Infra Petita in International Arbitral Awards: The Incomplete Reforms of Two Major Operators in International Arbitration

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Résumé

Le sort des sentences arbitrales infra petita *a fait l'objet de nombreuses questions et incertitudes. Si une partie de la doctrine, certaines lois nationales et certains règlements d'arbitrage ont parfois considéré l'*infra petita *comme un fondement à l'annulation d'une sentence arbitrale, il semble être communément admis aujourd'hui que l'*infra petita *fait plutôt l'objet d'un complètement de la sentence par le tribunal arbitral. En effet, les droits nationaux prévoient cette solution explicitement dans leur législation ou au travers de leur jurisprudence. Les règlements d'arbitrage contiennent, en principe, des dispositions similaires. Toutefois, deux acteurs majeurs en matière d'arbitrage international ont été et sont parfois encore réticents à adopter cette solution de manière explicite. Bien que la réforme du droit français de l'arbitrage prévoie enfin clairement le recours au complètement des sentences en matière d'arbitrage international, ces nouvelles dispositions sont insuffisantes et*

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peuvent soulever des difficultés pratiques. Le Règlement d'arbitrage de la Chambre de Commerce Internationale, quant à lui, ne prévoit toujours pas la possibilité pour le tribunal arbitral de compléter sa sentence infra petita, *en dépit de la récente réforme de 2012. Malgré une indéniable avancée vers l'uniformisation du droit de l'arbitrage international dans le cadre de sentences* infra petita, *il n'en demeure pas moins que des divergences et par conséquent des difficultés pratiques subsistent et nécessitent encore des éclaircissements.*

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The issue of *infra petita* in international arbitration has never been fully dealt with by national laws or arbitration rules. An arbitral award is regarded as *infra petita* when the tribunal omits to decide over a head of claim raised by the parties. The main question raised is that of the consequence of *infra petita* awards. Although *infra petita* could be considered to be indicative of the tribunal not having respected the mission confided in it by the parties, it has long been uncertain whether it should be considered as a reason for the annulment of an arbitral award[2] or be subject to a specific regime.[3] Literature and legislations seem to have been against considering *infra petita* as a motive for annulment of an arbitral award.[4] This is only sensible: in fact, the annulment of an award is based on and restricted to only a few grounds and is to be applied only when necessary. Hence the limited number of annulments granted, and only for legitimate reasons. Besides, why cancel an award and restart arbitration

[2] E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International (1999), §1417.

[3] E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, *op. cit.*, §1626-1630.

[4] X. Nyssen, S. Nataf, "L'infra petita dans les sentences rendues en France en matière d'arbitrage international", *Rev. arb.*, Vol. 4 (2010), pp.792-793.

proceedings for the entirety of the claims raised within a dispute when one can have the issue left undecided dealt with only and the award completed? Writers have therefore pleaded for the possibility of having an award completed in cases of *infra petita.*[5] However, this invitation to decide over the heads of claim omitted by the tribunal raises other issues and elements to be considered. Indeed, the tribunal's potential power to complete its award is limited in scope and time. First, in scope, as *infra petita* requires that a head of claim be omitted by the tribunal. And yet, this simple notion is already obscure and raises various questions such as: what is a 'head of claim' exactly,[6] but especially, what happens if the head of claim omitted is intertwined with one already decided over by the tribunal in its award?[7] Second, in time, as this power of the tribunal is only available within short periods of time after the awards have been rendered. This time restriction raises an issue as to the interplay between the various and different periods of time allocated in national laws and arbitration rules.

National laws (I) and institutional rules (II) have been behind in properly dealing with this issue of *infra petita* awards. And, even if most of them provide today arbitral tribunals with the possibility to complete their awards, one cannot fail to notice the limits of the systems of at least two of the main players in international arbitration.

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[5] E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration, op. cit.*, §1414.

[6] E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration, op. cit.*, §1417.

[7] The development of this notion of 'head of claim' is not the object of this article. However, one can consider that if the heads of claim are intertwined and the tribunal did decide over one of them, there would be no *infra petita.* Indeed, the tribunal could be considered as having dealt with the problematic head of claim along with with the other one and implicitly dismissed it.

I – *Infra petita* in domestic laws

In spite of a few shortcomings, national laws have in majority provided for or at least agreed on the concept of completion of incomplete awards (A). The acceptance of such completion in cases of international arbitration has materialized in French law through the reform of French arbitration law dated 13 January 2011 (B).

A. Domestic laws in favour of completion of *infra petita* awards

Most of the national laws in the main arbitration hubs tend to allow tribunals to complete their awards when they have omitted to decide over a head of claim brought before them by the parties.[8]

On the one hand, many national laws present a very unambiguous solution to cases of *infra petita* by explicitly allowing completion of awards by the arbitral tribunals.

