

## ELEMENTS OF AN AWARD

### I. Introduction

1. All things must come to an end – same applies to arbitral proceedings. Arbitral proceedings conclude when the arbitral tribunal renders the award. As it is the arbitrators' primary duty is to render an enforceable award,<sup>1</sup> it is vital to determine its necessary elements.

### II. Sources of the requirements

2. The formal and procedural requirements the arbitral award may stem either from the applicable arbitration law (*lex arbitri*), the parties' arbitration agreement or the institutional arbitration rules that parties choose to be applicable.<sup>2</sup> If the award does not meet such procedural requirements, it may be subject to annulment.<sup>3</sup>

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<sup>1</sup> Dasser, F. and Igbokwe, E.O., *Efficient Drafting of the Arbitral Award: Traditional Ways Revisited-Lesson Learned from the Past?*, in Klausegger, C., Klein, P., Kremslehner, F., Petsche, A., Pitkowitz, N., Welsler, I., Zeiler, G., (eds), *Austrian Yearbook on International Arbitration 2019*, 2019, pp. 282 [<https://www.lexology.com/library/detail.aspx?g=aca79a5e-4e2c-4a64-b435-f8f2be358533>].

<sup>2</sup> Turner, R., *Arbitration Awards: A Practical Approach*, 2005, p. 8; Redfern, A., Hunter, M. (eds.), *Law and Practice of International Commercial Arbitration*, 2004, sec. 8-53; *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Annulment, 8 July 2013, para. 178 (“Arbitration Rule 47 offers further detail on the requirements an award must meet: [...]. In all ICSID Arbitrations, the award must necessarily meet all of the elements set forth in the articles previously referred.”); *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 152 (“The obligation for tribunals to give reasons for their decisions arises out of the overriding duty to afford the parties a fair hearing, guaranteed in [Article 48\(3\) of the ICSID Convention](#) and ICSID Arbitration Rule 47(1)(i), and reiterated in numerous decisions of ICSID *ad hoc* committees.”); *The Islamic Republic of Iran v. The United States of America*, IUSCT Cases Nos. A15 (II:A), A26 (IV) and B43, Separate Opinion of Judge Charles N. Brower (Concurring in Part, Dissenting in Part), para. 11 (“Indeed, Article III (2) of the CSD provides that the Tribunal “shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out,” and the resulting Tribunal Rules of Procedure include Article 34(1) of those UNCITRAL Arbitration Rules without change: Settlement or Other Grounds for Termination Article 34 1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall..., if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.”); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, paras. 4.22-4.23 (“Article 32(2) UNCITRAL Rules: Article 32(2) provides as follows: The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay. Article 32(3) UNCITRAL Rules: Article 32(3) provides as follows: The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.”), 7.33 (“The Apotex I & II Award was made under the UNCITRAL Arbitration Rules 1976 forming part of the arbitration agreement between the parties to that arbitration. Under Article 32(2) of the UNCITRAL Rules, an award “shall be final and binding on the parties”, including an award made in the exercise of the tribunal’s power to decide upon its own jurisdiction. Under Article 32(3) of the UNCITRAL Rules, an award “shall state the reasons upon which the award is based.” Accordingly, as an award containing reasons under Article

### III. Mandatory requirements

3. The arbitral award in general should have a **written form**<sup>4</sup> (see **Article IV (1) of the New York Convention, Article 31 (1) UNCITRAL Model Law**), however there are exceptions to this principle, e.g. in England the parties may agree on the form of an award.<sup>5</sup> The award should also stipulate **the place of arbitration** and the date of the award (see **Article 47 (1) of the ICSID Convention, Article 31 (3) of the UNCITRAL Model Law**). It should, in principle, **state the reasons upon which it is based** (Article 31 (1) UNCITRAL Model Law). The arbitral award should be drafted in the agreed language of the arbitral proceedings, absent parties' agreement in a language appropriate under the circumstances (please see **Language of the Proceedings**) and should bear the arbitrators' signatures – in most legal systems in principle all arbitrators need to sign the award with rules specifying what are the effects of failure to gather all signatures.<sup>6</sup>
4. Case law is rather silent on the issue of how the arbitral award should be drafted and few cases that refer to this issue examine the role of arbitral secretaries in the drafting process.<sup>7</sup>

### IV. Content of the award

5. The contents of an award are usually determined by the arbitration agreement and the applicable *lex arbitri*.<sup>8</sup> There are several information that the arbitral award should include,<sup>9</sup> however, most of them are not mandatory:<sup>10</sup>

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32 of the UNCITRAL Rules, the Apotex I & II Award (with its reasons) was and remains final and binding upon Apotex Inc. and the Respondent, as agreed by those Parties.”)]

