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Toolkit for Award Writing

IBA Arb40 Subcommittee



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Preface

Angeline Welsh and Swee Yen Koh

Co-Chairs, IBA Arb40 Subcommittee

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The young arbitration community is thriving. Every major arbitral institution or organisation has a young arbitration practitioner group actively considering, debating and exchanging ideas on arbitration legal theory and practice. This is coupled with a renewed push by the arbitration community to identify new arbitrators, not only to address a lack of diversity in arbitral appointments but also in order to address concerns that a limited pool of arbitrators is one of the factors that have contributed to arbitration proceedings and the rendering of awards taking longer than they should.

One consequence of these developments is that many younger arbitration practitioners are making and are expected to make the transition from counsel to arbitrator. This Toolkit for Award Writing was conceived with this in mind; to act as a guide for the young arbitration practitioner as they approach the drafting of their first awards. It sets out both the legal and practical considerations to be taken into account when drafting an award, not only with a view to the efficient planning of that process, but also to the safeguarding of the award for the purposes of enforcement.

One of the central objectives of the IBA Arb40 Subcommittee is to provide support for young arbitration practitioners, as they develop and grow their practice. We hope that the Toolkit for Award Writing becomes a key reference text for those starting out on this new stage of their career.

Our sincere gratitude is expressed to all members of the IBA Arb40 Steering Committee who dedicated their valuable time to share their own expertise in contributing to this project; namely:

- Rouven Bodenheimer, Partner, Lungerich Lenz Schuhmacher;
- Sarah Grimmer, Secretary General, HKIAC;
- Gisela Knuts, Partner, Roschier;
- Tunde Ogunseitan, Counsel, Secretariat of the ICC.

Special thanks are due to Noradèle Radjai, Partner, Lalive. Noradèle has been the driving force behind the Toolkit for Award Writing. Not only did she conceive the project, she acted as supervising editor. It is hard to see how this project would ever have been completed without her significant professional insight and tireless dedication. Thanks are also warmly extended to Tino Schneider and Thomas Brown, two colleagues of Noradèle's at Lalive, who provided invaluable assistance in getting this project across the finishing line.

Chapter 1: Introduction

1.1 Reason for this toolkit

The writing of a reasoned and enforceable award is, without question, the key responsibility of an arbitrator. Yet, there are strikingly few practical guides available to assist arbitrators in performing this key responsibility.

When reviewing awards, it is also clear how different they can be in form: a reflection of the specifics of a dispute, the culture of the arbitrator(s) and parties, and the requirements of parties. This rich diversity of approach is of course a natural consequence of party autonomy and diversity of cultures in the field of international arbitration, and is to be encouraged. However, for the first-time arbitrator, the search for a helpful starting point can be difficult, especially when many awards in the field of commercial arbitration remain confidential and unpublished.

With the above in mind, the aim of this Toolkit for Award Writing is to provide practical advice in this important area. It must be emphasised that this is not intended to set any uniform standards of award writing or to inhibit an arbitrator's individual style. Nor is it intended to replace a thorough review of applicable national laws or institutional rules, which is critical to ensuring that any award complies with the parties' agreement and is enforceable.

1.2 Structure of the toolkit

The toolkit is intended to provide the reader with a set of tools from which to draw guidance and inspiration for award writing. The following paragraphs do not summarise the content of the chapters, but merely provide some signposts and draw out one or two themes that emerge from them.

Chapter 2 examines the grounds on which the recognition or enforcement of an award may be refused. Article V of the New York Convention is so crisp and logical in its presentation of the grounds for refusal that it could be regarded as the guiding light for any writer of an award. The fact that the UNCITRAL Model Law adopted Article V wholesale, with the effect that we now enjoy identical grounds

for refusal to enforce and annulment in the vast majority of countries,¹ has obviously underpinned the success of international arbitration over the last five decades. More practically for arbitrators writing their awards, assuming that the law of the seat is consistent with Article V, it has meant that arbitrators need only concentrate on one set of standards when writing an enforceable award.

Chapter 3 examines some practical considerations to bear in mind when writing an award. One of the key themes that emerges from the chapter is the need for planning and observance of time limits. This leads to the inevitable conclusion that arbitrators must keep in mind the award at an early stage of the arbitration and must preserve sufficient uninterrupted time to craft the award at the appropriate times. Some of the busiest arbitrators are the most disciplined and best prepared; however, particularly for those who are taking on roles as arbitrator in parallel with their ‘day job’ as counsel, the tools provided in this chapter aim to ensure that their arbitrator roles carry as much priority as their counsel roles.

Chapter 4 provides a summary of the principal contents of a typical award.

Chapter 5 sets out some tips and techniques for drafting an award. Party autonomy as it relates to choice of arbitrators means that individual cultures, styles and approaches differ. This diversity of approach is of course to be strongly encouraged, while operating within the boundaries of providing a clear and well-reasoned award, and the chapter seeks to aid the striking of this balance.

The main points contained in the substantive chapters are recalled in a checklist for award writing in Chapter 6, which we hope will assist arbitrators as they draft and, crucially, review their awards.

1.3 Our target audience

In the same way as an arbitrator should have in mind his or her audience when drafting an international arbitration award, the authors of this Toolkit for Award Writing have sought to provide a practical guide for those who are in the early stages of their practice as an arbitrator.

1 Legislation based on the UNCITRAL Model Law has been adopted in 72 states in a total of 102 jurisdictions: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html accessed on 3 June 2016.

Many in our target audience are already enjoying successful careers as arbitration counsel and will be intimately familiar with all aspects of the arbitration process. In the course of their work, they would have scrutinised awards to identify possible grounds for challenge and they would have formed their own views on what they regard as ‘good’ awards and ‘bad’ awards. However, lurking in their minds as they approach the time for writing their first awards may be the recognition that it is much easier to subject an award to critical scrutiny than it is to write one.

For those learned few in our target audience who are making the transition from the judiciary to the world of arbitration, the prospect of writing an award will not be nearly as daunting. However, it will require different considerations, for instance of not straying beyond the tribunal’s mandate and of observing the strict formalities of the award.

There are of course some in our target audience who are coming to arbitration without a background in law or the practice of arbitration. The dominance of arbitration counsel in the community of arbitrators has been the subject of many papers and is not for this introduction, save only to note that the best awards are characterised by a clarity and objectiveness of thinking that is not dependent on any specific background of the writer.

Chapter 2: General Considerations for Drafting an Award

There is no single ‘correct’ form of an award. However, there are some general considerations for drafting an award that must always be taken into account, such as any procedural or formal requirements. An arbitrator must ensure that the award complies with these, as well as any other fundamental rules (typically at the seat or at the likely place of enforcement) that may apply. These considerations vary depending on the type of award that is being rendered. This chapter sets out these general considerations, including the requirements for a decision to qualify as an award, the distinction between awards and procedural orders, the formal and procedural requirements of an arbitral award, and the different categories of arbitral awards.

2.1 Requirements for a decision to qualify as an arbitral award

As a starting point, it is of vital importance for an arbitrator to be aware what requirements must be met in order for a document to qualify as an arbitral award and for certain legal consequences to follow as a result. The New York Convention and other international arbitration conventions apply only to ‘arbitral awards’ and not to other categories of decisions or determinations.² The enforcement regime under the New York Convention is often one of the primary reasons why parties select arbitration as their dispute resolution process, making this a critical point.

In turn, pursuant to these conventions and most national laws, an arbitral award:

- has *res judicata* or other preclusive effects;
- is subject to being annulled pursuant to national arbitration legislation;
- is capable of being recognised and enforced under international arbitration conventions and most national arbitration legislation;
- satisfies requirements in some national arbitration legislation regarding the timing of a final arbitral decision resolving the parties’ claims in the arbitration; and

² Article 1(1) of the New York Convention.

- is required to satisfy form requirements and procedural steps imposed by some arbitration statutes or institutional arbitration rules.³

The New York Convention and most national laws do not expressly define the term ‘award’. The mere labelling of a communication by the arbitral tribunal is not dispositive, that is, just because a communication is named ‘award’ or ‘final award’, it does not necessarily mean that it is in fact an award. However, the New York Convention contains several references to ‘arbitral awards’ that prescribe a uniform international definition of what constitutes an award within the meaning of the Convention.

This concept has been condensed down to three basic conditions of an arbitral award whereby:

1. the award must result from an agreement to arbitrate;
2. the award must have certain minimal formal characteristics that are inherent in the concept of an award (see further 2.3 below); and
3. the award must resolve a substantive issue, not a merely procedural matter.⁴

In order for a decision to qualify as an award, arbitrators drafting their award should make sure that they comply with these conditions.

2.2 Distinction between awards and procedural orders

All awards have in common that they must resolve an essentially substantive issue in the arbitration. Purely procedural or administrative decisions are not considered awards by international arbitration conventions or national arbitration laws.⁵

3 G Born, *International Commercial Arbitration* (2nd edn, Alphen aan Den Rijn 2014), 2347 *et seq.* 2471 *et seq.* and 2907; civil law jurisdictions provide that awards have *res judicata* effect from the moment that they are made, eg, s 1055 German ZPO.

4 However, it is accepted that decisions on jurisdiction constitute awards. See, eg, *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, Award on Jurisdiction and Admissibility, PCA Case No 2012-12, 15 December 2015. As to the distinction between arbitral awards and procedural orders, see further 2.2 below.

5 See *Adamas Mgt & Services Inc v Aurado Energy Inc*, XXX YB Comm Arb 479 (New Brunswick QB 1004) (2005); *IPOC Int'l Growth Fund Ltd v LV Finance Group Ltd*, Civil Appeal No 30 of 2006 (BVI Court of Appeal, 18 June 2007); *LV Finance Group Ltd v IPOC Int'l Growth Fund Ltd* [2006] Bda LR 69 (Bermuda Commercial Court).

