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International Commercial Arbitration

5.6 Making the Award and Termination of Proceedings



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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty-one modules.

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WHAT YOU WILL LEARN

The major difference between arbitration and other alternative dispute resolution (ADR) techniques is that arbitration leads to a final and binding decision by the arbitral tribunal in the form of an award that can be executed under the New York Convention. While an award embodies a decision of the arbitral tribunal, not all decisions are awards. In Part I you will learn the difference between decisions that are awards and those that are not.

This module will describe in Part II the various types of awards the tribunal may issue, while Parts III and IV will discuss how they are made and their form and content.

Part V discusses the termination of the arbitration. Issuance of a final award is the most common of the events that terminate an arbitration. The exceptions to that rule are discussed in Part II when discussing additional awards, as well as the correction and interpretation of awards. The arbitration may terminate for other reasons, including the request of the parties to the arbitral tribunal to terminate the proceedings without issuing an award, or by a request of the parties to include their settlement of the dispute in an award. You will learn when the parties might prefer to end the proceedings without an award, and when it is better for them to request the inclusion of a settlement agreed upon in an award.

Arbitral awards often involve matters of general legal interest. Their publication contributes to the development of the law, both of international commercial arbitration and of the substantive law in question. However, publication brings in question the confidentiality of the arbitration. Part VI discusses the reconciliation of these two concerns.

1. DECISIONS AND AWARDS

1.1 Decisions and awards

The award of the arbitral tribunal is the instrument by which the tribunal records its decision in the arbitration. An award is not a mere recommendation. It is a final settlement of the matters contained in it. The award may simply declare the rights of the parties, for example, that the goods delivered in a long-term supply contract conformed to the contract. Such a declaration settles the dispute and permits the parties to continue the contract peacefully. The award may order one of the parties to pay a sum of money to the other party, to perform an act or to refrain from performing an act.

Not all decisions of the arbitral tribunal are awards. The tribunal will make many decisions during the course of the arbitration. Some of them are simply administrative, such as the scheduling of a hearing. Such decisions will normally be in the form of a procedural order. Other decisions are of more significance. A determination as to the seat of the arbitration or the language of the arbitration, if the parties have not made the determination, will normally be labelled as a decision. Yet other decisions may have a determinative effect on the arbitration without being a full and complete settlement of it. It is sometimes unclear whether such decisions should be denominated as “awards” or alternatively as “orders” or “decisions”.

ICC Arbitration Rules, Article 23.1 provides 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. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.”

It is important whether a decision of the arbitral tribunal is an award or whether it is some other type of decision. An award takes on a *res judicata* effect. It can be executed if the debtor of the award does not comply voluntarily. If the debtor has assets in one of the 134 countries party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it can be executed in that country under the terms of the Convention. Conversely, the party against whom an award is rendered can commence set aside proceedings, while normally the courts will not entertain any proceedings against other forms of decisions taken by the tribunal except as may occur in regard to the final award.

During the drafting of the UNCITRAL Model Law the importance of the term “award” led the Working Group to attempt to define it.¹ The proposal was that “Award means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.” There was general agreement on the first part of the definition, but serious concerns were expressed about the latter part, in particular the last portion referring to decisions on questions of procedure. In the end no agreement could be reached and the term was left undefined in the Model Law.

Although the ICC Arbitration Rules, Article 23.1, cited above authorize a tribunal to take a conservatory measure either in the form of an order or of an award, in an ICC arbitration there is a significant difference between the two in respect of the procedure that must be followed. An order can be made by the tribunal with no further ado. There is no need to notify anyone other than the parties of the order. However, before the tribunal can issue an award it must submit it to the ICC International Court of Arbitration. According to ICC Arbitration Rules, Article 27, 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.” Because submission of the draft award to the Court for its review delays its issuance, it appears that most conservatory measures ordered by ICC tribunals are in the form of an order. While this deprives the conservatory measure of the possibility of court enforcement in most countries, that is probably of little importance. A conservatory measure is issued while the arbitration is still in progress and few parties would wish to antagonize the tribunal by failing to follow its order.

The UNCITRAL Arbitration Rules and UNCITRAL Model Law also distinguish between the procedure for adopting a procedural decision and adopting an award or other decision. The Model Law in Article 29 provides:

“In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.”

A conservatory measure, even in the form of a decision, would be enforceable under the new Spanish law on arbitration, which provides in its Article 23(2) that “[t]he provisions relating to the setting aside and enforcement of awards shall apply to the arbitral decisions in respect of interim measures, regardless of the form of those measures.”²

¹ *Report of the Working Group on International Contract Practices on the work of its seventh session, A/CN.9/246, paras. 192-194.*

² *Law 60/2003 of 23 December 2003.*

In addition to conservatory measures, decisions as to whether the arbitral tribunal has jurisdiction to consider the dispute may also be in the form of an award on that issue or the tribunal may determine that it has jurisdiction but prefer to formalize its decision only in the final award. UNCITRAL Arbitration Rules, Article 21(4) provides:

“In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.”

It will be noticed that the UNCITRAL Arbitration Rules do not say in what form a ruling on jurisdiction as a preliminary question should be given. Since a decision that the tribunal does not have jurisdiction would bring the arbitration to an end, it would always be in an award. That would not necessarily be true of a decision that it does have jurisdiction. The question then arises whether such a decision should be subject to immediate review by a court or whether it should be reviewable by a court only when the court at the place of arbitration reviews the final award in set aside proceedings or when a court is requested to enforce the award. Immediate review raises the possibility that the respondent will appeal to the court simply as a means to delay the arbitration. Waiting until there is a final award raises the possibility that considerable time and money will be expended in an arbitration that the court later decides the arbitral tribunal did not have the jurisdiction to consider.

The UNCITRAL Model Law, Article 16(3) solved the problem without reference as to whether the arbitral tribunal’s decision that it had jurisdiction was in the form of an award or not:

“The arbitral tribunal may rule on a plea [that it does not have jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

The characterization given by the arbitral tribunal to any decision it may make does not bind a court if one of the parties attempts to bring it before a court, either to have it set aside or to have it enforced:

Publicis Communication v. True North “Communications, Inc., 3 F.3d 725 (U.S. 2d Cir., 2000). A joint venture between a French and an American firm had broken down. During the course of the arbitration to settle accounts between them the American firm requested the arbitral tribunal to issue an award ordering the French firm to turn over tax records to the American firm that the American firm said it needed in order to file with the tax authorities and the Securities and Exchange Commission. The tribunal granted the request, but in the form of a procedural order signed by the chairman “for and on behalf of the Arbitrators.” When the American firm sought confirmation of the procedural order as an award under the New York Convention as a precedent to enforcement, the French firm argued that it was a mere procedural order for which enforcement was not available. The trial court and the court of appeals held that the label given by the arbitral tribunal to its order was not binding on the court. Since the order of the arbitral tribunal was a final disposition of an issue that was in dispute, it was an award and could be enforced.

1.2 Summary

Awards constitute a final resolution of the dispute or of an aspect of it. They are subject to control by the courts in set aside proceedings or when the successful party requests a court to enforce it. There is no statutory definition as to what constitutes an award as distinguished from a decision or procedural order. The arbitral tribunal makes many other decisions during the course of the arbitration. As a general proposition, decisions are not subject to the control by the courts. Some decisions, such as a decision by the arbitral tribunal that it has jurisdiction or ordering an interim measure of protection may take the form either of an award or of a decision/procedural order. The characterization of a decision as an award or not is not binding on a court before which it is brought. Some arbitration laws specifically allow a party to seek review or enforcement of such decisions whatever form they may take.

