunal ceases to have jurisdiction over the case simultaneously with delivering the award, although it is debated whether this principle should be applied in cases where the award is rendered on the basis of fraudulent or otherwise irregular behaviour of the parties.<sup>12</sup> The French Court of Cassation considered such a possibility once the tribunal was still constituted, or

<sup>8</sup> Maciej Łaszczuk, *Kilka uwag o obowiązkach, niezależności i bezstronności arbitrów*, in *Arbitraż i Mediacja, Księga Jubileuszowa dedykowana doktorowi Andrzejowi Tynelowi* 321, 327–328 (Maciej Łaszczuk et al. eds, Warsaw 2012).

<sup>9</sup> See Blackaby et al., *supra* n. 5, at 622.

<sup>10</sup> Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* 1347 (Kluwer Law Int'l 2012).

<sup>11</sup> Born, *supra* n. 2, at 2519–2520.

<sup>12</sup> *Ibid.*, at 1348.

could be reconstituted.<sup>13</sup> A similar approach was presented, inter alia, in *Antoine Biloune v. Ghana Inv. Centre*,<sup>14</sup> where it was stated that, if a specific instance of corruption or fraud in the evidence would justify an international or national court in voiding or refusing to enforce the award, the tribunal, for as long as it retains jurisdiction over the dispute, can take necessary corrective actions, regardless of the fact that UNCITRAL Rules, which were applicable in that proceedings, do not allow *expressis verbis* for such a reconsideration.

Evolution of arbitration laws and practices which have led to relaxation of *functus officio* are reflected in the Model Law in its provisions regulating rectification and remission procedures. The Model Law adopts the position that a decision handed down by an arbitration tribunal, irrespective of the country in which it is made, is binding (Article 35(1)) and that, therefore, it should be final and definitive once the award is issued and causes the arbitral proceedings to be terminated (Article 32(1)). The decision becomes definite in that, absent agreement to the contrary by the parties, the decision reached by the arbitrators as to the merits of the case is not subject to further review and, through operation of the *functus officio* rule, the arbitrators' mandate expires once they have made their ruling. This, however, remains without prejudice to the possibilities for certain amendment of the award by the arbitration panel issuing it, or for its complete annulment consequent to a request for setting aside.

The Model Law provides for two possibilities for amendment of an arbitration decision by the panel which had issued it: rectification proceedings, by which term I understand (in aggregate) correction, interpretation and supplementation of the award, as well as remission proceedings. Apart from that, the two-tier arbitration proceedings with a possibility of appeal as to the merits of the case to an arbitration tribunal of second instance (and even, at least theoretically, multi-tier proceedings) if the parties so decide, have not been eliminated by the UNCITRAL Model Law.<sup>15</sup> Finally, renewed arbitration proceedings can be initiated upon annulment of the original award.<sup>16</sup>

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<sup>13</sup> *Fougerolle v. Procofrance*, Cour de Cassation, Judgment of 25 May 1992, 1 *Revue de l'Arbitrage* 91–92 (1993) (quoted in Waincymer, *supra* n. 10, at 1348).

<sup>14</sup> *Antoine Biloune v. Ghana Inv. Centre*, Award on Damages and Costs (30 June 1990), XIX Y.B. Comm. Arb. 11, 21–22 (Kluwer Law Int'l 1994).

<sup>15</sup> *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006* in *UNCITRAL Model Law on International Commercial Arbitration*, *supra* n. 3, at 35 ([www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)) (accessed 10 Oct 2016).

<sup>16</sup> Some jurisdictions based on the Model Law, however, limited this possibility. In Austria, if the award in the given case has already been annulled twice, at the third annulment the court, at the request of a party, shall declare the arbitration clause void, opening the way to final resolution before the general courts. See *Österreichische Zivilprozessordnung (öZPO)* [Austrian Code of Civil Procedure], Art. 611.5.

