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PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION

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Chapter 3

The Power of Arbitrators to Make *Pro Futuro* Orders

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1. INTRODUCTION

Specific performance constitutes, in common law parlance, the order of a court by which the breaching party to a contract is compelled to perform the activity contemplated in the contract.[1] In civil law countries, specific performance is considered a normal remedy that may be requested by the aggrieved party in case of any breach of any contract.[2] Common law countries, on the other hand, have developed a very particular system of protection of rights, which has traditionally condemned specific performance to a sort of ostracism among the remedies for breach of contract.[3] The traditional

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1 JONES, Gareth; GOODHART, William *Specific Performance* London: Butterworths, 1996, p. 1.

2 LAITHIER, Yves-Marie. "Comparative Reflections on the French Law of Remedies for Breach of Contract," in COHEN, Nihil; McKENDRICK, Ewan, *Comparative Remedies for Breach of Contract.* (Portland, Hart Publishing, 2005) p. 103; ZIMMERMAN, Reinhard. *The Law of Obligations. Roman Foundations of the Civilian Tradition.* (New York, Oxford University Press, 1996) p. 776; BEALE, Hugh; KÖTZ, Hein; HARTKAMP, Arthur; TALLON, Denis. (*gen. eds.*). *Casebooks on the Common Law of Europe. Contract Law,* Portland: Hart Publishing, 2002, p. 677; TREITEL, G.H. *Remedies for Breach of Contract. A Comparative Account* (Oxford, Clarendon Press, 1988) p. 48.

3 The explanation of the problem lies in the old system of administration of royal justice. The King exercised his *iuris dictio* through a system of courts of common law, where his subjects came to obtain redress for the wrongs committed against them. The number and variety of plaints made the system virtually unmanageable, hence the creation of the forms of action: documents with the Great Seal in them, which already contained pre-determined redress, with each action presenting certain formal conditions to be complied with in order for the action to be exercised. The forms of action

view notwithstanding, even the most recalcitrant detractors of specific performance now admit that it may constitute a useful remedy, and thus its role in contract law should be expanded.[4] Then, if the tendency points towards the admission of non-pecuniary remedies in ordinary

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commenced as a system of bureaucratic administration, with the possibility to create new actions if the case did not fit in one of the existing forms. It was not long until it acquired juridical ground, and what was not in the forms was not in the world, in the sense that no protection could be dispensed. The evolution turned the common law system of the forms of action rigid and obsolete, leaving numerous cases without an adequate solution. It is at this point that the figure of the Chancellor appears on the stage. Traditionally, the Chancellor was something like a prime minister for the King, who also advised him when the King himself carried on judicial functions as the "King in Council" (the Chancellor was a member of the Council). In fact, though Royal justice was ordinarily administered by common law courts, the subjects could come to the King to ask for redress as of Royal grace. The multiplication of complaints, as well as the need for the King to focus on other problems, provided for the delegation of responsibilities to the Chancellor, who commenced as an intermediary between King and subjects, and ended assuming the judicial function himself. The Chancellor could not decide upon the law, as the subjects normally requested justice from the King when their case had been neglected by common law courts, which were in charge of applying the law. Thus, the cases were decided upon equity, understood as the justice according to the specific circumstances of the case and a sense of morality, provided the generalities of the law had failed to do justice in the particular case (hence the denomination of the justice administered by the Chancellor as equity jurisdiction). The justice of the Chancellor relied on his power to act *in personam*, through coercion by jail sentences; and thus, was ideally suited for orders to perform, as opposed to the justice of common law, better for pecuniary remedies. Both systems remained, and the English justice system evolved into an oddity with different jurisdictions, administering different remedies (pecuniary and non-pecuniary), but deciding upon cases of the same nature, with consequent overlapping. This led to tensions between both jurisdictions, and the faster evolution of common law courts, and the development of the theory of contract by them, led to their standing as a regular jurisdiction, while the equity jurisdiction remained as an alternative mechanism, only for cases where common law courts did not provide an adequate remedy. This eventually affected the standing of specific performance as a remedy, which followed the destiny of the jurisdiction that administered it, and the consequences can still be felt today. MAITLAND, F.W. *Equity. A Course of Lectures.* Revised by John Brunyate, M.A. Cambridge: University Press, 1936, reprinted 1969, p. 2-3; HOLDSWORTH, Sir William *A History of English Law op. cit.* Volume I, p. 395-401, 424-428, 437-442, 459-465; BAKER, J.H. *An Introduction to English Legal History.* London: Butterworths, 2002, p. 318-321.

[4] FISS, Owen "The Supreme Court 1978 Term, Foreword: The Forms of Justice" *Harvard Law Review* no. 93 (1979), p. 29; JONES, Gareth; GOODHART, William. *"Specific Performance."* London: Butterworths, 1996, p. 4; LAYCOCK, Douglas "The Death of the Irreparable Injury Rule" *Harvard Law Review* no. 103 (1990), p. 687; VAN HECKE. "Changing Emphases in Specific Performance" *North Carolina Law Review.* (1961), no. 40, p. 1-22. On the economic efficiency of specific performance, see LINZER, Peter. "On the Amorality of Contract Remedies - Efficiency, Equity and the Second Restatement" *Columbia Law Review.* (1981), no. 81, p. 120, note 82; SCHWARTZ, Alan. The Case for Specific Performance, *Yale Law Journal.* 1979-1980, no. 89, p. 271-306; ULEN, Thomas S. The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies, *Michigan Law Review,* (1984-1985), no. 83, p. 341-403.

jurisdiction, why make such a fuss about non-pecuniary remedies in arbitration?

The answer is legal only in part, as the problem has also a psychological side. One of the foundations of arbitration is the emphasis on preserving its nature as an *alternative* dispute resolution means, offered together with plain application of the law, commercial expertise, and a careful analysis of the specific facts of the case. The final aim of all this is to back the decision with the strongest power of all: the power of common sense.[5]

This study is devoted to disentangling the described idealistic vision from its actual manifestations in the power of arbitrators to order non-pecuniary remedies. To that end, we split the problems into three parts. In Part II, we address the distinction between substance and procedure, since we consider that it strongly influences the debate over arbitrators' remedial power. In Part III, we actually examine the arbitrators' power to order typical non-pecuniary remedies. Injunctions and specific performance have, despite the lack of attention by legal writing, a substantial presence in case law records, which helps to build basic general principles. Finally, we do not intend to limit our study to classic manifestations of non-monetary relief. Rather, as we see in Part IV, problems actually surface when the remedy awarded goes beyond the strict performance of the contract. This phenomenon reveals that, aside from coercion, what constitutes a cumbersome problem for arbitration (as well as for adjudication) is the exercise of arbitral powers to somehow "manage," "arrange" or "organize" the future of the parties' relationship. Hence the reference in the title to *pro futuro* orders, rather than orders of performance.

2. IS THIS RESEARCH WORTHY AT ALL? NON-PECUNIARY REMEDIES AND THE SUBSTANCE AND PROCEDURE DICHOTOMY

2.1 Introduction

If we want to initiate our study of *pro futuro* orders in arbitration by asking ourselves whether arbitrators have the power to order performance of the contract, we need to know that the very question

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[5] In the words of Aristotle, arbitration, as opposed to adjudication, applies equity, instead of the law. See ARISTÓTELES. *Retórica*. Madrid: Gredos, 1999, Libro 1, Capítulo 13. Equity, in turn, is characterized as the justice according to the circumstances of the case, as opposed to the generalities of the law. See ARISTÓTELES. *Ética Nicomáquea – Ética eudemia*. Madrid: Gredos, 1985, Libro V, Capítulo 10.

might be biased. By framing it in those terms, we assume that *pro futuro* orders must be dealt with from the perspective of the arbitrators' power, rather than that of the parties' rights, hence the focus on procedural and not substantive law. From a procedural point of view, the key would be in analyzing the arbitrators' ability to "create" or "fashion" an appropriate remedy that satisfies the parties' needs. From a substantive perspective, the remedy would exist (or not) in the applicable substantive law, and it is not a subject of controversy that arbitrators have the power to apply that law. Therefore, the nature of the order to perform becomes of great importance as a preliminary issue to be solved before going any further. Because the right to performance or the performance decree has been so far the most popular remedy of such kind, our discussion focuses primarily on it.

2.2 Non-pecuniary remedies: substantive or procedural?

The answer to this question depends much on whether we depart from a civil law or a common law perspective. Civil law countries have inherited the codification process and, as such, the legislators' will to provide certainty. The emphasis on what the parties may request from the courts and not on the courts may award in their discretion has been called the "rights model."[6] In this context, the notion of substantive law stretches from primary rights (*i.e.*, those that directly stem from a contract), to secondary rights (*i.e.*, those that arise from the breach of primary rights). Common law countries, on the other hand, have inherited the system of the forms of action, where the emphasis is placed on the action exercised and the order requested from the court, rather than on the right protected by such an order. This has been called the "remedies model,"[7] where the procedural aspects are of utmost importance. That strong distinction would lead us to conclude that, while in civil law countries specific performance would be a matter of substance, in common law countries it would be a matter of procedure[8] and, there, as the old saying goes, "substance" and "procedure" would be equivalent to "right" and "remedy."[9]

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[6] FRIEDMANN, Daniel, "Rights and Remedies", in COHEN, Nihil; McKENDRICK, Ewan. *Comparative Remedies for Breach of Contract.* Portland: Hart Publishing, 2005, p. 8.

[7] *Ibid* p. 3 *et seq.*

[8] See Collins in Dicey & Morris, who states that "English lawyers gave the widest possible extension to the meaning of the term 'procedure.'" COLLINS, Lawrence, *et al.* (eds.). *Dicey and Morris on the Conflict of Laws* (2 vols.), London: Sweet & Maxwell, 1993, Volume 1, p. 169.

[9] *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). In the words of Collins, "The nature of the remedy is a matter of procedure to be determined by the lex fori." COLLINS, Lawrence,

Nevertheless, by sticking to old categories, we risk making a merely nominal analysis. Identifying procedure with remedy may be arbitrary if we do not know what a remedy really consists of. In this sense, it has been argued that, when a remedy is so close to a right that neglecting one could imply neglecting the other, then we should assume that the remedy enjoys a substantive nature.[10] Such would be the case with the right to performance, as there cannot be a remedy with a closer logical link to a contractual right than that of performance of the right.[11]

The international instruments on conflict of laws appear to follow this trend. The Rome Convention of 1980 on the Law Applicable to Contractual Obligations states that the law applicable to the contract governs the consequences of the breach.[12] That includes remedies for breach of contract,[13] and the right to request performance among them.