Conversely, typically, a procedural order should deal exclusively with matters regarding the conduct of the proceedings. However, the distinction may not always be clear-cut. For example, a decision on the burden of proof might not require the form of an award, whereas such an order would deal with a legal question that could have a major impact on the outcome of the substantive decision. It is also important to bear in mind that even where procedural orders deal with clearly procedural issues, such as setting dates for the submission of statements, dates for hearings and containing decisions on whether certain witnesses should testify at a hearing or decisions on requests for the production of documents, they are likely to have a significant impact on the conduct of the arbitration proceedings and therefore potentially on their outcome.⁶

Procedural orders, unlike arbitral awards, are not subject to annulment or recognition and enforcement. Further, the formal and procedural requirements for issuing procedural orders are less strict than for awards. To a certain extent, it is a question of style whether the arbitral tribunal uses formal procedural orders or simple forms of communication – for example, letters – in order to express its procedural determinations. In some legal cultures, it is more common to avoid procedural orders and use the tool of simple communication, whereas, in others, almost every communication from the arbitral tribunal towards the parties is effected by means of a procedural order.

2.3 Formal and procedural requirements of arbitral awards

To avoid annulment or non-recognition of an award, some formal and procedural requirements must be complied with. These requirements can stem from various sources. Generally, they are found in the arbitration legislation of the arbitral seat and the parties' arbitration agreement, including any applicable institutional rules incorporated into the arbitration agreement.

It is implicit from Article IV(1) of the New York Convention that the award should have a written form, as it requires an authenticated original award or a duly certified copy thereof.

⁶ See R Trittman, 'The interplay between procedural and substantive law in international arbitration' (2016) (1) *SchiedsVZ* 7.

National arbitration legislation at the seat of the arbitration and the place of enforcement (if known) might also impose form requirements that need to be followed by the arbitral tribunal and should be checked carefully. Most national arbitration laws require written form and a reasoned instrument, signed by some or all of the arbitrators, which is dated.

The UNCITRAL Model Law, which as previously noted has been adopted as the basis of many national arbitration laws, also provides in Article 31(3) that the award should stipulate the place of arbitration, with the effect that the award shall be deemed to have been made at that place.

The recommendation therefore is to ensure that the following formal requirements are complied with:

- the award must be in writing;
- the place of arbitration must be stipulated;
- the date of the award must be specified; and
- the award must be signed.

The practical considerations relating to the date, place and signing of an award are considered in greater detail in 3.3 below.

Whereas Article IV of the New York Convention addresses the formal requirements for recognition and enforcement, Article V sets out the substantive and procedural grounds for allowing a court in a Contracting State not to recognise or enforce an award. Most relevant to the drafting and structure of an award are paragraphs (a) to (d) (inclusive) of Article V(1) and Article V(2)(a). Each of these is an alternative ground for an award not to be recognised or enforced, with the burden of proof being on the party against whom the enforcement is invoked. The UNCITRAL Model Law (Article 36) adopts the same drafting almost verbatim (changing only the word ‘difference’ used in Article V(1)(c), to ‘dispute’ in Article 36(1)(a)(iii)).

By way of overview, the above-mentioned grounds to refuse recognition and enforcement are as follows:

- *Lack of capacity/invalidity of arbitration agreement.*⁷ This ground applies, for example, if one party to the arbitration agreement has no legal personality under the applicable law or if one party has been fraudulently induced to enter into the arbitration agreement.
- *Denial of opportunity to present party's case.*⁸ This ground applies, for example, if the arbitration proceedings were not notified to one party or in other cases of grave procedural unfairness.
- *Excess of authority.*⁹ This ground applies, for example, if the parties agreed to arbitrate claims *a* and *b*, but the tribunal also decides claim *c* regarding which no mandate exists.
- *Composition of the arbitral tribunal not in accordance with the parties' agreement or violations of parties' agreed arbitral procedures or law of arbitral seat.*¹⁰ This ground applies, for example, if the parties have agreed on a three-member arbitral tribunal and a sole arbitrator decides the dispute nevertheless.
- *Lack of arbitrability.*¹¹ This ground applies where the subject matter of the dispute cannot be resolved in arbitration proceedings. This is often accepted to be the case in, for example, employment and family law disputes, but is increasingly debated in other contexts, for example, antitrust, securities regulation, tax, intellectual property, bankruptcy or insolvency, consumer, and corporate disputes.

Taking into account these potential grounds for challenge or non-enforcement, arbitrators are advised to record clearly:

- *The arbitration agreement.* The full text of the arbitration agreement and, if in issue, an award on the validity of the arbitration agreement, specifying the law of the seat (*lex arbitrii*) and, to the extent it is an issue, the law governing the arbitration agreement, and setting out the basis on which the arbitral

7 Article V(1)(a) New York Convention; Article 36(1)(a)(i) of the UNCITRAL Model Law.

8 Article V(1)(b) of the New York Convention; Art 36(1)(a)(ii) of the UNCITRAL Model Law.

9 Article V(1)(c) of the New York Convention; Art 36(1)(a)(iii) of the UNCITRAL Model Law.

10 Article V(1)(d) of the New York Convention; Art 36(1)(a)(iv) of the UNCITRAL Model Law.

11 Article V(2)(a) of the New York Convention; Art 36(1)(b)(i) of the UNCITRAL Model Law.

tribunal has the power to rule on its jurisdiction (which may be provided for in the institutional rules¹²).

- *The notice to parties and due process.* The full procedural history of the arbitration, demonstrating that at no point has a party been denied the opportunity to present its case.
- *The scope of the award.* In detail the issues determined by the award, in particular to establish that the arbitral tribunal is determining all (and only) the issues that the parties have required to be determined.
- *The agreement of the parties.* This includes the history of the appointment of the arbitral tribunal, recording the parties' consent to the appointment of the arbitral tribunal or, in the absence of agreement, the process by which the arbitral tribunal was appointed in accordance with the law of the seat and applicable rules, and the process by which the applicable rules have been chosen and adhered to. Mentioning this is advisable in order to record that the composition of the arbitral tribunal and the conduct of the proceedings do not constitute grounds for non-recognition or annulment.

2.4 Categories of (international) arbitral awards

The following considerations attempt to identify the principal different types of arbitral awards.

Final award

As the name suggests, the term 'final' is typically used to refer to the last award in the arbitration disposing of all (remaining) claims and terminating the arbitral tribunal's mandate. However, in a broader sense of the term 'final', an award (even if described as a partial award) is considered final if it finally resolves a particular claim or matter with preclusive effect. Even awards granting provisional relief can be considered final because they finally dispose of a particular request for relief, notwithstanding the fact that they may be superseded by subsequent relief.¹³ This understanding of finality prevails in the context of recognition and

12 Eg, Art 23(1) of the 2010 UNCITRAL Arbitration Rules; LCIA Arbitration Rules 2014, Rule 23.1; Art 6(5) of the 2012 ICC Arbitration Rules; Art 15(1) of the AAA-ICDR; Art 19(1) of the HKIAC Administered Arbitration Rules.

13 See Born, n 3 above, 2428 et seq.

enforcement. A final award typically cannot be appealed (unless the parties provide for a review procedure in their arbitration agreement). Note, however, that only an award that resolves all outstanding claims concludes the arbitration and renders the arbitral tribunal *functus officio*.¹⁴

Partial award

A partial award is a final decision by the arbitral tribunal on a question that can be dealt with independently of other issues in the dispute, either because of its nature or because it concerns an identifiable and quantifiable part of the claim that can be separated from the rest of the dispute.

Rendering a partial award is an option for the arbitrators when some claims are reserved for later determination. For example, it is common for a tribunal to issue a partial award if it has determined that it is appropriate to determine its jurisdiction as a preliminary issue. A partial award is also commonly issued where the tribunal has determined it will resolve issues of liability separately and prior to quantum.

However, a partial award also finally decides and disposes of a particular claim. This can result in overlaps between partial and final awards. For example, in the event of a decision dismissing certain, but not all, of the claims on grounds of jurisdiction or admissibility, an award can be both partial (for it does not dispose of the whole case) and final (terminating the proceedings in respect of the claim dismissed).

Additional award – rectificative or interpretative

Like national court judgments, arbitral awards are subject to human fallibility and may contain mistakes, omissions or ambiguities. Within narrow limits, such defects can be corrected by the arbitrators.

Once a tribunal has issued its final award resolving all the remaining issues, it is usually considered to have terminated its mandate and will be *functus officio*. However, national arbitration laws and institutional rules often provide limited exceptions to this rule.

14 See further, R Knutson, ‘The Interpretation of Final Awards: When is a Final Award not Final?’ (1994) 11(2) *Journal of International Arbitration* 99; for detailed discussion of the *functus officio* doctrine, see Born, n 3 above, 2513–2520.

Clerical mistakes in an award, such as errors in computation or typographical errors, may typically be corrected by the arbitrators. For example, Article 33 of the UNCITRAL Model law provides that ‘within thirty days’, the tribunal may ‘correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature’ upon the request of a party or on its own motion. The tribunal’s decision to correct an award is typically considered to form part of the initial award.

If the parties have so agreed, which can also be an implied agreement, the tribunal may be requested by the parties to give an interpretation of a specific point or part of the award.¹⁵ Such a request may be appropriate if ambiguities exist in the award, in particular in its dispositive part.

Unless otherwise agreed by the parties, each party may typically request the arbitral tribunal within certain time limits (30 days under Article 33(3) of the UNCITRAL Model Law) to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. Such a request may require further written submissions from the parties and, sometimes, a further hearing. There is some debate whether the additional award forms part of the initial award or constitutes a separate award that is subject to separate annulment and enforcement proceedings.¹⁶

Interim/preliminary awards

An interim or preliminary award is an award that decides an issue relevant to the disposal of a claim, but does not finally dispose of the claim. It is described as an award that brings the case closer to a solution.¹⁷ This type of award is binding, although not enforceable. The purpose of such an interim award is to limit the scope of the dispute. Even though it cannot be enforced, an interim award binds the arbitral tribunal itself insofar as the tribunal’s final award must not conflict with the interim award previously made.