For instance, Section 57 of the 1996 English Arbitration Act provides for the corrections of awards and additional awards. The text gives the parties the freedom to agree on the powers of the tribunal to make an additional award and allows the tribunal, on its own initiative or on the application of a party, to "*make an additional award in respect of any claim [...] which was presented to the tribunal but was not dealt with in the award.*"

[8] A. Redfern, J. M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration*, Oxford University Press (2009), Chapter 9, §§ 9.199-9.201.

Just as the English Arbitration Act, the Spanish one provides in its Article 39 for the "*issue of a supplement to the award.*"[9] Furthermore, Article 1715 of the Belgian Judicial Code,[10] Article 1061 of the Netherlands Code of Civil Procedure, Section 32 of the Swedish Arbitration Act, Article 51(2) of the Egyptian Law No. 27/1994,[11] Article 535 of the Brazilian Code of Civil Procedure,[12] Article 166 of the Argentinean Code of Civil and Commercial Procedure,[13] Article 33(4) of the Indian Arbitration and Conciliation Act, as well as Article 43 of the Japanese arbitration law all contain the same mechanism of completion.

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[9] It allows the arbitrators, upon the request of one of the parties, to "*supplement the award as to claims presented in the arbitral proceedings and not resolved in the award.*"

[10] Previously Article 1708 and recently modified by Law modifying the sixth part of the Belgian Judicial Code regarding arbitration dated 24 June 2013. This new article will enter into force on 1st September 2013 and allows the parties, unless otherwise agreed between them, to ask the arbitral tribunal to complete its *infra petita* award. This is an improvement of the previous provision on completion of awards since Article 1708 used to provide for the completion of an award by the arbitral tribunal but only after referral of the parties to it by the Civil Court and unless disputed by the other party.

[11] Article 51(2) of Law No. 27/1994 promulgating the Law Concerning Arbitration in Civil and Commercial Matters (as amended by Law No. 9 of 1997): "*either of the parties to arbitration may, even after the expiry of the time limit for arbitration, request the arbitral tribunal [...] to issue an additional award on a claim submitted by such party in the course of the proceedings and overlooked by the arbitral tribunal.*"

[12] This article allows any of the parties to make an appeal, called *embargos de declaração*, of a decision if it is obscure and contradictory or has omitted a matter that should have been covered, this appeal being decided by the same judicial authority that issued the original decision.

[13] This provision allows any party to arbitral proceedings to file a motion requesting the arbitral tribunal to clarify the terms of an award. Such motion can invite the arbitral tribunal to provide an answer to any omission that may have been incurred on some of the claims deduced and discussed in the proceedings.

On the other hand, certain solutions offered by national laws are more uncertain and subject to interpretation and decided upon in some circumstances by case-law. Some laws seem to allow, for instance, completion of awards by their own courts; or do not contain any provisions on completion of *infra petita* awards, but rather seem to include it as a ground for annulment of an award. Nonetheless, most courts seem to have granted tribunals the possibility to cure omissions from their awards, even in the absence of specific provisions to this regard.

Although very similar to the English law, the Scottish arbitration law does not contain any explicit provisions regarding *infra petita*. Article 58 of the Arbitration Scotland Act 2010 only focuses on correction of clerical errors and interpretation of the award. Instead, Article 68 allows an appeal "*against the tribunal's award on the ground of serious irregularity [which is defined as] an irregularity of any of the following kinds which has caused, or will cause, substantial injustice to the appellant [...] the tribunal failing to deal with all the issues that were put to it.*" Based on the similarities of the Scottish regime to the English one, one might be lead to believe that appeals of awards in Scotland can only be limited to specific circumstances and are therefore rare.[14] The courts (although not the arbitral tribunal) are invited to complete the award instead of cancelling it, by varying it or varying part of it (Rule 67(2)(b)) or by asking the tribunal to reconsider its award or part of it (Rules 68(3)(b) and 70(8)(b)).

[14] *Lesotho Highlands Development Authority v. Impregilo SpA,* House of Lords decision (2005) UKHL 43, in Nathalie Meyer Fabre, Carla Baker Chiss, "La nouvelle loi écossaise sur l'arbitrage (Arbitration (Scotland) Act 2010)", *Rev. arb.* 2010, Vol.2010, Issue 4, pp.810-811, and which qualifies Article 68 of the Arbitration Act 1996 of 'high threshohd' and focuses on limiting the intervention of domestic courts in the arbitration proceedings.