That view, though, would risk neglecting the role of procedural law in the achievement of enforced performance, as well as, generally, in the administration of remedies. Such importance is acknowledged by the Rome Convention itself, which provides that substantive law will cover the consequences of the breach "within the limits of the powers conferred on the court by its procedural law."[14]

The problem with opening the gate to procedural law is that, if its role is emphasized too much, it could provide an argument to bring specific performance back to procedure. Indeed, if the court has to

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et al. (eds.). *Dicey and Morris on the Conflict of Laws* (2 vols.), London: Sweet & Maxwell, 1993, Volume 1, p. 171.

[10] COOK, Walter Wheeler, "'Substance' and 'Procedure' in the Conflict of Laws," 42 *Yale L. J.* 333, 343 (1933); *Copylease Corp. of Am. v. Memorex Corp.*, 408 F. Supp. 758 (SDNY 1976).

[11] Indeed, some scholars have argued that even "tertiary" rights, conceived to enforce the right to performance in case of a recalcitrant breaching party, like the right to request punitive fines, should be considered a matter of substance. See MOURRE, Alexis, "Judicial Penalties and Specific Performance in International Arbitration," Chapter 22, *infra.*

[12] Article 10 of the Rome Convention establishes that:
"The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular: [. . .]
(c) [...] the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;"

[13] As stated by Professors Giuliano and Lagarde in the Rapport on the Rome Convention, "The expression 'consequences of breach' refers to the consequences which the law or the contract attaches to the breach of a contractual obligation, whether it is a matter of the liability of the party to whom the breach is attributable or of a claim to terminate the contract for breach. Any requirement of service of notice on the party to assume his liability also comes within this context." *REPORT on the Convention on the law applicable to contractual obligations.* Available at http://www.rome-convention.org/instruments/i_rep_lagarde_en.htm.

[14] See Article 10 Rome Convention.

examine its powers to decide on specific performance, common law countries allow the courts to award or deny specific performance as a matter of discretion.[15] And it would not be hard to argue that something that depends upon the discretion of the court cannot be claimed as of right, and therefore is not substantive but procedural in nature.[16] Should that be our final conclusion?

Not quite. First, if every margin of discretion excluded the substantive nature, then we could not talk of any rights whatsoever, as, to some, the very notion of a right is equivalent to a prediction that the courts will act in a certain way if behaviour contrary to that right is undertaken.[17] Second, the role of discretion in specific performance in common law countries should not be exaggerated. The repetition of court practice and the publication of judicial decisions have greatly contributed to the development of an abundant case law, and the crystallization of numerous principles that inform the decision on specific performance.[18] Even if the outcome of a specific performance request were more uncertain than one of damages, there would still be sufficient predictability to permit discussion of a "right" of specific performance.

That seems to be the trend received by uniform law. The 1980 Vienna Convention on Contracts for the International Sale of Goods ("CISG"), the UNIDROIT Principles for International Commercial Contracts, and the Principles of European Contract Law, all texts on contract law (of substantive nature), contemplate the right to obtain performance within their provisions.[19] Article 28 of the CISG, which

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[15] McCLINTOCK, Henry L. *Handbook of Equity* St. Paul: West Publishing Co. (Hornbook Series) 1936, p. 1; POMEROY, John Norton Jr. *Pomeroy's Equity Jurisprudence and Equitable Remedies Six Volumes. Pomeroy's Equity Jurisprudence in Four Volumes*, Third Edition, Annotated and much enlarged, and supplemented by *A Treatise on Equitable Remedies* in two volumes, San Francisco: Bancroft-Whitney Company, 1905 § 762, p. 1284; DOBBS, Dan. *Remedies: Equity, Damages, Restitution.* St. Paul: West Publishing Co. (Hornbook Series) 1993, § 2.4 (7) p. 84; De FUNIAK, William Q. *Handbook of Modern Equity* Second Edition. Boston, Toronto: Little, Brown and Company, § 94, p. 221.

[16] COLLINS, Lawrence, *et al.* (eds.). *Dicey and Morris on the Conflict of Laws op. cit.* p. 171.

[17] "For legal purposes a right is only a hypostasis of a prophecy — the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it — just as we talk of the force of gravitation accounting for the conduct of bodies in space." See HOLMES, Oliver Wendell, *Natural Law*, 32 HARVARD L. REV. 40, 42 (1918). See also HOLMES, Oliver Wendell. *The Path of the Law*, 10 HARVARD L. REV. 1, 1-2 (1897).

[18] De FUNIAK, William Q., *Handbook of Modern Equity*, Second Edition, Boston, Toronto: Little, Brown and Company, § 94, p. 221; DOBBS, Dan B *Law of Remedies. Damages – Equity – Restitution op. cit.* § 2.4 (7), p. 84-85; POMEROY, John Norton Jr. POMEROY, John Norton *Pomeroy's Equity Jurisprudence and Equitable Remedies op. cit.* § 762, p. 1284-1285.

[19] Article 46 (1) CISG provides: "The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this

allows a tribunal to deny performance if the a result would be contrary to its own law,[20] does not change the characterization of the remedy. It merely introduces a concession to those countries (common law countries) that are more restrictive towards the remedy of performance than the Vienna Convention itself.[21]

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requirement;" and Article 62 reads: "The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement." Article 7.2.1. of the UNIDROIT Principles states: "Where a party who is obliged to pay money does not do so, the other party may require payment," while article 7.2.2. provides: "Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance . . ." In the Principles of European Contract Law, article 9:102 (1) states that "The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance;" and article 9:101 (1) provides: "The creditor is entitled to recover money which is due."

[20] Article 28 CISG states: "If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

[21] The controversy about the adoption of a general rule favouring specific performance during drafting of the Convention was based upon two main factors. First, there were countries where certain aspects of the right to specific performance were unknown (*e.g.*, a right to request repair), and there were no procedural mechanisms to enforce them. Consequently, a first draft of the current Article 28 was introduced with a reference to the possibility of the court to deny the request when it *could* not do so under its own law. Later, this position was expanded at the request of Anglo-Saxon delegations, who considered that the peculiarities of their own systems (where specific performance was an exceptional remedy) were important enough to put aside the goal of uniformity in this case. This inability to reach a compromise solution has been strongly criticised. See LANDO, Ole. "Commentary to Article 28" in BIANCA, Cessare Massimo; BONNELL, Michael Joachim. *Commentary on the International Sales Law.* Milán: Giuffré, 1987, para. 1.3, p. 233; KASTELY, Amy. "The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention" *Washington Law Review* no. 63 (1988), p. 627; WALT, Steven. "For Specific Performance Under the United Nations Sales Convention". *Texas International Law Journal* no. 26 (1991), p. 218. In any event, the evidence on the application of Article 28 remains sparse. Only in one case was this provision applied (*Magellan International v. Salzgitter Handel* Federal District Court [Louisiana] 7 December 1999). It was an American case; hence the Uniform Commercial Code was applied. The court did not deny specific performance; only sent the case again to the lower court, as it considered that the "inability to effectuate a cover transaction" (necessary to award specific performance under Section § 2-716 of the UCC) had not been properly established. To our view, in that case it did not seem that the claimant was trying to convince the court to exercise its discretion. Instead, the party seemed to claim specific performance as of right, once of course the "difficulty to cover" threshold had been established.

2.3 Why discuss the role of non-pecuniary remedies in arbitration?

With the arguments exposed, we could conclude that performance is a right of the parties, not a power of judges/arbitrators, and, consequently, the study of the latter would be of no use. Several other arguments, however, point towards the opposite conclusion, and thus recommend precaution.

First, although we are arguing for the substantive nature or the "right to performance," we cannot but recognize the merit of the procedural approach, especially considering that some of the most important case law on this problem is constructed from a procedural perspective. Second, even accepting the substantive nature of the problem – *i.e.*, the *right* to performance, rather than the *power* to order performance – there would still be issues of the arbitrators' powers to be dealt with. The most obvious is the problem of determining, once the contents of the applicable substantive law are clear, what degree of discretion is granted to the arbitrator to apply the law. In other words, what power the does the arbitrator have to shape the law to the circumstances of the case where there has been a request for the performance of the contract?[22]

In any event, the importance of the procedural perspective, focused on the power of arbitrators, is harder to be seen when the request seeks the specific performance of the contract. In that case, the remedy has such long standing that the arbitrator's role is hardly "creative" in the sense of "fashioning" an adequate relief. The case is very different, and this constitutes the third argument, when the order is not for the strict performance of the contract. Indeed, orders of performance only constitute the tip of the iceberg of a wider problem like that of *pro futuro* orders. Once we abandon strict adherence to the language of the contract and focus on resolving a complex dispute between the parties, the clarity that we achieved when dealing with pure performance orders blurs and vanishes.

In conclusion, it is not possible to discard the problem of the power of arbitrators to order performance. In any event, the discussion about the nature of the right of performance/power to order performance provided us with sufficient insight for the following parts o this chapter, not always to provide the right answer, yet to pose the right questions.

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[22] *Infra* at III(F).

3. FOUNDATIONS OF ARBITRATORS' POWER TO MAKE *PRO FUTURO* ORDERS: EXPERIENCE WITH SPECIFIC PERFORMANCE

3.1 Introduction

Once the relevance of the problem has been set, we need to effectively determine the basis on which the power of arbitrators to fashion an appropriate non-pecuniary remedy relies. The main sources are no secret, being, on the one hand, the parties' will through the conclusion of an arbitration agreement and the selection of a set of arbitration rules; and, on the other hand, the law applicable to the procedure and substance of the dispute. The findings, though, are very much based upon the experience with "typical" non-pecuniary relief, *i.e.*, specific performance and injunctions. If those are the remedies requested, it is not hard to even justify the arbitrators' power from a functional approach and extend it to the ability to shape substantive law to the needs of the case, even if the result may seem contrary to the policy behind the law. As a result, some of the conclusions reached with the specific performance experience may be too harsh if applied bluntly to other non-monetary relief. Clarifications and qualifications aside, however, the following analysis provides the necessary foundations to build up a general policy on arbitrators' non-pecuniary power.

