CHALLENGING AND ENFORCING ARBITRATION AWARDS GUIDE

THIRD EDITION

General Editor
J William Rowley KC

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of the *Challenging and Enforcing Arbitration Awards Guide*.

For those new to Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, alongside more in-depth books and reviews. We also organise conferences and build workflow tools that help you to research arbitrators and enable you to read original arbitration awards. And we have an online 'academy' for those who are newer to international arbitration. Visit us at www.globalarbitrationreview.com to learn more.

As the unofficial 'official journal' of international arbitration, sometimes we are the first to spot gaps in the literature. This guide is a fine example. As J William Rowley KC observes in his excellent preface, it became obvious recently that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and a reference work focusing on this phase was overdue.

The *Challenging and Enforcing Arbitration Awards Guide* fills that gap. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover construction, energy, evidence, intellectual property, M&A, mining disputes and telecommunications in the same unique, practical way. We also have books on advocacy in international arbitration, the assessment of damages, and investment treaty protection and enforcement.

My thanks to the editors for their vision and energy in pursuing this project and to our authors and my colleagues in production for achieving such a polished work.

David Samuels
London
April 2023

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Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – in other words, efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in 169 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 158.

Awards used to be honoured

International corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement,

most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

In the year before the first edition of this guide, Global Arbitration Review's daily news reports contained hundreds of headlines that suggested that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement. Indeed, in the first three months of 2023, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Nigeria seeks to overturn US$11 billion award;
- Russia fails to quash jurisdictional awards in Crimea cases;
- Swiss court upholds multibillion-dollar Yukos award;
- Swedish courts annul intra-EU treaty awards;
- Indian court annuls billion-dollar award for 'fraud';
- Malaysia challenges mega-award in French court;
- GE pays out after losing corruption challenge in legacy case;
- Ukrainian bank's billion-dollar award against Russia reinstated;
- Burford wins enforcement against Kyrgyzstan;
- India loses Dutch appeal over treaty award;
- ECJ dismisses London award in oil spill saga;
- 'Fifteen years is long enough': US court enforces Conoco award;
- Pakistan fails to stay Tethyan award in US; and
- India fails to upend latest award in protracted oil and gas dispute.

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially since 2008. However, the importance of the subject (without effective enforcement, there really is no effective resolution), and my anecdote-based perception of increasing concerns, led me to raise the possibility of doing a book on the subject with David Samuels (Global

Arbitration Review's publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Gordon Kaiser and the late Emmanuel Gaillard agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in April 2021. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said some 40 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

The guide is structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this third edition, the 15 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and admissibility of new evidence.

Part II of the guide is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This edition includes reports on 29 national

jurisdictions. The author, or authors, of each chapter have been asked to address the same 58 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. Obviously, the answers to a common set of questions will provide readers with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

With this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with the *Challenging and Enforcing Arbitration Awards Guide* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors those colleagues who were some of the internationally recognised leaders in the field. My fellow editors and I have felt blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role of funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach even further.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this edition of the publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley KC
London
April 2023

CHAPTER 2

The Arbitral Award: Form, Content, Effect

Venus Valentina Wong and Dalibor Valinčić[1]

Introduction

Each jurisdiction has its own sovereign power to determine the elements of an arbitral award that is rendered within its territory or in accordance with its laws. Even those jurisdictions that have adopted an arbitration law that is enacted according to the Model Law on International Commercial Arbitration[2] (the Model Law) may have different perceptions of what constitutes an arbitral award, particularly where and when the jurisprudence shapes the development of the law. Therefore, not only is it impossible to cover in one chapter the requirements on the form, content and effect of an arbitral award for all relevant jurisdictions, it is not necessary, thanks to the individual and specific reports on national jurisdictions in Part II of this guide.