Issues that could be subject to an interim award include decisions on choice of law, liability and the interpretation of a particular contractual provision. The interim character stems from its content; it is a step towards disposing of a

15 See Art 33(1) (b) of the UNCITRAL Model Law.

16 See Born, n 3 above, 3151.

17 P Sanders, *Commentary on the UNCITRAL Arbitration Rules* (Alphen aan Den Rijn 1977), 172, 210; further P Binder, *Analytical Commentary to the UNCITRAL Arbitration Rules* (London 2013), 34-005.

portion of the parties' claims (like a partial award) but does not purport to make a final decision by either granting or rejecting those claims.

The concept of an interim award, as explained above, is to be distinguished from the concept of provisional relief, which is sometimes referred to as a provisional award. Some institutional rules allow for a provisional award.¹⁸ Types of provisional award include orders for the payment of money or the disposition of property as between parties, or an order to make an interim payment on account of the costs of the tribunal.

An award granting provisional relief is interim in the sense that it may subsequently be taken into account by the arbitral tribunal in issuing its final award, but it is not an interim award in technical terms since it contains a (temporarily) final decision about a discrete request for relief. This is why some writers suggest that arbitrators should specify the scope of their decision precisely in order to avoid any confusion. To achieve this goal, it could be advisable to name an award 'Interim Award of Provisional Relief'.¹⁹

The requirements for interim and preliminary awards are not as strict as those for final awards. There is no need to state the reasons for an interim award and there are no strict form requirements: in principle, an interim award may be issued orally or, for example, may be contained in the transcript of an arbitral hearing.

Awards by consent

At any time during the proceedings, the parties may decide to resolve their dispute (fully or partially) by consent. Most arbitration rules specifically provide for this possibility and permit the arbitrators to enter an award upon agreed terms on the parties' request.²⁰ Parties may have no need to have their settlement agreement recorded as a consent award if all monies are paid and any other disputes are completely resolved. However, if any obligation remains to be performed after the signing of such an agreement, the arbitral tribunal is well advised to recommend to the parties that their settlement agreement be recorded in the form of an award. Otherwise, the non-performance by one party would merely constitute a breach of contract to be asserted in another

18 For example, LCIA Rules, Art 25.1 (iii), ICC Rules, Art 28(1) and r 10 of the Construction Industry Model Arbitration Rules 2011.

19 See further Born, n 3 above, 2435.

20 Eg, Art 36(1) of the 2010 UNCITRAL Arbitration Rules.

proceeding in arbitration or in court. Furthermore, in non-domestic cases, an award allows the possibility of enforcement under the New York Convention.

Another reason for reflecting the parties' agreement in an award is if one of the parties is a state or a state agency. Some jurisdictions are more inclined to comply with an award than with a settlement agreement.²¹

Default award

A default award is an award that is made following the failure of one party to participate in the proceedings.

In a case where a respondent does not participate or, after having participated, withdraws from the proceedings, the arbitral tribunal cannot simply render an award in favour of the claimant but must still render a reasoned award. Such an award may take the form of a partial, final or interim award and is subject to the same considerations set out above.

Additional considerations may apply, however, especially in terms of ensuring the enforceability of a (final) award. Particular care must be taken regarding the notification of all procedural steps throughout the proceedings to all parties (including the defaulting party). The absent party must be given the full opportunity to participate in the proceedings. As a practical consequence, the continuous efforts made by the arbitrators to notify the absent party and to give it the opportunity to present its case should be meticulously documented in the award.

21 See A Redfern and M Hunter, *International Arbitration* (6th edn, Oxford 2015), para 9.34.

Chapter 3: Practical Considerations for Drafting an Award

While engaged in drafting an award, the arbitrator must not lose sight of several key practical considerations to ensure that the eventual award is rendered in a timely fashion and complies with certain formalities. Accordingly, this chapter sets out the time limits that may apply to the drafting of an arbitral award, addresses issues connected to the language as well as to the signature, date and place of the award and further deals with issues pertaining to the notification of the award and confidentiality. The chapter also deals with the involvement of a tribunal secretary in the drafting of an award. While the use of a tribunal secretary has been the subject of much recent debate, there is broad agreement that when it comes to drafting an award, care must be taken in respect of the tasks that can be appropriately delegated to a tribunal secretary. It concludes with a section on making a cost award, usually the final step in an arbitration.

3.1 Time limits

It is often said that one of the advantages of arbitration over litigation is the speedier resolution of disputes. To maintain this advantage, and ensure the cost-efficiency of the arbitration, arbitrators should ensure sufficient time has been allocated to the deliberations, drafting and rendering of the award. In addition, some institutional rules set time limits for rendering awards, which should be adhered to.²²

Given the importance of appropriate time management for an arbitration, arbitrators should start planning their time at the appointment stage. Although it is impossible for an arbitrator to predict precisely the course of events the arbitration may take, the arbitrator should confirm his/her availability during the critical stages of the arbitration and allocate enough time to be able to participate in the hearings, the deliberation and the drafting of the award.

²² Article 37 of the 2010 SCC Arbitration Rules; Art 40(1) of the NAI 2015 Arbitration Rules; Art 30 of the 2012 ICC Arbitration Rules; the ICC International Court of Arbitration recently introduced reductions in arbitrators' fees where awards are delivered outside certain time limits (two months from the date of the last substantive hearing or the last written submission in the case of a sole arbitrator; three months in the case of a three-member tribunal) unless the delay is attributable to factors beyond the arbitrators' control or to exceptional circumstance. See Note to Parties and Arbitral Tribunals on the conduct of the arbitration under the ICC Rules of Arbitration, IV, D dated 10 May 2016.

In practice, since each case has its individual characteristics and complexities, the length of time that is reasonable for the rendering of an award can vary. Factors that arbitrators may take into account include the number and volume of written submissions, expert reports and witness statements; the number and length of hearings held in the case; the value and number of issues in dispute; the date of the last hearing and/or written submission; and the number of arbitrators on the arbitral tribunal.

A good practice for the arbitrators is to start early in the procedure to prepare a draft of the award. This draft will obviously lack any conclusions, but it is useful to summarise the information about the parties, the alleged facts, the parties' positions and other matters as they occur during the proceedings. If kept updated, arbitrators will find it easier to render the award soon after the closure of the proceedings. Drafting the issues to be determined early in the arbitration proceedings and keeping track of these issues at each stage in the proceedings helps to create a logical sequence and coherence by the time the arbitrator comes to write the reasoning and conclusions.

In three-member arbitral tribunals, the chairperson usually drafts the award. However, in particularly complex cases, it might be convenient to split the work among the three arbitrators, the implications of which are discussed in 5.7 below. In any event, sufficient time should be allowed for the review of the award by the entire tribunal and the incorporation of any comments thereto.

Compliance with the time limits can have important consequences for the validity of the award, because some domestic legislation provides for the setting aside of an award adopted after the expiry of the time limit for its adoption.²³

Other possible consequences of a delayed award, in institutional arbitrations, include the replacement of an excessively slow arbitrator,²⁴ the reduction of the fees of the arbitral tribunal,²⁵ or any specific arbitrator, as well as possible reputational damage: an institution or a party or a party's counsel would hesitate to reappoint an arbitrator who was repeatedly late.

23 For example, the Swedish Arbitration Act provides in Art 34(2) that 'An award... be wholly or partially set aside upon motion of a party... if the arbitrators have made the award after the expiration of the period decided on by the parties,...', Prop 1998/99:35, p 123 *et seq.*

24 See, eg, Art 15(2) of the 2012 ICC Arbitration Rules; H Lloyd et al, 'Drafting Awards in ICC Arbitration' (2005) 16(2) ICC IC Arb Bull 19, p 25.

25 See Note to Parties and Arbitral Tribunals on the conduct of the arbitration under the ICC Rules of Arbitration, IV, D dated 10 May 2016.

Finally, while drafting an award is exclusively in the arbitrators' domain, arbitral institutions may subject awards to a review procedure where the institution may point out formal or clerical errors or other deficiencies in the award to the arbitrators and request its correction or completion. Arbitrators should consider any such scrutiny process in planning the time required to render the award.²⁶

Arbitrators should be prepared to cooperate efficiently with the institution, even after a draft award has been submitted, to reduce the time of the scrutiny process. For instance, arbitrators should remain available for the institution to clarify questions about the award or suggestions to correct calculation or drafting errors.

3.2 Language

The language of the award should be identified at the outset, particularly since this can have implications on the award's enforceability. In practice, arbitrators are well advised to specify the language of the award in the terms of reference, right at the beginning of the arbitration. This avoids problems later on, when a party may try to use the discussion about the language of the award as a delay tactic or as a ground for opposing the recognition and enforcement of the award.

In most cases, the award is written in the language of the arbitral proceeding. This procedural language should be fixed at the earliest convenience, ideally by the parties. If the parties do not specify the language of the arbitration or, specifically, of the arbitral award, the arbitrators must determine it. The law of the seat of arbitration may also be relevant for determining the language of the award.²⁷

26 The level of scrutiny to which arbitral institutions submit awards differs widely. Under Art 33 of the 2012 ICC Arbitration Rules, the ICC International Court of Arbitration submits the award to a considerable level of scrutiny and may even draw the arbitrators' attention to points of substance. Article 28(2) of the 2013 SIAC Arbitration Rules contains a similar provision. Other arbitration rules do not provide for a comparable scrutiny process. See Art 27 of the 2014 LCIA Arbitration Rules; Arts 35 *et seq* of the 2010 SCC Arbitration Rules; Arts 32 *et seq* of the HKIAC Administered Arbitration Rules.

