

THE ARBITRAL AWARD

030403 VO

Internationale Handelsschiedsgerichtsbarkeit /
International Commercial Arbitration

Dr. Venus Valentina Wong, Bakk.phil.
Attorney-at-law

Vienna, 23 October 2017

TOPICS

- ❖ Definition of Award?
- ❖ Legal Sources
- ❖ Classification of Awards
- ❖ Decision on Costs
- ❖ Types of Relief
- ❖ Governing Law
- ❖ Requirements of an Award
- ❖ Making of an Award
- ❖ Delivery of the Award
- ❖ Correction, Interpretation and Additional Award
- ❖ Other Forms of Termination of the Arbitration Proceedings
- ❖ Other Legal Aspects

DEFINITION OF AWARD?

Yes!	No!
decision	preliminary view
of an arbitral tribunal	arbitral institution, state court etc.
on a request of one of the parties	<i>ex officio</i> measure of the tribunal
in a final manner (<i>res judicata</i> effect)	order on interim measure, procedural order etc.
decision as such is subject to court review in setting aside/annulment and enforcement proceedings	decision <u>not</u> subject to court review in setting aside/annulment and enforcement proceedings

NB: The distinction between procedural and substantive issue is not necessarily decisive!

LEGAL SOURCES

- International Treaties: e.g.
 - 1958 New York Convention
 - 1961 European Convention
 - ICSID Convention
 - bilateral treaties etc.
- National Arbitration Laws (*lex arbitri*): e.g.
 - Section 606 öZPO
 - Section 1054 dZPO
 - Article 189 Swiss PILA
- (Institutional) Arbitration Rules: e.g.
 - Article 36 Vienna Rules
 - Article 32 ICC Rules
 - Article 34 UNCITRAL Arbitration Rules
- Arbitration agreement? E.g. on time limit, reasoning, costs etc.

CLASSIFICATION OF AWARDS (1)

Reference in some **arbitration rules**, e.g.:

*“award’ includes, inter alia, an **interim, partial or final award.**”*

Article 2(v) ICC Rules

*“award’ includes any **interim, partial or final award.**”*

Article 6(1.8) Vienna Rules

*“Interim measures may be granted in the form of an **interim award.**”*

Article 16(2) Swiss Rules

CLASSIFICATION OF AWARDS (2)

National **arbitration laws** are often silent on any classification, except e.g.:

*“The arbitral tribunal may rule on its own **jurisdiction**. The ruling can be made together with the ruling on the merits or by **separate arbitral award**.”*

Section 592(1) öZPO

*“The arbitral tribunal shall, as a rule, decide on its jurisdiction by **preliminary award**.”*

Article 186(3) Swiss PILA

*“Unless the parties otherwise agree, the arbitral tribunal may render **partial awards**.”*

Article 188 Swiss PILA

The **UNCITRAL Model Law** is silent on any classification.

CLASSIFICATION OF AWARDS (3)

NB: Subject to any agreement of the parties to the contrary, the arbitral tribunal may, due to its discretion as to how to conduct the arbitral proceedings, render its decisions in one or several arbitral awards.

Practice Note: An explicit legal basis authorizing (or forbidding) the arbitral tribunal to render one or more arbitral awards is often found in the “Terms of Reference” (Article 23 ICC Rules) or in the “Procedural Order No. 1”.

CLASSIFICATION OF AWARDS (4)

With regard to the different stages of the arbitration:

- Final Award
- Interim (Interlocutory/Preliminary) Award
- Partial Award

With regard to the content of the award:

- Award on Jurisdiction
- Default Award
- Cost Award
- Consent Award/Award on Agreed Terms

NB: There is no absolute definition or categorisation of the above terms!

CLASSIFICATION OF AWARDS (5)

FINAL AWARD

- Decision on all open requests and claims, including on costs
- Termination of the proceedings
- Subject of setting aside/annulment proceedings at the place of arbitration
- Subject of recognition and enforcement proceedings under NYC or other enforcement mechanisms

CLASSIFICATION OF AWARDS (6)

INTERIM (INTERLOCUTORY/PRELIMINARY) AWARD

- Rendered in the course of the proceedings without terminating it (often: in case of bifurcation of the proceedings)
- on questions of procedure: e.g.
 - jurisdiction
 - admissibility of a claim, set-off claim or counterclaim
- on questions of substance: e.g.
 - applicable law
 - validity of the contract
 - liability in principle
 - statute of limitation
- Subject to setting aside/annulment?
- Subject to enforcement?