Nevertheless, it is helpful to have an essential understanding of what should and could constitute an arbitral award, specifically on the basis of the most important legal instruments in this regard – the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention (NYC)) and the Model Law. Although in many respects there is a core understanding of what constitutes an arbitral award, it is interesting to note the differences, particularly at the boundaries. Furthermore, for a more comprehensive and systematic view, we have approached the arbitral award from different perspectives. This chapter therefore covers the definition of 'award', types of awards, governing law, the content of an arbitral award, the form of the award and the effects of an arbitral award.

Definition of 'award'

Because the common legal sources, in particular the NYC and the Model Law, do not provide a definition of 'award', it is useful to describe what qualifies as an award and what does not.

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1 Venus Valentina Wong and Dalibor Valinčić are partners at Wolf Theiss Rechtsanwälte GmbH & Co KG.

2 Adopted by the United Nations Commission on International Trade Law in 1985, with amendments adopted in 2006.

First, an award is a decision that is rendered by an arbitral tribunal and not by an arbitration institution or by a court. Sometimes, uncertainties could arise if the name of the respective institution could be confused with that of the arbitral tribunal[3] or if the name of a state court includes a reference to arbitration.[4] In this context, it should be noted that where the institution makes certain decisions as to *prima facie* jurisdiction of either the institution or the arbitral tribunal yet to be constituted, those decisions are not to be considered as arbitral awards, as the actual decision on jurisdiction is usually reserved for the competence of an arbitral tribunal.

Another issue that might be controversial is whether an emergency arbitrator qualifies as an arbitral tribunal and, if so, whether his or her decisions would then also qualify as arbitral awards. Although the Singaporean legislator has now clarified that an emergency arbitrator falls under the definition of an arbitral tribunal, so that his or her decisions are enforceable,[5] other legal commentators would be more hesitant to equate an emergency arbitrator with a proper arbitral tribunal in instances where the legislator has not explicitly answered that question. Since the legal remedy that an emergency arbitrator grants is, by definition, of an interim nature, there are views that – subject to specific language in the arbitration law – an arbitral award is a decision of a proper arbitral tribunal and not of an emergency arbitrator.[6]

Second, an award is a decision addressing a specific request by the parties to the arbitration (usually the parties' requests for specific relief). A tribunal may also issue a procedural order (e.g., dealing with procedural provisions to be applied in the arbitration), and that order is not necessarily based on a request by one of the parties. Thus, an arbitral award is a tribunal's decision about a specific request that a party has put to it.

Third, an award should be final and binding on the parties to the arbitration; in other words, it has *res judicata* effect. Therefore, once an award is rendered and, with the exception of the procedures on correction of an award or rendering an additional award, the award may not be later revised by a tribunal, which is in contrast to a procedural order or an interim measure issued by a tribunal. Furthermore, the arbitral award is also binding on the arbitrators themselves and they may not – except for the correction of specific errors – amend or revise the award on their own initiative.

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3 For example, the previous name of the Vienna International Arbitral Centre (VIAC) was – in the German version of the 2013 edition of the rules – Schiedsgericht der Wirtschaftskammer Österreich, a literal translation of which is 'arbitral tribunal of the federal chamber of commerce Austria'.

4 For example, until 2014, the Supreme Arbitrazh Court, often translated as 'Supreme Arbitration Court', of the Russian Federation was a (state) court and not an arbitration institution.

5 See Section 2(1) of the Singapore Arbitration Act, which includes the 'emergency arbitrator' in its definition of 'arbitral tribunal' and includes an 'interim, interlocutory or partial award' (on the substance of the dispute) in the definition of 'award'.

6 See Ehle in Wolff (ed.), *New York Convention* (2nd ed., 2019), Article I, para. 71a.

Fourth, an arbitral award may be subject to court review in setting-aside and enforcement proceedings. There might also be other court proceedings in which an arbitral tribunal's decision is reviewed (e.g., a tribunal's decision whether or not to uphold the challenge of one of the arbitrators or a tribunal's interim measure), but these usually do not qualify as setting-aside or enforcement proceedings.