27 For instance, Art 28(1) of the Spanish Law on Arbitration (Law 60/2003, of 23 December 2003) states that, in the absence of a party agreement to the contrary, the arbitration takes place in one of the official languages of the place of arbitration.

When arbitrators must decide on the language to be used in drafting the award, they should take into account a number of factors to provide for due process and preserve the equality of the parties. First, they should agree upon a language that all the arbitrators understand. No arbitrator has the obligation to sign an award she does not fully understand; indeed, it would be detrimental to his/her credibility and authority. Keeping in mind the difficulties related to the translation and validity of different language versions, where an arbitrator was nominated in the belief that she understood the language of the arbitration, but then that language subsequently changed, the arbitrator should draw this to the attention of the parties as early as possible and, if necessary, be prepared to resign.

Secondly, the language should have some link to the dispute or the parties. Thus, the arbitrators may decide to write the award in the language of the contract underlying the dispute. They may also opt for the language used by both parties in their correspondence,²⁸ or the common official language of the parties' nationality, or even take into account the place where the award is most likely to be enforced. It is also possible that the arbitrators allow each party to submit their pleadings in their own language, and that only the arbitrators will adopt the award (and possible orders and partial awards) in a sole language.²⁹

Thirdly, the arbitrators should decide to write the award in only one language. Several official language versions of an award could increase the prospects of an application to set the award aside. If for exceptional reasons, for example in case of disagreement between the arbitrators, the arbitrators decide to write their award in several languages, they should agree on one language version that will definitively govern the award in case of any inconsistency. Although writing the award in one official language is encouraged, parties of course can make arrangements to have the final award translated into other languages for the purposes of deposit, confirmation or enforcement.

28 The language of the contract and the language used between the parties in their correspondence traditionally was so relevant that in the Preliminary Draft of the 1976 UNCITRAL Arbitration Rules it was understood that this was the default language in case the parties had not provided for a different language; see Report of the UNCITRAL, 8th Session, Summary of Discussion of the Preliminary Draft (Geneva, 1–17 April 1975), UN Doc A/10017 (1975), para 111.

29 J Nedden and A Herzberg, *ICC-SchO DIS-SchO Praxiskommentar zu den Schiedsgerichtsordnungen* (Köln 2014), 292.

Fourthly, arbitrators should take into account the scrutiny process by the institution, if applicable. For example, in addition to French and English, the ICC International Court of Arbitration scrutinises arbitral awards in Italian, Spanish, Portuguese and German. Any award rendered in another language is translated into one of the working languages for the scrutiny process. Before drafting the award, therefore, arbitrators may take into account whether the institution (if any) will or will not translate the award for the scrutiny process, and save time and discussions about linguistic issues resulting from such translation.

The law of the seat may also have relevant provisions for the use of languages. Some domestic rules provide for the deposit or registration of copies of the award before local courts at the place of arbitration. These copies are sometimes required to be translated into the local language at the seat. The UNCITRAL Model Law offers a flexible approach to the deposit of a specific language version of the award with the local courts of justice, by establishing that the ‘party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language’.³⁰ This provision has been adopted in varied forms into some domestic laws. Some states do not require the deposit of any translation of the awards,³¹ while others do require an official translation.³² The furnishing of such a translation may add costs and time to the arbitration. Arbitrators should plan ahead for these translations to be made in due course and include these translations in the time and cost assessment of the case.

Finally, notwithstanding the language of the award, arbitrators are free to use any other language in their conversations and deliberations during the arbitral procedure, but must take care to ensure that, in any conversations with the parties, any such other language is understood by both parties and their respective counsel, whether directly or with the involvement of a translator.

30 Article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration.

31 For instance, Art 193 of the Swiss Arbitration Law, which regulates the ‘deposit and certificate of enforceability’, does not make any provision regarding the language of an award, thus in principle allowing the deposit of an award drafted in a foreign language.

32 For instance, in Oman the prevailing party has to deposit the award with the local court; see Art 47(1) of the Omani Law of Arbitration in Civil and Commercial Disputes, Royal Decree No 47/97 (available online at www.omaninfo.com/law-and-legislation/omani-law-arbitration-civil-and-commercial-disputes.asp, last visited 5 February 2016).

3.3 Signature, date and place

Signature

Any valid arbitral award must bear the arbitrator's actual (as opposed to electronic) signature and date.³³ By signing the award, the arbitrators adopt the final version of the agreed-upon draft, which will be the version deemed to be 'made' in the sense of the 2012 ICC Arbitration Rules³⁴ and other relevant rules.³⁵

In the case of a sole arbitrator, the award is deemed to be made when the sole arbitrator signs and dates the award. In an arbitral tribunal with three arbitrators, the signature requirements depend on how the arbitral tribunal has reached its conclusion. When all arbitrators agree on the award, the award is deemed to be made when all arbitrators sign the award. In case of a majority decision, the award will be valid with the signature of the majority. In these situations, many awards contain an explanation as to why they are lacking certain signatures. Indeed, some arbitration laws explicitly require an explanation as to why signatures are missing.³⁶ Some awards that explain why they were adopted with a majority vote also bear the signature of the dissenting arbitrators. This is because signature of the award does not imply acceptance or full agreement with it. The signature rather means that the arbitrator in question has fully taken part in the proceeding leading up to it.

Arbitrators should check carefully any signature formalities or requirements at the place of arbitration. For instance, some jurisdictions require the initialling of all pages of the award by all members of the arbitral tribunal,³⁷ while others

33 Article 31(1) and (3) of the UNCITRAL Model Law on International Commercial Arbitration. This rule has been incorporated, eg, into the German Arbitration Law. See Art 1054(1) and (3) of the German Code of Civil Procedure (in the version as modified by the Law on the New Regulation of the Arbitral Process of 22 December 1997).

34 Article 31(1) and (3) of the 2012 ICC Arbitration Rules.

35 See, for instance, the wording of Art V(1)(e) of the New York Convention.

36 Article 31(1) of the UNCITRAL Model Law on International Commercial Arbitration. In contrast, the Swiss Arbitration Law does not require any explanation on why the signature of a member is missing. In fact, Art 189 of that law provides that 'The signature of the chairman is sufficient'. The 2012 ICC Arbitration Rules also do not require an explanation of why an arbitrator has not signed the award. In practice, however, the ICC Secretariat reaches out to those arbitrators asking them to provide an explanation, before it notifies the award to the parties.

37 For instance, Art 202(1) of the Qatari Civil and Commercial Procedure Law, Law no 13/1990, provides that in order to be valid, an award has to bear 'the signatures of the arbitrators'. In practice, the Qatari courts require the initialling of all pages of the award by all signing arbitrators.

require the physical presence of the arbitrators at the place (ie, the seat) of arbitration for validly signing the award³⁸ and that the arbitrators personally file the award with a local court in the seat of the arbitration.³⁹

The signature process of an award is not always straightforward and given the need for actual execution of the award by the arbitrators in multiple numbers of originals (see 3.4 below), this must be considered well in advance of the planned issue date for the award.

Date and place

Each arbitrator may state the effective date when he or she signs the award. The arbitrators are free to choose the date on which their award will become effective. The only limit to the arbitrator's discretion is that usually they cannot predate the award to the institution's approval (if any).⁴⁰ If the arbitrators have not specified any particular date for the effectiveness of the award, the award is deemed to be effective at the date of the last signature.

Some arbitration rules and national laws also require arbitrators to state the place where the award was made.⁴¹ This place refers to the legal place of arbitration, that is, the seat of the arbitration.⁴² For this reason, there is no need for arbitrators to specify the physical place where they are at the precise moment of signature of the award unless the award must be physically signed at the place of arbitration, as to which see 'Signature' above.

38 Article 212(4) of the United Arab Emirates Civil Procedure Code provides that an award is only issued in the United Arab Emirates if it was signed there. This may have implications on the enforcement of the award. For commentary see also: Global Legal Insights, International Arbitration 2nd Edition – United Arab Emirates: www.globallegalinsights.com/practice-areas/international-arbitration-/global-legal-insights-international-arbitration-1/united-arab-emirates, last visited 20 May 2016; Legal 500 Legal Developments in United Arab Emirates: www.legal500.com/c/united-arab-emirates/developments/22882, last visited 20 May 2016.

39 For instance, until 2014, Qatari courts required as a public policy consideration that any arbitral award, foreign or domestic, be adopted in the name of the Emir. The Qatari Court of Cassation abolished this requirement in a judgment on 25 March 2014, Qatar Court of Cassation Civil Challenge No 45 and 49, of 2014. However, the practice continues to be observed in Qatar.

40 Article 33 of the 2012 ICC Arbitration Rules, which states that the scrutiny takes place '[b]efore signing the award'.

41 See, eg, Art 31(3) of the 2012 ICC Arbitration Rules; Art 30(2) of the AAA-ICDR; Art 49(3) of the CIETAC Arbitration Rules; Rule 47(1)(e) of the ICSID Arbitration Rules; Art 26.2 of the LCIA Arbitration Rules; Art 34(4) the 2010 UNCITRAL Arbitration Rules.

42 In the sense of Art 18(1) of the 2012 ICC Arbitration Rules as opposed to the physical place where the arbitrators are located (or even where the hearings were held).

3.4 Notification

The notification of the award serves three main purposes. First, it usually creates the obligation for the parties to carry out the award without delay.⁴³ Secondly, the time limits for correction and interpretation of the award are calculated from the moment of notification.⁴⁴ Thirdly, any applicable time limits for commencing annulment proceedings typically run from the date of the notification of the award to the parties.

Arbitrators should consider the means for the notification of the award. In institutional arbitration, this is often done by the institution itself.⁴⁵ Otherwise, the arbitrators must notify the award to the parties themselves.⁴⁶

The number of original copies of the award depends on the circumstances of each case. Generally, the sole arbitrator or the chairperson circulates one signed original for each party and one for the institution (if any), in addition to one for each member of the arbitral tribunal. In the case of multi-party arbitrations, each individual party has the right to receive a signed original of the award. Accordingly, the chairperson has to circulate the appropriate number of originals among the co-arbitrators to sign.