3.2 Orders of performance, arbitrators' power and the arbitration clause

Arbitration is about consent. Despite all the niceties we may say about the arbitral function, or about arbitration as a mechanism for dispute resolution, all arbitration ultimately relies on the parties' will to submit to it. Consequently, it makes sense to begin any explanation related to the arbitrators' power by referring to its primary source (and limit): the arbitration agreement.

3.2.1 Arbitration clause as a source of arbitrators' power

As the sovereigns who set the conditions of the dispute, the parties may clarify the remedial problem by expressly giving the arbitrators the power to grant non-pecuniary remedies. If such is the parties' will, there is nothing better than to so state expressly in the arbitration clause. Cases can be mainly found in Anglo-Saxon

jurisdictions like the United States (probably because the parties did not take for granted that the arbitrator could issue non-pecuniary orders).[23]

Arbitrators' remedial power, however, is hardly something the parties consider when drafting the arbitration agreement. Thus, it is usually special circumstances that bring the issue to the parties' attention. That is the case where the kind of dispute likely to arise

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[23] In *Young v. Deschler*, 202 Misc. 811, 110 N.Y.S.2d 220 (Sup. Ct. 1952) the parties agreed to an arbitration clause that stated: "Any controversy arising under this agreement shall be submitted to arbitration to be held in the City of New York in accordance with the rules of the American Arbitration Association, before at least three arbitrators. Said arbitrators may, in their award, recommend the granting of equitable or other injunctive relief as may be suitable." After the subscription of the agreement the parties disagreed on whether to proceed with arbitration. The Court of Appeals ruled that "On the facts and circumstances of this case, all issues in the controversy between the parties including the validity, application or limitation of the covenants in question, are for the arbitrators who may if they deem it proper decide such issues in plaintiff's or defendant's favour." In a similar way, in *Lively v Hunter* 130 Ga. 106, 60 S.E. 264 Ga. (1908) the parties needed to resolve a dispute on whether the construction of a storage facility for guano fertilizer damaged the plaintiff's property, and thereby an injunction against construction was needed. In order to settle that, the parties concluded a (very long) arbitration agreement that stated: "Whereas, there is a matter of controversy between F.J. Hunter, as executor of Mrs. M. V. Medlock, deceased, and as the next friend of the children of Mrs. Medlock, as plaintiffs, v. C. P. Lively and H. M. Lively, now pending in Gwinnett superior court, in which the plaintiffs are seeking and have had granted a temporary injunction, restraining said defendants from using a certain warehouse situated on the right of way of the Southern Railroad Company, in the town of Norcross, in said county, fully described in the petition in said case, for the purposes of storing guano and commercial fertilizers, acids, or other manures in said house, to the injury and damage of plaintiffs and their property, either temporarily or permanently. And said parties have agreed to submit the question of nuisance or injury or damage to arbitration. And for this purpose the plaintiffs have selected T.B. Wray and defendants have selected Huburt Letrow as their arbitrators, and have also selected J. E. McElvoy as the third arbitrator, or umpire. Said award is to be conducted under the provisions of the Code of Georgia, known as the statutory arbitration, in the hearing of said case. Upon the hearing the only question to be submitted to and passed upon by said arbitrators is whether the health or property of said plaintiffs have been injured or damaged by the use of said warehouse as above stated and the injunction now in force shall be made permanent. And, in the event said arbitrators decide that said warehouse worketh hurt or injury to the health or property of said plaintiffs, then it is agreed that said defendants will not use the same for said purposes. The award to be returned to and made the judgment of the superior court of said county. It is further agreed that the restraining order now in force shall be continued until the award is rendered by said arbitrators, and the case stand continued until such award is made. In witness whereof said parties have hereto set their hands and seals. This 27th day of October, 1904, C.P. Lively & Son. [L.S.] Fred Hunter [L.S.]". In deciding the issue, the arbitrators declared: "After hearing the evidence and considering the matter submitted to us, we find that the property of said defendants would be damaged by the use of said warehouse for the storing of commercial fertilizers as above stated. We therefore find in favour of said F.J. Hunter, executor, and that the injunction now in force be made permanent."

between the parties typically requires coercive action, *e.g.*, collective bargaining disputes.[24] Another classic situation occurs where the dispute has already arisen when the submission to arbitration is drafted; hence no *ex ante* arbitration agreement, or *clause compromissoire*, but an *ex post* agreement (*compromis*) is concluded.[25] Typically in these cases, the power was drawn from the language of the clause, but also from the very fact that it was, precisely, the duty to perform (or abstain from performing) that was submitted to arbitration.[26]

3.2.2 Arbitration clause as a limit to arbitrators' power

The parties' will may not only be utilized as a source of the arbitrators' power to order non-pecuniary remedies, but also as a limit of such power. The interpretation of such kind of limitation was at stake in the case *Decca Music Group Limited v. Michael Jagger, Keith Richards, Charles Watts* (also known as the *Rolling Stones* case).[27] The parties signed an agreement for the management of royalties received

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[24] If the problem concerns the relocation of industrial facilities, a strike, or a close-down in breach of a collective bargaining agreement, the way to enforce the parties' commitments will surely not be through monetary compensation. Hence the kind of arbitration clauses inserted in these type of agreements, with a language that foresees the possibility of non-pecuniary remedies, *e.g.*, "In application of any and all rights which the manager of the Union and the manager of the Association, or their deputies, or their Impartial Chairman may have pursuant to this agreement or by operation of law, it is agreed that in the event of any breach of the collective agreement or any of the terms thereof by any one obliged thereunder, the manager of the Union and the manager of the Association, or their deputies, may, as part of their decision, issue any and all mandatory directions, prohibitions or orders directed to or against any party breaching the collective agreement or any party thereof." (New York coat industry agreement); or "The award or decision of the arbitrator, in addition to granting such other relief as the arbitrator may deem proper, may contain provisions commanding or restraining acts and conduct of the parties." (garment industry). See FLEMING, R.W. "Arbitrators and the Remedy Power" *Virginia Law Review* Vol. 48 no. 7 (November 1962) p. 1203. The wide scope of the arbitration clause inserted in the collective bargaining agreement constituted the base in *Ruppert v Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958) for the arbitrator to order an anti-strike injunction.

[25] CRAIG, W. Lawrence; PARK, William W.; PAULSSON, Jan. *International Chamber of Commerce Arbitration*. Third Edition. New York: Oceana Publications, 1998, p. 37.

[26] In *Young v. Deschler*, 202 Misc. 811, 110 N.Y.S.2d 220 (Sup. Ct. 1952), it was not until after several claims of unfair competition that the parties decided to subscribe the *compromis*, and submit the arisen dispute to arbitration. In *Lively v Hunter*, 130 Ga. 106, 60 S.E. 264 Ga. (1908), it was not until after the executor of the Hunters' will sued the Livelys for an injunction that restrained them from erecting the premises, and the courts had granted a temporary injunction that the parties agreed to an arbitration to determine whether the injunction had to be made permanent.

[27] *Decca Music Group Limited v. Michael Jagger, Keith Richards, Charles Watts*, High Court of Justice. Chancery Division, Case No: HC 04 C00863, Royal Courts of Justice, 11 June, 2004.

by the band.[28] Besides the right to claim proceeds unduly retained by Decca, the band enjoyed a right to audit the accounts kept by Decca.[29] Interestingly, the parties established a division in the jurisdiction. The disputes between the parties were to be resolved in arbitration *PROVIDED ALWAYS* (read the clause) that the claim was for a monetary sum.[30]

The clause's meaning was tested when differences of opinion arose as to whether Decca was complying with its duties under the agreement, and the band exercised the right to account in front of ordinary courts, which Decca sought to declare incompetent.[31] Addressing the issue as one of interpretation of the arbitration clause, the judge of the court of first instance admitted the claim, considering that it was not one for a monetary sum but one for specific performance.[32]

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[28] Basically the arrangement consisted in the payment of the royalties from Decca to the bank, which, in turn, would pay them to the band a while later. This way, they deferred the payment and, consequently, the tax liability (which was probably the reason why the agreement was subscribed to in the first place).

[29] The clause read as follows: "The Artist [that is, the Rolling Stones] may cause each account delivered to him pursuant to clause 5(3) to be audited by a leading Chartered Accountant appointed by him ('the Auditor') and the Bank [. . .] and the company [that is, Decca] or either of them (as the case may be) shall [...] make available to the Auditor any and all such books and records and other documents (whether or not similar to those enumerated) pertaining to the subject matter hereof which the Auditor may reasonably request for the purpose of performing his auditing duties." *Decca Music Group Limited v. Michael Jagger, Keith Richards, Charles Watts* High Court of Justice. Chancery Division. Case No. HC 04 C00863. Royal Courts of Justice. 11 June, 2004, para. 3-4.

[30] The clause read: "Any and every dispute difference or question which may at any time arise upon under or in connection with or pursuant to this Agreement or touching or concerning the construction meaning effect validity or enforceability thereof or of any provision thereof or concerning any alleged determination or claim for rectification thereof shall be referred to a single arbitrator [. . .] PROVIDED ALWAYS that in the event of any claim by either of the parties hereto for breach of or otherwise arising out of or in connection with or pursuant to this Agreement the sole obligation of the other party in respect of such claim shall be to pay such sum as may be awarded upon arbitration pursuant to this clause *and such arbitration or award shall be a condition precedent to the institution of any action at law or in equity.*"

[31] The launch of the album *Forty Licks* was a success, and the band wanted to ensure that they were being paid the correct amount. The argument of Decca was that the enforcement of the right to account was, in reality, a claim for a monetary sum, and thus, should be exercised through arbitration. In addition, Decca argued, provided the wide scope of the arbitration agreement, the band had to exhaust all possibilities to settle the dispute by claiming a monetary sum before requesting non-pecuniary remedies. *Decca Music Group Limited v. Michael Jagger, Keith Richards, Charles Watts,* High Court of Justice, Chancery Division, Case No: HC 04 C00863. Royal Courts of Justice, 11 June, 2004.

[32] The Court held (correctly, in our opinion) that, though the right to audit could be exercised jointly with the right to request payment of the sums due, it could also be exercised as an independent right, worth of separate protection (we presume as a right to control the management of the account). Furthermore, once specific performance was excluded, there was no possible way of protecting the right to audit and thus, excluding

Such was the conclusion until, on appeal, the tables were turned.[33] The court revoked the first judgment, holding that the parties had expressed a preference for arbitration, that the right to audit could be properly protected through a claim for the unpaid royalties, and thus, no equitable relief was needed.[34] We believe that the case was incorrectly decided, as the court neglected the parties' will in favour of resilient criteria of traditional law.[35] It can be viewed as an example of court overreach, and used to make the case for further clarity when drafting arbitration clauses limiting remedial power.