Rectification proceedings, first and foremost, afford the arbitrators a possibility of correcting any inaccuracies, spelling or calculation mistakes, and other manifest errors tainting their original decision (Article 33(1)(a)). Second, the arbitrators may use rectification proceedings to interpret their original decision and place it in a broader context if one of the parties has voiced doubts concerning the verdict (Article 33(1)(b)). Such elaboration of the original decision, however, may not entail any changes or supplements as to its substance. This risk has been hotly debated by the delegates at the Commission. The necessity of introducing this solution in international arbitration, where use of foreign languages may be a problem for the parties, was balanced by limiting only the specific point or part of the award and timing and by the requirement of the parties' approval.<sup>17</sup> Third and last, the arbitration tribunal may expand its original decision by ruling on further claims which had been submitted during the proceedings but not covered by the original decision (Article 33(3)). In all these three variants of rectification, correction, interpretation, or, as the case may be, supplementation of the original award is effectuated by the arbitration panel sitting in the same composition which issued the original ruling. In this respect, then, the mandate of the arbitration tribunal does not cease on the basis of the Model Law, and the parties submit the application for rectification to the arbitration tribunal which issued the original ruling.

Another avenue for amendment of an arbitration award is presented in remission proceedings, as regulated by Article 34(4) of the Model Law. The court to which an application for quashing of an arbitration decision has been submitted may suspend its proceedings for a specified period of time so as to enable the arbitration tribunal, as it were, to revisit its proceedings with a view to removing the basis for setting aside of the award. In other words, this is another situation in which the arbitrators' mandate is renewed subsequent to the handing down of their original decision: the defective award ('defective' in the sense of including elements which may be taken as grounds for its setting aside) is amended by the arbitral tribunal empanelled in the same composition as the one which first issued it. The arbitrators' actions in remission proceedings may concern correction of any and all mistakes providing grounds for setting aside of the arbitration decision other than such as lying beyond the ambit of the arbitration tribunal in the first place.<sup>18</sup> Remission proceedings are quite new in Model Law jurisdictions and are not used very often; however, pertinent regulations of the English

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<sup>17</sup> Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* 371–372 (Sweet & Maxwell 2010).

<sup>18</sup> Andrzej Zielony, *Postępowanie rektyfikacyjne i remisyjne dotyczące wyroku sądu polubownego*, 3 Przegląd Sądowy 25, 50 (2007).

Arbitration Act are deemed to be the most effective tool available to a court if the award is challenged.<sup>19</sup>

The remission proceedings, as currently regulated, apply within the setting aside procedures; in other words, before the annulment of the award. In the process of adopting the new UNCITRAL Model Law, the option of remanding the award to the original panel of arbitrators after annulment (so called re-institution) was examined as possible.<sup>20</sup> Practice shows, however, that the courts did not find it appropriate to remit the case to the arbitral tribunal for the purpose of enabling that arbitral tribunal to recall or revise its decision on the merits of the case or to consider fresh evidence on the merits of the case.<sup>21</sup>

Two-tier proceedings continue to be a rarity in arbitration practice, even if they have gained some proponents of late.<sup>22</sup> The essence of such a solution lies in the fact that arbitral awards can be verified as to their substance, the normal situation being that no such legal recourse is available even as some parties to arbitration express such a need. Breach of substantive law is not one of the grounds for setting aside. Two-tier proceedings are typical in commodity arbitration rules,<sup>23</sup> and they have also been introduced in a number of regular commercial arbitrations rules.<sup>24</sup> The rules basically provide that the arbitration verdict at second instance is always handed down by 'new' arbitrators, i.e. ones who were not involved in formulation of the original award.<sup>25</sup>

In summary, it must be emphasized that, save for two-tier proceedings, aimed as they are mainly at revision of the award on substance, all other alterations are decided by the original panel of arbitrators. Following this result, the prohibitory argument based on *functus officio* should be revisited: there is no systemic argument which would support such a prohibition. To the contrary, the system of rectification, and in particular the institution of remission, supports the argument that, in principle, there is nothing amiss in the original arbitrators revisiting the award.

<sup>19</sup> Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* 682–683 (Kluwer Int'l Law 2003).

<sup>20</sup> J. Martin H. Hunter, *International Commercial Arbitration*, 11 Int'l Bus. Law. 203, 205 (1983).

<sup>21</sup> *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 165 (United Nations, New York 2012), [www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf](http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf) and cases cited therein (accessed 10 Oct 2016).

