

Award and Its Contents

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28 November 2014

Definition of Award

- Award in arbitration ↔ judgment in court litigation
- Award provides a final decision on a substantive issue in the case
- Three basic conditions:
 - Award must result from an agreement to arbitrate
 - Awards must meet certain minimum formal characteristics:
 - Be in writing
 - Be issued and signed by an arbitral tribunal
 - Intended to be a final determination of an issue
 - Awards must resolve a substantive issue, not a procedural matter
 - E.g., determination of jurisdiction, liability, damages; interlocutory decisions; decisions on provisional measures

Award v. Order

- Order: procedural decision // Award: substantive decision
- Orders deal with procedural issues relating to the conduct of the arbitration
 - E.g., scheduling of hearings, exchange of written submissions, document production
- The distinction between orders and awards is not always clear
 - E.g., a ruling on a statute of limitations issue could be viewed as either procedural or substantive
 - What about security for the costs of arbitration?
- Importance of Distinction
 - Only awards qualify for recognition/enforcement under the applicable international conventions
 - If a decision is an award, the time limit for challenging it begins to run
- Different tribunals may use different terminology to refer to their procedural decisions (e.g., award, order, decision, direction). The name is not dispositive of its classification

Types of Awards

- **Partial Awards**
 - Decisions that finally dispose of part, but not all, of a party's claims
 - E.g., Award for damages for a particular breach of contract
- **Interim Awards**
 - Decisions that finally decide an issue relevant to disposing of a claim, but do not finally dispose of the claim
 - E.g., Choice of law determination
 - These types of awards can save considerable time and expense by resolving key issues
 - A possible disadvantage of partial and interim awards is that they may provide the disappointed party with an opportunity to delay the proceedings by applying for judicial intervention to nullify or set aside the award
- **Final Awards**
 - Decisions that conclude the dispute that the tribunal was appointed to decide
 - The tribunal's jurisdiction ceases to exist (*functus officio*)

Types of Awards (cont'd)

- Awards by Consent
 - As in litigation, many international commercial arbitrations settle before a final award is issued
 - Upon settlement, parties can either agree to terminate the arbitration or jointly seek an award by consent
 - Consent awards allow the parties to have the arbitral tribunal reduce the parties' settlement terms into findings by the tribunal
 - Consent awards carry the same status for recognition/enforcement purposes under the New York Convention as any other awards
 - If the settlement will require any further performance by one or both of the parties, it may be advisable to obtain an award by consent as a precautionary measure
- “Default Awards”
 - Different from default awards in court litigation: full award on merits, even though respondent(s) did not appear

Components of an Award

I. Description of background

- Background to arbitration (parties, arbitral tribunal, arbitration agreement, applicable arbitration rules, applicable substantive law)
- Procedural background
- Factual background
- Parties' claims and contentions

See, e.g., 2012 Decree (France):

II. Article 1481

The arbitral award shall state:

- (1) the full names of the parties, as well as their domicile or corporate headquarters;*
- (2) if applicable, the names of the counsel or other persons who represented or assisted the parties;*
- (3) the names of the arbitrators who made it;*
- (4) the date on which it was made;*
- (5) the place where the award was made.*

Components of an Award (cont'd)

II. Reasoning

- Tribunal reasons towards its decisions
- Reasoned awards are the standard in international commercial arbitration
 - Due deliberation (colleagiality); avoids the risk of mistaken, arbitrary or compromise decisions, provides the parties with the opportunity to understand how their arguments have been approached; increases the chances of voluntary compliance
 - Parties are always free to agree that no reasons shall be provided
 - New York Convention does not require that reasons be provided in order for an award to be enforceable

See, e.g., Article 31(2) ML:

Article 31. Form and contents of award

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given [...].

Components of an Award (cont'd)

III. Dispositive part

- Decisions on claims and counterclaims
- Interest
- Costs

Dissenting Opinion

- Stems from common law jurisdictions
- Dissenting opinions are less common in international arbitration, but they do exist
 - Civil law arbitrators are beginning to embrace the concept
 - Most arbitral institutions do not prohibit dissenting opinions, and some expressly allow them
- Dissenting opinions may be annexed to the award or delivered separately to the parties
 - In either case, the dissent does not form part of the award
- In some jurisdictions, a dissenting opinion may imperil the validity of the award or the likelihood of enforcement

Permissible Remedies

- Most common form of remedy: monetary damages
- Depending on the *lex arbitri*, however, panels may have wide latitude to issue many other types of remedies including:
 - Specific performance
 - Restitution
 - Punitive damages
 - Correction of a contract
 - Gap Filling and adaptation of a contract
 - Injunctions
 - Declaratory Relief
 - Interest
 - Costs

Costs of the Arbitration

- Costs of the arbitration include:
 - Fees and expenses of the arbitral tribunal
 - Administrative expenses of the arbitral institution
 - Fees and expenses of tribunal-appointed experts
- Costs of the parties:
 - Fees and expenses of counsel
 - Fees and expenses of party-appointed experts
 - Fees and expenses of fact witnesses
- Money spent preparing and presenting the case (expenses by in-house personnel; copy, telephone and fax charges; cost of renting space for meetings and hearings; etc.)