Section 11 of the United States Federal Arbitration Act authorizes the federal district court where an award was made to modify or correct the award upon the request of one of the parties in certain specific cases. However, this section does not refer to *infra petita* situations or precise whether the arbitral tribunal is entitled to complete such awards. Still, the completion of an award by the tribunal seems to be accepted in practice in the US. Indeed, in March 2001, a US District Court[15] ordered the remand of a 1994 ICC award to the sole arbitrator, finding that his award did not 'fully adjudicate an issue that had been submitted', and that he therefore had 'not exhausted his function as to that issue'. For the District Court, clarification of amounts owed under the award required the arbitrator 'to complete his duties by applying his reasoning to the facts and [did] not reopen the merits of the case'.

In Switzerland, and pursuant to Article 190(2)(c) of the PILA, an award can be challenged and set aside if the arbitral tribunal "*failed to rule on one of the claims.*" There seem to be no provision dealing with the correction and interpretation of an award let alone with its completion in case of *infra petita.*

French arbitration law was also one example of this lack of complete and effective solution in matters of international arbitration. Although paragraph 2 of Article 1475 of the *Code de procédure civile*[16] (Code of Civil Procedure) ("CPC") did

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[15] *M & C Corp. v. Erwin Behr GmbH & Co.*, No. 91-74110 (E.D. Mich., 30 March 2001), in Brooks W. Daly, *Correction and Interpretation of Arbitral Awards under the ICC Rules of Arbitration*, ICC International Court of Arbitration Bulletin VOl. 13 No. 1 (2002), p.69.

[16] Paragraph 2 of Article 1475 CPC provided that "*l'arbitre a néanmoins le pouvoir d'interpréter la sentence, de réparer les erreurs et omissions matérielles qui l'affectent et de la compléter lorsqu'il a omis de statuer sur un chef de demande. Les articles 461 à 463 sont applicables. Si le tribunal*

provide for the completion of awards by arbitral tribunals, this provision was only applicable to local arbitrations. In the case of international arbitration awards, it has long been discussed whether *infra petita* was to be a ground for the annulment of an award or simply resolved by completion of the latter. And yet, Article 1495 CPC applicable to international arbitration[17] seemed to refer, *inter alia*, to Article 1475. It could therefore be construed that, even when it came to international arbitration in France, the arbitral tribunal had the power to complete the award when it did not decide on a head of claim raised by the parties. It also implied that if the tribunal could not be constituted again, it was within the powers of the relevant jurisdiction/court if there had not been any arbitration to decide over the head of claim left unsolved. Article 1475 referred to Article 463 CPC when it came to *infra petita*, and therefore to domestic rules applicable to French courts and French decisions.

Therefore, the only solution to *infra petita* in international arbitrations held in France was to refer and apply rules formerly destined to solve *infra petita* in French decision. Literature and case law then extended this practice and applied these rules to international arbitration.[18] French case-

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arbitral ne peut être à nouveau réuni, ce pouvoir appartient à la juridiction qui eût été compétente à défaut d'arbitrage." (English translation: "Nonetheless, the arbitral tribunal has the power to interpret the award, to correct clerical errors and omissions in it and to complete it when it has omitted to decide over a head of claim. Articles 461 to 463 are applicable. If the arbitral tribunal cannot be brought together again, this power belongs to the courts which would have had jurisdiction in the absence of arbitration proceedings.")

[17] This article is applicable only when the international arbitration proceedings are governed by French law and unless otherwise agreed by the parties or provided by Articles 1493 and 1494 CPC.

[18] E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, *op. cit.*, §1628; X. Nyssen, S. Nataf, "*L'infra petita* dans les sentences rendues en France en matière d'arbitrage international", *op. cit.*, pp.788-792.

law in fact repeatedly held that the omission to decide over a head of claim was not a ground for annulment of the award.[19]

B. *Infra petita* in the reform of the French arbitration law

The reform of 13 January 2011 meant to develop, specify and adapt French arbitration law. The result of this reform is the elaboration of more accurate and specific rules. And yet, this reform seems to have partially failed in its aim when it comes to *infra petita* awards in international arbitration. Although the new text now provides for completion of international arbitral awards, the provisions and solution granted are incomplete.