<sup>22</sup> Mauro Rubino-Sammartano, *An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings*, 6 J. Int. Arb. 181, 181–188 (1989).

<sup>23</sup> GAFTA Rules of Arbitration, rule 125; BCA London Arbitration Rules; FCC Arbitration and Appeal Rules; FOSFA Rules of Arbitration and Appeal.

<sup>24</sup> Rules of the Lewiatan Arbitration Court; AAA Optional Appeal Procedure; JAMS Optional Arbitration Appeal Procedure; CPR Arbitration Appeal Procedure.

<sup>25</sup> Rules of the Lewiatan Arbitration Court, Sch. V para. 6.4; AAA Optional Appeal Procedure, rule A-4; JAMS Optional Arbitration Appeal Procedure, rule (A); CPR Arbitration Appeal Procedure, rule 4.1–4.2. For more on selection of appellate arbitrators, see Mateus Aimoré Carreteiro, *Appellate Arbitral Rules in International Commercial Arbitration*, 33(6) J. Intl. Arb. 185, 201 et seq. (2016).

There is also no jurisdictional problem, which seems to be vital in the *functus officio* argument. By the very fact of their reappointment, the mandate of the arbitrators is reconstituted.

In like spirit, there is no axiological argument against reappointment of the original arbitrators. The values informing the *functus officio* rule are linked to the parties' expectations of a fast and efficient way of dispute resolution. Those arguments cease to apply if the arbitration must start anew anyway and, to the contrary, appointment of the same arbitration panel might contribute to expeditious and fast re-resolution of the dispute.

Such rationale stands behind e.g. the German law, which is a Model Law jurisdiction, and Swiss solutions, which allow *expressis verbis* for remanding the case after annulment of the award. The German court annulling the arbitral award may refer the case for renewed consideration by the arbitration tribunal which had issued the original decision, upon request of the party if it sees fit. Such a decision is usually influenced by considerations of time and cost. Then the arbitral tribunal must decide the case anew, taking into account the decision of the court.<sup>26</sup> A similar mechanism is adopted in Switzerland, based not on statutory law, but on case law, since the Swiss Private International Law Act (PILA) does not, similarly to the Model Law, regulate this matter.<sup>27</sup> Various systems of remission procedures are incorporated not only in the UNCITRAL Model Law and jurisdictions based on it, but also in other jurisdictions such as England, France and, as already mentioned, Switzerland, making the phenomenon of revisiting the award by the original arbitrators even less unusual.

In this context, the situation of Austria may be atypical among the UNCITRAL Model Law countries. Interestingly enough, Austrian arbitration law does not provide for remission proceedings, whether on the basis of Article 34(4) of the UNCITRAL Model Law or otherwise, which could be an argument offered against the possibility of reappointment of arbitrators. Adopting a different position, Christian Aschauer<sup>28</sup> argues (and his argument goes even beyond the reappointment problem) for allowing remission as a natural consequence of setting aside of the arbitration award, even without provisions expressly allowing for such a procedure. This argument is rooted

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<sup>26</sup> Zivilprozessordnung (ZPO) [German Code of Civil Procedure], Art. 1059(5). See also Stefan Kröll & Peter Kraft, *Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure)*, Chapter VII: Recourse Against the Award, § 1059 – Application for Setting Aside in Arbitration in Germany, *The Model Law in Practise* 51, 418 (Karl-Heinz Böckstiegel et al. eds, Kluwer Law Int'l 2015).

<sup>27</sup> According to the established case law, by analogy to the provisions of the Federal Tribunal Act on the revision of decisions of the Federal Tribunal, see Nathalie Voser & Anya George, *Revision of Arbitral Awards in Post Award Issues*, 38 ASA Special Series 43, 56–66 (Pierre Tercier ed., Juris Publishing 2011).