3.3 Orders of performance, arbitrators' power and arbitration rules

Though we find examples where the arbitration clause contained an express attribution, or a limit, to the arbitrators' power to order performance, the practice on that remains scant, since the parties

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ordinary courts' jurisdiction would have been equivalent to neglecting the right. *Decca Music Group Limited v. Michael Jagger, Keith Richards, Charles Watts*, High Court of Justice, Chancery Division, Case No: HC 04 C00863, Royal Courts of Justice, 11 June, 2004.

[33] *Michael Jagger, Keith Richards, Charles Watts v. Decca Music Group Ltd (2004)* [2004] EWHC 2542 (Ch) Ch D (Pumfrey J) 12/11/2004.

[34] In the first place, the court affirmed that the language of the clause was wide enough to encompass a dispute relating to the right to audit the accounts. The court, however, seemed to forget the warning in capital letters "PROVIDED ALWAYS [. . .]the sole obligation of the other party in respect of such claim shall be to pay such sum as may be awarded. . . ." In the second place, the court wondered whether the right contemplated under Clause 6 (right to account) could not be properly enforced through a monetary claim and, as a consequence, whether arbitration and account were mutually exclusive ("whether or not the obligation under Clause 6 is such that a breach is not capable of being compensated in damages with the result that there is, in effect, a repugnancy between the arbitration clause and Clause 6"). The court concluded in the negative, stating that damages would be an adequate remedy. In this case, the court held, if there were a difference between amounts paid and amounts due, the damages would consist in that difference. If there were none, damages would be nominal ("It seems to me that prima facie the measure of damages for breach of Clause 6 should be arrived at as follows. If on an audit under Clause 6 it would have been discovered that there had been an underpayment then the underpaid sum is the measure of damages. If on an audit under Clause 6 it were to be discovered that there had been no underpayment, then damages would be nominal only"). *Michael Jagger, Keith Richards, Charles Watts v. Decca Music Group Ltd (2004)* [2004] EWHC 2542 (Ch) Ch D (Pumfrey J) 12/11/2004.

[35] The solution adopted by the court can be read only to mean neglecting any autonomy to the right of account. However, that would be contrary to the will of the parties, who separated the right from that to request a monetary sum, and put it in a separate clause. Besides, in the non-monetary enforcement of what right would the parties be thinking when drafting the clause, other than the right to audit? The court decided the issue hidebound by the old saying that specific performance (and equity in general) may only act when damages are not an adequate remedy, without even considering whether the parties had that in mind when they drafted the arbitration clause.

seldom think about relief when drafting the agreement. Consequently, we find in the arbitration rules selected by the parties a secondary source and limit of power, in line with the parties' will.

The case where non-monetary remedial power is established with crystal clarity is that of the American Arbitration Association Arbitration Rules. Rule R-43 expressly establishes the arbitrators' power to order specific performance, among other equitable relief.[36] Other sector-specific rules of the AAA establish such remedial power for arbitrators as well.[37]

The AAA Arbitration Rules have been the basis for arbitrators' orders of specific performance in numerous cases. The subject-matter of the cases where they have been used has been diverse, encompassing disputes on transfer of businesses,[38] non-competition clauses,[39] management,[40] and construction contracts.[41]

Although not explicitly, the Rules of the International Centre for Dispute Resolution (ICDR) also provide for the arbitrators' power to award non-pecuniary remedies. Article 28 (5) of its Arbitration Rules expressly excludes punitive damages among the remedies available to the arbitrators,[42] which leads one to conclude that all other conventional remedies are allowed.[43] This conclusion is confirmed by

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[36] The Rule reads as follows: "(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Rule R-43, available at http://www.adr.org/RulesProcedures.

[37] Such is the case of Rule R-44 of the American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures; Rule 42 of the Patent Arbitration Rules states: "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract or injunctive relief to terminate infringement"); Rule 45 (Scope of award) of the Arbitration Rules for the Real Estate Industry (Including a Mediation Alternative); or Rule 37 c. of the Arbitration Rules for Wills and Trusts.

[38] *General Fuse Co. v. Sightmaster Corp.* 7 Misc.2d 997, 162 N.Y.S.2d 630 N.Y.Sup. (1957).

[39] *Young v. Deschler,* 202 Misc. 811, 110 N.Y.S.2d 220 (Sup. Ct. 1952).

[40] *Staklinski v Pyramid Electric Company,* 6 N.Y.2d 159, 160 N.E.2d 78 N.Y. (1959).

[41] *Grayson-Robinson Stores, Inc. v. Iris Construction Corp.,* 8 N.Y.2d 133, 168 N.E.2d 377 N.Y. (1960).

[42] The provision reads: "Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. This provision shall not apply to any award of arbitration costs to a party to compensate for dilatory or bad faith conduct in the arbitration."

[43] Other rules contemplate a similar solution, like article 32 (4) of the Chicago International Dispute Resolution Association (CIDRA) Arbitration Rules, which provides: "Unless the parties agree otherwise, the parties expressly waive and forego

the express reference of Article 28 (4) to the specificities of a pecuniary award,[44] which, in our opinion, leaves implicit that there can be awards with non-pecuniary content.

3.4 Orders of performance, arbitrators' power and the *lex arbitri*

In the absence of explicit reference by the parties' arbitration agreement and the selected set of arbitration rules, another source/limit for the arbitrators' power to order non-pecuniary remedies may be the law applicable to arbitral proceedings, *i.e.*, the *lex arbitri*. Unfortunately there are few examples of arbitration laws entering into the specificities of the arbitrators' remedial power.

Two such examples, however, are the English Arbitration Act, followed in this respect by the Irish Arbitration Act. Both instruments provide for a remedial power equal to that of ordinary courts, including the power to order specific performance, with the exception of contracts relating to land.[45] Thus, English law, known to be the most restrictive towards the use of specific performance as a remedy is nevertheless ready to grant arbitrators such power.

The only doubts relate to the scope of the limitation of remedial power in "contracts relating to land," a provision that, if interpreted too widely, could seriously hamper the arbitrators' ability to solve certain disputes. Fortunately, however, English courts generally leave arbitrators much room to manoeuvre. In *Telia Sonera*[46] the two parties

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any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner."

[44] Article 28 (4) of the ICDR Arbitration Rules reads: "A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law."

[45] Section 48 (5) of the English Arbitration Act reads as follows:

> The tribunal has the same powers as the court
> (a) to order a party to do or refrain from doing anything;
> (b) to order specific performance of a contract (other than a contract relating to land);
> (c) to order the rectification, setting aside or cancellation of a deed or other document."

Section 26 of the Irish Arbitration Act provides:

> Unless; a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land.

[46] *Telia Sonera AB v Hilcourt Docklands Ltd*, 4th July 2003, Chancery Division.

had concluded a lease contract, which included a covenant that committed the lessee to undertake certain repair works in the leased facilities, works it did not accomplish. The lessor initiated arbitral proceedings to request an order for the works to be completed. The problem rested on whether, in such case, the arbitrators would have the power to order performance of the repair works. In both the arbitration stage and in ordinary courts, it was held that the limitation contained in the *lex arbitri* had to be interpreted restrictively, so as to include merely those cases where the subject matter of the dispute was the transfer or creation of a security interest in immovable property.[47]

That interpretation leaves the arbitrators with powerful tools and a wide margin of discretion to resolve disputes. And those could be even wider if the parties so choose. In fact, the limits imposed upon the arbitral power lie in the absence of the parties' contrary intention.[48] Were the parties to draft a more expansive arbitration clause, or to choose a set of arbitration rules that provided so, that would be the prevalent criterion, as the limits in the examined arbitration laws lack mandatory character, let alone a public policy nature.

3.5 What if nothing is said?

So far we have found examples where the arbitration agreement, arbitration rules, or *lex arbitri* act as sources of or limits to the arbitral power to order non-pecuniary remedies, especially specific performance. We should not deceive ourselves, however, by thinking that we may always expect an express reference to arbitrators' remedial power when we need it. In the immense majority of cases, neither parties nor arbitral institutions, nor legislatures, for that matter, pay sufficient attention to the issue of remedies. In such cases, we need to find alternative methods to draw powers and limits from the previously examined sources.

3.5.1 Interpretation of the arbitration clause

As stated before, cases where arbitration clauses say nothing on the issue of arbitrators' remedial power constitute the immense majority. Yet the fact that this is common practice provides no

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[47] *Telia Sonera AB v Hilcourt Docklands Ltd*, 4th July 2003, Chancery Division.

[48] Section 48 (1) of the English Arbitration Act provides that: "The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies." Section 26 of the Irish Arbitration Act explicitly relies on the arbitration agreement for the arbitrators' remedial power, since it states: "Unless a contrary intention is expressed therein, every arbitration agreement shall [. . .], be deemed to contain . . . ."

consolation. Thus, in almost all cases arbitrators have to decide on the request for relief without any express reference whatsoever indicating which was, or would be the parties' intention on non-pecuniary remedies. In these cases, should the rule for or against specific performance prevail?

The issue has been addressed on several occasions, and the conclusion is unanimously favourable to the arbitral power. In some cases, the result was reached through a "finalistic" interpretation, looking forward to giving "maximum utility" to the arbitration clause. There were cases where the dispute concerned compliance with duties that have no possible substitute if not performed by the contracting party, like those involving negative covenants. Thus, if the case concerns adherence to, say, a covenant not to compete, denying the arbitrators the power to order performance would be equal to depriving arbitration, and the arbitration clause, of any effect.[49] In other cases, not even negative obligations were expressed in the contract. Their content and the arbitrator's power to enforce them specifically were drawn from the need to protect the main (positive) contractual obligation.[50]

In other cases, the "finalistic" interpretation and the "maximum utility" of the arbitration agreement have been carried one step further, with an interpretation independent of the kind of obligation assumed by the parties under the main contract. Thus, in some cases, the

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[49] See, for example, *Linwood v. Sherry*, 16 Misc. 2d 488, 178 NYS2d 492, *aff'd without op.* 7 App. Div. 2d 757, 181 N.Y.S.2d 772 (1958); *Utility Laundry Serv., Inc v. Sklar*, 300 N.Y. 255, 90 N.E.2d 178 (1949). In addition to non-competition clauses, there have been other situations that have tested the enforceability of negative promises through arbitration, like cases of collective labour relations, where parties have committed themselves not to move a factory to a different location (with the consequent layoff). See *Goldstein v. Int'l Ladies' Garment Workers' Union*, 328 Pa. 385, 196 A. 43 (1938).