1.3 Test your understanding

- 1. What is the difference between a “decision” of the arbitral tribunal and an award?**
- 2. Is there any difference in the procedure that must be followed in adopting a decision or adopting an award?**
- 3. Must a decision that the arbitral tribunal has jurisdiction to consider the dispute be issued as an award?**
- 4. When can a decision of the arbitral tribunal that is not in the form of an award be challenged in the courts?**
- 5. Are any decisions that an arbitral tribunal may make during the course of an arbitration that are not in the form of an award enforceable in the courts?**

2. CATEGORIES OF AWARDS

The terminology in regard to the categories of awards is not used consistently. Article 32(1) of the UNCITRAL Arbitration Rules provides that “In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or partial awards.” The ICC Arbitration Rules, Article 2(iii), say that “Award” includes, inter alia, an interim, partial or final Award.” Use of the term “inter alia” implies that there are yet other types of awards. Finally, other arbitration rules, such as those of the German Institution of Arbitration (DIS) speak only of “the award” without differentiating between different categories of awards.

2.1 Final award

The term “final award” is used with two meanings. The most common is that the award contains the final decision of the tribunal on all matters that were submitted to it. As stated in the UNCITRAL Model Law on International Commercial Arbitration, Article 32, “The arbitral proceedings are terminated by the final award ... [and] the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings ... “ with exceptions that will be discussed in sections 3.6 to 3.8 below.

A second meaning sometimes given to the term “final award” is that the award finally settles a portion of the dispute that can be separated from the remainder of the dispute but it does not necessarily terminate the arbitration or the mandate of the arbitrators to consider the remaining portions of the dispute. Such an award has all of the consequences of a final award in that it is *res judicata* in respect of what is contained in it, and it would be subject to set aside proceedings brought by the disappointed party or enforcement proceedings by the successful party.

2.2 Partial award

As indicated above a separable portion of the dispute may be finally settled in what is often referred to as a partial award.

Spain, Law 60-2003 of 23 December 2003, Article 37(1), “Unless otherwise agreed by the parties, the arbitrators shall decide the dispute in a single award or in as many partial awards [laudos parciales] as they deem necessary.”

Even though the term is not defined in any arbitration rule or arbitration law, from the context it is clear that the partial awards are meant to be final awards in regard to the matters that are considered in them.³

³ This is specifically stated in the Statement of Purposes to the Spanish law.

Although the term suggests that what is envisaged is an award on the substance of the dispute, it might as well refer to an award on such a matter as jurisdiction or conservatory measures. Partial awards are also used frequently to separate the decision on liability and the decision on the quantum of damages or on the allocation of costs.

As indicated in Article 37(1) of the Spanish law, the parties are free to decide that there shall be no partial awards. It would be rare that they would specifically decide on such detailed matters of procedure. If they do not, the arbitral tribunal is free to use its best judgment as to whether the dispute should be decided in a single award or in two or more partial awards.

In a complex arbitration it may be a practical solution for the parties and for the arbitral tribunal to decide those parts of the dispute that can be clearly separated from the other parts in partial awards. There are dangers, however. Once an award has been issued, be it partial or final, it cannot be changed. What appears to be clearly separable may on later consideration turn out to be linked to a portion of the dispute that is yet to be decided. In that case, the arbitral tribunal has no choice but to decide the later portions of the dispute in a manner consistent with the partial award or awards already issued.

Another danger is that each partial award is subject to set aside as well as enforcement proceedings. If there are several partial awards, the parties and the tribunal may find themselves involved in complex litigation that may influence those portions of the dispute that are still before the tribunal.

2.3 Interim award

An interim award is one that is issued while the arbitration is in progress. It is used with two different meanings. In some cases it is used to mean a partial award, i.e. one that finally settles a portion of the dispute. Such an award may decide the jurisdiction of the tribunal, the applicable law, liability in respect of all or a portion of the dispute or damages. That may be the more common usage because, while the specific issue is determined definitively, there are other issues to be decided by the arbitral tribunal.

More appropriately, however, the term interim award is limited to those awards that do not finally settle any aspect of the dispute. The most typical interim award of this type is an award on interim measures of protection.

As has been seen above, there is an active controversy as to whether interim measures should be ordered in the form of a decision or in the form of an award and whether a court should enforce the arbitral tribunal's decision against a recalcitrant party. The ICC Arbitration Rules, Article 23.1 specifically authorize the arbitral tribunal to order any interim or conservatory measure it deems appropriate either as an order or in the form of an award. It has also been noted above that the Spanish Arbitration law, Article 23.2 provides that arbitral decisions in respect of interim measures of protection, regardless of

the form of the decision ordering those measures, can be brought before the courts by the obligated party to have them set aside and that, conversely, the successful party can seek enforcement in the courts against a recalcitrant party.

This law, adopted in December 2003, may be the wave of the future. A Working Group of UNCITRAL is currently considering a new Article 17(bis) to the Model Law that would specifically provide for court enforcement of interim measures ordered by an arbitral tribunal.⁴ The draft being considered by the Working Group is considerably more complicated than is the text in the Spanish law. There are numerous differences between enforcing a decision on interim measures, whether in the form of an award or not, and enforcing a final award. The most obvious is that a decision on interim measures may be modified or rescinded by the arbitral tribunal itself. A second is that the measure ordered by the arbitral tribunal may not be compatible with the procedural rules governing the court.

The concerns that have led to the somewhat complicated draft currently before the UNCITRAL Working Group are essentially those that have led many courts to refuse to enforce an award on interim measures ordered by an arbitral tribunal.

Resort Condominiums International Inc (USA) v. Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd (Australia), (Queensland Supreme Court, 1993), 118 Aust. L. Rep. 644, XX YBCA 628, 641. An arbitral tribunal in the United States issued what it termed an “award” ordering an Australian licensee for the duration of the arbitration not to enter into competing arrangements and to deposit into an escrow account all revenues received as a consequence of the license agreement. When the licensor sought to enforce the award in Australia, the Queensland Supreme Court found that the award was clearly of an interlocutory nature and that it did not bring the arbitration to a close. Consequently, it held that the “award” was not an award for the purposes of the New York Convention.

2.4 Award on agreed terms (consent award)

It is a frequent occurrence that the parties in an arbitration are able to arrive at a settlement. The settlement can, of course, be formalized as an amendment to their original contract or as a new contract. In that case, if one of the parties does not fulfil its obligations under the settlement, the other can commence a new arbitration (assuming that there is a suitable arbitration clause) or litigation. An alternative possibility provided in most arbitration rules and laws is that the settlement be formalized as an award on agreed terms. A typical provision is contained in the UNCITRAL Model Law, Article 30:

⁴ As of the time of writing the most recent state of deliberations is to be found in the Report of the Working Group on Arbitration on the work of its fortieth session (New York, 23-27 February 2004), A/CN.9/547.

“(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.”

The arbitral tribunal may be told of the settlement by one of the parties alone, especially if the settlement has been recorded in a contract. Upon learning of the settlement, and being convinced that it had really taken place, the arbitral tribunal is called upon to terminate the proceedings, by which is meant the entire arbitration. It would be rare that a tribunal would do so without having received assurances from both or all the parties that the settlement had truly been agreed upon.

The arbitral tribunal is to record the settlement in the form of an arbitral award on agreed terms only if it is requested to do so by the “parties”, i.e. by all the parties. As noted in Article 31(2), an award on agreed terms is an award, which means that there can be execution on it if one of the parties fails to live up to its terms. It is the responsibility of the arbitral tribunal to assure itself that it is not lending its assistance to injustice in regard to a party, but there is little concern if all the parties make the request.

The Model Law makes it clear that the tribunal need not record the settlement as an award if it has an objection to doing so. That is because the arbitral tribunal also has an obligation to assure itself that the requested award on agreed terms does not constitute a fraud or otherwise violate mandatory rules of law. For example, the settlement may be intended as a means to avoid exchange controls. To be sure, if the measure were brought to a court for execution, the court would be authorized by Article V of the New York Convention to refuse to do so if it found that the award violated public policy. However, the arbitral tribunal is in a better position to understand the implications of the settlement than is a court at a later time.