<sup>28</sup> Christian Aschauer, *Neue Gerichtszuständigkeiten für Schiedssachen in Österreich*, 1 b-Arbitra 9, 23–24 (Bruylant 2014).

in the assumption that, upon annulment of the award, the proceedings are not finished yet, and that annulment itself has an *ex tunc* effect. Appointment of the new tribunal would be contrary to procedural economics and have no rational basis, in particular when no blame could be apportioned to the original arbitrators, as in a situation where new evidence became known after the award was rendered. The author does not exclude, however, all the reservations which may arise from application of the impartiality principle. Christian Aschauer's concept may appear revolutionary but, on the other hand, it is very attractive from the perspective of parties seeking recourse in arbitration, especially in terms of costs not being incurred twice, as is now the practice. A valuable argument relating to setting aside of partial awards has been contributed to the debate by Andreas Reiner.<sup>29</sup> In such a case (save for jurisdictional issues), he argues, the mandate of the arbitrators would clearly not have ended. Accordingly, it makes no sense to distinguish the regulation of setting aside the partial award, where the case is sent back to the same tribunal, and the different regulation of setting aside of the final award, where the same panel of arbitrators is prohibited.

There is no debate on this issue in Turkey, another UNCITRAL Model Law country, where the law explicitly provides that, in the event of annulment of an arbitral award, the parties may appoint new arbitrators and re-determine a new term of arbitration and, also, that the parties may re-appoint their former arbitrators.<sup>30</sup> This example clearly indicates that reappointment of arbitrators, by definition, does not interfere with the system of law set out in the UNCITRAL Model Law.

Summing up, the fact that arbitrators are *functus officio* after delivery of the award does not *a priori* create an impediment preventing the arbitral panel from acting again after their award is annulled. The analysis should now proceed to the issue of the potential impact of the norms and usages regulating arbitrators' conflict of interest.

### 3 DEONTOLOGICAL ANALYSIS OF THE REAPPOINTMENT OF ARBITRATORS IN THE CONTEXT OF RENEWED PROCEEDINGS

By virtue of the fact that the UNCITRAL Model Law does not regulate the composition of the arbitration panel re-considering a case subsequent to setting

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<sup>29</sup> Email from Andreas Reiner, Partner, ARP, to Beata Gessel-Kalinowska vel Kalisz, Partner, GESSEL, Article – Austria (15 June 2016, 5:26 p.m. CET).

<sup>30</sup> Turkish International Arbitration Law, Law no. 4686 (2001), Art. 15(A) *in fine* in *International Handbook on Commercial Arbitration, Annex I-1, Annex I-14* (Jan Paulsson ed., Kluwer Law Int'l 1984, last updated: Mar. 2005 Supplement No. 43), <https://international-arbitration-attorney.com/wp-content/uploads/International-Arbitration-Law-Of-Turkey.pdf>.

aside of the original award, regard must be had to the general principles and usages concerning appointment of arbitrators in international commercial arbitration. This analysis might be helpful for those jurisdictions which, while incorporating the Model Law into their systems, lay down no express rules in this respect. If the 'second' arbitration panel differs in composition from the 'first', the situation is essentially similar to one where the case is being heard for the first time. If, meanwhile, one of the original arbitrators, or, indeed, the entire arbitration panel, are appointed a second time, the influence of the 'first' proceedings on the status of such arbitrators in the second proceedings becomes a legitimate question.

The concern about lack of impartiality in the context of re-examination of the same case by the same arbitration panel is far from universal and can be accounted for by differences between the respective legal cultures as well as understanding of principles of arbitrators' ethics.

As regards legal culture, reappointment of arbitrators should not engender so much controversy in those jurisdictions which do not enforce an unequivocal proscription on participation of judges involved in the proceedings at first instance before the general courts in subsequent stages of the same case, leaving this question to be settled on a case-by-case basis. The deontology of Polish civil procedure, as an opposite example, excludes such a possibility outright, a state of affairs which, inevitably, colours perceptions of this issue in the context of arbitration. Article 48 § 1.5 of the Polish Civil Process Code excludes a judge from cases in which she was already involved at a lower instance; Article 398 § 2 of the Civil Process Code, meanwhile, stipulates that, in the event that a case is referred for renewed consideration consequent to an application for extraordinary appeal (*kasacja*), it will be heard by a panel of judges with a different composition. Hence, regardless of the rule of Article 1184 § 2 of the Polish Civil Process Code, emphasizing that these rules should not be applied to arbitration proceedings on the basis of a simple analogy, as well as introduction of classic UNCITRAL Model Law remission proceedings, this argument is used in doctrinal discourse to dismiss the possibility of reappointment of the arbitrators.<sup>31</sup>