<sup>3</sup> Born, G.B., *International Arbitration: Law and Practice*, 2012, p. 285.

<sup>4</sup> Nacimiento, P., Port, N.C., Kronke, H., Otto, D. (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 2010, p. 152.

<sup>5</sup> See Section 52 (1) of the English Arbitration Act (1996) (“The parties are free to agree on the form of an award.”). [[https://www.jus.uio.no/lm/england.arbitration.act.1996/52.html#:~:text=Section%2052.,-%2D%20Form%20of%20award&text=\(1\)%20The%20parties%20are%20free,the%20form%20of%20an%20award.&text=\(4\)%20The%20award%20shall%20contain,when%20the%20award%20is%20made.](https://www.jus.uio.no/lm/england.arbitration.act.1996/52.html#:~:text=Section%2052.,-%2D%20Form%20of%20award&text=(1)%20The%20parties%20are%20free,the%20form%20of%20an%20award.&text=(4)%20The%20award%20shall%20contain,when%20the%20award%20is%20made.)].

<sup>6</sup> Born, G.B., *International Commercial Arbitration. Vol. II*, 2009, p. 2446.

<sup>7</sup> Dasser, F. and Igbokwe, E.O., *Efficient Drafting of the Arbitral Award: Traditional Ways Revisited- Lesson Learned from the Past?*, in Klausegger, C., Klein, P., Kremslehner, F., Petsche, A., Pitkowitz, N., Welser, I., Zeiler, G.,(eds), *Austrian Yearbook on International Arbitration 2019*, 2019, pp. 279 [<https://www.lexology.com/library/detail.aspx?g=aca79a5e-4e2c-4a64-b435-f8f2be358533>].

<sup>8</sup> Redfern, A., Hunter, M. (eds.), *Law and Practice of International Commercial Arbitration*, 2004, sec. 8-59.

<sup>9</sup> See IBA Arb40 Subcommittee, *Toolkit for Award Writing*, 2016 [<https://www.ibanet.org/Search/Search.aspx?query=toolkit>].

<sup>10</sup> Born, G.B., *International Commercial Arbitration. Vol. II*, 2009, p. 2443.

- a. **type of award** – there are several types of awards (i.e. final, partial, interim, preliminary, additional, consent, default);<sup>11</sup> the type of award should be indicated to determine whether the tribunal’s decision is in fact an award or simply a procedural order<sup>12</sup> – however, the arbitral tribunal’s decision on jurisdiction constitutes an award;<sup>13</sup>
- b. **the names and addresses** – of the parties, of their representatives, the arbitrators, and the secretary of the arbitral tribunal, if applicable;
- c. **the full text of the arbitration agreement** – it shows the basis for the arbitral tribunal’s jurisdiction to hear and resolve the case; if the tribunal’s jurisdiction had been challenged by one of the parties, this section should also consist of information on the resolution of such challenge;
- d. **applicable law** – both when it comes to the applicable institutional arbitration rules, if any, and the law applicable to the arbitration agreement and the applicable substantive law;
- e. **the procedural history** – the purpose of this section is to establish that the proceedings were conducted in a proper manner and each party had an equal opportunity to present its case; it shall consist of information on the constitution of the arbitral tribunal, on the seat of arbitration, on eventual challenges to the arbitrators, on parties’ submissions and briefs throughout the proceedings, and the date and the course of the hearing, the date of closing of proceedings;
- f. **parties’ requests for relief** – this section shall indicate parties’ requests and claims (i.e. monetary relief, specific performance, declaratory relief, injunctive relief), **counter-claims**, including any amendments, withdrawals or waivers of any claims, if any;
- g. **factual summary** – this section should contain a summary of the relevant facts of the case and information whether a given circumstance is agreed or disputed between the parties;<sup>14</sup> if a certain factual circumstance is disputed between the parties, the arbitral tribunal should provide the reasoning and evidence it relied upon in establishing such circumstance;

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<sup>11</sup> ICC Rules of Arbitration (2017), Article 2(v) (“award’ includes, inter alia, an interim, partial or final award.”) [[https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_2](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_2)]; Vienna Rules (2018), Article 6(1.8) : (“award refers to any final, partial or interim award”) [<https://www.viac.eu/en/arbitration/content/vienna-rules-2018-online#Definitions>]; UN Conference on Trade and Development, The Course on Dispute Settlement in International Trade, Investment and Intellectual Property, 2005, 2.1-2.6 [<https://unctad.org/en/Pages/DITC/TNCD/Dispute-Settlement-in-International-Trade.aspx>]; Redfern, A., Hunter, M. (eds.), *Law and Practice of International Commercial Arbitration*, 2004, sec. 8-40 – 8-49.