Finally, one should note that the distinction between procedural questions and substantive questions (or questions on the merits) is not decisive, as an arbitral tribunal may rule by an award on purely procedural questions, such as on its jurisdiction.

In conclusion, one may say that an arbitral award is a decision of an arbitral tribunal which, upon a specific request by one of the parties, rules on the question in a final and binding manner and is subject to court review in setting-aside or enforcement proceedings.

Types of awards

Different stages of the arbitration

The most common award is the final award that a tribunal renders at the end of an arbitration. A final award should resolve all open questions, both as to procedure and as to merits, and usually also contains a decision on costs.[7] Typically, one of the orders in the dispositive section of the award would state that 'all other requests are rejected' or '. . . denied'. By such an order, the tribunal would formally cover all outstanding requests that a party might have raised in the arbitration. However, whether or not the tribunal has also dealt with it on the substance is a different question and would have to be answered by way of interpreting the entire award.

Subject to specific remedies provided for under the applicable arbitration rules, such as on correction of the award or on an additional award, a final award marks the end of the arbitration.

In contrast to that, an interim[8] award or a partial award deals – as indicated by the term – only with a specific issue in arbitration. An interim award[9] usually deals with a question that is then considered final and binding for the remainder of the arbitration (e.g., the question of jurisdiction over the entire matter or certain issues in arbitration). Accordingly, an interim award could also deal with questions of the applicable law or the statute of limitations. However, there is no common consensus on a clear terminology and thus, the term 'interim award' might also be used in instances where the decision of the tribunal is indeed of a merely interim nature, such as interim relief of an arbitral tribunal or of an emergency arbitrator.[10]

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7 Blackaby, Partasides, et al., *Redfern and Hunter on International Arbitration* (7th ed., OUP, 2023), para. 9.19.

8 Some older terminology might also refer to 'interlocutory' or 'preliminary' awards.

9 References to the term 'interim award' can be found in the Arbitration Rules of the International Chamber of Commerce (ICC Rules), at Article 2(v); VIAC Rules of Arbitration 2021 (Vienna Rules), at Article 6(1.8); and Swiss Rules of International Arbitration (Swiss Rules), at Article 34(1).

10 See, for example, Swiss Rules, Article 29(2): 'Interim measures may be granted in the form of an interim award.'

Although there is no strict distinction between an interim award and a partial award, the latter will typically be rendered when the parties put a number of claims to the tribunal, which then decides on certain claims at an earlier stage and on the remaining claims at a later stage, unless the parties settle regarding the remaining claims, which is often the underlying purpose or intention of having a partial award.

Whether or not a tribunal may render more than one final award (i.e., to decide certain issues in separate awards such as an interim or partial award) is usually subject to party agreement. If the parties have not agreed otherwise, the tribunal's right to do so would normally be derived from the rules and laws governing the arbitration or, ultimately, from the tribunal's general power to conduct the proceedings as it deems appropriate.

Article 47 of the UK Arbitration Act 1996 explicitly stipulates that, where the parties have not agreed otherwise, 'the tribunal may make more than one award at different times on different aspects of the matters to be determined'. Article 188 of the Swiss Private International Law Act (PILA) contains a similar provision. Many other arbitration laws are silent on this question. However, arbitration rules[11] do include a provision on the tribunal's power to resolve the matter in more than one (final) award.[12] In any event, if the parties have agreed that the tribunal should decide all claims in one final award because they want to have expeditious proceedings or, conversely, if the parties agree on a bifurcation of the proceedings, the tribunal should comply with the parties' agreement if it does not want to risk a setting aside of the award (or awards) or a refusal of enforcement, in particular in accordance with Article V(1)(d) of the NYC. In arbitration proceedings under the Arbitration Rules of the International Chamber of Commerce (ICC Rules), drawing up the terms of reference pursuant to Article 23 of the ICC Rules is often an opportunity for the tribunal to include the provision that it has the discretion to render separate awards.