Given its importance, notification of the award to the parties should usually be made by international courier or by public postal services against return receipt. When awards contain particularly sensitive information, parties may wish to pick up the awards personally at the offices of one of the arbitrators or of the institution (if any). Under some arbitration rules, after the notification, the arbitrators remain obliged to assist the parties in complying with any further formalities that may be needed to ensure enforcement

43 Article 34(6) 2012 ICC Arbitration Rules; Art 34(3) of the HKIAC Administered Arbitration Rules; Art of the 40 2010 SCC Arbitration Rules; Art 30 of the AAA-ICDR; Art 26(8) of the 2014 LCIA Arbitration Rules.

44 Article 35(1) and (2) of the 2012 ICC Arbitration Rules; Art 41 of the 2010 SCC Arbitration Rules; Art 33 of the AAA-ICDR; Art 37(1) of the HKIAC Administered Arbitration Rules; Art 29(1) of the 2013 SIAC Arbitration Rules; Art 27 of the 2014 LCIA Arbitration Rules; J Fry *et al*, *The Secretariat's Guide to ICC Arbitration: a practical commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC* (Paris 2012), 347, 349–350; M Bühler and T Webster, *Handbook of ICC Arbitration: commentary, precedents, materials* (3rd edn, London 2014), 538–541.

45 Under the 2012 ICC Arbitration Rules, once the award is made, the president of the arbitral tribunal conveys the original copies of the award to the ICC Secretariat. The Secretariat then notifies the award to the parties (Art 34(1) of the 2012 ICC Arbitration Rules).

46 Article 34(6) of the 2010 UNCITRAL Arbitration Rules.

of the award.⁴⁷ This can include, for instance, assisting in obtaining the *apostille* under the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.⁴⁸

National arbitration laws may impose specific obligations regarding notification of the award, such as time limits for notification.⁴⁹ Arbitrators need to keep these local requirements in mind when notifying the awards.

3.5 Confidentiality

Under most national laws and arbitration rules, arbitrators have a special duty of confidentiality towards their co-arbitrators, towards the parties and towards the arbitral institution (if any). At the same time, confidentiality may be a right that the arbitrators may invoke towards the other actors involved in the arbitral proceeding, as well as against third parties. Some cases require special confidentiality arrangements due to their subject matter. This enhanced confidentiality may be arranged for cases about defence or public safety matters.

Confidentiality becomes especially relevant during the award adoption process. First, arbitrators must keep the draft award confidential in the course of circulating it to their co-arbitrators and the arbitral institution. This means that they must not communicate the draft award to the parties or their counsel, witnesses, experts or the media. Secondly, the confidentiality obligation also applies to the views of the co-arbitrators expressed in whatever form (written or oral) during the deliberations. Thirdly, the award has to be communicated to the parties in such a way as to preserve the confidentiality of the deliberations and of the award itself. Arbitrators should identify (and, as the case may be, confirm with the parties) the manner in which the award is to be notified and to whom, in order to preserve confidentiality. Fourthly, even after the adoption of the award and the notification to the parties, the arbitrators must refrain from publishing the award unless expressly permitted by the parties.

47 Article 34(5) of the 2012 ICC Arbitration Rules.

48 Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, 527 UNTS 189.

49 Under the Italian Code of Civil Procedure, provided until 1994, the arbitrators were obligated to notify an award within one year of its adoption. This requirement, enshrined in Art 825(2) of the Code, was eliminated in the 1994 reform of Italian arbitration law; see L. Salvaneschi, *Commentario del Codice di Procedura Civile. Libro Quarto – Dei Procedimenti Speciali. Dell'Arbitrato (Article 806-840)* (Bologna 2014), 815.

The arbitration agreement, the terms of reference, as well as the award, may contain confidentiality requirements binding upon the parties and/or the arbitrators, and should therefore be verified in connection with preparation and notification of the award.

3.6 The role of the tribunal secretary in the award writing process

The role of a tribunal secretary has been the subject of much debate within the international arbitration community. The debate has centred on whether arbitrators have been delegating too much of their role to the tribunal secretary such that the secretary has in essence become the ‘fourth arbitrator’.⁵⁰

The mandate of the arbitrator is *intuitu personae* (‘according to the person’) and consequently it is impermissible for an arbitrator to delegate decision-making to a third party, such as a tribunal secretary. At the same time, a tribunal secretary may perform a very valuable role in helping to produce a timely award. With complex arbitrations, long and complicated procedural histories need to be recorded correctly in the award and it may be more cost efficient for a tribunal secretary to undertake some role in preparing the award, for example, the preparation of a framework for the award that includes all of the prescribed elements for an enforceable award, provided that this is done under the careful supervision of the arbitrator. In this regard, it is worth noting that the 2015 Queen Mary/White & Case International Arbitration Survey revealed that while the arbitration community that took part in the survey support the use of a

50 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, pp 42 and 43: www.arbitration.qmul.ac.uk/docs/164761.pdf, last visited 6 June 2016; C Partasides, ‘Secretaries to Arbitral Tribunals’, in B Hanotiau and A Mourre (eds), *Players Interaction in International Arbitration* (Paris 2012), Dossiers of the ICC Institute of World Business Law 9, 84; revised Note on the Appointment, Duties and Remuneration of Administrative Secretaries, available at www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Flash-news/Introduction-of-revised-Note-on-the-Appointment,-Duties-and-Remuneration-of-Administrative-Secretaries, last visited 20 May 2016; the role of the arbitral secretary was heavily debated in the publicly known ‘Yukos’ case, which was ultimately decided on other grounds, *The Russian Federation v Veteran Petroleum et al*, Judgment, Rechtbank Den Haag C/09/477160 / HA ZA 15-1, 20 April 2016, unofficial English translation available at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:4230>, last visited 20 May 2016. 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration: www.arbitration.qmul.ac.uk/docs/164761.pdf, last visited 6 June 2016.

tribunal secretary, it is overwhelmingly of the view that the substantive parts of the award should be written by the arbitrator(s) and not the tribunal secretary.⁵¹

In response to this concern, there has been a proliferation of institutional rules and guidelines that seek to define the tasks that may be legitimately delegated to the tribunal secretary. Therefore, in determining the scope of a tribunal secretary's role (if any) in assisting with the award, tribunals should have regard to any applicable institutional rules or guidelines.⁵²

3.7 Costs

Finally, it is worth noting that the arbitral tribunal should ensure at an early stage in the award-writing process that the parties have made sufficient advances of costs so as to cover the amount that is required by the arbitral tribunal in order to complete the award-writing process. It is important to organise this well in advance because the award will not generally be notified until the arbitral tribunal's fees have been settled in full and so any delay in resolving cost issues could lead to a delay in the final notification of the award. Where the arbitration is being administered by an institution, the institution itself will often anticipate this and support the tribunal in the efficient management of the process.

51 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, pp 42 and 43: www.arbitration.qmul.ac.uk/docs/164761.pdf, last visited 6 June 2016.

52 Revised Note on the Appointment, Duties and Remuneration of Administrative Secretaries, available at www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Flash-news/Introduction-of-revised-Note-on-the-Appointment,-Duties-and-Remuneration-of-Administrative-Secretaries, last visited 20 May 2016; SIAC Practice Note for Administered Cases – On the Appointment of Administrative Secretaries, available at www.siac.org.sg/our-rules/practice-notes/practice-note-for-administered-cases-on-the-appointment-of-administrative-secretaries, last visited 20 May 2016; HKIAC Guidelines, available at <https://actuarbitragealtana.files.wordpress.com/2015/04/hkiac-guidelines-on-use-of-secretary-to-arbitral-tribunal-final.pdf>, last visited 20 May 2016; Young ICCA Guide on Arbitral Secretaries, available at www.arbitration-icca.org/media/3/14235574857310/aa_arbitral_sec_guide_composite_10_feb_2015.pdf, last visited 20 May 2016.

Chapter 4: Content of the Award

This chapter provides guidance to arbitrators on how to issue procedurally sound, factually and legally comprehensive, reasoned decisions that respect the mandate prescribed by the parties' arbitration agreement. In particular, this chapter addresses the content of the award, including procedural information, relevant facts and applicable law, the parties' arguments and requests for relief, the dispositive issues and the arbitral tribunal's analysis.

4.1 Mandatory requirements

It is important to verify what content an award must contain according to the law applicable to the procedure (*lex arbitri*), the rules of procedure and/or the parties' agreement. Most modern arbitration laws and procedural rules stipulate only minimal mandatory requirements as to the content of an award. The most common mandatory requirement is that the award shall state the reasons upon which it is based.⁵³ Furthermore, national arbitration laws and procedural rules often provide that an award must indicate the date on which it was made and the place of arbitration (see also 'Date and place' in 3.3 above).⁵⁴ Failure to include the required contents may provide grounds for a successful application to set aside or annul the award.

Although additional content may not strictly be required under the applicable law, procedural rules or by party-agreement, it is generally recommended that awards contain further information, as discussed below.

53 Article 31(2) of the UNCITRAL Model Law on International Commercial Arbitration; Art 34(3) of the 2010 UNCITRAL Rules; Art 34(3) of the 2012 Arbitration Rules of the Permanent Court of Arbitration; Art 48(3) of the ICSID Convention; Art 31(2) of the 2012 ICC Arbitration Rules; Art 26(2) of the 2014 LCIA Arbitration Rules; Art 34(4) of the HKIAC Administered Arbitration Rules; Art 36(1) of the 2010 SCC Arbitration Rules; Section 4.4c.