[50] Such was the case in *Vogel v. Simon*, 26 Misc. 2d 436, 201 N.Y.S.2d 877 (N.Y.Sup. 1960) where the parties concluded an agreement to distribute the assets of a partnership, without liquidating them (according to the agreement, the assets had to be "distributed to the parties as ratably and equitably as possible and in the event of inequality a cash adjustment shall be made between them"). Since they could not agree on that, they submitted the issue to arbitration, pursuant to another clause inserted in the agreement ("If they cannot agree upon the terms of such distribution then the same shall be determined by arbitration as hereinafter provided"). It occurred that one of the parties performed some acts that were harmful for the value of the assets to be distributed. Thus, though the competence attributed to the arbitrator was declaratory, since the acts of the defendant were could affect the final outcome, the arbitrator considered himself competent to issue an order restraining activities harmful for the assets, and the court confirmed such competence by stating that the acts of the defendant, if he was not stopped in his tracks "may have an effect upon the ultimate problem of the distribution of the assets of the partnership." See *Vogel v. Simon*, 26 Misc. 2d 436, 201 N.Y.S.2d 877 (N.Y.Sup. 1960).

reference in the arbitration clause to the arbitrators' jurisdiction to decide on "any dispute arising out of or relating to" the main contract has been interpreted to include disputes as to whether specific performance should or should not be ordered. Then, such jurisdiction implicitly (and logically) carries with itself the power to enforce it.[51] Finally, arbitration clauses have been stretched to their limit in cases where the arbitrators have considered the reference to the need that the settlement of disputes through arbitration be "final" to imply that, without the power to order performance, the dispute could not be finally settled, and thus, the arbitrators could not have fulfilled the mandate with which the parties entrusted them.[52]

3.5.2 *Interpretation of arbitration rules and lex arbitri*

The previous discussion shows a real creativity effort in the interpretation of the agreement in order to extract the power to order non-pecuniary remedies. Nevertheless, sometimes it is hard to extract a solid foundation for that power from language as concise as that of a standard arbitration agreement. For that reason, we should also turn our attention to more complex frameworks, like arbitration rules and arbitration laws that are more suitable for drawing inferences as to the arbitrators' powers.

Although the following rules are silent on the remedial power *vis-à-vis* the final award, we may reach a conclusion on them by examining the provisions on interim measures of protection. The UNCITRAL

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[51] In *Freydberg Bros., Inc. v. Lewis Corey*, 177 Misc. 560, 31 N.Y.S.2d 10 (N.Y. Sup. 1941) the arbitrators used language in the arbitration clause that stated "Any dispute of any nature that might arise between us is to be adjusted by the American Arbitration Association, and the award is to be final and binding on both." [Emphasis added.] In a similar way, the arbitrators in *Suffolk Development Corp. v Pat-Plaza Amusement Corp.*, 236 N.Y.S.2d 71 interpreted in that sense an arbitration clause stating "any matter involving [...] failure to perform any provision of the lease.". In *J.J. Gregory Gourmet v Antone's Import*, 927 S.W.2d 31 (Tex. App. - Houston [1st Dist.] 1995) the clause read "All disputes, claims and questions regarding the rights and obligations of [AIC and J.J. Gregory] under the terms of this Agreement are subject to arbitration . . ." Finally, in a more international setting, the ICC Award 7453 of 1994 used as a basis an arbitration clause stating "All disputes arising in connection with the present contract . . .."

[52] In *General Fuse Co. v. Sightmaster Corp.*, 7 Misc.2d 997, 162 N.Y.S.2d 630 (N.Y.Sup. 1957) the parties submitted to arbitration a dispute over the valuation of a packet of shares. Because the parties had entrusted the arbitrator with the final resolution of the dispute, he not only valued the shares, but also ordered one of the parties to purchase them. In the ICC Award No. 7453 of 1994, the arbitrator supported the argument on the wide scope of the arbitration clause ("All disputes arising in connection with the present contract") by referring to the final resolution of the dispute through arbitration (the clause continued "shall be finally settled . . . by one . . . arbitrator") to draw his power from the agreement.

Arbitration Rules include in their Article 26 a reference to the arbitrators' power to order "any interim measures it deems necessary in respect of the subject-matter of the dispute." Such language is mimicked by Article 17 of the UNCITRAL Model Law on International Commercial Arbitration,[53] and also by the rules of the most important arbitration institutions.[54] Other texts, like the LCIA Arbitration Rules, or the Rules of the Chartered Institute of Arbitrators, include references to the possibility of ordering in a provisional way any relief requested for the final award.[55] Typical measures of interim protection are the orders of provisional performance or abstention.[56] Therefore, if arbitrators are entitled to order performance on a provisional basis, they should have the power to order it in the final award, as, in most cases, a provisional order to perform will serve the purpose of preserving the final decision on the performance of the contract.

3.5.3 Arbitrators' "inherent" power

The previous examples show that it is possible to build elegant rhetorical bridges between the written words of agreements, rules and laws, and the actual powers of arbitrators. Would it be possible to build such bridges in the air? In other words, could we justify an

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[53] Article 17 of the UNCITRAL Model Arbitration Law provides: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute . . ."

[54] ICC Rules state, in their Article 23 (*Conservatory and Interim Measures*), that "unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate." Similar language is employed by Article 43 of the Arbitration Rules of the China International Economic and Trade Arbitration Commission, Article 26 of the Swiss Arbitration Association Arbitration Rules, and Article 38 of the Netherlands Arbitration Institute Arbitration Rules, etc.

[55] The LCIA Arbitration Rules provide, in their Article 25: (*Interim and Conservatory Measures*) that:

> 1. The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:
> c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.

Article 7 (8) of the Chartered Institute of Arbitrators Arbitration Rules provide: "The arbitrator has power to grant relief on a provisional basis in respect of the following matters: [. . .](c) a provisional order for the grant of any relief claimed in the arbitration."

[56] BOND, Stephen R., The nature of conservatory and provisional measures, in: *Conservatory and Provisional Measures in International Arbitration*, Paris, ICC Publishing, 1993, p. 11.

arbitral power to order non-pecuniary remedies with no basis in the texts that serve as sources of and limits to such powers?

The evidence suggests that it is, indeed, possible, if we follow the "inherent" or "implicit" powers approach. According to it, besides those contained in the arbitration agreement, arbitration rules, and *lex arbitri*, arbitrators have the powers (including remedial powers) necessary to provide the function they were selected for, *i.e.*, to solve the parties' dispute effectively.[57]

Indeed, this view only goes one step further than the extensive interpretation we have discussed above. When the basis is the arbitration agreement, it is interpreted in the sense that the function performed by the arbitrators in the specific case necessarily implied the power to order performance or abstention. When the basis is in the arbitration rules, or the *lex arbitri*, again, the existence of the power is evaluated in accordance with what is necessary in the case at hand.

Thus, stating that, arbitrators generally have the inherent power to order performance of or abstention from certain acts is no more than drawing a general inference from the empirical evidence of specific cases. If it has been seen that arbitrators often need injunctive power in order to make a just decision, then a functional interpretation necessarily concludes that arbitrators need to have such power, regardless of the language of the arbitration agreement, arbitration rules, or *lex arbitri* (unless, of course, they explicitly exclude it).

This seems also to be the holding in case law.[58] The functional interpretation, or "inherent powers" argument, is sometimes found

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[57] *Vogel v. Simon*, 26 Misc. 2d 436, 201 N.Y.S.2d 877 (N.Y. Sup. 1960); *Suffolk Development Corp. v. Pat-Plaza Amusement Corp.*, 236 N.Y.S.2d 71 (N.Y. Sup. 1962); *United Electrical Radio and Machine Workers of America v. Honeywell Inc.*, 522 F.2d 1221 (1975); *Matter of Arbitration between Marine Engineers Beneficial Association, AFL-CIO and Isbrandtsen Company, Inc.*, 36 Misc. 2d 617, 233 N.Y.S.2d 408 (1962); *Miller Brewing Company v. Brewery Workers Local Union no. 9*, 562 F. Supp. 1368; ICC Award no. 7453/1994 *Yearbook of Commercial Arbitration*, Vol. XXII (1997), p. 107-124; *Service Employees International Union, AFL-CIO, CLC v. Local*, 70 F.3d 647 (1st Cir. 1995); *Cook v. Mishkin*, 95 A.D.2d 760, 464 N.Y.S.2d 761 (N.Y. App. Div. 1st Dept. 1983).

[58] In the United States this rule has its origin in the arbitration of labour disputes. Perhaps because of their complexity and their passionate and, sometimes, bitter nature, it was there earlier than anywhere else where the need for non-pecuniary remedies became evident. Labour arbitration disputes constituted the laboratory where the doctrines on the arbitrators' remedy power where first elaborated and tested. The landmark case law were the so-called "United Steelworkers Trilogy," named after three cases decided by the Supreme Court, all involving the named union: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigating Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In these cases, the Supreme Court set a presumption in favour of the competence and power of the arbitrators to fashion the appropriate remedy for the wrong. The applicable test was that the award "drew its essence" from the collective bargaining

together with arguments related to an expansive interpretation of the arbitration clause,[59] but in other cases it is the sole reason for the arbitrators' power.[60] Allowing an arbitrator to order injunctive relief without a basis in the arbitration agreement or the applicable rules was the last threshold to be crossed in arbitration's absorption of non-pecuniary remedies.