Content of the award

Although arbitration laws are often silent on different types of awards (particularly with regard to an interim award or partial award), various arbitration laws do refer to an arbitral award that decides on jurisdiction. Articles 186(3) and 190(3) of PILA and Section 592(1) of the Austrian Code of Civil Procedure provide that an arbitral tribunal may decide on its own jurisdiction by way of an arbitral award. The tribunal's power to make an award on the issue of jurisdiction stems from the principle of *Kompetenz-Kompetenz* generally acknowledged in international arbitration. According to this principle, a tribunal has the 'competence' to say whether it has the 'competence' to decide a matter (which would normally be reserved for the courts).

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11 See, for instance, Swiss Rules, Article 34(1); and the Arbitration Rules of the London Court of International Arbitration (LCIA Rules), Article 26.1.

12 Poudret and Besson, *Comparative Law on International Arbitration* (2nd ed., 2007) paras. 721–22.

In contrast to such explicit statutory provisions, the Model Law and jurisdictions following this specific concept of the Model Law merely provide that the tribunal may rule on its own jurisdiction 'either as a preliminary question or in an award on the merits'.[13] Irrespective of whether a tribunal decides the issue of jurisdiction by way of a separate 'award on jurisdiction' or in a different form, this decision is subject to court review. Parties should be aware of the kind of legal remedy that they have against such a decision of the tribunal, in particular where time limits for raising the legal remedy are relatively short (e.g., Section 1040(3), sentence 2 of the German Code of Civil Procedure provides for a deadline of one month to challenge a decision of the tribunal that it has jurisdiction over a certain matter).

Another type of award that is explicitly recognised in arbitration laws or arbitration rules is that of the 'consent award' or 'award on agreed terms'.[14] Where parties to an arbitration settle their dispute without the need for the arbitral tribunal to rule on the parties' specific requests, they may consider jointly requesting the tribunal to render an award on agreed terms.[15] As the term itself indicates, an award on agreed terms is an arbitral award rendered by the tribunal; not merely a settlement agreement approved or recorded by the tribunal. As a consequence, a tribunal must review the content of the 'agreed terms' submitted by the parties and make its own assessment. The tribunal may not render an award in breach of the law or public policy at the place of arbitration, or where there are other doubts as to the correctness of the requested award on agreed terms. After all, by transforming the parties' agreed terms into an arbitral award, the parties' agreement becomes final and binding and is an enforceable title (particularly under the NYC).[16]

Although there should be no discussion that a tribunal's final decision on costs, if it is not included in the award on all remaining issues, may also be included in a cost award, there has been debate concerning the correct form of the decision in another scenario relating to costs: if one party is in default of paying its share of the advance on costs and the other party substitutes that payment. In such a case, the party who has advanced both shares could immediately request the tribunal to order the defaulting party by way of an award[17] to reimburse the defaulting party's share without waiting until the end of the arbitration when the tribunal would render the final award, including the tribunal's decision on costs.[18]

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13 cf. Model Law, Article 16(3), sentence 1.

14 In the following, the authors refer only to 'award on agreed terms', which shall also include the meaning of 'consent award'.

15 cf. Model Law, Article 30.

16 See Haas and Kahlert, in Weigand and Baumann (ed.,) *Practitioner's Handbook on International Commercial Arbitration* (3rd ed., 2019), (Chapter 21) 'New York Convention', para. 21.110.

17 See Vienna Rules, Article 42(10), which states that the tribunal may order the non-paying party 'by way of an award or other appropriate form'; see, also, LCIA Rules, Article 24 at 24.6 and 24.7.

18 For further discussion, see Ehle in Wolff, op. cit. note 6, Article I, paras. 72 and 73.

A term that might sometimes arise and create (legal) confusion is the 'default award'. As in court proceedings, it may happen that the respondent does not participate in the proceedings. According to many civil procedural laws, the judge may, or might even be required to, render a default judgment by which he or she considers the factual allegations or legal grounds (or both) of the plaintiff to be correct and thus awards the relief requested by the plaintiff without any further review or with only a limited review. In arbitration, this 'automatism' is generally not accepted, as the arbitral tribunal usually has the duty to examine whether it has jurisdiction over the matter and whether the relief as requested by the claimant may be granted based on the claimant's factual and legal assertions.