An award on agreed terms is also available from some arbitration organizations that include a conciliation or mediation service. The Rules of the Conciliation Centre at the Croatia Chamber of Economy provide that, if the parties so request and conclude an arbitration agreement, the conciliator may be appointed as arbitrator who will render a consent award.⁵ By requiring an arbitration agreement and the appointment of the conciliator as arbitrator the form of an arbitration is preserved.

The Conciliation Rules of the Society of Maritime Arbitrators in the United States do not even require that the form of an arbitration be preserved, except

⁵ *Rules of Conciliation, Croatia Chamber of Economy, Conciliation Centre, Article 6.*

to the extent that the settlement agreement can be considered to be an arbitration agreement. Its Conciliation Rules, Article 10, provide that:

“The parties, by signing the settlement agreement, put an end to the dispute and are bound by the agreement which shall, for the purposes of its enforcement, be treated as an award pursuant to an arbitration agreement, and is enforceable in accordance with the provisions of [the Federal Arbitration Act].”

Since an award on agreed terms in the course of an arbitration is the final decision in regard to a real dispute that has been arbitrated, there is no reason of principle why it should not be considered an award and, as such, be enforceable under the New York Convention even in States that have not adopted the Model Law or a provision similar to Article 30 in their arbitration law. It is somewhat more problematical to provide that the settlement agreement can be an award that is enforceable under the New York Convention when the dispute has been submitted to conciliation or other form of non-contentious dispute resolution procedure.

In addition to rendering the settlement into an enforceable award, an award on agreed terms may have other advantages for one or both of the parties. It may be easier to justify the result to higher management or to political authorities if it is formalized as an award. Similarly, an award may be submitted directly for payment by the appropriate officials as having the approval of the arbitral tribunal to the agreement of the parties. In some countries this may also include officials responsible for administering exchange controls.

A possible disadvantage of rendering the agreed settlement as an award is that may be more likely to become public than would a settlement in the form of a simple agreement between the parties.

2.5 Default Award

It is not wise for a party against whom an arbitration has been commenced to refuse to participate in it and to present its defences. In an earlier time it sometimes happened that a respondent would refuse to participate in the appointment of the arbitral tribunal and neither the rules that might have been applicable nor the relevant arbitration law provided a means to complete the tribunal. That would be a rare occurrence today. Modern arbitration rules and law all provide a mechanism for the appointment of any missing arbitrators.⁶ The arbitration will commence even without the participation of the respondent.

It is the common rule currently that the failure of the respondent to submit a defence or to participate in the hearings to which it has been given adequate notice does not impede the arbitral tribunal from continuing the proceedings on the basis of what is presented to it. The absence of the respondent does not

⁶ See, e.g., *UNCITRAL Model Law, Article 11(4)*.

relieve the claimant from the obligation to present its evidence to sustain the claims that it has made. It can be anticipated that there will be such evidence and the award will favour the claimant in all respects. The UNCITRAL Model Law, Article 25, expresses this policy in the following words:

“Unless, otherwise agreed by the parties, if, without showing sufficient cause, ... (b) the respondent fails to communicate his statement of defence in accordance with Article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations.”

The award issued at the end of an arbitration in which the respondent has not participated will be enforced so long as the respondent has been given proper notice and an opportunity to present its case.

2.6 Additional award

The “final award” may not cover every issue that needs to be decided in the arbitration. In some cases that is deliberate. For example, the arbitral tribunal may leave to a subsequent award a decision on the costs. In that case the “final” award is really a partial award, though it may cover all of the claims presented in the statement of claim.

In other cases failure to cover all of the issues is an error on the part of the arbitral tribunal. Most arbitration rules permit the arbitral tribunal to issue an additional award on those claims that were presented to it. This authority is usually strictly limited in time. A typical provision is found in the UNCITRAL Arbitration Rules, Article 37:

“(1) Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

(2) If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.”

While the Model Law permits the arbitral tribunal to make an “additional” award only on the request of a party, some national laws permit the arbitral tribunal to make the additional award on its own initiative.⁷ Other national arbitration laws do not permit additional awards or may restrict them to limited issues, such as a decision on costs.

⁷ See, e.g., England, *Arbitration Law 1996, Article 57.*

Some national arbitration laws may permit a court to remit an award to the arbitral tribunal to complete it in regard to a claim that was not decided in the award, but this is not the general rule.⁸

2.7 Correction of award

Errors in calculation, dates or otherwise may inadvertently be present in an award. Under the doctrine that the arbitration was terminated and the arbitral tribunal lost all its functions with the issue of the award, a doctrine that was strictly applied in older arbitration laws, there was no possibility for the error to be corrected. Modern arbitration laws and rules provide that the arbitral tribunal can correct such errors, either on its own initiative or at the request of a party. The time within which such an error can be corrected is always limited. One to two months is typical for international commercial arbitration, though shorter periods are common for domestic arbitration.

2.8 Interpretation of award

There may be occasions when the operative portion of an award is unclear or where in a complex arbitration the award appears to place inconsistent obligations on the parties. In such a case it may be appropriate for the arbitral tribunal to interpret the award for the parties. Most arbitration rules provide for the possibility. ICC Arbitration Rules, Article 29, provide that a party may make such a request to the ICC Secretariat within 30 days of receipt of the award. The request will be sent to the other party who will be given a short time, not exceeding 30 days, to comment on the request. The arbitral tribunal is not bound to give the requested interpretation. If it does decide to do so, the interpretation takes the form of an addendum to the award and becomes part of the original award.⁹

The interpretation must be of the award, not of the reasoning. The arbitral tribunal must be careful not to allow a request for interpretation to become an opportunity for a party to present new arguments in regard to matters that were already settled in the award.

2.9 Summary

There are two fundamentally different types of awards. There are those awards that are final in regard to what is decided in them and there are those awards whose contents can be changed at a later date by the arbitral tribunal. The term “final award” is usually restricted to those awards that are intended to resolve all of the issues in controversy, or at least all of those that have not been resolved by previous partial awards. However, an award that definitively

⁸ See, e.g., *Israel, Arbitration Law 1968, Article 22; England, Arbitration Law 1996, Article 68.*

⁹ *Since the interpretation is in effect a modification of the form of the award, it must be submitted in draft to the ICC Court of International Arbitration for its review before it is sent to the parties.*

settles one or more issues in dispute but leaves open others for later resolution is also called on occasion a final award.

A partial award settles one or more, but not all, of the issues in dispute. The term partial award is usually used in the sense of a “final partial award”, but on occasion it is also used to indicate those awards the contents of which can later be changed by the arbitral tribunal, such as an interim (measure) award of protection.

Similarly, while the term “interim award” is most properly used in connection with an interim award of protection, on occasion any award that is not a final award settling all issues in the dispute is referred to as an interim award.

If the parties reach a settlement during the arbitration, they can request the tribunal to issue an award on agreed terms. The tribunal will usually do so, but it is not required to do so. An award on agreed terms is an award and can be enforced under the New York Convention. If the parties do not wish their settlement to be recorded as an award, the settlement agreement would be enforceable as would any contract. Some arbitral organizations that also have a conciliation service will permit the parties to appoint the conciliator as an arbitrator and to record the settlement in the conciliation as an arbitral award.

The non-participation of a respondent who has been given proper notice of the commencement of the arbitration and of any scheduled hearings does not preclude the arbitral tribunal from proceeding with the arbitration. The claimant would still have to submit sufficient evidence to sustain its claim and the arbitral tribunal can issue its award on the basis of the evidence before it. Such a default award cannot later be attacked by the respondent on the grounds that it did not participate in the arbitration.

The issue of a final award terminates the arbitration and the mandate of the arbitral tribunal. A strict application of this principle would mean that the arbitral tribunal could neither issue an additional award in regard to matters it had inadvertently omitted from the “final award” nor correct errors in calculation or the like or interpret the award for the benefit of the parties. Therefore, modern arbitration law and rules permit the tribunal to take such actions. Some limit the tribunal to acting upon the request of a party while others permit the tribunal to issue an additional award or correct errors on its own initiative. In either case, the additional award, the correction or the interpretation can be made only within a restricted period of time. None of these actions can modify the original award or call in question the reasons on which the award was based.