Considering the issue irrespective of the state courts' preferences, appointment of the same arbitrators may not be considered separately from the grounds upon which the original award was annulled. There are four distinct categories of

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<sup>31</sup> Łaszczuk, *supra* n. 8, at 327–328. Tomasz Kurnicki has adopted a similar view as regards remission proceedings before the state courts (which, incidentally, he considers to be a hybrid between arbitration and litigation subject to the general rules); he argues that such a solution undermines the finality of the arbitration award, which should not be modified at the same instance. The same basic point probably holds true with regard to renewed arbitration proceedings. See Tomasz Kurnicki, *Znowelizowane postępowanie przed sądem polubownym*, 22 MoP 1120, 1127–1128 (CH Beck 2005).

grounds for setting aside of the original arbitration award under the UNCITRAL Model Law. The first one comprises circumstances relating to lack of impartiality and/or independence or of the requisite traits or qualifications on the part of the arbitrator.<sup>32</sup> Such circumstances, when they do arise, exclude the arbitrator concerned by definition. The second (typical for cases where proceedings are re-opened) concerns discovery of new evidence or instances where the original award had been secured through commission of a criminal offence; in this category it is actually advisable that the case be reconsidered by the original arbitration panel in an unchanged composition in that there is nothing which would compromise its members.<sup>33</sup> The third comprises procedural irregularities which do not cast doubt on the arbitrators' impartiality. The fourth, finally, concerns the merits upon which the award rests. Category three and four may call for more discussion.

Furthermore, a few additional remarks concerning this last category may be in order. The UNCITRAL Model Law, as opposed to the common law concept of appeal on a point of law in England or manifest disregard of the law in the United States,<sup>34</sup> does not empower the state courts to address the substance of the arbitration ruling, yet questions of this sort have been known to arise in reference to application of the public policy clause (Article 36(1)(b)(ii)).<sup>35</sup> The solutions posited in Article 23(c) of the Uniform Arbitration Act, as amended in 2000, an American model law drawn up by the National Conference of Commissioners on Uniform State Laws, provide useful guidance in this respect for the courts and the parties coming before them. The model mechanism proposed therein expressly specifies the situations in which the matter should be ruled upon by the arbitration tribunal which had issued the original decision and in which the matter should be referred to a new arbitration panel. As to the grounds for quashing an arbitration award, they are divided into three groups: (1) cases where renewed arbitration is impossible due to lack of an arbitration clause; (2) cases which may be heard again by the same arbitration panel (procedural issues); and (3) cases which warrant appointment of a new arbitration panel (corruption, lack of impartiality and/or improper behaviour of an arbitrator affecting the rights of a party). This Uniform

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<sup>32</sup> An interesting recent example is presented in the now-famous decision in *CDR Créances SAS et al. v. Bernard Tapie et al.*, Paris Court of Appeal No. 13/13278, 17 Feb. 2015, quashing the arbitration award consequent to the discovery of a collusion between two arbitrators, Bernard Tapie, and his counsel; see Laurence. Franc Menget & Peter Archer, *Paris Court of Appeal Orders the Retraction of an Award Made Where One Arbitrator Lacked Independence: The Ongoing Tapie Saga*, <http://hsfnotes.com/arbitration/2015/03/04/paris-court-of-appeal-orders-the-retraction-of-an-award-made-where-one-arbitrator-lacked-independence-the-ongoing-tapie-saga/> (accessed 10 Oct. 2016).

<sup>33</sup> See also cases cited *supra* ns 13, 14.

<sup>34</sup> English Arbitration Act 1996, s. 69(3)(c); see Blackaby et al., *supra* n. 5, at 611; Lew et al., *supra* n. 19, at 678.

<sup>35</sup> See *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, *supra* n. 21, at 161.

Arbitration Act (UAA) resolution is also far from ideal, seeing as procedural irregularities which allow for reappointment are not always of a sort which might not prejudice the arbitrator in rehearing the case.