CLASSIFICATION OF AWARDS (7)

PARTIAL AWARD

- Decision on a part of the dispute in a final manner, i.e. *res judicata* effect: e.g.
 - one of several reliefs requested
 - claim and counterclaim
 - part of the quantum

CLASSIFICATION OF AWARDS (8)

AWARD ON JURISDICTION

- Can be an interim or final award
- Depending on the *lex arbitri*:
 - obligation to challenge such award immediately, otherwise deemed to be waived in setting aside/annulment proceedings regarding the final award (Article 186(3) SwissPILA, Section 592(1) öZPO);
 - other jurisdictions (e.g. BEL, NL, SWE) provide for challenge of the final award
- Award declining jurisdiction including cost decision?

CLASSIFICATION OF AWARDS (9)

DEFAULT AWARD (1)

- One party does not participate in the proceedings (usually the respondent)
- Arbitral tribunal must examine its jurisdiction *ex officio*
- No “default” recognition of the claims as raised by the claimant, i.e. arbitral tribunal must find the facts and review the evidence before it
- Due process
- Non-participation in arbitration proceedings is usually not deemed as waiver in subsequent setting aside/annulment or enforcement proceedings

CLASSIFICATION OF AWARDS (10)

DEFAULT AWARD (2)

- Arbitral tribunal must ensure due process, i.e. right to be heard of the non-participating party and equal treatment of the parties, including:
 - Proper notice of initiation of arbitral proceedings
 - Proper notice of appointment of arbitrators
 - Opportunity to present its case

NB:

- duty of the participating party or the arbitrators to search for appropriate address?
- provisions of “fictitious” notification in various arbitration laws and arbitration rules

CLASSIFICATION OF AWARDS (11)

CONSENT AWARD/AWARD ON AGREED TERMS

- In case of **settlement** of the parties
- Only upon **joint request** of the parties
- Not necessarily without **reasoning!** (see Section 605 no. 2 öZPO vs. Section 1054(2) dZPO and Article 31(2) Model Law)
- Arbitrators' right und duty to **review** the content of such award → refusal allowed, reasons for refusal: e.g.
 - violation of (national/international) public policy
 - non-compliance with AML/KYC provisions
- Subject to court review in setting aside/annulment and enforcement proceedings

NB: Section 605 no. 1 öZPO provides for record of settlement, which constitutes a domestic enforceable title, but not an award under NYC!

DECISION ON COSTS (1)

(1) *Where the arbitral proceedings are terminated, the arbitral tribunal shall decide upon the **obligation to reimburse the costs** of the proceedings, provided the parties have not agreed otherwise. [...]*

(2) [...]

(3) *Together with the decision upon the obligation to reimburse the costs of the proceedings, the arbitral tribunal shall, as far as this is already possible and the costs are not set off against each other, **determine the amount of costs** to be reimbursed.*

(4) *In any case, the decision upon the obligation to reimburse the costs of the proceedings and the determination of the amount shall be made in the **form of an arbitral award** under section 606.*

(5) *If the decision on the obligation to reimburse the costs of the proceedings or the amount to be reimbursed was not made, or was only possible to be made after the termination of the arbitral proceedings, such decision shall be made in a **separate arbitral award**.*

Section 609 öZPO

DECISION ON COSTS (2)

- Final, interim or partial award including decision on costs
- Separate award on costs only
- Order or award on the reimbursement of substitute payment of advance on costs (e.g. Article 42(4) Vienna Rules)

DECISION ON COSTS (3)

CLASSIFICATION OF COSTS

- Costs of the arbitral institution (in institutional arbitration)
- Fees and expenses of the arbitrators
- Costs of the party
 - Fees and expenses for legal counsel
 - Fees and expenses for party-appointed experts
 - Costs for witnesses (travel and accommodation costs, training)
 - Costs for in-house counsel: fees (disputable and depending on the circumstances) and expenses (travel and accommodation costs)
- Costs for tribunal-appointed experts
- Costs of the hearing: venue, catering, interpreter, minutes etc.