Regarding domestic arbitrations in France, Article 1475 CPC on *infra petita* was replaced by Article 1485 of the CPC. But the content of the article remained the same. Alongside Article 1492 which provides for the cancellation of the award

[19] Angers Court of Appeal, 28 September 1987, *Rev. arb.* 1988, p.162, obs. M.-C. Rondeau-Rivier; Paris Court of Appeal, 25 March 1997, unpublished (summary available on www.lexisnexis.fr/lnjcpro, under jurisdata number 1997-022128); Civ. 2nd, 7 January 1999, *Rev. arb.* 1999, p.272; Paris Court of Appeal, 7 February 2008, *Société Société française de rentes et de financement Crédirente c/ Compagnie générale de garantie SA, Rev. arb.* 2008, p.501, obs. J.-B. Racine; Paris Court of Appeal, 19 June 2008, *SA Domaxel achats et services c/ société Etablissements Laurent Gagnaire, Rev. arb.* 2008, p.835; Paris Court of Appeal, 27 November 2008, *Société GFI informatique SA c/ société Engineering Ingegneria Informatica SPA et autre, Rev. arb.* 2009, p.229; Paris Court of Appeal, 12 March 2009, *Prince Moulay Hisham Abdallah et autre c/ société Consolidated Contractors Group SAL Holding Company et autre, Rev. arb.* 2009, p.432; Paris Court of Appeal, 12 March 2009, *Société SAS Delta air plus c/ Montaz, Rev. arb.* 2009, p.433; Civ. 1st, 10 October 2012, unpublished (available on www.legifrance.gouv.fr, under appeal number 11-18405); Paris Court of Appeal, 20 November 2012, *Société Industria Conciaria Virginia Spa c/ société Forward Leather Company et autre, Rev. arb.* 2012, p.879.

if the tribunal failed to comply with its mission,[20] Article 1485 *CPC* provides that:

> "*La sentence dessaisit le tribunal arbitral de la contestation qu'elle tranche.*
> *Toutefois, à la demande d'une partie, le tribunal arbitral peut interpréter la sentence, réparer les erreurs et omissions matérielles qui l'affectent ou la compléter lorsqu'il a omis de statuer sur un chef de demande.* [...]
> *Si le tribunal arbitral ne peut être à nouveau réuni et si les parties ne peuvent s'accorder pour le reconstituer, ce pouvoir appartient à la juridiction qui eût été compétente à défaut d'arbitrage.*"[21]

Therefore, French arbitration law provides for completion of a domestic award by the arbitral tribunal or by the competent courts if the tribunal cannot be constituted again. Article 1486 CPC adds that the parties have to request such completion within 3 months following the notification of the award.

The main difference lays in the provision for *infra petita* in international arbitration. On the one hand, just as Article 1492 for domestic arbitration does, Article 1520 CPC

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[20] "*Le recours en annulation n'est ouvert que si [...] 3° le tribunal arbitral a statué sans se conformer à la mission qui lui avait été confiée.*" (English translation: "An annulment action is only available if [...] 3° the arbitral tribunal has decided without respecting the mission confided in it.")

[21] English translation: "The award relieves the arbitral tribunal of its mission over the dispute it decides.
However, the arbitral tribunal can, upon the request of one of the parties, interpret the award, correct the clerical errors and omissions in it and complete it when it has omitted to decide over a head of claim. [...]
If the arbitral tribunal cannot be brought together again and if the parties cannot reach an agreement to constitute it again, this power belongs to the courts which would have had jurisdiction in the absence of arbitration proceedings."

provides for the cancellation of the award if the tribunal failed to comply with its mission[22] in cases of international arbitration. But, on the other hand, Article 1506 CPC on international arbitration now specifically and explicitly refers to paragraphs 1 and 2 of Article 1485 CPC set out above. Article 1506 and therefore this referral to Article 1485 are applicable in France for all international arbitration awards.

Therefore, Article 1506 seems to settle the debate on *infra petita* in matters of international arbitration and establish with certainty that the action to set aside is not applicable in French law to *infra petita* awards in international arbitration. *Infra petita* awards are now clearly and explicitly subject to Article 1485 CPC.

This new provision, however, does not solve all the issues in French law in terms of *infra petita* awards in international arbitration. Whilst trying to provide with a solution and an explicit provision, the legislator failed to provide a full and complete regime governing *infra petita* awards. Article 1506 CPC refers to paragraphs 1 and 2 of Article 1485 and therefore allows completion of an *infra petita* award. It does not however refer to paragraph 3 of the article which provides for a solution, in domestic arbitration, in case the reconstitution of the arbitral tribunal is impossible. This provision is therefore not applicable to international arbitration awards.[23] In the case of *infra petita* awards

[22] "*Le recours en annulation n'est ouvert que si [...] 3° le tribunal arbitral a statué sans se conformer à la mission qui lui avait été confiée.*" (English translation: "An annulment action is only available if [...] 3° the arbitral tribunal has decided without respecting the mission confided in it.")