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agreement. In the third case of the trilogy, the Court tried to qualify an expanded interpretation of its former statements by adding that "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." Since then, however, the view gradually held was that the policy in favour of arbitration justified arbitrators' fashioning an adequate remedy according to the circumstances of the case, a sort of "inherent" power, only limited by the contract between the parties. See *United Electrical Radio and Machine Workers of America v. Honeywell Inc.*, 522 F.2d 1221 (1975) where the court stated: "While it is inappropriate for us to determine whether the contract before us would authorize an arbitrator to grant the declaratory and injunctive relief sought here, such relief is not *inherently* beyond the capacity of an arbitrator." With these precedents, and others where arbitrators had resorted to injunctive relief (*Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958) the use of this remedial power was extended to the field of general commercial and contract law. See *Linwood v Sherry*, 16 Misc. 2d 488, 178 N.Y.S. 2d 492, *aff'd without op.*, 7 App. Div. 2d 757, 181 N.Y.S. 2d 772 (1958); *Cook v. Mishkin*, 95 A.D.2d 760, 464 N.Y.S.2d 761, (N.Y. App. Div. 1st Dept. 1983), where the court stated of arbitrators that "Their function is to find a just solution to the controversy between the parties, and to that end it will be for them to "fashion the remedy appropriate to the wrong;" *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 689 F.2d 301, 306 (2d Cir. 1982); or *Advanced Micro Devices [AMD] v. Intel Corp.*, 9 Cal. 4th 362, 885 P.2d 994, 36 Cal. Rptr. 2d 581 (1994). In an international setting, the analysis has been much focused on the power to order interim measures of protection, where the "inherent powers" approach has taken root. See DONOVAN, Donald Francis, Powers of the Arbitrators to Issue Procedural Orders, including Interim Measures of Protection, and the Obligation of Parties to Abide by Such Orders, *ICC International Court of Arbitration Bulletin*, Vol 10, no. 1, Spring 1999, p. 61; McDONNELL, The Availability of Provisional Relief in International Commercial Arbitration, *Columbia Journal of Transnational Law*, no. 22 (1984), p. 273; HOELLERING, Michael F., The Practices and Experience of the American Arbitration Association, in: *Conservatory and Provisional Measures in International Arbitration* (Paris, ICC Publishing, 1993) p. 31. See, however, ICC Award 7453 of 1994.

[59] *Freydberg Bros., Inc. v. Lewis Corey*, 177 Misc. 560, 31 N.Y.S.2d 10 (N.Y. Sup. 1941); *Suffolk Development Corp. v. Pat-Plaza Amusement Corp.*, 236 N.Y.S.2d 71 (N.Y.Sup. 1962); *Vogel v. Simon*, 26 Misc. 2d 436, 201 N.Y.S.2d 877 (N.Y.Sup. 1960).

[60] *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 689 F.2d 301, 306 (2d Cir. 1982); ICC Award no. 7453 of 1994.

3.6 Orders of performance, arbitrators' power and the law applicable to the substance of the dispute

Until here we have analyzed the arguments in favour of arbitrators' power to order performance as if such were a procedural issue. However, as pointed out above, the question of arbitrators' powers remains relevant, even if the issue is treated as one of substance. In that case, one needs to examine the powers of the arbitrators in relation to the substantive law applicable to specific performance, and the degree of discretion they enjoy in this respect.

3.6.1 Arbitrators, orders to perform, and substantive law

This section attempts to answer the question of the extent of the arbitrators' margin of discretion in ordering performance under the applicable substantive law. On the basis of the case law examined, the answer is: "very wide." Examples support that arbitrators go far beyond what the standard interpretation of the law would authorize in awarding or denying an order of performance.

On the one hand, arbitrators sitting in common law jurisdictions have awarded specific performance in cases where, typically, the law provides for a denial of the remedy, such as contracts for personal services[61] or construction contracts.[62] In *Staklinski v. Pyramid Electric Company*, a leading case, the arbitrator ordered the reinstatement of a managing director of the company, since he considered that the contract clause on dismissal in case of disability had been wrongfully interpreted.[63] The arbitrator did not stop at the fact that, under a simple application of standard American contract law, the solution

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[61] DOBBS, Dan, *The Law of Remedies Damages – Equity – Restitution op. cit.* § 2.5(4) p. 98; TREITEL, Sir Guenter, *Remedies for Breach of Contract. A Comparative Account* (Oxford, Clarendon Press, 1988) p. 47; CORBIN, Arthur Linton, *Corbin on Contracts*, Volume 12; CORBIN, Arthur Linton, *Restitution, Specific Performance, Election of Remedies op. cit.*, §1164, p. 283; JONES, Gareth / GOODHART, William *Specific Performance, op. cit.*, p. 169; McCLINTOCK, *Handbook on Equity* § 61, p. 101; POMEROY, John Norton, *Pomeroy's Equity Jurisprudence and Equitable Remedies op. cit.* § 759, p. 1275. This was anticipated as a problem for the remedial power of arbitrators. See FLEMING, R.W., Arbitrators and the Remedy Power, *op. cit,*. p. 1215.

[62] AXELROD, Eliot L., Judicial Attitudes Toward Specific Performance of Construction Contracts, *University of Dayton Law Review*, Vol. 7, No. 2 (Fall 1981), p. 38; POUND, Roscoe, The Progress of the Law, 1918-1919, Equity, *Harvard Law Review*, Vol. 33, no. 3 (1920), p. 434; OLECK, Howard L., Specific Performance of Builders' Contracts, *Fordham Law Review*, Vol. 21 (1952), p. 156; LENNARD, Gary L., Specific Performance of Construction Contracts - Archaic Principles Preclude Necessary Reform, *Notre Dame Law*, Vol. 47 (1972). p. 1027.

[63] *Staklinski v. Pyramid Electric Co.*, 6 N.Y.2d 159, 160 N.E.2d 78 (N.Y. 1959).

would have been to compensate the aggrieved party.[64] In *Grayson v. Robinson Stores*, the arbitrators ordered the performance of a contract for the construction of a mall, even though for such agreements, as for all requiring extensive supervision of construction works, the remedy is generally denied.[65]

On the other hand, there are also examples where arbitrators have denied an order of performance, even if the applicable substantive law had provided for it. Such was, in our opinion, the case of the Zürich Chamber of Commerce arbitration award No. ZHK 273/95.[66] The case concerned an international sale of goods with the CISG as applicable law, and the buyer requested performance of the contract. Article 46 CISG provides for performance as of right, with few exceptions. Nevertheless, the tribunal denied the request with a shocking paucity of details as to why it did so. True, Article 28 CISG provides for the right of a court to deny the remedy when it would do so under its own law,[67] but this provision was primarily conceived for common law judges. Despite the fact that it would not be hard to expand the reference to a "court" so to include an arbitral tribunal.[68] Yet the problem would be to interpret the reference to "its own law," as it is not entirely clear what is the "own law" of an arbitral tribunal. It depends on the views of arbitration.[69] These views notwithstanding, in

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[64] Indeed, in the enforcement stage, the court admitted that the marginalization of specific performance was, in part, due to the specificities of the traditional division between jurisdiction at law, and jurisdiction in equity, something that was not applicable in arbitration. "The fact of the matter is that much of equity jurisdiction and relief is patterned on the assumption of the test of the adequacy of the relief at law. This has undoubtedly influenced the areas where equitable relief is denied on other substantive grounds, such as is involved here [. . .]. Hence, when there is an adequate remedy at law equity will the more quickly refrain from granting the extraordinary relief that has been historically associated with equity. *But in the case of arbitration no distinction is made between these forms of relief, the dichotomy of which is historically associated with the development of our courts.*" *Staklinski v. Pyramid Electric Company*, 6 N.Y.2d 159, 160 N.E.2d 78 (N.Y. 1959).

[65] *Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.*, 8 N.Y.2d 133, 168 N.E.2d 377 (N.Y. 1960).

[66] Arbitral Award ZHK 273/95 31st May 1996. Available at http://cisgw3.law.pace.edu/cases/ 960531s1. html.

[67] *Supra* § II.2.

[68] In this sense, see Article 1.11 of the UNIDROIT Principles, which provides that: "In these Principles [. . .] 'court' includes an arbitral tribunal . . .. "

[69] If arbitration is seen as a system that mirrors ordinary justice, then the role of arbitrators would be roughly equal to that of judges, being completely subject to the law, and with the only difference that they are appointed by the parties. If arbitration is seen as a contract, then the law will play no significant role unless the parties so provide, with the contract being almost the only source to be used by the arbitrators to draw their conclusions. Between these two views, there may be a multitude of mixed approaches, where the law plays a more or less significant role. Finally, other views have suggested that arbitration must be seen autonomously and independently from ordinary justice.

that case the arbitration took place in Switzerland, a civil law country whose law, like the CISG, exhibits a preference for specific performance. Thus, even applying Article 28 CISG in the context of arbitration, it would have been hard not to grant the request for performance in the specific case. Yet the arbitral tribunal denied it without much discussion on the contents of the law. The conclusion to be drawn is that, in case of arbitration, Article 28 CISG is, probably, inadequate and insufficient. The room it grants *vis-á-vis* specific performance is still too narrow compared with the discretion that arbitrators exercise in practice, as the Zürich Chamber of Commerce Award showed.

3.6.2 *Arbitrators, orders to perform, and public policy*

Even if arbitrators enjoy wide discretion when dealing with substantive law, they need to remain within the boundaries of public policy – either international, or of the country where the award needs to be enforced.[70] An arbitrator could thus see the triumph of a novel approach to performance be trounced by having the award set aside.

That being said, however, there is not much room for the operation of public policy principles in relation to orders of performance. That conclusion can be asserted authoritatively since the challenges to the enforceability of the award have been scant, unsuccessful, or unrelated to the remedy.

One of the challenges to the enforceability of an award containing an order of performance has been the argument arbitrators who, contrary to judges, lack *imperium* and could not have the power to make such an order.[71] Naturally, this objection was rejected on the

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Arbitration would constitute a service of dispute resolution, and arbitrators respond to that motive. Further on these jurisdictional, contractual, mixed and autonomous views of arbitration, see LEW, Julian, *Applicable Law in International Commercial Arbitration* (New York, Oceana, Dobbs Ferry, 1978) p. 189-198.