54 Article 31(3) of the UNCITRAL Model Law on International Commercial Arbitration; Art 34(4) of the 2010 UNCITRAL Rules; Art 34(4) of the 2012 Arbitration Rules of the Permanent Court of Arbitration; Rule 47(1), ICSID Arbitration Rules; Art 31(3) of the 2012 ICC Arbitration Rules; Art 26(2) of the 2014 LCIA Arbitration Rules; Art 34(5) of the HKIAC Administered Arbitration Rules; Art 36(2) of the 2010 SCC Arbitration Rules; Section 4.3.

4.2 Administrative or procedural contents

It is recommended that an award contain certain basic information regarding the arbitration, such as:

- the names and addresses of the parties (including any company or commercial registration number and their nationality or jurisdiction of incorporation) and of their legal or other representatives (including any change in representation);
- the date, parties and precise terms of the arbitration agreement (in full, including a record of any agreed amendments);
- the place of the arbitration and whether it was agreed by the parties or determined by the arbitral tribunal or the institution;
- the law or rules of law applicable to the arbitration agreement and the merits of the dispute, and whether they were agreed by the parties or decided by the arbitral tribunal;
- the procedural rules governing the arbitration (ensuring that the correct version of the rules, as agreed by the parties, is referred to);
- the language or languages of the arbitration (including an indication as to which is authoritative if there is more than one) and whether it/they were agreed upon or determined by the arbitral tribunal or institution;
- the name(s), nationalities and relevant contact details of the arbitrator(s);
- the manner in which the arbitral tribunal was constituted;
- the institutional case reference number, if any;
- the secretary of the arbitral tribunal, if any;
- the principal chronology of the events leading to the commencement of the dispute (eg, issuance of a letter of intent or notification of dispute);
- the principal chronology of the proceedings (eg, including procedural directions and the parties' main submissions);
- the steps that the arbitral tribunal took to ascertain the facts of the case;

- the dates of any evidentiary or other hearings and any previous awards;
- the date when any proceedings were closed;
- where applicable, the time limit for rendering the award, including any extensions to that limit; and
- the type of award.

4.3 Type of award

The award should indicate, typically on the cover page, what kind of award it is. The *lex arbitri* or procedural rules may indicate the appropriate nomenclature. For example, it may be identified as a final, partial or interim award. If an award is not final, it may be useful to indicate not only that it is a partial or interim award, but also its subject matter. For example, it may be an interim or partial award on jurisdiction, it may be an award on remaining issues of jurisdiction and liability, or an award on liability, an award on compensation, or an award on costs.⁵⁵

4.4 Procedural history

The recommendation is that the award should contain a procedural history section recording key procedural information. The aim of such a section is to demonstrate that the arbitration was properly commenced and that the proceedings were conducted with due process and equal treatment of the parties. Such information may be relevant in later recognition and enforcement or set-aside or annulment proceedings.

Key procedural information that may be recorded in a procedural history section includes the arbitration agreement, the commencement of the arbitration, the constitution of the arbitral tribunal, procedural applications made by the parties to the arbitral tribunal and the arbitral tribunal's treatment of such applications, and details concerning the pleadings and evidence submitted by the parties.

Where an award is being made following a prior award, the recommendation is that the award refers to the prior award and to the procedural history contained

⁵⁵ On types of awards, see further 2.4 above.

in that prior award, with the result that the current award need only describe the intervening procedural history.

4.5 Basis of jurisdiction

An award should record the basis upon which the arbitral tribunal's jurisdiction is grounded.⁵⁶ This is typically done by including a recitation of the arbitration agreement (including any amendments thereto). When one of the parties is not participating in the proceedings, or has objected to the arbitral tribunal's jurisdiction, the proper resolution of the arbitral tribunal's jurisdiction is of particular importance and should be clearly reasoned and recorded.

If the arbitral tribunal's jurisdiction has been challenged by a party and resolved in an earlier award, a later award may include a brief statement of the jurisdictional objection and the arbitral tribunal's resolution of it. Objections to the admissibility of claims may be treated in a similar way.

4.6 Parties' requests for relief and identification of issues

The award should recite the parties' requests for relief as they exist at the time of the closing of the proceedings, that is, any claims, counterclaims or other requests that require a decision of the arbitral tribunal, including any amendments to the parties' requests for relief, withdrawal of claims or waivers.

The award should state the issues to be decided. These are sometimes identified by the parties or by the arbitral tribunal by reference to the parties' submissions. Together, the parties' requests for relief and the issues to be decided define the arbitral tribunal's scope of mandate.⁵⁷ This can be used as a checklist to ensure that the arbitral tribunal does not exceed its mandate or, conversely, fail to resolve issues that require determination.

Where applicable, the award may also identify whether certain issues are contingent on others, only necessitating a decision depending upon the outcome of the primary issue (eg, a decision on damages depends on a previous determination of liability).

⁵⁶ See 2.3 above.

⁵⁷ H Lloyd *et al*, 'Drafting Awards in ICC Arbitration' (2005) 16(2) ICC IC Arb Bull 19, 30.

4.7 Factual summary

The award should contain an account of the relevant facts of the dispute. The account is typically a chronological summary of the facts relevant to the issues and claims of which the award disposes, rather than a recitation of the parties' factual narratives. For some awards, it may be also appropriate to contain a one- to two-page introductory factual summary of the dispute, as well as a broad overview of the parties' positions.

The factual summary should be as uncontroversial as possible and identify whether facts are agreed or disputed.⁵⁸ Where the arbitral tribunal makes a finding over a disputed fact, it should provide its reasons and refer to the evidence relied on for its determination.

4.8 Summary of claims/submissions

It is recommended that an award summarise the parties' positions with respect to the issues that are relevant to the arbitral tribunal's decision.

In complex cases involving a multitude of issues, it is advisable to structure the summaries of the parties' arguments on an 'issue-by-issue' basis (ie, the parties' positions are juxtaposed immediately after each other under each issue), followed by the arbitral tribunal's analysis and conclusion on each issue. The issue-by-issue method may be preferable if the determination of some issues depends on the determination of others. In cases with fewer issues, it may be sufficient to summarise the parties' positions '*en bloc*', to be followed by the arbitral tribunal's analysis and conclusion.

The award should not provide a verbatim transcription of every argument submitted by a party, but should be limited to identifying key points central to the arbitral tribunal's determination. It is important that the summaries are accurate as they reflect the arbitral tribunal's understanding of the parties' cases. Where the parties' arguments are unclear, a direct quotation of the relevant text, rather than paraphrasing, may be more appropriate.

58 H Lloyd *et al*, 'Drafting Awards in ICC Arbitration' (2005) 16(2) ICC IC Arb Bull 19, 30.

4.9 Applicable laws and procedural rules

The award should identify the procedural rules (*lex arbitri*, rules of procedure, procedural rules agreed by the parties) and substantive law applicable to the dispute. If the applicable laws or procedural rules are in dispute between the parties, the award should set out the parties' positions in this regard and the arbitral tribunal's determination with reasoning.

4.10 The arbitral tribunal's reasons and findings

The arbitral tribunal's reasoning is arguably the most important content of any award, expressly required by many national arbitration laws⁵⁹ and most arbitration rules.⁶⁰

The rationale behind providing a comprehensive reasoning in an award is that it constrains the powers of the arbitrators by compelling them to base their decision on the law and facts. It reduces the risk of arbitrary decisions and indicates to the parties that the arbitral tribunal has thoughtfully considered their submissions. Furthermore, stating the reasons in the award enables a court or body in later recognition and enforcement or set-aside or annulment proceedings to understand the arbitral tribunal's decision-making process.

One way to ensure sufficient reasoning is to refer closely to the list of dispositive issues (as agreed by the parties or determined by the arbitral tribunal) and to address each of the parties' main arguments on each issue. With regard to the dispositive issues, the award should explain the reasoning according to which the arbitral tribunal applied the applicable law to the relevant facts (including references to the factual record).

Occasionally, in the interests of speed, parties may jointly request an arbitral tribunal to issue a decision in the form of an order without reasons, with a reasoned award to follow. In the face of such a request, the arbitral tribunal

59 Article 31(2) of the UNCITRAL Model Law on International Commercial Arbitration; Art 1506 of the French Code of Civil Procedure; English Arbitration Act 1996, s 52(4); German ZPO, Art 1054; Art 189(2) of the Swiss Law on Private International Law; Art 54 of the Chinese Arbitration Law.

60 Article 34(3) of the 2010 UNCITRAL Arbitration Rules; Art 34(3) of the 2012 Arbitration Rules of the Permanent Court of Arbitration; Art 48(3) of the ICSID Convention; Art 31(2) of the 2012 ICC Arbitration Rules; Art 26(2) of the 2014 LCIA Arbitration Rules; Art 34(4) of the HKIAC Administered Arbitration Rules; Art 36(1) of the 2010 SCC Arbitration Rules; Art 62(c) of the WIPO Rules; Section 4.4.

should verify that such a step is allowed under the *lex arbitri* and procedural rules (notwithstanding the parties' agreement) and record that fact. The arbitral tribunal should also be wary that through the process of drafting the award, it might find reason to change its original ruling.

Arbitrators may sometimes include *obiter dicta*, or statements that are extraneous to the disposition of the issues that the award must address. While the inclusion of *obiter dicta* is not generally recommended in an award, it may serve a purpose, for example, it may provide alternative reasoning to the arbitral tribunal's primary determination: even if determination *x* were wrong, the claim would still be denied because of determination *y*. Here, determination *y* is the *obiter dicta*.

4.11 Operative part (*dispositif*)

An award must contain the arbitral tribunal's ultimate findings and decisions. These are typically set out in a separate section at the end of the award, known as the operative part of the award or the *dispositif*. The *dispositif* lists the arbitral tribunal's decisions on the parties' requests for relief in simple terms, point by point. It should allow a reader to understand immediately what the arbitral tribunal has decided.⁶¹

The *dispositif* is usually prefaced by introductory language, such as: 'For the foregoing reasons, the Arbitral Tribunal renders the following decisions.'⁶² If the award is not final, the *dispositif* may also contain a decision that defers certain matters to a later stage of the proceedings. For example, if the first award determines just one of several objections to jurisdiction, it may state: 'All other objections to jurisdiction shall be determined in a later phase of these proceedings.'