[23] Beyond the problem of the application of this paragraph to international arbitration awards, one can wonder what the aim of this provision really is. Indeed, apart from cases of physical incapacity in which the arbitrators could not be brought together again, an arbitral tribunal can always be gathered together or reconstituted. Even more so, if we consider that the tribunal is not *functus officio* since it did not answer all heads of claim

rendered in proceedings governed by French law in matters of international arbitration, the legislator did not provide any solution if the arbitral tribunal cannot be constituted again. The only recourse for an *infra petita* award under French law is to have the award completed by the arbitral tribunal itself. If the tribunal cannot be constituted again, the parties do not have any other option and are therefore stuck with an incomplete decision. One conceivable solution is that the parties start new arbitration proceedings concerning the heads of claim omitted in the initial arbitration. But such a solution goes against the fundamental principles of efficiency and celerity of arbitration proceedings.

One can't help but wonder why, while reforming French arbitration law, the legislator left such an issue undealt with. Was this a simple unintentional omission or did he intentionally refer through Article 1506 CPC to paragraphs 1 and 2 of Article 1485 only? A close reading of paragraph 3 of the article leads us to think that this omission was entirely intentional.

Indeed, paragraph 3 of Article 1485 provides that "*Si le tribunal arbitral ne peut être à nouveau réuni et si les parties ne peuvent s'accorder pour le reconstituer, ce pouvoir appartient à la juridiction qui eût été compétente à défaut d'arbitrage.*"[24] In international arbitration, the courts which would have had jurisdiction in the absence of arbitration can be the courts of another State. However, the French legislator

raised by the parties. The tribunal therefore need not be reconstituted by the parties. This interpretation can be comforted by the opposition between paragraphs 1 and 2 of Article 1485 CPC – the tribunal is *functus officio* but for the correction, interpretation and completion of its award – in which cases it still has jurisdiction.

[24] English translation: "If the arbitral tribunal cannot be brought together again and if the parties cannot reach an agreement to constitute it again, this power belongs to the courts which would have had jurisdiction in the absence of arbitration proceedings."

cannot enact such a rule. He is not entitled to decide over the jurisdiction of any courts but those of his State. It therefore seems like the French legislator abstained from referring to this paragraph 3 in matters of international arbitration in order not to impose jurisdiction on other States' courts. By doing so, he left a void as to the fate of *infra petita* awards rendered in France in matters of international arbitration and concerning which the arbitral tribunal cannot be reconstituted.

And yet, the legislator could have limited the extent of this void. Indeed, paragraph 3 of Article 1485 could apply in international arbitration if the courts having jurisdiction in the absence of arbitration were the French courts. The legislator could have therefore replaced paragraph 3 with a unilateral conflict of jurisdictions rule which would have designated the French courts if those would have had jurisdiction in the absence of arbitration proceedings. According to Berthold Goldman,[25] Article 1475 CPC (now Article 1485 CPC) was to apply to any international award, rendered in France or abroad, under the indispensable condition that the French courts would have had jurisdiction over the dispute settled in this award, pursuant to the applicable conflict of jurisdictions rules. The solution to this legal void would therefore be, in conformity with Berthold Goldman's proposition, to deem paragraph 3 of Article 1485 applicable in matters of international arbitration (even if not referred to by Article

[25] *In* N. Garnier, "Interpréter, rectifier et compléter les sentences arbitrales internationales", *Rev. arb.* 1995, p. 565, §12, "*l'article 1475 CPC devait s'appliquer 'à toute sentence internationale, qu'elle soit rendue en France ou à l'étranger, quel qu'en soit le caractère, sous la condition indispensable que le juge français eût été compétent sur le litige tranché par cette sentence*". (English translation: "article 1475 CPC had to apply 'to any international award, whether rendered in France or abroad, whatever its characteristics are, under the indispensable condition that the French courts would have had jurisdiction over the dispute settled in this award").

1506), with its application limited to the cases only where the competent courts would have been the French ones, in the absence of arbitration proceedings.

In spite of this shortcoming, the recent explicit application of Article 1485 CPC to international arbitration awards is valuable. Indeed, the debate as to whether *infra petita* could be a ground for annulment of an award is put to an end. The completion of awards for heads of claim left unanswered is the most adequate solution to this simple but long debated issue. Such completion being a simple addition to the initial award, it would not modify, alter or annul any of its content. It is therefore in line with the unanimously accepted principle of finality of arbitral awards. The will to protect the efficiency of arbitration is thus twofold in this situation: one must protect the efficiency and security provided by arbitration, *i.e.* on the one hand, the efficiency found in the finality of the award and, on the other hand, the efficiency of arbitration in the possibility to complete the incomplete award by referring the omitted issues to the arbitral tribunal and not have recourse to annulment or worse, leave the outstanding claims unresolved.

II – *Infra petita* in institutional arbitration rules

Just as national laws, most arbitration rules deal with the issue of *infra petita* awards (A.). By contrast, the ICC Rules, a major player in the world of international arbitration, are silent when it comes to this issue. This silence raises considerable difficulties in practice, mainly for the party victim of such an award (B.).