2.10 Test your understanding

- 1. What is meant by a “final award”?**
- 2. Can a partial award be a final award?**
- 3. If the parties agree that there should be no partial awards, can the arbitral tribunal issue an award in respect of the liability of the respondent and reserve to a later time a decision on the quantum of compensation to be paid to the claimant?**
- 4. Can the arbitral tribunal correct errors in calculation in an award if neither the relevant arbitration law nor arbitration rules specifically authorize it to do so?**
- 5. Under what circumstances should parties who have reached a settlement request the tribunal to issue an award on agreed terms?**
- 6. How might a settlement reached in a conciliation proceeding become an award on agreed terms in arbitration?**
- 7. Under what circumstances can the tribunal issue a default award? Can such an award be enforced under the New York Convention?**

3. MAKING OF AWARD

3.1 Time limits

One of the professed advantages of arbitration is that it is speedier than are the State courts. Consequently, it is a matter of professional ethics that a prospective arbitrator should accept an appointment only if he is able to give to the arbitration the time and attention that the parties are reasonably entitled to expect.¹⁰ An arbitrator who fails to act may be replaced.¹¹

A more direct approach is found in arbitration rules that prescribe time limits within which an award must be issued. The period within which the award is to be rendered may be measured from the time the arbitral tribunal was formed,¹² the Terms of Reference were adopted,¹³ the case was submitted to the arbitral tribunal by the Secretariat,¹⁴ or the closure of the proceedings.

The time limits specified must be considered as a goal rather than as strict limits. Time limits that are measured from the date when the case is transmitted to the arbitral tribunal, or its equivalent, may often turn out to be too restrictive, especially in international commercial arbitration. Therefore, institutions that have such time limits invariably have a mechanism by which that time limit can be extended. The extension is normally made by the institution, on the recommendation of the arbitral tribunal, rather than by the arbitral tribunal itself. An example is found in the ICC Arbitration Rules, Article 24:

“(1) The time limit within which the Arbitral Tribunal must render its final Award is six months. Such time limit shall start to run from the date of the last signature by the Arbitral Tribunal or by the parties of the Terms of Reference or, in the case of application of Article 18(3), the date of the notification to the Arbitral Tribunal by the Secretariat of the approval of the Terms of Reference by the [ICC] Court.

(2) The [ICC] Court may extend this time limit pursuant to a reasoned request from the Arbitral Tribunal or on its own initiative if it decides it is necessary to do so.”

Where a time limit for the making of the award is found in the arbitration agreement or rules governing the arbitration, the English Arbitration Law of 1996 permits the court to extend it. However, this may be done only after “exhausting any available arbitral process for obtaining an extension of time.”¹⁵

¹⁰ See, e.g., *Indian Council of Arbitration, Rules of Ethics, Article 2; American Arbitration Association-American Bar Association, Code of Ethics for Arbitrators in Commercial Disputes, Canon 1(b)(4)*.

¹¹ See *UNCITRAL Arbitration Rules, Article 13(2)*.

¹² See, e.g., *CIETAC Arbitration Rules, Article 52* (“nine months from the date on which the arbitration tribunal is formed”).

¹³ See, e.g., *ICC Arbitration Rules, Article 24* (six months).

¹⁴ See, e.g., *Stockholm Chamber of Commerce, Article 33* (“six months as from the date when the case was referred to the Arbitral Tribunal”).

¹⁵ *England, Arbitration Act, Article 50*.

Very few arbitration laws have time limits for the award, since it is difficult to provide a general rule for all cases. The arbitration law of Peru does set a time limit of twenty days after the stage of presentation of proof, but the limit is subject to the contrary agreement of the parties, to a contrary provision in the rules governing the arbitration, and to the right of the arbitrators to extend the period by fifteen days.¹⁶

The consequences that might follow from an award not being delivered within the time specified by the parties or the arbitration rules are usually not specified. One possibility is that an award delivered after the specified time might be set aside as not having been delivered in accordance with the procedure agreed by the parties. A different approach is taken by the arbitration law of Egypt in its Article 45:

“(2). If the arbitral award is not rendered within the period referred to in the preceding paragraph, either of the two parties to arbitration may request the president of the court referred to in Article (9) of the present Law to issue an order either extending the time limit or terminating the arbitral proceedings. In the latter case, either party may bring the dispute to the court having initial jurisdiction to adjudicate the case.”

During the drafting of the Model Law the question was raised as to whether the Model Law should contain a provision on time limits. “However, it was agreed that the model law should neither set such a time-limit nor deal with the legal consequences of the expiry of a time-limit stipulated by the parties, since in international commercial arbitration the circumstances varied considerably from one case to another.”¹⁷

3.2 Majority, unanimity or chairman’s casting vote

Where the arbitral tribunal consists of three arbitrators, it is always desirable that the award be adopted unanimously. However, a requirement of unanimity would permit a recalcitrant arbitrator to preclude the arbitral tribunal from arriving at any award. Therefore, most arbitral rules and laws provide that the award shall be reached by a majority of the arbitrators, unless otherwise agreed by the parties. As provided in the UNCITRAL Model Law, Article 29:

“In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.”

¹⁶ Peru, General Arbitration Law, Article 48.

¹⁷ Report of the Working Group on International Contract Practices on the work of its third session, A/CN.9/216, para. 74.

A rule that awards must be agreed to by all or a majority of the arbitrators can lead to deadlock when no majority can be reached. This is most likely to happen when the party appointed arbitrators support the position of the party that appointed them and the chairman would adopt a position that reflected fully the arguments of neither of the parties. In such a case the chairman would be forced to choose one or the other of the extreme positions. Fortunately, this is rare, but not unknown. The ICC Arbitration Rules provide that in such a case “the award shall be made by the chairman of the Arbitral Tribunal alone.”¹⁸ The same rule is found in the English Arbitration Act.¹⁹

3.3 Dissenting or concurring opinions

There is a wide divergence in court practice between common law countries in which dissenting and concurring opinions are an accepted part of judicial practice and civil law countries where they are generally prohibited as violating the secrecy of the deliberations. Both dissenting opinions, in which the writer disagrees with both the result and its reasoning, and concurring opinions, in which the writer agrees with the result but not the reasoning, can have a salutary effect in demonstrating to the losing party that its arguments were adequately considered. The writer of the dissenting or concurring opinion must be careful, however, that it does not contain grounds for setting aside the award. While dissenting and concurring opinions can be of importance in arbitrations between private parties, they are apt to be of even greater importance in arbitrations between a foreign investor and the host State and other arbitrations where a State is a party. Indeed, the Iran-US Claims Tribunal found it necessary to amend the UNCITRAL Arbitration Rules to allow both dissenting and concurring opinions when it adopted them for use by the Tribunal.²⁰ Similarly, the Article 47(3) of the ICSID Rules provides “Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.”

On occasion an arbitrator may refuse to sign the award as a means of signalling dissent from the award. Arbitration rules commonly provide that the award needs to be signed by a majority only, provided that the reasons for the omitted signature are stated.²¹

A dissenting or concurring opinion may be attached to the award, as in the ICSID Rules, or it may be simply delivered to the parties apart from the award. In neither case is it generally considered to be part of the award.

There are few national laws on arbitration that have provisions in regard to dissenting or concurring opinions. During the drafting of the Model Law the question was raised by the Secretariat as to “whether the Model Law should take a stand on the ... issue of dissenting opinions, e.g. either generally allow

¹⁸ ICC Arbitration Rules, Article 25(1).

¹⁹ England, Arbitration Act, Article 20(4).

²⁰ Iran-US Claims Tribunal Rules, Article 32, “any arbitrator may request that his dissenting vote or his dissenting vote and the reasons therefore be recorded.”