This possibility of reappointment of arbitrators calls, finally, for arguments surrounding the impartiality of an arbitrator who may have been compromised by virtue of his involvement in the previous proceedings.

The principle of impartiality requires the arbitrator to be free of subjective biases, predispositions, or affinities that interfere with fairly and impartially deciding the parties' dispute.<sup>36</sup> In considering the question of impartiality in the context of two consecutive arbitrations, we would do well to view it in juxtaposition to relevant provisions of the IBA Guidelines. The general standard laid down under item 2(c) points to the fact that an arbitrator has a conflict of interest if he is influenced by factors other than the merits of the case as presented by the parties in reaching his decision. Such extraneous factors shaping the outlook of the arbitrator may arise if the arbitrator has knowledge taken away from the first proceedings. The same may be said as a comment to point 2.2, which puts the arbitrators' prior involvement in the dispute onto the Waivable Red List. Standard 3.1.5 of the Orange List assumes an arbitrator's bias if he currently serves, or has served, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties. Standard 3.5.2 of the Orange List cites situations in which the arbitrator has publicly advocated a position on the case, whether in a published paper, a speech, or otherwise. Indeed, if we consider the matter from this angle, the arbitrators (even though in aggregate) have in fact published their opinion on the case, at least to the parties, in their original award. This is even more manifest where an arbitrator prepares her *votum separatum* to the award, which is an individual opinion on the particularities of the case. Application of this standard will be analysed below in more detail.

As a general comment, one cannot forget that the consecutive arbitrations, while separate from the formal point of view, relate to the same claim, concern the same parties, and the knowledge gathered on the case derives from those same parties. In other words, they basically create the realm of one and the same case resolution. In this situation, the status of an arbitrator cannot be analysed as if he had participated in two completely different, unrelated proceedings. For these purposes, it is irrelevant whether the reconsideration of the case is carried out based on UNCITRAL Model Law remission proceedings, i.e. prior to annulment of the award, or after annulment of the award. Otherwise, such solutions as are adopted in Germany or in Switzerland would be qualified as unethical from this perspective, and I believe that this is not the case. In principle, I would not share

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<sup>36</sup> Born, *supra* n. 2, at 1988.

the opinion that the IBA Guidelines can be of particular assistance in solving the problem of reappointment because their casuistic approach does not allow for universal encompassing of the situation of two consecutive proceedings, as analysed herein.

In some jurisdictions, the concept of prejudgment, as partially accounted for in Standard 3.5.2 of the Orange List, constitutes a standalone ground for quashing of the award.<sup>37</sup>

Gary Born argues that prejudgment arises in a situation when the arbitrators issue their verdict without having first heard the parties.<sup>38</sup> Such a situation causes an arbitrator to decide on the basis of an alien factor. The alien factor does not have to be the sole basis for a decision, but must be a significant contributor. A factor is alien if it consists of anything other than evidence and arguments relevant to a policy, principle, or rule directly at issue.<sup>39</sup> Undoubtedly, in the discussed situation the arbitrator decides the case in the first award, so theoretically she 'prejudged' it before issuing the award in the second proceedings. Again, from a purely formal perspective, the 'first' and 'second' arbitration proceedings constitute two distinct cases; in substantive terms, meanwhile, we are looking at one and the same case, and the renewed proceedings are geared to repeated consideration of the same basic claim which had already been addressed in the 'first' proceedings.

That said, in the first and second proceedings, the award is based only on submissions and evidence from the parties, so considering this situation in light of Standard 3.5.2 of the IBA Orange List or of the definition of alien factor as explained above remains strongly questionable.

The question of such extrinsic prejudgment, i.e. prejudgment relating to factors beyond the arguments or facts proffered in the proceedings, is clearer than the intrinsic notion of this term. The question then arises whether, in rehearing of the case, the knowledge and emotions accrued in the first proceedings constitute *sui generis* prejudice in the second proceedings. The Circuit Court of Appeals, ruling on *Re J.P. Linahan, Inc.*,<sup>40</sup> made a broad comment on this issue, stating that 'impartiality' may not be defined to mean the total absence of preconceptions in the mind of the judge. Everyone acquires social value judgments, and many idiosyncratic 'learnings of the mind', while probably amounting to uniquely personal prejudices which may somehow interfere with fairness at a

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<sup>37</sup> See Born, *supra* n. 2, at 3246. Potential allegations of prejudgment are never far from the thoughts of arbitrators as they rule on interim measures; especial care is taken to formulate the reasoning for interlocutory security so as to not expose themselves to charges that, as they institute interim measures, they are simultaneously ruling on the merits of the case.