A. Arbitration rules explicitly providing for the completion of awards

Many arbitration rules authorize the making of supplementary awards by the tribunal.[26] When such rules have been chosen by the parties as applicable to the proceedings, the arbitrators have no choice but to apply this provision for completion.

All the major institutional arbitration rules do contain explicit provisions to this regard.[27]

As in French law, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") provides for the annulment of an award in very specific cases[28] and for the possibility of having the award completed in case of an *infra petita* decision. As in the context of French law, annulment is therefore not available for *infra petita*. Article 49(2) of the ICSID Convention provides that: "*The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award* [...]. *Its decision shall become part of the award and shall be notified to the parties in the same manner as the award* [...]". Article 49 of the ICSID Arbitration Rules provides further procedural details for such requests.

Article 39(1) of the 2010 UNCITRAL Arbitration Rules also provides for the possibility for a party, "*within 30 days after*

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[26] G.B. Born, *International Commercial Arbitration*, Kluwer Law International (2009), p.2544.

[27] A. Redfern, J. M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration, op. cit.*, Chapter 9, §§9.202-9.206.

[28] Including cases where "*the Tribunal has manifestly exceeded its powers*", Article 52 of the ICSID Convention.

the receipt of the termination order of the award", to "*request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.*"

This possibility is also set out in Article 33(3) of the UNCITRAL Model Law on International Commercial Arbitration, "*unless otherwise agreed by the parties* [and] *within thirty days of receipt of the award*".

Similarly (almost identically), Article 30(1) of the AAA International Arbitration Rules grants the parties the possibility to request, "*within 30 days after the receipt of an award, [...] the tribunal to [...] make an additional award as to claims presented but omitted from the award.*"

Finally, Article 27(3) of the LCIA Rules also allows the parties, "*within 30 days of receipt of the final award*" to "*request the Arbitral Tribunal to make an additional award as to claims or counterclaims presented in the arbitration but not determined in any award.*" This provision in fact already existed in the 1985 LCIA Rules.

This same provision is repeated, although under a slightly different wording, in several other institutional arbitration rules, such as the Association française d'arbitrage Arbitration Rules (Article 17(3)), the WIPO Arbitration Rules (Article 66(c)), the CAMCA Arbitration Rules (Article 32(1)), the Inter-American Conciliation and Arbitration Commission (Article 34(1)), the German Institution of Arbitration (DIS Rules) (Section 37), among others.

These explicit provisions provide "*a mechanism for a tribunal to resolve claims that might otherwise lead to an "excess of authority" challenge to an award under Article V(1)(c) of the New York Convention*" and similar national law

provisions.[29] Contrary to the provisions of French law, these articles do not mention at all the notion of an arbitral tribunal *functus officio*. The absence of such notion therefore entails that the tribunal needs not be reconstituted and that the completion of an *infra petita* award is within the mission of the tribunal confided in it by the parties. The completion of an award is therefore within the powers inherent to the arbitral tribunal.

B. Silent arbitration rules

The ICC Rules seem to be the only institutional arbitration rules lacking specific provisions for the completion of awards. But while it is true that they do not explicitly provide for such completion, they do not forbid it either.

The 1998 ICC Arbitration Rules did not provide any solution for *infra petita* awards. Indeed, Article 29 of the Rules, born from the reform creating the 1998 Rules, only referred to the correction of clerical, computational or typographical errors and the interpretation of an award.[30] The 2012 reform of the Rules did not imply any change either as to completion of awards, and Article 35 (previously Article 29) still refers to the correction of clerical, computational or typographical errors or the interpretation of an award only.

The question therefore raised is whether the silence of the rules implies the definite exclusion by these rules of the possibility to have the arbitral tribunal complete an award or whether it could be possible to apply to ICC proceedings the provisions of national laws in favour of the completion of

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[29] G.B. Born, *International Commercial Arbitration*, *op. cit.*, p.2542.

[30] X. Nyssen, S. Nataf, "L'*infra petita* dans les sentences rendues en France en matière d'arbitrage international", *op. cit.*, pp.786-787.

awards? Is this absence a void which must be fulfilled by the laws applicable to the proceedings?

During the discussions around the new draft of the 1998 ICC Rules, the question was raised as to whether a party should have a right to file a request for an additional award. The ICC National Committees decided against such provision which they claimed would have encouraged improper requests and been contrary or at least redundant with the ICC Court's scrutiny process (Article 27 of the 1998 ICC Rules, now Article 33 of the 2012 ICC Rules).[31]

The discussions held now over the necessity of a provision in the ICC Rules for the completion of awards follow the exact same pattern as those over the necessity of provisions in the Rules for the correction of clerical errors and interpretation of awards. The 1975 Rules did not contain any provisions on correction or interpretation of awards for the same reasons now raised against a provision on completion, being that such provisions were not necessary providing the existence of the Court's scrutiny procedure.[32] The similarities between the questions of correction and interpretation on the one hand and completion on the other render a similar evolution and resolution of the debate likely.