²¹ See, e.g., Singapore International Arbitration Centre, Arbitration Rules, Article 28.3.

or generally prohibit their issuance.”²² No action was taken in the Commission. However, when Bulgaria adopted the Model Law it provided that “The arbitrator who disagrees with the award shall submit his dissenting opinion in writing.”²³ Conversely, the Chinese arbitration law specifically permits a dissenting arbitrator to refuse to sign the award.²⁴

3.4 Notification and deposit of award

It goes without saying that the award must be notified to the parties. Notification not only communicates to the parties which of them has prevailed and their rights and duties under the award, it commences the periods within which a party that is not satisfied with the award can request the court to set it aside and a prevailing party can move to have it recognized and enforced.

The UNCITRAL Arbitration Rules, being rules for ad hoc arbitrations, place on the arbitral tribunal the obligation to communicate to the parties copies of the award signed by the arbitrators.²⁵ Where the arbitration has been conducted under the auspices of an arbitration organization, the award will normally be communicated to the parties by the secretariat of the organization. That is stated explicitly in such rules as the German Institution of Arbitration (DIS), the International Chamber of Commerce and the International Arbitration Rules of the American Arbitration Association.²⁶ Notification by the secretariat of the institution will take place only once all of the fees have been paid.²⁷

Arbitration laws typically place the burden of communicating the award to the parties on the arbitral tribunal, since there may be no institution involved. A typical provision is found in the Netherlands Arbitration Law, Article 1058:

*“(1) The arbitral tribunal shall ensure that without delay:
(a) a copy of any award, signed by an arbitrator or the secretary of the arbitral tribunal, is communicated to the parties.”*

Once both parties have a copy of the award, there is no inherent reason why the award must be kept by the arbitral tribunal or arbitration institution. The UNCITRAL Arbitration Rules do not, for example, have any such requirement. Institutions usually do keep a copy, however, even where not required to do so by law.²⁸

²² *Report of the Secretary-General, Analytical commentary on draft text of a model law on international commercial arbitration, A/CN.9/264, Article 31, para. 2.*

²³ *Bulgaria, Arbitration Law, Article 39(1).*

²⁴ *China, Arbitration Law, Article 54.*

²⁵ *UNCITRAL Arbitration Rules, Article 32(6).*

²⁶ *See, e.g., German Institution of Arbitration (DIS), Arbitration Rules, Article 36.2; ICC, Arbitration Rules, Article 28(1); American Arbitration Association, International Arbitration Rules, Article 27(5).*

²⁷ *See, e.g., German Institution of Arbitration (DIS), Arbitration Rules, Article 36.3; ICC, Arbitration Rules, Article 28(1).*

²⁸ *See, e.g., Swiss Rules, Article 32.6. Retention of a copy by the arbitral tribunal or arbitral institution is not required by the Swiss Private International Law.*

Some arbitration laws require deposit of the award with the court. The obligation normally falls on the arbitral tribunal, but it may also fall on the successful party.²⁹ Most arbitration rules provide that if the arbitration law of the place of arbitration requires deposit with a public authority, the arbitral tribunal is obligated to follow the provisions of the law. Such a provision is designed to remind the arbitral tribunal, which may be composed of arbitrators from countries other than that of the place of arbitration, of the possibility of such a requirement. As provided in the UNCITRAL Arbitration Rules, Article 32:

“(7) If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.”

3.5 Summary

Many arbitration rules, but few arbitration laws, specify the time within which the tribunal must issue its award. The period of time may be measured from the time the arbitral tribunal was formed, the Terms of Reference were adopted, the case was submitted to the arbitral tribunal or the closure of the proceedings. Because the exigencies of the case may require more time than specified, as a general rule there is a means by which the time for the award to be issued may be extended. Extension may be limited to a short period of time, or it may be more extensive. This depends on the type of disputes that are envisaged. The right to extend the period of time may be given to the tribunal itself or it may rest in the arbitral institution or the State court.

The consequences that may follow from the failure of the tribunal to issue the award within the requisite time may be unclear, but the tribunal should always be sure to have the time extended if it is not able to comply with the time requirement. There is always the threat that the award may be set aside on the grounds that it was not issued in accordance with the agreement of the parties. The arbitration law may specify other consequences, such as the termination of the arbitration.

Most arbitration rules provide that, where the tribunal is composed of more than one arbitrator, the decision must be taken by a majority of them. Some rules specify that where there is no majority, which can happen if two party appointed arbitrators insist on the positions of the party that appointed them, the chairman’s vote decides the award.

It is a controversial question as to whether dissenting or concurring opinions should be allowed in arbitration because, it is thought, such opinions violate the confidentiality of the deliberations. Some rules allow them, in particular rules designed for arbitrations in which a State will be one of the parties.

²⁹ Belgium, *Judicial Code, Article 1702.2, (chairman of the arbitral tribunal)*; Egypt, *Arbitration Law, Article 47, (successful party)*.

Few arbitration laws have provisions specifically providing either for or against dissenting opinions. If a dissenting or concurring opinion is written, it may be attached to the award but it is not as such a part of the award.

The award must be notified to the parties. Arbitration laws or rules for ad hoc arbitration usually place the obligation on the tribunal. Institutional arbitration rules usually will provide that the institution will communicate the award. Arbitration laws that require deposit of the award with the State court normally place the obligation on the tribunal, but in some laws it is the successful party who must do the deposit.

3.6 Test your understanding

- 1. Why are there requirements that the award be issued within some specified period of time?**
- 2. What can be done if the tribunal is not able to meet the deadline?**
- 3. Is it serious for the tribunal to miss the deadline?**
- 4. If the arbitral tribunal is composed of more than one arbitrator, how many have to vote for the award?**
- 5. What are the arguments for and against dissenting or concurring opinions?**
- 6. Who must communicate the award to the parties?**
- 7. If the award must be deposited with the court, who has the obligation to do the deposit?**

4. CONTENT AND FORM OF AWARD

4.1 Content of award

The style in which the award is written depends largely on the legal style of the draftsman, who is usually the chairman of the arbitral tribunal. A chairman from a common law country may be expected to write a long and exhaustive award, setting forth in considerable detail the factual background to the case. A chairman from a civil law country may be expected to write a more succinct award that contains less of the facts in the dispute. An experienced chairman is apt to write an award that lies somewhat in between the two extremes. Whatever be the style employed, the award has to contain the minimum contents as required by the governing arbitration rules and the governing arbitration law.

The UNCITRAL Arbitration Rules and the UNCITRAL Model Law express the currently prevailing view that only a short list of matters is required to be in the award. The award must:

- be in writing;
- be signed by the arbitrators or contain an explanation for any missing signature;
- state its date and the place of arbitration;
- state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.³⁰

A few arbitration rules or laws have more detailed requirements. They may include the identification of the arbitrators, the parties and the authority of their representatives, claims submitted and the dates and circumstances of important procedural actions.³¹

4.2 Written and signed

It is almost a universal requirement in international commercial arbitration that the award be written and signed. The New York Convention implies in its Article IV that the award must be in writing, but does not say so explicitly. The UNCITRAL Model Law states it explicitly in Article 31. The English Arbitration Act, which applies to domestic as well as international arbitrations, provides that the parties are free to agree on the form of the award, e.g. that it may be oral, but in the absence of such an agreement the award must be in writing and signed.³²

³⁰ UNCITRAL Arbitration Rules, Article 32; UNCITRAL Model Law, Article 31.

³¹ See ICSID Arbitration Rules, Rule 47 for such a detailed list of matters to be included in the award.

³² Article 52. The parties may also agree that the award does not have to contain reasons or the date of its making or the seat of the arbitration.

There are different rules in regard to the signature. A requirement that all of the arbitrators must sign the award would allow a dissenting arbitrator to block its issuance. Consequently, many arbitration laws and rules provide that the award is valid if signed by a majority of the arbitrators, though an explanation of the reason for any missing signature may be required. A typical provision is found in the UNCITRAL Model Law, Article 31:

“(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.”