<sup>12</sup> The key points on how to determine whether the tribunal’s decision is in fact an award (and can be therefore challenged) – see *ZCCM Investments Holdings Plc v Kansanshi Holdings PLC and Kansanshi Mining PLC*, [2019] EWHC 1285 (Comm).

<sup>13</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015. International Centre for Settlement of Investment Disputes, *Award*, ICSID Convention Arbitration, (“if a Tribunal issues a decision on jurisdiction upholding its jurisdiction, such decision forms part of the eventual award. If a Tribunal decides that it has no jurisdiction, it renders an award.”) [<https://icsid.worldbank.org/en/Pages/process/Award-Convention-Arbitration.aspx>].

- h. **summary of parties' arguments** – this section should consist of a (rather brief) summary of parties' standing with regard to the relevant key issues in the case; it may be structured on an issue-by-issue basis;
- i. **reasoning and findings** (please see **Motivation**) – the arbitral award's reasoning is the most important part of the award (the heart of the arbitral award), required usually by both the applicable arbitration law and institutional arbitration rules<sup>15</sup> (see e.g. Article 31 (2) UNCITRAL Model Law, Article 48 (3) of the ICSID Convention, Article 34 (3) UNCITRAL Arbitration Rules); parties may jointly request the tribunal to issue a decision without the reasoning;
- j. **operative part** (please see **Operative part**) – there the arbitral tribunal determines its decision with respect to the parties' requests and claims; if the arbitral tribunal decided to award compensation or any other form of pecuniary relief, it should clearly specify the amount, the currency, the beneficiary of the payment alongside the information on taxes and interest;
- k. **award on costs** – the tribunal should determine who and to what extent bears the costs of the proceedings.

## V. ICSID awards

6. When it comes to investment arbitration conducted according to the ICSID Arbitration Rules, the requirements of the award are regulated in **Articles 46-49 of the ICSID Arbitration Rules**.
7. The formal requirements are stated in **Article 47 (1) of the ICSID Arbitration Rules** – the award shall be **in writing** and should contain the following information: (a) a precise designation of each party; (b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution; (c) the name of each member of the Tribunal, and an identification of the appointing authority of each; (d) the names of the agents, counsel and advocates of the parties; (e) the dates and place of the sittings of the Tribunal; (f) a summary of the proceeding; (g) a statement of the facts as found by the Tribunal; (h) the submissions of the parties; (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and (j) any decision of the Tribunal regarding the cost of the proceeding.<sup>16</sup>
8. Moreover, the award shall be drawn up and signed **within 120 days** after closure of the proceeding; however the Tribunal may extend this period by a further 60 days if it would otherwise be unable to draw up the award (Article 46 of the ICSID Arbitration Rules). The award shall be **signed by the members of the Tribunal who voted for it**; the date of each signature shall be indicated (Article 47 (2) of the ICSID Arbitration Rules).

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<sup>15</sup> Born, G.B., *International Arbitration: Law and Practice*, 2012, p. 283.

<sup>16</sup> Redfern, A., Hunter, M. (eds.), *Law and Practice of International Commercial Arbitration*, 2004, sec. 8-54.

9. Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49 (2) of the Convention, a supplementary decision on, or the rectification of, the award (Article 49 (1) of the ICSID Arbitration Rules).

## VI. Challenges to awards that fail to meet the formal requirements

10. The applicable legal provisions that regulate the procedure of challenging an arbitral award (**Article V of the New York Convention** and **Articles 34 and 36 of the UNCITRAL Model Law**) do not expressly provide that failure to meet the formal requirements of an award constitutes a ground for such challenge. **The states rarely in their domestic legal system provide for form requirements as grounds a challenge with regard to arbitral awards made abroad.**<sup>17</sup> However, there were cases where such basis was the reason a party was seeking an annulment (or refusal of enforcement) of an arbitral award.
11. There are cases when an award has been successfully challenged due to failure to meet the requirement of the arbitrators' signatures and the authentication of the award as per **Article IV (1) (a) of the New York Convention**. As an example, in an Italian case, the Court refused enforcement as only two out of three arbitrators' signatures were properly authenticated.<sup>18</sup> Additionally, in a rather old German case, the court refused enforcement as the award did not contain the names of the arbitrators.<sup>19</sup> In turn, a Swiss court granted enforcement of an award despite the fact the presented award was lacking some of the necessary arbitrators' signatures<sup>20</sup> and in a recent case the Austrian court recognized an award with only a majority of signatures, as there was a valid explanation to such a formal defect.<sup>21</sup>
12. There was also an interesting case with respect to the requirement of stating the names of the parties in the award properly. In the *LKT Industrial Berhad (Malaysia) v. Chun* the defendant opposed the enforcement of an award while stating it did not refer to him, as the name used therein was not his (Albert Chun Ying Llo instead of Albert Chun Ying Ho). However, the Court rejected the defendant's arguments and stated the circumstances of the case proved the award did in fact refer to him.<sup>22</sup>

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<sup>17</sup> Born, G.B., *International Commercial Arbitration*. Vol. II, 2009, p. 2444.

