Under most developed national arbitration regimes, arbitrators have broad discretion in fashioning relief.\(^1\) Although the type of award most often made by an international arbitral tribunal is one that grants monetary compensation, non-monetary remedies that comprise specific performance, of which an important sub-group is *restitutio in integrum*, and declaratory relief are also awarded when requested by the parties. Yet, some commentators consider that specific performance as such is rarely used to finally settle the dispute between the parties.\(^2\) It still has a marginal status even if it may prove useful.\(^3\) Recently, however, an arbitral tribunal found that there is ample practice to the contrary. Specific performance is ordinarily granted in cases where remedy in the form of money damages is inappropriate because it is either inadequate or impractical. Several elements may be taken into account to find a satisfactory substitute to monetary compensation: the difficulty of proving damages and the difficulty of collecting damages.

A declaratory award has a different purpose. It establishes the legal position of the parties definitively and has binding effect as between the parties. It may be a useful device especially where the parties have a

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\(^2\) An arbitral tribunal pointed out, in an award rendered in 1973, that specific performance “is a concept which has hardly ever been used in international law.” See British Petroleum Company (Libya) Ltd. v. The Government of the Libyan Arab Republic, Award on the Merits (Oct. 10, 1973), reprinted in P. Sanders ed., *Y.B. Comm. Arb.* 143 (1980). In that case, the arbitrator held that “*restitutio in integrum* and specific performance refer to the same problem.”

continuing relationship and want to resolve the dispute between them without the risk of damaging their relationship. Declaratory relief is a remedy often used if there is nothing to be actively enforced, but it is often granted with monetary compensation or other kind of remedies such as, for example, specific performance.

The main issue arising in respect of non-monetary remedies such as declaratory relief and specific performance is that of appropriateness. This issue involves examination of factual elements but also legal factors that include the question of recognition and enforcement.

**SPECIFIC PERFORMANCE AND DECLARATORY RELIEF IN ARBITRAL PRACTICE**

Orders for specific performance may cover different kinds of obligations, depending on the parties’ contractual obligations: transfer of a patent, production of documentation contractually required, payment of commissions, replacement of defective goods, taking delivery of goods, delivery of goods, drawing on proceeds of letter of credit, payment of security for costs.

Arbitral tribunals may award specific performance as a preliminary or provisional measure, for example, to secure the claim which is examined or to finally resolve the dispute. An award requiring a party to pay security for the costs of the arbitration may also be considered as an order of specific performance. Thus, such decision may have a definite or a provisional binding effect.

The obligation to submit to arbitration disputes covered by the arbitration agreement is itself capable of specific performance. Indeed, as pointed out by Messrs. Fouchard, Gaillard, and Goldman, “if the only remedy for a party’s refusal to perform an arbitration agreement were an award of damages, that arbitration agreement would be of little value.”

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5 See Born, supra note 1, at 813.


7 A party may, for example, request from an arbitral tribunal an award requiring the other party to continue performance of the contract until the dispute is finally settled. See the example cited by Alan Scott Rau in “Provisional Relief in Arbitration: How Things Stand in the United States,” 22(1) J. Int’l Arb. 1 (2005).