DECISION ON COSTS (4)

THE ARBITRAL TRIBUNAL'S DISCRETION TO ALLOCATE COSTS

*[...] The arbitral tribunal shall, in exercise of its discretion, take into account the circumstances of the case, in particular the outcome of the proceedings.
[...]*

Section 609(2) öZPO

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

Article 38(5) ICC Rules

Unless the parties have agreed otherwise, the arbitral tribunal shall decide on the allocation of costs in the manner it deems appropriate.

Article 37 Vienna Rules

TYPES OF RELIEF

- Monetary relief
 - Specific performance
 - Declaratory relief
 - Injunctive relief
- depends, in particular, on law applicable to the merits

WHAT LAW GOVERNS THE AWARD?

- *Lex arbitri*
- Law applicable to the substance of the dispute (merits)
- New York Convention (or other multi- or bilateral treaties on enforcement)
- Arbitration rules

REQUIREMENTS OF AN AWARD (1)

Article 31. Form and contents of award

- (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.*
- (2) The award shall state the **reasons** upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.*
- (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.*
- (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be **delivered** to each party.*

Article 31 UNCITRAL Model Law

REQUIREMENTS OF AN AWARD (2)

REQUIREMENTS AS TO THE FORM (1)

- Written form
- Signature of the arbitrators
- Date of rendering
- Place of arbitration/seat

REQUIREMENTS OF AN AWARD (3)

REQUIREMENTS AS TO THE FORM (2)

- Written form
 - is the rule, exceptions: Section 52 Engl AA and Section 1495 French NCPC (parties' agreement)
 - Written arbitral award as subject of enforcement proceedings, in particular:

“The duly authenticated original award or a duly certified copy thereof;“
Article IV(1)a NYC

- Signature of the arbitrators
 - in principle by all arbitrators
 - but a majority of arbitrators suffices if reasons of non-signing are given by chairperson or another arbitrator

REQUIREMENTS OF AN AWARD (4)

REQUIREMENTS AS TO THE CONTENT (1)

- Reasoning
 - no reasoning if so agreed by the parties
 - lack of sufficient reasoning as possible violation of due process or procedural public order

REQUIREMENTS OF AN AWARD (5)

REQUIREMENTS AS TO THE CONTENT (2)

- Date
 - triggers certain time periods
 - date of notification triggers time period for setting aside/annulment claim
- Place of arbitration
 - relevant for setting aside/annulment proceedings: courts of what state are competent?
 - relevant for enforcement proceedings: domestic or foreign award? courts of what state are competent?

REQUIREMENTS OF AN AWARD (6)

REQUIREMENTS AS TO THE CONTENT (3)

- “**reasoning**” is mentioned in most arbitration laws and arbitration rules
- However, the following should also be included
 - **Parties** to the arbitration (and their representatives), their contact details (notification!), their nationality (arbitrability *ratione personae*!)
 - **Arbitrators** and arbitral **institution**
 - Reference to the underlying **arbitration agreement**
 - Reference to choice-of-law clause or decision on **applicable law**
 - Subject-matter of the dispute (arbitrability *ratione materiae*!) including
 - **Facts** of the case
 - The parties’ **relief requested**
 - **Procedural history** (due process!)
 - Precise **dispositive** part (including cost decision)

MAKING OF AN AWARD (1)

DELIBERATION OF THE ARBITRAL TRIBUNAL (1)

- Most arbitration laws are silent on deliberation.
- Arbitration rules deal with deliberation in the context of the seat of arbitration, e.g.:

“The arbitral tribunal may deliberate at any location it considers appropriate.”

Article 18(3) ICC Rules

“The arbitral tribunal shall be free to deliberate at any location and in any manner.”

Article 25, last sentence Vienna Rules

- At the place of arbitration?
- In person?

MAKING OF AN AWARD (2)

DELIBERATION OF THE ARBITRAL TRIBUNAL (2)

- Parties' right to be heard
- Confidentiality: participation of tribunal secretary?

Practice Note:

- Deliberation of the tribunal ideally immediately prior and after the oral hearing.
- Draft arbitral award prior to the oral hearing.