<sup>38</sup> *Ibid.*

<sup>39</sup> John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 New Eng. L. Rev. 657, 660 (1993–1994).

<sup>40</sup> *In re J.P. Linahan, Inc.*, 138 F. 2d 650, 651–654 (2d Cir. 1943).

trial, are not a 'by definition case' for remanded proceedings. Justice Frank expressed the view that:

[i]n case upper court judges on an appeal decide that the findings of a trial judge are at fault because they correctly or incorrectly think those findings insufficiently supported by relevant and competent evidence, that appellate decision does not brand him as partial and unfair. When, his decision reversed because of errors in his findings of fact or conclusions of law, the case comes back to his court for a further hearing, he will not, if he is the kind of person entitled to hold office as a judge, permit his previous decision in the case to control him.

The important point is that Justice Frank emphasized that it is intellectual and emotional integrity (qualities which, hopefully, any given judge should demonstrate throughout her or his entire career) which is key for purposes of assessing a potential bias.

A different position is proposed by John R. Allison, who argues that intrinsic impartiality (or structural impartiality, as dubbed by the author) occurs always, although its degree, as assessed from the perspective of certain process values where efficiency is usually counterbalanced with fairness of process,<sup>41</sup> may either require or not require barring the same judge from rehearing the case.<sup>42</sup>

In particular, the author draws a distinction between situations where there are extra facts or arguments reappearing in the case and where no such facts or arguments come into play. In the latter case, the level of bias is quite high. The primary question posited by the author is whether the first decision was accompanied by process value protections appropriate to the circumstances. This means that the original judges have not fulfilled their mission properly, and this can result in their having closed minds when reconsidering the case during the appellate proceedings. Things are different in a situation where, in re-examining the earlier decision, additional factual or legal issues appear for determination. If such new issues are so different from those considered earlier that, in practical terms, the judges are asked to rule upon a new case, the potential for prejudgment is far less.<sup>43</sup>

While both the above opinions were expressed in connection with 'regular' (rather than arbitral) proceedings, they may just as well be applied to any decision process of an adjudicative nature. It is worth noting that both focused on potential intellectual bias relating to 'premature theory formation', and not to an emotional

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<sup>41</sup> Allison, *supra* n. 39, at 671–682: the process values include instrumental values, such as accuracy, efficacy and fairness, as well as non-instrumental values, such as individual dignity, heuristic goals and institutional legitimacy. Depending on the values which prevail in the given situation, the level of acceptability of the bias may vary.

<sup>42</sup> *Ibid.*, at 722–727.

<sup>43</sup> *Ibid.*, at 724.

bias, such as empathy or antipathy, which could arise vis-à-vis the parties. This emotional bias probably cannot be associated with the fact of having earlier relations within the first proceedings. If this is the case, an objection should be raised within the first proceedings as well.

At this juncture, based on the above considerations, the following reflection arises before answering the question of proper composition of the arbitration panel: the question of purpose of such re-arbitration should be defined. To wit, it is important to identify whether the new proceedings are initiated with the aim of perfection of the award or, on the contrary, with the aim of examining the case completely anew because the court's decision on setting aside the award completely discredited it in the eyes of the parties or the appointing authority. Finally, the re-arbitration could be aimed at review of the first arbitrators' panel, as is done in the appellate arbitration, in the course of two-tier proceedings. In the English system, such an answer is in fact offered by the court, which decides on the quashing of the arbitration award. Under the English Arbitration Act, a court may remit the case to the arbitrators where an appeal on a question of law is allowed or when the arbitration procedure is challenged in the courts, and the court is convinced that the arbitration proceedings and determination may be improved upon. The annulment of the award is seen as a drastic remedy and is only justified when remission cannot produce the required results.<sup>44</sup> The UNCITRAL Model Law does not regulate the matter in this way – in fact, it does not regulate this issue at all. It could be teleologically argued, however, that by introduction of the remission procedure, which allows for perfection of the proceedings and award, setting aside of the award itself is left for cases where all-out disqualification is called for. Such an interpretation, however, is not really convincing. Such a finding also cannot be confirmed by the practice of the courts, where remission is not in use in general, and it is difficult to generalize that all cases subject to setting aside were of such a nature that could not be cured within the remission process. Therefore, the decision lies in the hands of the parties or of the appointing authority, and it should be taken based on evaluation of certain process values and the purpose of the second arbitration. Effectiveness of the arbitration, on the one hand, and its fairness, on the other, will be the main elements to be weighed in the decision process; in the case of the appointing authority, the reputation of the appointing institution will also be at stake.