Costs of the Arbitration (cont'd)

- Tribunal can take into account the parties' procedural behavior during the arbitration
 - This allows arbitral tribunals to punish bad faith or uncooperative behavior
 - IBA Guidelines on Party Representation, Section 26 . Remedies for Misconduct:

26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may: [...]

(c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs;

- Art. 37(5) ICC Rules:

In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

Interpretation and Correction of Awards; Amendment / Additional Award

- Correction:
 - Generally, the *lex arbitri* and/or arbitration rules allow an arbitral tribunal to correct any mistakes or clerical errors in its award, within a limited period of time after the award was rendered (30 days)
 - *sua sponte*, or
 - upon request of a party
- Interpretation:
 - Generally, the *lex arbitri* and/or arbitration rules allow an arbitral tribunal to clarify an ambiguity in its award within a limited period of time after the award was rendered (30 days)
 - In theory, interpretations should only explain the original award more clearly, and should not amend or alter it
 - Because of the possibility that the interpretation will alter the substance of the award, interpretation is more controversial than mere correction of mistakes
- Correction and Interpretation are issued as Addendum / Decision

Interpretation and Correction of Awards; Amendment / Additional Award (cont'd)

- Amendment / additional award:
 - If an arbitral tribunal fails to deal with any of the claims presented to it, the *lex arbitri* and/or arbitration rules sometimes afford the tribunal the power to amend its award or to issue an additional award
- Costs
 - Should the Arbitral Tribunal be paid for this additional work?

Remission of Awards

- Art. 35(4) ICC Rules:

Where a court remits an award to the arbitral tribunal [...]. The Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses.

- Article 34 ML. Application for setting aside as exclusive recourse against arbitral award:

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Res judicata

- ILA 2006 Recommendations on *Res Judicata* and Arbitration:

3. An arbitral award has conclusive and preclusive effects in further arbitral proceedings if:

3.1 it has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration;

3.2 it has decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings;

3.3 it is based upon a cause of action which is invoked in the further arbitration proceedings or which forms the basis for the subsequent arbitral proceedings; and

3.4 it has been rendered between the same parties.

Res judicata (cont'd)

- ILA 2006 Recommendations on *Res Judicata* and Arbitration:

4. An arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to:

4.1 determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto;

4.2 issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.

Functus officio rule

2012 Decree (France), Article 1485:

Once an award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award.

However, on application of a party, the arbitral tribunal may interpret the award, rectify clerical errors and omissions, or make an additional award where it failed to rule on a claim. The arbitral tribunal shall rule after having heard the parties or having given them the opportunity to be heard. [...]

Time-limit for Rendering Award

- Art. 30 ICC Rules:
 - 6 months, extendable
- Art. 10 (B) Turkish Arbitration Act:

B) Unless otherwise agreed by the parties, an award shall be rendered within one year, in the case of a sole arbitrator, from the date of his appointment or, in the case where there is an arbitral tribunal, from the date when the minutes of the tribunal's first meeting are kept.
- Importance / consequence of failure to observe

Notification and Publication

- The arbitral tribunal or the arbitral institution sends each party an original signed version of the award
 - The parties are equally provided with a copy of the dissenting opinion
 - Importance of the date of notification
 - On a request, an award may be “certified” (/ “apostilled”)
- Due to confidentiality reasons, full versions of awards are not generally published or provided to third parties
 - Some institutions will publish sanitized versions with the parties’ names redacted
 - See, e.g., ICC Bulletin

ICC Practice

CASE No. _____

ICC AWARD CHECKLIST 2012 RULES

Disclaimer: This Checklist is intended to provide arbitrators acting under the ICC Rules of Arbitration with guidance when drafting Awards. It does not constitute an exhaustive, mandatory or otherwise binding document. It should not be thought to reflect the opinion of the members of the International Court of Arbitration of the International Chamber of Commerce or of its Secretariat, but is simply intended to facilitate the arbitrators' mission. Moreover, this Checklist is not exhaustive of issues that may be raised by the ICC Court.

