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What's Next? – Practical Ponderings on Arbitrators and Overturned Jurisdictional Awards

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There are a number of questions that influence how arbitration treats cases in which an award is challenged successfully. A court overturns an award declining jurisdiction, but what's next? The easy answer, and certainly the practical one is for the arbitrator to resume the case and render an award on the merits.

When trying to justify why this should be so, the easy answer becomes more complicated. To clarify the justification of this seemingly obvious answer, the following thoughts and conclusions prompted this note. Hopefully, you will feel moved to comment and equally share your views.

A. Is the arbitrator still around? – This is not litigation after all

In cases of more than two parties or more than one issue or both, in which the arbitrator declines jurisdiction for a party or an issue, the arbitrator is still on hand, assuming the decision is rendered as an award which can be decided by the courts while the remainder of the arbitration is either ongoing or stayed. In all other cases, the arbitration is for all practical terms concluded.

When an arbitration is concluded, the arbitrator turns back into a normal person and is no longer an arbitrator. This process is technically called functus officio. *Functus officio* begins when the arbitrator concluded her business. It is argued that this is the same moment and the same extent to which res judicata begins. Unaffected by *functus officio* are possibilities to (i) interpret, (ii) correct, (iii) supplement or (iv) revise an award.

Resuming arbitration could thus be based on interpretation, correction, supplementation or revision duties of an arbitrator. The first two are directed at minor clerical errors or a clarification of what had already been stated. These two are not directed at an entire absence of an award on the merits. They are inapplicable to awards purely on jurisdiction. The third and fourth options are more promising. Is making a decision on the merits, which has not been rendered before, an addition to the award? Alternatively, could this process be qualified as revising an existing final award, when it does not merely supplement but entirely change the outcome? I suggest that it is neither.

Arbitrations, which are neither stayed nor continued, but end without any decision on the merits, leave nothing to be supplemented. The merits were entirely excluded. Merits have not been

decided and thus needs to still be decided upon, so that the extent of the supplementation would equal a full merits decision. This is not a supplementation but a entirely new award. The same is true for revision.

Arbitrations which are stayed or continued, while a judicial decision on a jurisdictional issue is pending, could possibly produce effects which require supplementation or revision. This is only true insofar as any decision, beyond the jurisdictional one, had been taken and such decision would be altered by the decision on the "new" merits. Only in such cases would a technical revision be appropriate and serve as basis for the arbitrator to re-take the case. This cannot be taken as the general rule. As a note aside: if a decision had been taken without a party that should have been in the proceedings, it violates due process with regard to this party and the decision must be set aside.

In short, resuming the arbitration cannot be based on (i) interpretation, (ii) correction or (iii) supplementation. Resuming arbitration previously dismissed for want of jurisdiction can be based on (iv) revision only if a previous merits award forms an integral part of an already rendered award. In most cases these awards will have to be set aside in any case, so that a revision is not an appropriate remedy.

Once an award is overturned the case returns to the "unsolved" status. The legal effect of anything decided evaporates. In short, the award still needs to be made, and the arbitrator returns to her status *ex tunc*, and is not *functus officio*. The arbitrator's source of the authority to resume the case is clear: the original arbitration contract.

What happens if the arbitrator is no longer available? Can an arbitrator decline on the basis that she already rendered an award? One would hope that here the rules are settled. They are not. I decline commenting on the precise duties of an arbitrator here It is only clear that the arbitrator needs to decide all issues put before her. One could argue that the arbitrator fulfilled her duties with the jurisdictional award, even when that is overturned.

Regarding decisions on jurisdiction, the duty of the arbitrator is more than merely making one decision. In jurisdictional issues, the arbitrator has competence-competence and the first bite at the apple when it comes to deciding what and who becomes part of arbitration and thus is subject to her obligation. However, in no jurisdiction and especially in light of the New York Convention's permission of review concerning jurisdiction (to a limited extent), the arbitrator's discretion on her decision is limited.

A part of arbitration is that the arbitrator knows that by accepting to serve, competence-competence is subject to review. The mandate may be slightly different from what she thought and decided initially. This is decidedly different from a decision on the merits. From a contractual point of view (no matter the jurisdiction of the arbitrator's contract or the seat of the arbitration), she remains contractually bound to decide the case, even after she initially declines jurisdiction, if a competent court disagrees.

The arbitrator is not liberated from her duty to decide by the concept of arbitrator immunity in cases of declined jurisdiction. I decline to comment on the exact extent of arbitrator immunity. The basic tenant is that the arbitrator is immune for claims based on the performance of their adjudicative functions. In short, an arbitrator does not have to be perfect or even right when making decisions on matters before her, unless she acts in bad faith. Given that a jurisdictional award would be set aside, an arbitrator who declines to resume a case because she declined

jurisdiction and was overturned would most likely be considered bad faith. Another twist is the issue of a court of enforcement rather than a court of original jurisdiction of the seat orders a "remand".

Assuming that a contractual duty as outlined above exists, two practical problems rear their heads:

One should be very reluctant to force an arbitrator into specific performance., If unwilling, the arbitrator effectively ceases to be the arbitrator and cannot be forced to come back. The remedy for a violation of contract in an arbitrator contract is damages, not specific performance.

Two, even if specific performance (i.e., a remand) was ordered, it is often the result of a judgment or order by a court in which the parties are combatting the award and to which the arbitrator is not a party.

French courts decided that the arbitrator is not party to a judgment on the validity of on award. (*Judgment of 16 December 1997, Van Luijk v. Société Commerciale Raoul Duval*, 1999, Rev. Arb. 253 (French Cour de Cassation civ 1e.)) A traditional remand is not possible, as the court has no jurisdiction to decide the actions of a party foreign to the litigation. Under English law, where the arbitrator's contract is interpreted as part of the underlying arbitration agreement (*Compagnie Européenne de Céréales SA v. Tradax Exp. SA* (1986) 2 Lloyd's Rep. 301 (Q.B.)), including the arbitrator, the remand binding would be possible. However, English law is the exception.

Technically, if there were a reluctant arbitrator, a new case would have to be brought to order her compliance, in so far as this is possible in the jurisdictions involved.

Having discussed that the arbitrator is not *functus officio* when an award on jurisdiction is set aside, I would like to conclude with examples from one of my own jurisdictions. Even though Switzerland orders parties to return to original arbitrator (see e.g. *Swiss Federal Court 4A_433/2009*), there are issues of potential partiality, especially when a (partial) decision on merits had already been made (so in the *United States Murchison Capital Partners, L.P. v. Nuance Communications., Inc.*, 760 F.3d 418 (5th Cir., July 25, 2014).

A general answer to "remand" the case to the original arbitrator cannot be sufficient. Sometimes it may be appropriate – nay – necessary to re-appoint another panel, or even let the courts decide. In my view, in the narrow realm of jurisdictional cases, a remand to the original arbitrators seems the most appropriate.

As is common in arbitration, the variations are colorful. The inquiry – what's next? – can be answer like this: If a court overturns a decision on jurisdiction, the contractual obligation of the arbitrator re-ignites *ex tunc*. However, she cannot be forced to take the case again by the court setting aside the jurisdictional award.

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