After addressing each of the parties' claims or requests for relief, a *final* award should also contain a 'catch-all' decision such as: 'All other claims are dismissed.'

Within the confines of the requests submitted by the parties, a tribunal may order different kinds of relief, the most common of which are the following:⁶³

61 H Lloyd *et al*, 'Drafting Awards in ICC Arbitration' (2005) 16(2) ICC IC Arb Bull 19, 35.

62 *Ibid* 36, for examples of decision formulas.

63 D Sutton *et al*, *Russell on Arbitration* (24th edn, London 2015), paras 6-097–6-128.

- *Directing the payment of money.* If the tribunal directs the payment of money, it will usually specify the amount to be paid, the currency in which the payment must be made and who must make the payment to whom; such a direction may also include the terms of payment.
- *Granting injunctive relief.* The tribunal typically has the power to order a party to do or refrain from doing something.
- *Ordering specific performance.* A tribunal may typically order the performance of a contract.⁶⁴
- *Granting declaratory relief.* A tribunal may typically make declarations as to the existence or extent of the parties' rights.
- *Awarding interest.* See 4.14 below.

4.12 Dissenting and separate opinions

Most national laws and arbitration rules do not prohibit arbitrators from writing a dissenting or separate opinion. Dissenting arbitrators must respect the confidentiality of arbitral deliberations, as well as their personal duties of independence and impartiality.⁶⁵ Depending on the applicable procedural rules, a dissenting opinion may be attached to an award or delivered to the parties as a separate document. The dissenting opinion is not part of the award in either case. It is within the discretion of the majority of the arbitral tribunal whether or not to address the dissent or separate opinion in the text of the award.

In case an arbitrator refuses to sign an award, it is important to check the *lex arbitri* and procedural rules for any relevant mandatory requirements. Most rules provide that the award may be signed by the majority only, but that the reason for the omitted signature shall be indicated in the award.⁶⁶

64 Where the arbitral tribunal sees fit to award performance, it may also consider awarding damages in default, in case restitution or performance is not made. In such case, the arbitral tribunal may stipulate in the *dispositif* an outer time limit by which restitution or performance shall be made, failing which an alternative award for damages will become binding.

65 Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnouch Arsanjani *et al* (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Nijhoff 2011), 821–843. See further 3.5 above.

66 See further 3.3 above.

An arbitrator may disagree with the majority's determination of an issue or issues but not wish to write a dissenting or separate opinion. In such cases, subject to any mandatory requirements, the arbitrator's disagreement on the point in question may be recorded in the body of the award and the *dispositif*. It may even be that the arbitrator is not identified but that the text simply records that the issue was decided by majority.

4.13 Reservation of issues

If the award is not a final award, the arbitral tribunal may reserve issues for later determination. It is advisable that such issues are clearly designated, so that the extent of the award's operative part remains clear. It should also be indicated in the *dispositif* that certain matters have been deferred.

Arbitral tribunals should ensure that any matter that they have reserved for determination at an earlier stage of the proceedings is resolved in a later award.

4.14 Taxes and interest

If tax liability is an issue in dispute between the parties, the arbitral tribunal must resolve that question in an award. The award should state whether and to what extent any amount of money awarded includes or excludes amounts payable by way of tax.

The award should determine and provide reasoning for the arbitral tribunal's decision on any claim for interest.⁶⁷ It should address the applicable interest rate and (for each claim if necessary) the date from which and until which interest is payable.⁶⁸ If the outer date cannot be stated in terms of a given day, the deadline may be described, for example, 'interest at [X] rate per [period] is awarded from the date of this award until full payment of the damages awarded'. The award should state what kind of interest shall be awarded (simple or compound interest) and how it should be calculated (eg, interest to be compounded on an

67 As to the available methods see J Rodner, 'The Applicable Interest Rate in International Arbitration' (2004) 15(1) ICC IC Arb Bull 43, 45 *et seq*.

68 As to the starting point of interest, see L Hammoud and M Secomb, 'Interest in ICC Arbitral Awards: Introduction and Commentary' (2004) 15(1) ICC IC Arb Bull 53, 57 *et seq*.

annual basis).⁶⁹ If the applicable arbitration law distinguishes between pre-award interest (the interest accruing between the time at which a payment obligation arose or at which a payment request was made and the time when an award was made) and post-award interest (the interest accruing from the date of the award), the tribunal should specify the applicable interest rates separately.⁷⁰

4.15 Award of costs

The arbitral tribunal may be required to fix and allocate the costs of arbitration, including parties' legal costs in an award and the arbitral tribunal's fees and expenses. The arbitral tribunal's decision shall take into account any party agreement on the allocation of costs (sometimes included in the arbitration agreement) or any presumption found in the *lex arbitri* or applicable procedural rules.

In order for the arbitral tribunal to be able to make an award on legal costs, it is usual for the parties to be required to make submissions as to their costs after the proceedings have closed. When making its determinations on costs, the arbitral tribunal may consider the reasonableness of the costs claimed, the conduct of the parties, the nature and complexity of the dispute, and whether a party has succeeded in whole or in part.

In relation to the award on the remaining costs of the arbitration (arbitral tribunal's costs and expenses and institutional costs, if any), these costs and expenses (including, if applicable, VAT) will generally be fully covered by advances made by the parties. In advance of finalising the award, the sole arbitrator or chairperson of the tribunal will be concerned (in ad hoc arbitrations, in particular) to ensure that all of these costs are properly recorded and monitored against the advances paid by the parties. Since typically the arbitral tribunal and the administering arbitral institution, if any, are reimbursed out of the advances, the award on costs needs to address whether the winning

69 H Lloyd *et al*, 'Drafting Awards in ICC Arbitration' (2005) 16(2) ICC IC Arb Bull 19, 34. See also J Rodner, 'The Applicable Interest Rate in International Arbitration' (2004) 15(1) ICC IC Arb Bull 43; L Hammoud and M Secomb, 'Interest in ICC Arbitral Awards: Introduction and Commentary' (2004) 15(1) ICC IC Arb Bull 53. Article 26(4) of the 2014 LCIA Arbitration Rules is one of the rare provisions in institutional arbitration rules providing guidance on the issue of interest.

70 The English Arbitration Act 1996 distinguishes between pre- and post-award interest, see s 49(3) and (4). However, many arbitration laws do not contain this distinction, such as the UNCITRAL Model Law, the United States Federal Arbitration Act, the Swiss Private International Law Act and the French Code of Civil Procedure.

party should be reimbursed by the losing party for all or part of those advances made by the winning party and applied in payment of the tribunal (and the institution, if any).

It is important that the award of costs is a reasoned award, which is also then included in the operative part of the award (*dispositif*).

Chapter 5: Tips and Techniques for Drafting

While there is no single correct style, format and structure for an award, clarity, consistency and accuracy are key in any award. This chapter contains tips and techniques that will assist an arbitrator in developing an effective style, format and structure.

5.1 Style and length

In determining the appropriate style, an arbitrator must consider several elements in drafting the award. First, an arbitrator must ask: Who is my reader? What are the needs and expectations of the parties? What purpose does this particular arbitral award serve? Will the award be published or not? All these considerations will play into determining the appropriate style.

The writing style should primarily be adapted to the main readers of the award:

- The losing party needs to know that the case was correctly and fairly decided and its position was duly considered by an impartial decision-maker. In this sense, the arbitrator's reasoning could be described as being primarily for the loser's benefit.
- The winning party needs to be able to understand and enforce the award. The award must be sufficiently clear for an enforcement authority to be able to commence the applicable enforcement procedures. Thus, the operative part could be described as being primarily for the winner's benefit.
- The enforcement authorities will need the operative part of the award to clearly record the rights and obligations of the parties in order to enforce the award and will need to be satisfied that due process was observed; hence, the procedural history is primarily for the court's benefit.
- The arbitral institution administering the dispute, if any, may have certain expectations or guidelines concerning the style of the award.

Plain language should be preferred, particularly where the arbitral tribunal is not a native speaker in the language of the award. It is usually advisable to have a native speaker review the award, bearing in mind confidentiality

considerations. The award should be clear and intelligible and avoid technical terminology that may not be easily understandable to readers who are not specialists in the relevant field.

An award must also be cogent and the tribunal's decision and reasoning clear on the face of the award. Not only are the parties more likely to respect the outcome when the reasoning of the award is sound and compelling, lack of certainty could also be a ground of challenge.⁷¹ Consistency is an important factor in this regard, including the use of consistent terminology throughout the award.

It is usually advisable that facts be narrated in the third person, and that the discussion of the issues, witness and party testimony, and other procedural matters, is presented in an objective and neutral manner. Humour and sarcasm are not appropriate in this context and, more subtly, a sensitive approach to potentially confronting issues such as the credibility of a witness or the quality of a submission can make the decision more palatable for a losing party to accept, noting of course that the need for sensitivity should not compromise an award's clarity of reasoning.

When it comes to the length of the award, there is no golden rule as to the appropriate number of pages. The number of pages will depend on the case, in particular on the number and complexity of the issues to be decided and the volume of the parties' submissions. In the context of these considerations, an award should be as concise as it can, through the use of positive statements and the active voice where possible. Long sentences are best avoided, as well as including too much information in a single sentence. Awards also benefit from being broken into numbered paragraphs and separate sections, as indexed at the start of the award, all of which helps to give a structure and clarity to the award.

Since every word included in the award should serve a purpose, a verbatim report of the parties' arguments is rarely useful. Instead, a concise summary of the parties' arguments in the relevant part of the award is usually more effective.