Some laws require only the signature of the presiding arbitrator.³³ Others require the signatures of all the arbitrators who voted for the award.³⁴ Similar provisions appear in various arbitration rules.

4.3 Place and date

It is an all but universal requirement that the award have on it the date when it is made and the place of arbitration.³⁵ Both have legal consequences, but neither needs to reflect the place where and date when it was signed.

In international commercial arbitration once the proceedings have been closed, the arbitrators return to their home countries. The draft award will be circulated among the arbitrators for their comments and approval. It would not be reasonable to require all to return to a single place simply to sign it.

UNCITRAL Arbitration Law, Article 31(3), “The award shall state its date and the place of arbitration as determined in accordance with Article 20(1). The award shall be deemed to have been made at that place.”

The place of arbitration plays a significant role throughout the arbitration. It determines the law governing the arbitration and the courts empowered to act in support of, or to interfere with, the arbitration. Similarly, stating the place of arbitration on the award confirms the court before which the losing party can move to have the award set aside. It also establishes whether enforcement of the award can be sought under the New York Convention.

According to the UNCITRAL Model Law, and all other modern arbitration laws, the hearings and other procedural acts need not have taken place at the place of arbitration.³⁶ As a consequence, the “place of arbitration” may be factually largely or completely fictitious. Even so, the “place of arbitration” is of prime legal significance.

³³ See, e.g., *Swiss Private International Law, Article 189(2)*.

³⁴ See, e.g., *England, Arbitration Act, Article 52(3)*.

³⁵ But see note 32 in regard to the English law.

³⁶ See *UNCITRAL Model Law, Article 20(2)*.

A few arbitration laws require the award to indicate where it was signed in fact.³⁷ Such a provision can normally be complied with easily in domestic arbitrations but is less practicable in international arbitrations with arbitrators from several countries.

The date of the award determines when the award has *res judicata* effect and can be executed by a court.³⁸ It also begins the period within which the losing party can move to have the award set aside,³⁹ though the time limit may be stated to begin when the award is received.

UNCITRAL Model Law, Article 34(3), “An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award ...”

4.4 Reasons

Some arbitration laws require that all awards contain the reasons on which they are based.⁴⁰ Most require reasons unless the parties have agreed otherwise or the award is on agreed terms.⁴¹ The Netherlands arbitration law, Article 1057(4)(e) provides, in addition, that no reasons need be given in the award if “the award concerns merely the determination only of the quality or condition of the goods.” Finally, the Federal Arbitration Act of the United States does not require reasons to be given in an award, and reasons are typically not given in domestic arbitrations.⁴²

Some arbitration institutions require reasons to be given in all awards.⁴³ The most common provision appears to be that reasons need to be given unless the parties have agreed otherwise, the award records a settlement reached between the parties or the parties have agreed that the arbitrators can act as *amiables compositeurs*.⁴⁴ The concept of *amiables compositeurs* is considered more fully in module 5.5.

No arbitration law or rules sets forth the style or extent of the reasons that must be given in the award. What is needed is a sufficient explanation for the

³⁷ See, e.g., Bolivia, *Law on Arbitration and Conciliation*, Article 56; Brazil, *Arbitration Law*, Article 26.

³⁸ See, e.g., France, *New Code of Civil Procedure*, Article 1478.

³⁹ See, e.g., England, *Arbitration Act*, Article 70(3), “within 28 days of the date of the award”.

⁴⁰ See, e.g., Belgian *Judicial Code*, Article 1701(6).

⁴¹ The UNCITRAL Model Law contains such a provision in its Article 31(2).

⁴² American Arbitration Association, *Commercial Arbitration Rules*, Rule R42(b) – applicable to domestic arbitrations – provides that “The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.” In contrast, the AAA International Arbitration Rules, Article 27(2) follows the text of the UNCITRAL Arbitration Rules and requires reasons to be given for the award unless the parties agree otherwise or it is an award on agreed terms.

⁴³ See, e.g., International Chamber of Commerce, *Arbitration Rules*, Article 25(2). The requirement apparently applies even to a settlement recorded in the form of an award under Article 26.

⁴⁴ See, e.g., UNCITRAL Arbitration Rules, Articles 32(3) and 34(1); American Arbitration Association, *International Arbitration Rules*, Articles 27(2) and 29(1).

parties to understand the process by which the arbitral tribunal reached its decision. Since in principle the awards remain confidential (though with the caveats below), there is no need for a learned discourse on the law.

4.5 Remedies

Neither arbitration laws nor arbitration rules specify the remedies that can be ordered by an arbitral tribunal.⁴⁵ In principle, any remedy available under the applicable law in litigation in a state court is available in arbitration. A preliminary question is whether remedies are a matter of substantive or procedural law, because that will determine whether the remedies available are found in the law governing the arbitration or the law governing the merits of the dispute. The arbitral tribunal must also be aware that its authority to fashion a remedy appropriate to the dispute may be limited by the arbitration agreement.

Whatever remedy is ordered by the arbitral tribunal may have to be enforced by a State court. The tribunal should, therefore, be aware of any limitations there may be in the country where the award is likely to be enforced. A few examples are given below.

Specific performance is, in principle, the natural remedy in civil law countries. It is a considerably more restricted remedy in common law countries. Although common law courts have been known to enforce awards of specific performance in situations where they would not have ordered it in similar litigation, such an award places obligations upon them they may not be equipped to fulfil and that they may find to be against public policy.

Some countries, and particularly the United States, allow arbitral tribunals to award non-compensatory damages intended to punish and deter fraud or substantial malice. Such damages are referred to as punitive damages when assessed by the tribunal. In addition, certain statutes in the United States provided for a trebling of the damages to civil parties for certain offences and though such trebled damages are usually awarded by courts, arbitral tribunals can do so as well. Since the punitive damages or the trebled amount of the damages are not compensatory, they may be considered to be against public policy in a number of countries and therefore not enforceable under the New York Convention.

Gap filling by a third party can be an important function allowing the parties to continue with the contract. However, even if the arbitration clause would permit the arbitral tribunal to undertake the function, there is a question as to whether it is permitted by the relevant law or, if permitted, whether the resulting decision by the tribunal would be recognized as an “award”.

⁴⁵ A partial exception is found in SIAC, *Arbitration Rules*, Article 28.5, which provides that the tribunal may award simple or compound interest on any sum which is the subject of the dispute at such rates as the tribunal finds appropriate for a period ending not later than the date upon which the award is complied with.

The matter was extensively discussed during the preparation of the UNCITRAL Model Law. It was finally decided not to include a provision, in large measure because many countries already had provisions allowing for gap filling and adjustment of contracts outside of arbitration and because the subject was complex and not yet ripe for an internationally unified approach.⁴⁶ When Bulgaria adopted the Model Law it added a provision authorizing the arbitral tribunal to consider “disputes arising about filling gaps in a contract or its adaptation to newly arisen circumstances”.⁴⁷

4.6 Costs

It is normal that the award will specify the costs of the arbitration and allocate them between the parties. The ICC Arbitration Rules, Article 31, provide:

“(3) The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.”

Since the allocation of costs is contained in an award, a party who is to recover costs from the other party is able to secure execution should that become necessary. Sometimes the award on costs is a separate award rendered after the main award has been issued and the winning party has been determined.

Costs arising out of an arbitration are of two types. The arbitration costs include the administrative costs of the arbitral institution, the fees and travel expenses, if any, of the arbitrators and the cost of such services as the renting of rooms for hearings and the fees of translators or experts appointed by the tribunal. The legal costs are those associated with the legal representation of the parties.