An additional question arises when not all of the arbitrators are reappointed, but only one or two. This situation might lead to a potential lack of balance in access to information. An arbitrator who was involved in the first arbitration already had the chance to familiarize herself with the case before the others became

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<sup>44</sup> Lew et al., *supra* n. 19, at 681.

involved. Also, nonverbal experience in the earlier proceedings might lead to the opinion of certain predominance of such arbitrator over one who is appointed for the first time. The question is, whether this imbalance may create a bias on the side of the 'old' arbitrator. I would not agree that such a bias exists by definition. The problem of impartiality must be analysed independently in relation to each of the arbitrators alone, and all of the threads analysed above must be considered. In addition, paradoxically, a mixture of new and first-time panel members contributes to the more multilateral examination of a case. One must also realize that, in the second proceedings, arbitrators may analyse only such evidence and statements as were adduced in any way in the second proceedings, and only upon such material may the award be based, irrespective of what may have been submitted in the first proceedings.

#### 4 CONCLUSIONS

In international commercial arbitration, in a number of jurisdictions which follow the UNCITRAL Model Law with no particular emphasis on the subject matter, such as Turkey, the effects of a situation where the original arbitral award has been set aside and the parties embark on new arbitration proceedings are not clear. The question is whether the parties (or, as the case may be, any appointing authority) are then free to choose whatever arbitrators they please, including the former ones, absent provisions to the contrary in the arbitration clause or in the rules of the given arbitration institution or commonly accepted appearance of bias. As discussed above, various opinions may be (and were) voiced in this regard. After analysing the different arguments, I submit that this question should, as a matter of principle, be generally answered in the affirmative, unless the particularities of the given case prove otherwise. First, the evidence covering such jurisdictions as Germany or Switzerland shows that there is no implied and intrinsic notion of impartiality or prejudgment attaching to the arbitrator who sits on an arbitral panel deciding a case again after annulment of the original arbitration award. Secondly, systemic analysis of the UNCITRAL Model Law itself, specifically of its remission procedures where the original arbitration panel may be called upon to amend its award, confirms such *prima facie* lack of conflict of interest. Introduction of the provisions of Article 34(4) of the Model Law in such jurisdictions has particular consequence, which leads us to the third argument: unless the particular norms of a given jurisdiction provide otherwise, the norms applicable to appointment of judges in the state courts should not be applicable to arbitrators in international arbitration, as has been explained using the example of Poland.

Fourthly, due to the fact that there is a functional *junctim* between the 'first' and the 'second' proceedings, neither the IBA Guidelines nor principles of

prejudgment apply automatically in this situation. Each case falls to be considered separately. In certain circumstances, as explained above, an arbitrator may be excluded from the 'second' proceedings on grounds associated with the 'first' round of arbitration, where prejudgment issues may serve as an impediment to arbitrators' reappointment, or with the grounds for quashing of the original award, where circumstances relating to lack of impartiality and/or independence or of the requisite traits or qualifications on the part of the arbitrator are the most obvious. In other situations, and in particular in case of fraudulent behaviour of the party or where the new facts or arguments appear, reappointment of arbitrators would be the most efficient way forward.

In conclusion, finally, a blanket prohibition of reappointment of arbitrators presents a very instrumental approach and does not consider all the nuances of the notion of impartiality in terms of situations which may appear in actual practice.