Although no such provisions were included in the 1975 ICC Rules, the ICC Court allowed in practice arbitral tribunals to correct an award, or to provide an interpretation where necessary.

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[31] M. Blessing, "The ICC Arbitral Procedure under the 1998 ICC Rules: What has changed?", *ICC Bull.*, Vol.8, No. 2 (December 1997), §24.

[32] *Id.* See also X. Nyssen, S. Nataf, "L'*infra petita* dans les sentences rendues en France en matière d'arbitrage international", *op. cit.*, pp.786-787.

More specifically, the ICC Court had the opportunity to decide, in case 6653, that the arbitral tribunal was empowered to interpret an award and correct clerical errors and omissions, and that the silence of the Rules was not to be interpreted as a rejection of this possibility.[33]

As explained by Jean-Jacques Arnaldez[34] and Nathalie Garnier[35], Article 30 (previously Article 24) of the Rules providing for the finality of the award and Article 33 (previously Article 27) providing for the scrutiny of the Court did not exclude the possibility for interpretation, correction and completion. Indeed, the finality of the award only applies to the heads of claim decided over in the award which can therefore not be discussed again.[36] The provision for scrutiny of the awards by the Court does not prevent from any further errors and need for clarification. Even if the latter are very rare, it is certainly preferable to allow parties victims of an incomplete award to make a request for completion before the tribunal rather than force them to commence new arbitration or national proceedings. This interpretation of Articles 30 and 33 of the Rules is comforted by Article 41 (previously Article 35) which provides that "*the Court and the arbitral tribunal [...] shall make every effort to make sure that the award is enforceable at law.*" In order to guarantee the efficiency and enforceability of awards, it should be necessary to give the arbitrators the possibility to complete them.

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[33] Extracts in J.J. Arnaldez, Y. Derains & D. Hascher, *Collection of ICC Arbitral Awards 1991-1995*, Kluwer Law International (1997), pp.525-529.

[34] J.J. Arnaldez, Y. Derains & D. Hascher, *Collection of ICC Arbitral Awards 1991-1995*, *op. cit.*, pp.525-529.

[35] N. Garnier, "Interpréter, rectifier et compléter les sentences arbitrales internationales", *op. cit.*, §7.

[36] The completion of an award, in the shape of an addendum (as for corrections and interpretations), would in fact not be a new award or a replacement of the previous award, but simply an addendum which will be deemed to be incorporated in the former award.

In addition, the tribunal's mission cannot be deemed to be over and the tribunal *functus officio* if some heads of claim still have to be decided over, even if an award was rendered.[37] The arbitral tribunal's mission is the one defined by the parties. Therefore, if one of the heads of claim raised by the parties has not been dealt with, the arbitrators' mission is not fulfilled and they are therefore not relieved of their duties. The initial incomplete award can therefore be considered as a partial or temporary award, which does not put an end to a tribunal's mission. This reasoning is confirmed by the absence of any such notion from the provisions on completion of any of the institutional rules detailed above.

Furthermore, and in the silence of the Rules, Article 19 seems to allow for completion if provided for by the applicable procedural law.[38] The article provides for the "*proceedings before the arbitral tribunal* [to] *be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.*"

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[37] See A. Redfern, J. M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration*, *op. cit.*, Chapter 9, §9.198, where completing an award is considered as an exception "*to the general rule that an arbitral tribunal becomes* functus officio *on the issue of a final award*". Same position adopted in E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, *op. cit.*, §1414. See also, G.B. Born, *International Commercial Arbitration*, *op. cit.*, pp.2513-2520; X. Nyssen, S. Nataf, "L'*infra petita* dans les sentences rendues en France en matière d'arbitrage international", *op. cit.*, p.792.

[38] G.B. Born, *International Commercial Arbitration*, *op. cit.*, p.2544; X. Nyssen, S. Nataf, "L'*infra petita* dans les sentences rendues en France en matière d'arbitrage international", *op. cit.*, pp.786-787.