In institutional arbitration the institution normally has a schedule of administrative and arbitrator fees and the award will be in conformity with it. The institution will collect an advance from the parties to cover the expected costs, and will request additional advances as required during the continuation of the arbitration.⁴⁸ Even so, the total amount of arbitration costs may exceed the amount deposited with the institution as an advance. A few arbitration rules and laws specifically permit the arbitral tribunal to withhold the award if the fees and expenses of the arbitrators have not been paid in full.⁴⁹ Even if the right of the arbitral tribunal to withhold the award is not specified in the law, it is probably permitted.

⁴⁶ Report of the Working Group on International Contract Practices on the work of its sixth session, A/CN.9/245, paras. 18-23.

⁴⁷ Bulgaria, Arbitration Law, Article 1(2).

⁴⁸ See, e.g., International Chamber of Commerce, Article 30.

⁴⁹ See, e.g., German Institution of Arbitration (DIS), Arbitration Rules, Article 36.3; International Chamber of Commerce, Arbitration Rules, Article 28(1); England, Arbitration Act, Article 56(1).

In litigation in most countries in Europe the losing party can be compelled to pay the legal costs of the winning party. Those costs may reflect the true costs of representation, or they may be costs as determined by the court. In the United States each party's legal costs are paid by it with no contribution from the losing party to the winning party. The general rule in international commercial arbitration is that the arbitral tribunal can assess the legal costs between the two parties as it finds appropriate. The International Arbitration Rules of the American Arbitration Association, Article 31, provide:

“The tribunal shall fix the costs of arbitration in its award. The tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.

Such costs may include:

(d) the reasonable costs for legal representation of a successful party”

The Commercial Arbitration Rules of the American Arbitration Association have no such provision.

The CIETAC Rules limit the amount of legal costs to be awarded to 10% of the total amount awarded to the winning party.⁵⁰

4.7 Summary

The UNCITRAL Model Law and many modern laws that follow its pattern have only a short list of requirements in regard to the form and content of the award. The award must be in writing and signed, state its date and the place of arbitration and contain reasons for the award. Some other arbitration laws have considerably more extensive requirements that include identification of the arbitrators, of the parties and of their representatives and a full description of the various procedural steps.

Most arbitration laws or rules anticipate that all the arbitrators will sign the award, even those who disagree with it. Even so, they normally provide that only a majority need to sign the award, provided that an explanation for the missing signature is given. Some laws and rules require that all the arbitrators who voted for the award must sign it while others require only the chairman's signature.

The date of the award is important in that from that date the award has *res judicata* effect and it starts the period during which a set aside proceeding or enforcement proceeding can be undertaken, though the period may also begin from the date when the award was notified to the parties. The place of arbitration as stated on the award determines in what State set aside proceedings could take place and whether the award is a domestic or a foreign award for enforcement purposes.

⁵⁰ Article 59.

In principle all remedies available under the applicable law that can be given in litigation are available in arbitration. The tribunal may be limited by the arbitration agreement and it must be aware that some remedies that are common in some countries may be against public policy in others. The award will normally include the amount of the costs and an allocation of those costs between the parties. The costs may include both the arbitration costs, including fees of the arbitrators, administrative fees of the institution and direct expenses of the tribunal, and the costs of legal representation of the winning party.

4.8 Test your understanding

- 1. What are the requirements for the form and content of an award?**
- 2. Must the award be written under all circumstances?**
- 3. If there is more than one arbitrator, how many of them must sign the award?**
- 4. What are the functions of requiring the date and the place of arbitration on the award?**
- 5. What limitations are there on the remedies that can be contained in an award?**
- 6. How are the arbitration costs determined?**

5. TERMINATION OF PROCEEDINGS

According to the UNCITRAL Model Law Article 32 and general practice, the arbitration is terminated and the mandate of the arbitral tribunal terminates when one of the following occurs:

- a final award is issued;
- the claimant withdraws his claim;
- the parties agree on the termination of the proceedings;
- the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

As noted above, the rule that the arbitration is terminated and the mandate of the arbitral tribunal terminates when a final award is issued is modified to the extent that the arbitral tribunal can correct any mistake in calculation or otherwise, complete the award by making an additional award as to claims presented in the arbitral proceedings but omitted from the award or give an interpretation of the award.

Similarly, the UNCITRAL Model Law recognizes that the respondent may have an interest in the continuation of the arbitration. Therefore, even if the claimant withdraws his claim, the arbitration is not terminated if “the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute”.⁵¹

⁵¹ UNCITRAL Model Law, Article 32(2)(b).

6. CONFIDENTIALITY AND PUBLICATION OF AWARD

One of the often asserted advantages of arbitration is that it is confidential. Any existing principle of confidentiality has always been understood to be a restricted one, since any action to set aside an award or to enforce it automatically makes the award public. The question as to whether confidentiality is an inherent attribute of arbitration has been discussed extensively in recent years, particularly following a decision of the High Court of Australia in 1995 denying that it was.

Esso Australia sought to obtain a declaration that documents disclosed to the public utilities respondent in the arbitration could not be turned over by the respondents to their controlling body, the Minister for Energy and Materials. The High Court of Australia rejected an appeal from the Supreme Court of Victoria that had turned down the request. While recognizing that privacy was an essential attribute of arbitration, it did not consider that in Australia “we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purpose of the arbitration.” Esso Australia Resources Ltd. V. Plowman, High Court of Australia, 128 Austr. L. Rep. 391 (1995).

In general arbitration laws do not have any provisions on confidentiality or on the associated question as to whether awards may be published. The matter was considered during the preparation of the UNCITRAL Model Law and rejected.

Report of the Secretary-General: possible features of a model law on international commercial arbitration, A/CN.9/207, para. 101. “It may be doubted whether the model law should deal with the question whether an award may be published. Although it is controversial, since there are good reasons for and against publication, the decision may be left to the agreement of the parties or the arbitration rules chosen by them. If, nevertheless, a provision were to be included, probably an acceptable compromise could be that the award may be made public only with the express consent of the parties.”

In contrast to arbitration laws, many arbitration rules contain provisions on confidentiality. The UNCITRAL Arbitration Rules are perhaps the most limited, since they provide only that the award may not be made public without the consent of both parties.⁵² Other rules provide a broader obligation of confidentiality that extends to the existence of the arbitration and to all documents produced for the arbitration.⁵³

⁵² UNCITRAL Arbitration Rules, Article 32(5).

⁵³ See, e.g., London Court of International Arbitration, Article 30.

The Singapore International Arbitration Centre's Arbitration Rules, Article 34.6, set out in considerable detail the obligation of confidentiality and its limitations:

“The parties and the Tribunal shall at all times treat all matters relating to the proceedings (including the existence of the proceedings) and the award as confidential. A party or any arbitrator shall not, without the prior written consent of the other party or the parties, as the case may be, disclose to a third party any such matter except:

- (a) for the purpose of making an application to any competent court;*
- (b) for the purpose of making an application to the courts of any State to enforce the award;*
- (c) pursuant to the order of a court of competent jurisdiction;*
- (d) in compliance with the provisions of the laws of any State which is binding on the party making the disclosure; or*
- (e) in compliance with the request or requirement of any regulatory body or other authority which, if not binding, nonetheless would be observed customarily by the party making the disclosure.”*

In spite of the general principle of confidentiality that arises out of the rules of the various organizations, a significant number of arbitral awards are published usually edited in such a way that the parties are not identified. This is fairly common within certain trades.

London Maritime Arbitrators Association, LMAA Terms, Article 26. “If the tribunal considers that an arbitration decision merits publication and gives notice to the parties of its intention to release the award for publication, then unless either or both parties inform the tribunal of its or their objection to publication within 21 days of the notice, the award may be publicised under such arrangements as the Association may effect from time to time. The publication will be so drafted as to preserve anonymity as regards the identity of the parties, of their legal or other representatives, and of the tribunal.”

Awards in investment arbitrations are of great public interest and it is not surprising that they are often published. Awards in NAFTA arbitrations involving either Canada or the United States can be published at the instigation of either party while those that involve Mexico depend on the applicable arbitration rules.⁵⁴ In contrast, the rules governing arbitrations in ICSID limit publication of the award unless the parties consent.⁵⁵ Even without the consent of the parties ICSID is permitted to include in its publications excerpts of the legal rules applied by the tribunals. This undoubtedly contributes to the general willingness of the parties to have the awards published.