<sup>18</sup> *Società Distillerie Meridionali v. Schuurmans & Van Ginneken BV*, Italian Court of Cassation, 14 March 1995, 2919, XXI Y.B. Com. Arb. 607 (1996).

<sup>19</sup> Oberlandesgericht [OLG] Köln, Germany, 10 June 1976, IV Y.B. Com. Arb. 258 (1979).

<sup>20</sup> Bundesgericht, Switzerland, 4 October 2010, 4A\_124/2010.

<sup>21</sup> Oberster Gerichtshof, Austria, 13 April 2011, 3 Ob 154/10h ("The Chairman (note: of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation) confirmed the absence of the signature of one of the arbitrators on the award, stating the reasons, so that a permissible procedure within the meaning of Sec. 39 item 3 of the Arbitration Rules had taken place. (...) **The absence of the signature of one of several arbitrators thus does not constitute an ordre public contravention**, provided that the reason for this is noted on the arbitral award. In this respect, the arbitral award submitted by the operator did not provide any grounds for official proceedings.") [own translation].

<sup>22</sup> *LKT Industrial Berhad (Malaysia) v. Chun*, Supreme Court of New South Wales, Australia, 13 September 2004.

13. Moreover, even though the arbitral award should in principle be reasoned (Article 31 (1) UNCITRAL Model Law), it was decided by several courts that lack of motivation of an award, i.e. failure to state the reasons, cannot be the basis for its annulment.<sup>23</sup> The courts stated that even though the fact that a reasoning constitutes a formal arbitral award requirement under their respective domestic systems, the failure to give reasons is not contrary to the public policy and thus lead to a successful challenge provided it was permissible under the *lex arbitrii*.<sup>24</sup>
14. However, under Article 52 (1) (d) and (e) of the ICSID Convention, either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (d) that there has been a **serious departure from a fundamental rule of procedure**; or (e) **that the award has failed to state the reasons on which it is based** (please see **Grounds of annulment of ICSID Awards**). Additionally, if the reasoning was not drafted in a proper manner it may be a basis for a request for interpretation – under **Article 50 (1) of the ICSID Convention** if any dispute shall arise between the parties **as to the meaning or scope of an award**, either party may request interpretation of the award by an application in writing addressed to the Secretary-General. Corresponding regulation is embodied in **Articles 50-52 of the ICDIS Arbitration Rules**.

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<sup>23</sup> *Navigation Sonamar Inc. V. Algoma Steamships Limited*, (1994) XIX YCA 256, Superior Court of Quebec (Rapports Judiciaires de Québec 1987, 1346) [[https://www.uncitral.org/clout/clout/data/can/clout\\_case\\_10\\_leg-1005.html](https://www.uncitral.org/clout/clout/data/can/clout_case_10_leg-1005.html)]; the judgement of the Swedish Supreme Court of 31 March 2009, case ref. no. T 4387-07 (Soyak II case) (“After a dispute concerning construction works in Moscow had arisen between the parties, the dispute was, in accordance with the parties’ agreement thereon, submitted for arbitration according to the rules of the Arbitration Institute of the Stockholm Chamber of Commerce. **These rules provide that an arbitral award shall include reasons for the award. Soyak has challenged the resulting arbitral award and moved that it shall be wholly or partially annulled on the reasons that the arbitral tribunal has largely omitted to provide reasons, or that the reasons provided were insufficient or contradictory.** [...] From the investigation in the present matter, nothing has been shown but that the arbitral tribunal has stated what it had found to be shown, for all disputed issues, and they were numerous, based on what had transpired during the arbitration proceedings. **Having regard to the preceding, the reasons for the arbitral award cannot be deemed to be so defective as to give grounds for challenge proceedings.**”) [<https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=1023208&propId=1578>].

<sup>24</sup> Nancy Cour d’appel, 29 January 1958, 47 Rev. Crit. Dr. int’l. priv. 148; *Bobbie Brooks Inc. v. Lanificio Walter Banci*, Florence Corte di Appello, 8 October 1977, IV Y.B. Comm. Arb. 289; *Efxinos Shipping Co. v. Rawi Shipping Lines Ltd*, Genoa Corte di Appello, 2 May 1980, VIII Y.B. Comm. Arb. 381. See also the Supreme Court, Poland, I CSK 23/19 and R. Kos, M. Durbas, *Words, words, words: concise reasoning not grounds to vacate award*, in: International law Office, February 2020.