MAKING OF AN AWARD (3)

VOTE (1)

Most arbitration laws and arbitration rules provide for a decision by (at least) a majority vote

- Majority decision
 - All three arbitrators sign, but award indicates that it is rendered by a majority vote
 - All three arbitrators sign, but there is a dissenting opinion (not necessarily by a co-arbitrator!)
 - Only the majority of arbitrators signs the award
- The chairperson's cast vote (e.g. Section 20(4) EngAA, Article 189(2) Swiss PILA, Article 32(1) ICC Rules, Article 35(1) Vienna Rules)
- In person?
- At the place of arbitration?

MAKING OF AN AWARD (4)

VOTE (2)

- Dissenting opinion
 - Most arbitration laws and arbitration rules are silent
 - Allowed? Prohibited?
 - Right of the minority?
 - Violation of the confidentiality of the deliberations?
 - Part of the award?
 - To be delivered to the parties?

DELIVERY OF THE AWARD

Forms of Delivery:

- Most common and conventional method: by post or private courier
- In person
- By electronic means

Legal Effects:

- Binding upon the parties
- Triggering of certain time periods
 - In particular: setting aside/annulment proceedings at the place of arbitration
 - Declaration of enforceability in some jurisdictions (common law)

CORRECTION, INTERPRETATION AND ADDITIONAL AWARD (1)

Article 33. Correction and interpretation of award; additional award

Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) party, with notice to the other party, may **request** the arbitral tribunal to **correct** in the award any errors in **computation**, any **clerical** or **typographical** errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an **interpretation** of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall **form part of the award**.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article **on its own initiative** within thirty days of the date of the award.

CORRECTION, INTERPRETATION AND ADDITIONAL AWARD (2)

Article 33. Correction and interpretation of award; additional award

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an **additional award** as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

Article 33 UNCITRAL Model Law

CORRECTION, INTERPRETATION AND ADDITIONAL AWARD (3)

- Correction of the award:
 - upon request of a party
 - *ex officio*
 - only computational, clerical, typographical or similar errors
- Interpretation of the award:
 - upon request of a party
 - specific point of part of the award (modification or supplement not allowed!)
- Additional award:
 - upon request of a party

CORRECTION, INTERPRETATION AND ADDITIONAL AWARD (4)

- Requirement of due process
- Same requirements as to form and content
- Be aware which part of the award triggers the relevant time limit for setting aside/annulment or other proceedings
- Requirement to request correction, interpretation and/or additional award before the filing the setting aside/annulment claim?
 - Eng, NL, CH, AUT
- Be aware of possible conflicting time periods, in particular in jurisdictions where time limit for setting aside/annulment claim is rather short (e.g. F, CH)

OTHER FORMS OF TERMINATION OF THE PROCEEDINGS (1)

- Decision of the arbitral institution, e.g.:
 - If, after the filing of the request for arbitration but before the constitution of the tribunal,
 - advance on costs is not paid (see, e.g., Article 42(3) Vienna Rules)
 - claims are withdrawn, subject to cost consequences to be ordered by a tribunal (see, e.g. Article 38(6) ICC Rules)

OTHER FORMS OF TERMINATION OF THE PROCEEDINGS (2)

- Order of the arbitral tribunal
 - upon the parties' joint request/upon the **parties' agreement**
 - **withdrawal** of claim (with or without prejudice to re-file the claim), unless respondent has legitimate interest
 - if claimant does not waive its claim (without prejudice withdrawal)
 - respondent has incurred costs in defending the claim
 - if continuation of the arbitral proceedings is **impossible** or **unnecessary**, e.g.:
 - non-continuation of the parties (in particular of claimant)
 - non-payment of (further) advance on costs

OTHER LEGAL ASPECTS OF THE ARBITRAL AWARD

- Delocalised awards? Delocalised arbitration?
- Prescription of arbitral awards?
- Confidentiality and publication of awards?
- Set-off of arbitral awards in enforcement proceedings?
- Awards under CETA?

THANK YOU FOR YOUR ATTENTION!



Dr. Venus Valentina Wong, Bakk.phil.

Counsel

E-Mail: valentina.wong@wolftheiss.com

Telefon: +43 1 51510 5755



THE WOLF THEISS GUIDE TO:

[International Arbitration in Central, Eastern & Southeastern Europe](#)