[70] See article V.2 (b) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[71] In the United States this matter was dealt with in early industrial disputes. At that time the views on arbitration could hardly be disentangled from those in ordinary courts. In consequence, the discussion on the expansion of arbitrators' power to grant remedies was argued in comparison with the powers of a chancellor. Obviously, such parallel inevitably drew on the public v. private nature of ones' and another's powers, and was resolved in the negative. In this sense, the Michigan Supreme Court stated that "an arbitrator is not a chancellor. He possesses no equitable powers excepting as the submission may expressly grant such. He is in no position to mollify, qualify, or straddle, and he has no right to dictate specific types of relief outside the scope of the submitted issue or issues, once he has decided the latter." *Carr v. Kalamazoo Vegetable Parchment Co.*, 354 Mich. 327, 332, 92 N.W.2d 295, 296 (1958). That an arbitrator is not the same as a chancellor, everyone can see. FLEMING, R.W., Arbitrators and the Remedy Power, *op. cit.* p. 1205. Once the differences in nature are settled, however, the question

grounds that the *imperium* does not relate to the order of performance, but to the coercive mechanisms that may be employed to make that order effective. Therefore, provided that those always lie with national courts, the *imperium* argument is not persuasive.[72]

In other cases, the objection to performance orders has been formulated by putting the notion of "public policy" on a level with that of "equity principles."[73] Such construction has suffered an outright rejection, as it would leave the door open for Anglo-Saxon courts to scrutinize the contents of any performance award, to check whether the solution complies with that expected from a court of equity.[74]

More particular subjects of controversy have been the limits to specific performance, and the debate over whether or not they could be characterized as public policy criteria. Public policy nature has been denied to the rules limiting specific performance in contracts with extended supervision,[75] or contracts for personal services.[76]

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is whether the fact that arbitrators draw their powers from the agreement precludes them from issuing imperative orders. And the answer is in the negative, since they have to rely on the State's enforcement mechanisms. See *Torno v Kumagai*, Paris Court of Appeal (1re Ch. Civ.), 19 May 1998.

[72] In *Torno v Kumagai* the court stated: "Et considérant que l'absence d'imperium de l'arbitre a seulement pour conséquence de le priver de tout pouvoir coercitif à l'égard des parties et des tiers en subordonnant notamment l'efficacité de sa décision à l'exequatur de l'autorité publique; qu'elle ne lui interdit pas en revanche, lorsque telle est sa mission, de prescrire aux parties des obligations de faire sauf à faire dépendre l'exécution forcée de sa décision du contrôle préalable de l'autorité publique." *Torno v Kumagai*, Paris Court of Appeal (1re Ch. Civ.), 19 May 1998.

[73] In *Young v. Deschler*, 202 Misc. 811, 110 N.Y.S. 2d 220 (Sup. Ct. 1952), though the court enforced the award, it left a dangerous precedent by stating that "A court will not render a decree which shocks good conscience or is otherwise offensive to equity," thereby supporting the view that an award has the nature of a contract.

[74] In *Staklinski v. Pyramid Electric Company*, 6 N.Y.2d 159, 160 N.E.2d 78 N.Y. (1959), the court firmly stated: "There is no controlling public policy which voids an arbitration agreement like this one and the courts are not licensed to announce a new public policy to fit the supposed necessities of the case." See also *Freydberg Bros., Inc. v. Lewis Corey*, 177 Misc. 560, 31 N.Y.S.2d 10 N.Y. Sup. (1941), where the enforcement court held: "Nor is there any merit to the claim that the arbitrators in the instant case may not properly award relief in the nature of a decree of specific performance. There is no rule of law limiting the relief which an arbitrator may award to money judgments, even in cases where no equitable decree would be proper if the controversy between the parties were being determined by a court rather than by arbitrators."

[75] *Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.*, 8 N.Y.2d 133, 168 N.E.2d 377 (N.Y. 1960).

[76] Though the problem of extended supervision was more clearly outside the scope of public policy, in the scenario of labour relations this issue was all but clear. Indeed, one of the unsolved problems left by the *United Steelworkers* Trilogy was that of cases where the remedy fashioned by the arbitrators drew its essence from the agreement but implied the specific performance of contracts for personal services. FLEMING, R.W., Arbitrators and the Remedy Power, *op. cit.* p. 1215. In the United States, this issue has been dealt

Finally, in some cases where a State interest constituted an obstacle to the order of performance, this concerned the actual enforcement rather than the substantive contents of the order, making it difficult to disentangle public policy from the Act of State doctrine. Such was the case in *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*[77] Arbitrators ordered the delivery of specific equipment, and, as a result of the United States trade restrictions towards Iran, delivery was not possible. The performance of the contract did not involve, in abstract terms, any violation of public policy. It was the

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with on several occasions. First, the problem was mainly restricted to a certain statute (the 1932 Norris-La Guardia Act, also known as the Anti-Injunction Bill) which was adopted as binding law in most of the States. Such law precluded from issuing injunctions in employment disputes. In *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958), there was a request for an injunction to enforce an anti-strike and anti-slowdown provision in the collective bargaining agreement. The arbitrator awarded it, and the award was enforced by the court, which held that, while the Norris-La Guardia Act represented an important policy, the award was also protected by another strong policy, namely that of favouring arbitration. Provided arbitrators drew their powers from the arbitration agreement and that it was not likely that the parties drafting such agreement intended to limit the powers of the arbitrators as to become ineffective, upholding the award constituted the best way to reconcile both arbitration policy, and the policy behind the Norris-La Guardia Act. The later evolution of these views led arbitrators to face the more cumbersome issue of the enforcement of an individual services contract in cases like *Freydberg Bros., Inc. v. Lewis Corey*, 177 Misc. 560, 31 N.Y.S.2d 10 (N.Y. Sup. 1941), where the award was upheld. Later, in *Staklinski v. Pyramid Electric Company*, 6 N.Y.2d 159, 160 N.E.2d 78 (N.Y. 1959), the dissenting opinion by Judge Burke said that the enforcement of the award was contrary to "the statutory policy confiding to directors the management of public corporations and the principles of equity barring injunctive relief of this nature." The majority view, however, upheld the award, arguing that there was no threat to personal freedom, which constitutes the main public policy concern in the enforcement of contracts for personal services.

[77] *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.* 969 F.2d 764 (9th Cir. 1992). In 1975, the Government of Iran entered into an agreement with Hoffman Export Corporation ("Hoffman") for the sale of military communications equipment and related services to Iran. In January 1978, all shares of Hoffman stock were acquired by Gould, Inc. The United States embassy in Teheran, Iran, was seized and diplomatic personnel taken hostage on November 4, 1979. Once the crisis ended, Iran and the U.S. reached the compromise of setting up the Iran-United States Claims Tribunal. Hoffman (later Gould) brought a claim before the tribunal for breach of contract, which the Ministry of Defence of Iran contested with a counter-claim by on the same terms. The tribunal held that neither party had breached the contract, since the hostage crisis amounted to a case of *force majeure*, with the result of the discharge of the parties' obligations under the contract. Besides monetary obligations, the tribunal held Gould to be "obligated to make available" to Iran certain communications equipment in the possession of GMI. According to the Court of Appeals, the Claims Tribunal award fell under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and thus was returned to the district court. The district court only modified the award in one respect: Respondents were relieved of the obligation to make available to Iran the communications equipment because the district court determined that "doing so would violate United States export restrictions."

actual delivery to the contract party that was problematic. Similarly, in investment arbitration, we find references to the denial of specific performance as a remedy on the basis that it cannot be ordered against a sovereign State – again, an objection that is unrelated to the contents of the obligation.[78]

In summary, public policy principles should not play a strong role in the issue of performance orders in arbitration. Even if the contents of an order of performance were contrary to public policy, the most normal situation would be that the very obligation for which compliance was requested was itself contrary to public policy (for example, a request for the performance of an agreement contrary to competition law). The objection would thus be to the right, not the remedy. The previous evidence should also suffice to trounce those views suggesting that specific performance is contrary to the foundations of international arbitration due to the enforcement problems they pose, and that specific performance should therefore be excluded on the basis of public policy principles.[79] Difficulty of enforcement does not, in itself, qualify as a public policy principle. Indeed, the reaction to difficulties encountered in rendernig justice should not generally be a retreat but a move forward, and a development of the legal mechanisms of enforcement.[80] Furthermore, far from the dismal and messy scenario depicted by the specific performance's detractors, the reception of the remedy in international arbitration,[81] and even in purely domestic arbitration in Anglo-Saxon countries,[82] can hardly be more encouraging. Finally, if awards ordering performance may create enforcement problems in an international setting, monetary awards have no guarantee of success either, as case law shows.[83]

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[78] *Libyan American Oil Co. (LIAMCO) v. Gov't of the Libyan Arab Republic* (1981) 20 I.L.M. 1.

[79] ELDER, Troy, The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes, *Arbitration International*, Vol. 13, No. 1 (1997).

[80] That is generally the argument employed by common law scholars to dismiss the difficulty of supervision as an absolute objection to the requests for specific performance. See AXELROD, Eliot L., Judicial Attitudes Toward Specific Performance of Construction Contracts, *op. cit.* p. 39; DOBBS, Dan B., *The Law of Remedies. Damages - Equity - Restitution, op. cit.* § 2.5(4), pp. 99-100

[81] See *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 689 F.2d 301, 306 (2d Cir. 1982); ICC Award no. 7453 of 1994; *Torno v Kumagai*, Paris Court of Appeal (1re Ch. Civ.), 19 May 1998.

[82] See *Cook v. Mishkin*, 95 A.D.2d 760, 464 N.Y.S.2d 761 (N.Y. App. Div. 1st Dept. 1983); *Staklinski v. Pyramid Elec. Co.*, 6 N.Y.2d 159, 160 N.E.2d 78 (N.Y. 1959); *Young v. Deschler*, 202 Misc. 811, 110 N.Y.S.2d 220 (Sup. Ct. 1952); *Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.*, 8 N.Y.2d 133, 168 N.E.2d 377 (N.Y. 1960).

[83] In order to prove the case against arbitral awards of specific performance, scholars have referred to case law in the context of disputes with a State party – specifically to the triad of cases after the Lybian nationalization process. See ELDER, Troy, The Case

4. WHAT'S NEXT? NON-PECUNIARY REMEDIES AND FUTURE CHALLENGES FOR ARBITRATION

The conclusion seems to be quite straightforward. If the issue is regarded from a more procedural perspective, arbitrators enjoy a wide power to make non-pecuniary orders, committing the parties' future activities. Nevertheless, even if the issue is regarded from a more substantive view, arbitrators have the broadest autonomy to frame non-pecuniary orders, the criteria of substantive law notwithstanding. Hence, this being an already settled issue, we should wonder whether and to what extent it is still worthy of further study.