1. General

- ☐ A. ICC case reference number mentioned in full on front page.
- ☐ B. Award clearly identified in its title as Interim, Partial, Final or Award by Consent.
- ☐ C. Paragraphs numbered.
- ☐ D. Pages numbered.
- ☐ E. Table of contents included (unless Award is short and does not need one).
- ☐ F. Abbreviations defined and used consistently.
- ☐ G. Translations of quotations in languages other than the language(s) of the arbitration.
- ☐ H. Indication of the applicable version of the ICC Rules of Arbitration (e.g. 2012).

2. Identification of the parties, their representatives and the arbitrator(s)

- ☐ A. Parties' complete addresses and correct names. Clarify the identity of any parties to the arbitration that are different from the parties to the contract(s).
- ☐ B. Addresses of parties' representatives.
- ☐ C. Arbitrators' addresses.

3. Arbitration and choice-of-law agreements

- ☐ A. Quotation of entire arbitration agreement(s).
- ☐ B. Record of any agreed amendments to the arbitration agreement(s).
- ☐ C. Precise indication of the parties to and/or signatories of the arbitration agreement(s).
- ☐ D. Quotation of relevant choice-of-law clause.

4. History of the arbitral proceedings

- ☐ A. Summary of all procedural steps to date (e.g. Request for Arbitration, Answer, Terms of Reference, date of the case management conference, procedural timetable, parties' submissions, hearing).
- ☐ B. Indication of the ICC Court's decisions regarding (if applicable):
 - ☐ i. Article 6(4);
 - ☐ ii. Place of arbitration;
 - ☐ iii. Number of arbitrators.

- ICC Award Checklist:

ICC Practice (cont'd)

- ICC Award Checklist:

- ☐ C. Description of the constitution of the Arbitral Tribunal (including confirmation or appointment decisions).
- ☐ D. If applicable, reference to the parties' agreement on an alternative method of nominating or appointing the president of the Arbitral Tribunal.
- ☐ E. Date of closing of the proceedings under Article 27 (for every award).
- ☐ F. Indication of the time limit for rendering the final award, including any extensions granted by the Court under Article 30(2) and the date on which it was granted. It is recommended that all extensions granted by the Court and the date(s) on which they were granted be specified, especially when Paris is the place of arbitration.
- ☐ G. **If there has been a prior Award**, no need to repeat the procedural history set out in the prior Award, but simply:
 - ☐ i. restate the information mentioned in sections 1, 2 and 3 above;
 - ☐ ii. refer to the previous Award, the date on which it was notified to the parties by the Secretariat, the issues it decided, and the fact that its procedural background is incorporated by reference into the present Award;
 - ☐ iii. describe the procedure subsequent to that set out in the previous Award.

5. Jurisdiction

- ☐ Wherever jurisdiction has been contested, or there is a non-participating party, or the ICC Court has made an Article 6(4) decision, the award should ordinarily include the Arbitral Tribunal's decision on jurisdiction or state why it is not necessary.

6. Costs of the Arbitration (Final Awards only)

- ☐ A. Costs of arbitration fixed by the ICC Court and each party's legal costs dealt with separately in both the body of the Award and in the dispositive section.
- ☐ B. Reference to Article 37 and to the discretion in Article 37(5) to allocate costs (i.e. costs of arbitration fixed by the Court and parties' legal costs) and fix the amount to be borne by each party.

7. Dispositive section, place of arbitration, date, signature

- ☐ A. Award contains a dispositive section mentioning all orders (including the decision on jurisdiction, if applicable) and nothing more.
- ☐ B. Award deals with all of the issues and parties' claims (which should be stated clearly and precisely somewhere in the Award and compared to the Terms of Reference), including the parties' most recent requests for relief, and decides nothing more than those issues and claims (state clearly if certain claims are reserved for one or more future Awards).
- ☐ C. State in the dispositive section of Final Awards that all other requests and claims are rejected (unless the nature of the Award makes this unnecessary).
- ☐ D. After the dispositive section, add the date on which the Award is made and the signatures in the following manner:

Place of arbitration: City (Country)

Date: __/__/____ [date must be later than the Court session at which the Award was approved and not earlier than when the last arbitrator signs]

Signature(s): _____

ICC Practice (cont'd): Scrutiny

- ICC Rules, Article 33:

“Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal’s liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.”

(Emphasis added)

- Article 6 of Appendix II to the ICC Rules

“Scrutiny of Arbitral Awards

When the Court scrutinizes draft awards in accordance with Article 33 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of the arbitration.”