⁵⁴ NAFTA, Article 1137.4 and Article 1137.4 Annex.

⁵⁵ ICSID, Arbitration Rules, Rule 48(4).

Among arbitral institutions conducting general international commercial arbitrations, the International Chamber of Commerce has the most active publication program of awards. Since 1990 ICC has published volumes of abstracts of awards with the names of the parties deleted, and a number of other arbitral institutions do likewise.

7. CASE STUDIES

7.1 Cases to be studied in groups

Case 1

An arbitral tribunal composed of three arbitrators acting under the UNCITRAL Arbitration Rules rendered an arbitral award after due deliberations.

The award in favour of the claimant was rendered by the majority of the arbitral tribunal but was not signed by the respondent's appointed arbitrator. Furthermore, the award did not state the reasons upon which it was based, mentioning that in the arbitration agreement the parties did not require that the award state reasons.

Questions:

- a- Discuss the validity of the above arbitral award.**
- b- Was the arbitral tribunal right to issue the award without reasons?**
- c- In case the award is not valid, could the arbitral tribunal upon the request of a party correct the award or make an additional award?**
- d- If the state where the arbitration took place had adopted the UNCITRAL Model Law, could a court, upon the request of a party, order the arbitral tribunal to give reasons for the award?**

Case 2

A contract of sale of equipment was concluded in February 2000 between an Egyptian company (Buyer) and an Italian company (Seller) for the shipment of different types of equipment to different countries. The contract contained an arbitration clause stipulating that all disputes were to be settled by arbitration in Paris according to the Rules of Arbitration of the International Chamber of Commerce (ICC), by a sole arbitrator to be appointed by the President of the Court of Arbitration of the said Chamber. The contract stipulated that the shipping documents were to be considered as an integral part of the contract. An arbitration clause was inserted in one of the shipping documents signed by both parties in March 2000 referring all disputes of the shipment to arbitration in Cairo according to the UNCITRAL Arbitration Rules.

The shipment of the equipment was delayed and the Buyer refused to receive it alleging that it was not delivered in conformity with the terms and specifications agreed upon in the contract.

The Buyer submitted a request before the national court to issue an interim measure to sell the equipment before it was ruined because of the circumstances in the port.

A request of arbitration was filed by the Buyer before the Cairo Centre and an arbitral tribunal was composed of an arbitrator appointed by the claimant (Buyer), an arbitrator appointed by the respondent (Seller) and a president appointed by the two co-arbitrators.

During the first preliminary hearing held in Cairo, the respondent (Seller) raised a plea that the arbitral tribunal did not have jurisdiction as both parties expressly agreed in their contract that all disputes should be settled in Paris before the ICC, by a sole arbitrator. The respondent requested the arbitral tribunal to rule on the plea concerning its jurisdiction by an award to be rendered before the final award.

Moreover, the respondent alleged that the claimant waived his right to arbitrate by submitting the case to the national court.

Questions:

- a- Is the arbitral tribunal entitled to issue an award on the plea as to its jurisdiction? What do you think the right decision would be?**
- b- If the arbitral tribunal rules that it has jurisdiction, when can the respondent appeal the decision to the national court? Does it matter whether the arbitral tribunal's decision was in the form of an award or a procedural order?**
- c- Instead of ruling immediately, can the arbitral tribunal proceed with the arbitration and rule on the objection to its jurisdiction in its final award?**
- d- Would the application to the national court to issue an interim measure be considered as a waiver of the claimant's right to arbitrate?**

Case 3

An arbitral tribunal was duly composed of three arbitrators according to the UNCITRAL Rules. Both parties agreed in the preliminary hearing that the arbitral tribunal should render its award in one year. The parties made their submissions, the witnesses were heard and cross-examined and the arbitral tribunal declared the hearings closed. During the course of deliberations and before it came to an end, the respondent's appointed arbitrator refused to participate in deliberations and to join any meeting with the other arbitrators.

Questions:

- a- Could the President of the arbitral tribunal and the claimant's appointed arbitrator (as a truncated tribunal) render the award in the absence of the non-cooperative arbitrator?**
- b- Is the replacement of the respondent's arbitrator required?**
- c- Would the answer to question (b) be different if the non-cooperative arbitrator was the chairman of the arbitral tribunal?**
- d- If you think that another arbitrator is to be appointed, and the procedures would not be finished in the time limit agreed upon, would there be a legal way to save the arbitration?**

Case 4

An agreement was concluded between party (A) buyer and party (B) seller for the shipment of a certain drug that could be used to induce an abortion. The contract included an arbitration clause providing that all disputes should be settled according to the UNCITRAL Arbitration Rules.

A dispute arose between the two parties after the first shipment. (A) alleged that the drug was not up to the specifications agreed upon. (B) denied the allegation. An arbitration request was filed by (A).

The arbitral tribunal was established of three arbitrators, and after the first hearing, the two parties reached a settlement. They requested the arbitral tribunal to include the settlement in an award on agreed terms. The arbitral tribunal terminated the proceedings, but did not include the settlement in an award. It gave no reasons for its failure to do so. The respondent objected alleging that the arbitral tribunal was under an obligation to issue the award as requested, and that there were no legal grounds for its refusal.

Questions:

- a- Would the arbitral tribunal be under an obligation to include the settlement in an award?**
- b- What may be the justifications of the arbitral tribunal for the non inclusion of the settlement in an award on agreed terms?**
- c- Would the arbitral tribunal be under an obligation to state reasons for its refusal to issue a consent award?**
- d- If the arbitral tribunal were to include the settlement in an award, how detailed would the reasons for the award have to be?**

Case 5

An arbitral tribunal was duly composed of three arbitrators in accordance with an agreement between the parties to settle their dispute according to the national law of a state that had adopted the UNICITRAL Model Law without amendment. The parties agreed that any decision of the arbitral tribunal, other than procedural decisions, should be by unanimous vote.

After a full hearing and long deliberations it was impossible for the arbitrators to agree on an award.

By a majority vote the arbitral tribunal issued an order terminating the arbitration.

Questions:

- a- Was the order of termination of the procedures valid?**
- b- Did the arbitral tribunal have any other alternative?**
- c- Could the respondent request a court to recognize the termination of the arbitration as res judicata in regard to the merits?**

7.2 Mastery Test – Yes or No test

	YES	NO
1 • Arbitral awards may be subject to appeal.		
2 • Arbitral awards would not be enforced without the consent of the party against whom it is issued.		
3 • Parties may agree according to the UNCITRAL Model Law on issuing awards by the chairman alone if no majority is realized.		
4 • A well established, and accepted practice under the UNCITRAL Arbitration Rules permits a “truncated tribunal” to issue an internationally enforceable award.		
5 • Parties may be responsible for the problems that may occur in the deliberations between arbitral tribunal's members.		
6 • Confidentiality of deliberations has no exceptions.		
7 • Partial award means an interim award.		
8 • The application to state courts to issue an interim measure would be considered a waiver of the agreement to arbitrate.		
9 • The arbitral tribunal would consider that the defaulting party had no defence if it realizes that he was properly notified of the arbitration.		
10 • The arbitral tribunal is under an obligation according to the UNCITRAL Arbitration Rules to include the parties' settlement in a consent award.		
11 • The arbitral tribunal has an absolute power according to the UNCITRAL Arbitration Rules to order termination of the procedures.		
12 • Parties may agree that the award will be issued orally.		
13 • It is not permitted for the parties under the UNCITRAL Arbitration Rules to waive the requirement that the arbitral tribunal state reasons for the award.		
14 • An award may be nullified if it is not signed by all arbitrators.		
15 • Separate and dissenting opinions of arbitrators have the same contents.		

8. FURTHER READING

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