Furthermore, in its Guide to ICC Arbitration, the Secretariat brought clarifications concerning the possibility for completion of awards. It said:

> "*The arbitration law at the place of the arbitration may grant parties additional rights relating to the completion of awards. For example, some laws allow parties to request an additional award addressing claims presented in the arbitration but omitted from the award. In many instances, these additional rights will be waivable or subject to contrary agreements between the parties. By agreeing to ICC arbitration, the parties may in such cases be limited to the scope of correction and interpretation permitted by Article 35(2). In this regard, the Secretariat's Note on Correction and Interpretation of Arbitral Awards ("Note") states as follows:*
>
> *Where the relevant national law or court practice provide specific circumstances in which an arbitral tribunal may render certain decisions other than corrections or interpretation regarding an award which had been approved and notified, such situations shall be treated in the spirit of this Note.*
>
> *The arbitral tribunal will therefore need to determine whether its power to revise the award is limited to the provisions of Article 35(2), or whether additional non-waivable (or non-waived) rights exist under local law. The Court has in a number of exceptional cases approved addenda in which arbitral tribunals have relied on the law at the place of the arbitration to correct omissions in their awards.*"[39]

[39] The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC

This Note and the comments of the Secretariat are therefore open to the possibility of additional awards provided that national laws or courts allow them. This approach has been confirmed for instance in the ICC case 9235[40] in which the arbitrators went beyond Article 29 to complete their award and based their competence on the Egyptian law applicable to the proceedings.

Already under the 1988 Rules which did not provide for correction or interpretation of awards, the ICC itself had decided, regarding the US case *M & C Corp. v. Erwin Behr GmbH & Co*,[41] that corrections and interpretations were a matter for the arbitral tribunal and had invited the sole arbitrator to decide on his own jurisdiction. The Court's decision therefore suggests that the absence of a provision for correction and interpretation (and by extension for completion) should not be interpreted as an absolute exclusion of this type of action when ordered by a national court. Under the same ICC Rules, the Swiss Federal Tribunal held that, as the Rules did not exclude them, correction and interpretation of awards may be available if permitted by the *lex arbitri*. In that specific case, and since Swiss law which was the *lex arbitri* provided for correction and interpretation of awards, the arbitral tribunal was found to have jurisdiction to interpret its award.[42]

International Court of Arbitration, ICC Publication No. 729E (2012), §§3-1277, 3-1278.

[40] *In* Brooks W. Daly, *Ibid*, p.68.

[41] *In* Brooks W. Daly, *Id*, p.70; see also ICC Case No. 6233/1992, Yearbook, XX (1995), p. 58, in which the arbitral tribunal refused the interpretation of an award in application of French provisions allowing it because the arbitral proceedings were not governed by French law. *A contrario*, it is possible to deduce that had French law been applicable to the proceedings, the tribunal would have accepted to interpret the award pursuant to Article 1475 CPC.

[42] Swiss Federal Tribunal, 1st Civil Court, 2 Novembre 2000 (2001), *ASA Bull.* 88.

And yet, this Note and the necessity to rely on national laws set forth by the ICC seem to be in contradiction with the idea that it is of the tribunal's duty to complete its award. As explained above, the absence of reference to a tribunal *functus officio* in any other arbitration rules seems to entail that completion of an award is within the powers inherent to the arbitral tribunal. However, in accepting the tribunal's power to complete its award only if national laws or courts provide for it, the ICC seems to consider that this power is an exception and requires explicit permission.

In addition, the lack of specific provision on completion in the ICC Rules raises another issue, that of the period of time within which the parties can bring the *infra petita* award before the tribunal. Indeed, most arbitration rules[43] grant the parties the possibility to request the completion of an award within 30 days after the award.[44] However, in the silence of the ICC Rules, what is the period of time applicable to completion and after which the tribunal becomes in fact *functus officio*, 30 days as granted for correction and interpretation or the period of time granted by the national law applicable to the proceedings?[45] In this case, it seems reasonable to consider that the period of time granted to the parties is that of the national laws applicable to the proceedings and providing for completion.

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The avoidance of *infra petita* awards is essential as such awards can be interpreted as providing grounds for refusing

[43] And in fact the ICC Rules themselves regarding correction and interpretation of awards.

[44] And sometimes within 30 days after receipt of the award.

[45] For instance, French law grants the parties 45 days to bring a request for completion before the arbitral tribunal.

enforcement under the New York Convention as within the arbitrators' excess of authority set forth in Article V(1)(c) of the Convention. It is therefore necessary to set out a uniform and complete system of completion of awards applicable throughout international arbitration law which would fill in the gaps left by some institutional rules if not by some national laws. Although we are now tending towards this uniform system, prominent laws and rules such as the French arbitration law or the ICC Rules are still incomplete and raise considerable difficulties and inconsistencies. Most importantly, the impact of *infra petita* awards on the mission of the tribunals needs to be clearly set forth. Such an explanation is indeed essential and could simplify – if not solve – the entire debate on *infra petita* awards.