The answer to this question is in the affirmative, as soon as we realize that all the examples used to illustrate the problem involved cases where the remedy requested was, merely, the specific performance of the contract terms. The issue becomes far more problematic when we abandon the comfortable scope of the strictness of contract terms, and jump into the field of orders whose content is partially based on the language of the contract but also on general duties, hence aiming at doing justice in the specific case, and restoring the balance between the parties. Such *pro futuro* orders (we cannot tag them as orders of performance anymore) demonstrate that the arguments and examples used for our previous findings constitute only the tip of the iceberg of a much wider problem. Perhaps this phenomenon is better explained through an example. Imagine two manufacturers of electronic equipment that conclude a general cooperation agreement, in which they undertake to exchange

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Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes, p. 26-29. First, account must be taken that cases with a State party do not illustrate the general remedial problems faced in a standard arbitration, but a specific and very idiosyncratic case. Second, the triad of Lybian cases would serve, if anything, to prove the opposite point for which they are raised. Of these cases, in the *Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Gov't of the Libyan Arab Republic*, 17 ILM 1 (1978) (Dupuy, sole arb., 1977) (*Topco* case), the private party requested specific performance, *i.e.*, compliance by the Lybian government with the investment contract and restitution of the concession, and the arbitrator conceded it. On the other hand, in *Libyan American Oil Company (LIAMCO) v. Gov't of the Libyan Arab Republic* (1981) 20 I.L.M. 1 (*LIAMCO* case) the arbitrator denied the request for specific performance and awarded damages instead. When we come to the enforcement process, the *Topco* case was settled quickly and amicably: *Topco* renounced its right of performance in exchange for monetary compensation, which was promptly paid by the Lybian government. ,The *LIAMCO* case, on the other hand, went through a whole enforcement nightmare, with several processes in different countries aimed at seizing the State's assets, with the increased cost this implied, only to have several of them denied on the basis of the State's immunity from execution. See CRAIG, W. Laurence; PARK, William W.; PAULSSON, Jan, *International Chamber of Commerce Arbitration* (3rd ed., New York, Oceana Publications, 2000), p. 672.

technology in order to both ensure a secondary source of it. After some time, one of the companies begins to act reluctantly with regard to its part of the agreement, haggling over minor details, in what seemed a wilful attempt to delay the compliance with its duties. The other party took the issue to arbitration. The arbitrator found that the balance of the agreement had been upset and needed to be restored. For that purpose, he ordered the breaching party to grant the other a free license for a specific product. The original contract between the parties, however, did not include any explicit reference to it. Did the arbitrator act within her powers?

If some may think this case a bit outlandish they only need to examine the records of *Advanced Micro Devices (AMD) v. Intel Corporation.*[84] In that case, the arbitrator issued an order (equitable remedy, in his words) that, despite being a performance order, did not call for the strict performance of the specific contents of the contract. In such a case, even with the precedents on specific performance, the response as to whether the arbitrator was entitled to order such a remedy was less than clear. After the award was rendered, the enforcement stage turned into a tennis match, with the first instance confirming the award,[85] the second revoking the decision and denying enforcement,[86] and finally the Supreme Court of California upholding it again.[87]

The possible reasons for a sense of uneasiness with these kind of remedies are diverse. First, it could be argued, if an order does not call for the strict performance of the contract, the relationship between right and remedy is less immediate.[88] That makes it necessary, again, to scrutinize the issue carefully from the procedural perspective of the powers of the arbitrators. Moreover, orders like this, unlike traditional

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[84] *Advanced Micro Devices [AMD] v. Intel Corp.*, 9 Cal. 4th 362, 885 P.2d 994, 36 Cal. Rptr. 2d 581 (1994).

[85] *Advanced Micro Devices [AMD] v. Intel Corp.*, 858 P. 2d 567 (Cal. 1993).

[86] *Advanced Micro Devices [AMD] v. Intel Corp.*, 16 Cal. App. 4th 346, 348 (Cal. Ct. App. 1993).

[87] *Advanced Micro Devices [AMD] v. Intel Corp.*, 9 Cal. 4th 362, 885 P.2d 994, 36 Cal. Rptr. 2d 581 (1994).

[88] In a brilliant article, Professor Chayes dealt with the evolution of litigation in the field of public law, one of whose main factors was the disentanglement of right from remedy. CHAYES, Abram, *The Role of the Judge in Public Law Litigation*, 89 HARVARD L. REV. 1281, 1299-1300 (1976). We merely took the liberty of extrapolating his conclusions to the field of private law. Indeed, we argued before that the division between substance and procedure was the more subtle when the connection between right and remedy was closer. See COOK, Walter Wheeler, 'Substance' and 'Procedure' in the Conflict of Laws, *op. cit.* p. 343; *Copylease Corp. of Am. v. Memorex Corp.*, 408 F. Supp. 758 (S.D.N.Y. 1976). Thus, the looser the relationship, the more we approach the procedural perspective, where uncertainty reigns.

justice, are not intended to solve past grievances but to articulate the parties' future relationship. That "executive" or "management" task is extraneous or, at least, unsettling, to the essence of adjudication.[89]

In the context of our study, however, we need to focus not so much on general questions of jurisprudence, but on actual problems of arbitration. And the fact is that the previously described exercise of remedial power still constitutes a puzzle, even if the debate is restricted to the exercise of the arbitral function, and poses problems for which there is not a unique and clear answer.

We should begin by examining the problem of contract modification by arbitrators. Although there is some experience with the application of equitable devices such as reformation of contracts in the arbitral context,[90] arbitrators are still wary of the limits of their power to modify a contract if the parties have not expressly authorized them to do so.[91] Now let us take a glance at the case previously described. By using his remedial power to issue an order of performance, the arbitrator was, in reality, modifying the contract, introducing new obligations into the parties' relationship.[92]

This immediately poses a problem of coherency. Theoretically, contract modification and contract remedies should be two different aspects with respect to the powers held by the arbitrators. It seems, however, that such is not the case anymore: the expanded use of orders to perform is transforming them into instruments to change the contract, but without the proper scrutiny of that mechanism.

There is a second concern that such *pro futuro* orders should raise. Current dispute resolution systems are evolving, and increasingly combine elements of arbitration with others from mediation and conciliation. As a result, those mechanisms can be inserted within the

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[89] Professor Lon Fuller already analyzed the compatibility of *pro futuro* orders with the judicial function, answering in the affirmative. See FULLER, Lon, *The Forms and Limits of Adjudication*, 92 HARVARD L. REV. 353, 391-392 (1978).

[90] Initially, arbitrators requested an express authorization by the parties. See *In re Vincent J. Smith, Inc.*, 19 A.D.2d 763, 241 N.Y.S.2d 507 (1963). However, the position later evolved towards the admission of such remedy as an almost "inherent" feature of arbitral powers. *SCM Corp. v. Fisher Park Lane Co.*, 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398 (1976). See BEDELL, Stephen P; EBLING, Louis K., *Equitable Relief in Arbitration: A Survey of American Case Law*, 20 LOYOLA L. J., 1, 55 1988.

[91] See UNCITRAL Award of May 4, 1999, *Yearbook of Commercial Arbitration* no. 13 (2000), p. 61, taken by Professor Berger to exemplify the cumbersome nature of the problem of the ability of arbitrators to modify the contract. See BERGER, Klaus Peter, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 36 VAND. J. TRANSNAT'L L. 1347, 1353 (2003).

[92] Indeed, the arbitrator was creating *ex novo* a (free) license for technology that the parties had not contemplated in their original agreement. See *Advanced Micro Devices [AMD] v. Intel Corp.*, 9 Cal. 4th 362, 885 P.2d 994, 36 Cal. Rptr. 2d 581 (1994).

contractual relationship and not merely used as a last resort for irreversible crises. That implies a more flexible role for arbitrators, but also the confusion between the exercise of arbitration and mediation functions and between the formation, performance, non-performance, and remedial stage of the contract. In this context, it will be increasingly hard to distinguish between orders of performance, orders to preserve the *status quo* during the negotiation/arbitration, orders to restore the contractual balance and allow a productive negotiation, orders that attempt merely to bring parties to the negotiating table, and orders whose purpose is to enforce a general duty of good faith, in the contract or during the negotiations.[93]

Again, this poses an evident problem of coherency. If arbitrators are awarded more discretion under a particular kind of order than under another, they are likely to employ it for ends it was not conceived for and to engage in "power-shopping," picking the doctrine most adequate for their purposes.

5. CONCLUSION

Despite the disdain exhibited by scholarly writing, the issue of non-pecuniary remedies has erupted onto the arbitration stage and plans to stay, gradually playing a more significant role. The increased complexity of disputes; the need for arbitrators as service providers to offer a better and more comprehensive performance, and the incorporation, in some cases, of the dispute resolution mechanism into the formation, execution and completion stages of the contract, pose challenges for which the basic elaborations provided so far can hardly give an answer.

In the cases examined, the problem of non-pecuniary orders was each time dealt with according to the very specific circumstances of the case, which created a sort of balkanization of the issue. The willingness

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[93] In *Advanced Micro Devices* it was not entirely clear whether, besides restoring the balance between the parties, the arbitrator fashioned the described remedy as a means of punishing Intel for failing to comply with its duty to negotiate in good faith and, if so, whether that would be a duty under the contract, or a duty of the negotiation process once the dispute arose. Burton, for example, argues that the remedy had an exemplary component. See BURTON, Steven J., Combining Conciliation with Arbitration of International Commercial Disputes, 18 HASTINGS INT'L AND COMP. L. REV. 637, 648-49 (1995),. Regarding this problem, again, the parallel with industrial relations cases can be useful, since in that context we see the manifest need for arbitrators to adapt to a dynamic environment where negotiation is alternated with performance, and arbitrators must be capable of shaping the parties' agreement and enforce its provisions, as well as the general duties of good faith. See FLEMING, R.W., Arbitrators and the Remedy Power, *op. cit.* p. 1199-1200.

to respect specificities notwithstanding, this article argues for the need of an approach based on uniform principles.

Those uniform principles necessarily have to address our problem from several perspectives. First, the limits of an expansive interpretation of the arbitration clause and the arbitration rules chosen by the parties need to be ascertained. That perspective also needs to distinguish between cases where the parties merely intend to settle past grievances and cases where there are problems likely to stretch themselves into the future. Second, when applying arbitration laws, we need to examine the strength of national public policies supporting arbitration to stand a clash with the policy supporting the respect for the letter of the contract. Third, a better effort needs to be made to define the arbitral functions when mediation, negotiation, conciliation and arbitration are closely intertwined. Only in this way may an imperative order made by an arbitrator be evaluated, and the excesses of power be tackled.

In summary, reason needs force to be imposed (words and paper are nothing without the swords of men, said the *Leviathan*). In the case of arbitral *pro futuro* orders the problem is the opposite, as the policies supporting arbitration have backed every exercise of power by arbitrators to order non-pecuniary remedies. It is now time to build rules and principles to be the framework within which such force is to be exercised.