Footnotes and citations in the award should be presented in an accepted style, applied in a uniform manner.⁷²

71 D Sutton *et al*, *Russell on Arbitration* (24th edn, London 2015), paras 6-088–6-089.

72 For further reading, the following writing style guides are recommended: S Pinker, *The Sense of Style: The Thinking Person's Guide to Writing in the 21st Century* (New York, NY: Penguin 2014); W Strunk Jr and E B White, *The Elements of Style* (New York: Pearson Longman 2009).

5.2 Structure

Awards must have a clear and concise structure, separating the formal and substantive aspects of the award. The principal elements of the award (see Chapter 4 on content of the award) are the introduction, the recitals, the reasoning and the operative part.

Beyond that basic outline, it is advisable to tailor the structure of an award to the particulars of the case. If there is an arbitral institution administering the arbitration, it is worth checking whether it has a model arbitration award to be used as a basis.

The reasons and findings section of the award must be presented in a way that aims to ensure that the parties are able to understand how the tribunal perceived the facts of the case, how the relevant law applies to those facts, as well as the logic that leads to the conclusion the tribunal has reached. All of the parties' claims should be dealt with methodically, with greater emphasis on any points that were particularly debated.

The following specific considerations regarding structure may be useful to ensure the logical sequence and coherence of the award, from the reasons to the conclusion:

- addressing jurisdiction before substance;
- discussing the basis of the claim before quantum; and
- addressing preliminary issues before any related issues.

5.3 References to exhibits and authorities

The extent and manner of using references to exhibits, legal authorities and witness testimony will depend on the arbitrator(s) and on the nature of the case. Nevertheless, there are a few general guidelines to keep in mind when referring to exhibits, authorities and witness testimony.

All exhibits, evidence and authorities cited during the proceedings should be clearly and precisely identified in the award, including page references, such that they can be easily referred to by anyone reading the award. The references should be double-checked against the original document. The parties' own

citations may be used, as long as those citations are clear. References to the parties' submissions, evidence and exhibits should usually contain pinpoint citations for example to specific paragraph numbers.

5.4 References to witness testimony

References in an award to witness testimony also require clarity and precision. For the reasons given in 5.1 above, when referring to testimony of party representatives and witnesses, including how witnesses are referred to in the award (name, title), the discussion should remain polite and respectful at all times. In the case of an arbitral tribunal, a party-appointed arbitrator can sometimes be of assistance in ensuring that references to the relevant appointing party and to testimony provided by or on behalf of that party are couched in a way that will not cause offence from a cultural perspective.

Summarising the essence of a witness's testimony on a particular issue is usually sufficient, although direct quotations may be useful to highlight a certain point. Long quotations are usually not recommended.

5.5 Use of annexures and diagrams

In general, an award should be clear and complete in and of itself, without reference to attachments or exhibits.

This being said, there may be certain special cases where annexures – for example, aids used by the arbitrator during deliberations (such as tables, diagrams) – are justified.

Pictures, flow charts, diagrams, tables, lists and even formulae can all be effective means of demonstrating the reasoning for the award, but noting that these should be items that are already on the record of the proceedings. If the arbitrator produces his or her own materials, this carries a high risk of the losing party questioning the accuracy of those materials or asserting that they go beyond the scope of the issues to be determined.

5.6 Final review – proofreading, figures, calculations and references

Proofreading the award once it is final is crucial. While an automatic spell check can be applied to spot clear errors, it is always advisable to conduct a final review of a paper copy.

The final review should ensure that terms are defined in a coherent manner, that parties are correctly and consistently referred to and that abbreviations (whether those used by the parties or adopted independently by the award) are uniform and correct. There should be no defined terms, definitions or cross-references in the operative part of the award, which should be self-sufficient.

It is vital to avoid clerical and mathematical errors in the final award. Thus, it is advisable to double-check the amounts requested in the parties' submissions and ensure that the award matches those requests.

Finally, all cross-references and quotations should be double-checked. While automatic cross-references may be used, it is always advisable to check these manually at the final stage. In the case of quotations, it is important that these are absolutely correct and properly attributed. If the quotation has been translated, then the original language of the quotation must also be reproduced in full.

5.7 Sharing the drafting of an award

By default, the chairperson of an arbitral tribunal with three or more members is in charge of the drafting of the award, unless otherwise agreed. One common arrangement is for one arbitrator to draft the award, and the co-arbitrators to then comment and supplement as necessary. The arbitrator who has the overall drafting responsibility should edit all comments and addenda so as to ensure that the style of the text is consistent. Considerations leading to sharing may include the particular expertise (as to substantive law, specific procedural, or substantive issues, native language) of the arbitral tribunal's various members. In any event, it is advisable that deliberations take place immediately after the hearing while all the particulars of the case are still fresh in the mind of the arbitrators. If the drafting responsibilities are shared among the arbitral tribunal members, certain questions of fee allocation may also arise (sharing of the fees corresponding to the shared responsibilities). It is advisable that these issues be addressed upfront.

If the arbitral tribunal deems it necessary to share the drafting of award among co-arbitrators, uniformity of language and reasoning should be ensured. In such cases, the allocation of the work should be agreed before the hearing, if possible, although such allocation may need to be adjusted in the event that the assigned drafter does not comply with the agreed time limits. The arbitrators should agree on who is responsible for the final draft and who will write each part of the award. The arbitrators should also agree on deadlines and the order in which the members of the arbitral tribunal will comment on the draft.

The chairperson will of course be responsible for final review of the award. With the audience of the award in mind, great care must be taken to ensure that the award is not disjointed or internally inconsistent on account of the contributions of different tribunal members. Linguistic differences also risk highlighting to the readers where sections of the award have been written by different people, and it is sometimes challenging for a chairperson to edit the drafting sufficiently to entirely harmonise these linguistic differences.

Chapter 6: Checklist for Award Writing

General and practical considerations

- Be aware of the conditions to be met to ensure a decision qualifies as an award.
- Ensure to choose the type or form of award required for the decision in question.
- Applicable time limits must be obeyed or extended, if needed.
- The award must be in written form.
- The award must be drafted in the language agreed by the parties or, if no language has been agreed, in a language that is appropriate under the circumstances.
- The award must be notified in an appropriate way, bearing in mind all relevant factors, including any applicable procedural rules.
- The award and its notification must respect any applicable confidentiality requirements.
- When using a tribunal secretary to assist with the award, the secretary has to be supervised by the arbitrators and no decision-making powers may be delegated.
- At an early stage in the award-writing process, but in any event before rendering an award, the arbitral tribunal should ensure that it has sufficient funds in the way of an advance on costs from the parties in order to finalise the award.

Content of the award⁷³

- Check for mandatory requirements as to the content of the award.
- Ensure the cover page/award includes all the necessary information and stipulates the type of award.
- Check that the administrative and procedural contents listed in Chapter 4.2 (Administrative or procedural contents) are provided, including the contents that are required as matters of form and procedure, such as:
 - stipulation of date of the award and the place where it was made (being the seat of the arbitration); and
 - signature of award by all arbitrators (if an award is not signed by one or more arbitrators, some arbitration laws require an explanation as to why they did not sign the award);

and the contents that are required as matters of substance, such as:

- the existence and terms of the arbitration agreement;
 - notice to parties and due process throughout the whole course of arbitration;
 - the agreed issues to be determined and ensuring that the tribunal determines all (and only) those issues; and
 - the parties' consent to the appointment of the tribunal, and to all aspects of the procedural history.
- Ensure the award sets forth the basis for the arbitral tribunal's jurisdiction. Where jurisdiction has been contested or there is a non-participating party, include the tribunal's decision on jurisdiction or state why it is not necessary.

⁷³ The ICC Award Checklist is another useful tool, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/practice-notes-forms-checklists/>, last visited 7 June 2016.

- Ensure that all the facts relevant to the findings in the award have been provided. Where facts are disputed, explain how the parties differ on those factual allegations and identify the evidence upon which the tribunal's findings of fact are based.
- Ensure the award sets out the parties' requests for relief and specifies the dispositive issues.
- Ensure the parties' arguments that are relevant to the reasoning of the award have been accurately reflected in the award.
- Ensure the reasoning addresses all dispositive issues and that the award states fully the reasons for the arbitral tribunal's decisions.
- Ensure the award contains an operative part setting out all of the arbitral tribunal's dispositive findings and that the award expressly disposes of all issues that it was intended to resolve. Check if there is a need to reserve any issues for later resolution in the proceedings.
- Ensure the award addresses, if applicable, tax obligations.
- If the award grants interest, ensure that the award determines, with reasoning, the applicable interest rate, the dates from and to which interest shall accrue, the type of interest and basis for its calculation.
- If applicable, ensure the award (in both the reasoning and the *dispositif*) includes determinations on the calculation and allocation of costs.
- If there is a dissenting or separate opinion, check that dissenting opinions or separate opinions are allowed under the applicable arbitration law and rules.
- If an arbitrator has refused to sign the award, ensure that this has been dealt with as required by the applicable procedural rules.

Drafting styles and techniques

- Sanity-check: ensure that style, length and structure are appropriate in light of the award as a whole.
- Review for consistent and correct use of terminology (including defined terms) and grammar.
- Check footnotes and citations to ensure correctness.
- Check figures, calculations and cross-references and quotations for accuracy.
- Ensure that any translated quotation is accompanied by the quotation in its original language.
- Check exhibits, referenced authorities and annexures to ensure they are accurate.
- Ensure that all paragraphs and pages are numbered and that a contents page is included.
- Conduct final proofread, especially of the operative part.
- Review consistency and logic of reasoning to ensure there are no gaps.
- Scrutinise operative part with extra care, especially in light of the applicable arbitration law and rules.

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International Bar Association

4th Floor, 10 St Bride Street

London EC4A 4AD

United Kingdom

Tel: +44 (0)20 7842 0090

Fax: +44 (0)20 7842 0091

www.ibanet.org