The Model Law, most arbitration laws and most arbitration rules provide for the possibility to render an additional award, which is actually rendered after the final award. As a principle, an additional award may be rendered only upon the application of a party where the tribunal has omitted a decision on a claim, or a request raised by one party.[19]

Law governing the award

When making an arbitral award, a tribunal should make sure that it complies with the various legal sources that might be applicable to the award. First, it is the law at the place of arbitration, the *lex arbitri*, that governs certain important aspects of an award. The law at the place of arbitration would usually not only explicitly stipulate the requirements as to the form and content of the award. From a wider perspective, the law at the place of arbitration sets the framework for the setting-aside regime. Since there should be no uncertainty as to the law at the place of arbitration, it is fair to say that a tribunal has the task and the duty to render an award that should withstand the scrutiny of setting-aside proceedings. In contrast, it is not necessarily possible for a tribunal to foresee the jurisdiction in which enforcement will be sought, and thus a tribunal may not necessarily be aware of all national-specific requirements that would render an arbitral award universally enforceable.

Within the mandatory framework of the arbitration law at the place of arbitration, parties in arbitration usually enjoy a high degree of autonomy to agree on procedural and substantive aspects. Where they have done so, the tribunal should observe any party agreements even though it depends on the jurisdiction as to whether non-compliance with a specific agreement of the parties would lead to a successful challenge of the award.

The law applicable to the merits of the dispute is equally relevant to understand the reasoning and, most importantly, the specific orders of the award in the dispositive section.

It has been widely debated whether arbitrators should apply the NYC since the NYC is addressed to the contracting states and provides mainly for the legal requirements at the enforcement stage, thus after an arbitral award has been rendered. Although this chapter is not a suitable place to continue this debate, it is generally advisable for arbitrators to take into consideration certain grounds for refusal. The most frequent instance that arbitrators might encounter and a situation that is explicitly governed under the NYC is the question of what law governs the substantive validity of the arbitration agreement (Article V(1)(a)). When the arbitrators must determine whether they have jurisdiction over the matter (and

19 See, among many others, Model Law, Article 33(3).

the *lex arbitri* does not provide otherwise), the answer of the conflict-of-law provision under the NYC is clear: it is the law designated by the parties[20] or, failing any such designation, the law at the place of the arbitration.[21]

Content of an arbitral award

Both arbitration laws and commonly used arbitration rules require that an arbitral award states the date on which it is made.[22] The exact date an arbitral award was made has legal implications in various respects.

First, arbitration rules often prescribe that the tribunal should render its award within a certain time limit.[23] Although time limits are generally seen as being of a purely 'administrative' nature and extensions are granted for specific reasons (by the arbitration institution), the rendering of the award outside a prescribed time limit may be used by an unsatisfied party to challenge the award. Apart from such legal aspects in a narrow sense, calculating the amount of time taken by the tribunal to render an award may have an effect on the financial remuneration of the arbitrators or at least serve as a useful tool for evaluating the efficient conduct of the arbitration.

Second, the date of the award may be the starting point for calculating the time limit for a correction or interpretation of the award. Although Section 57(4) of the UK Arbitration Act applies this starting point to both applications by a party and the tribunal's own initiative, other rules count from the date of the award only if the tribunal adopts a correction on its own initiative.[24]

Third, when a party intends to raise a legal remedy, the starting point for the calculation of the relevant time limit is usually not the date of the award but the date of notification to that party. This applies to applications for correction, interpretation and an additional award as well as to setting-aside claims.

Another important substantive requirement is indicating the place of arbitration. Although there might be arbitrations without a place of arbitration,[25] the common perception is that either the parties have agreed on a place prior to the dispute (in particular in the arbitration agreement) or after the dispute has arisen. Agreement on the place of arbitration may also be reached by reference to where the chosen arbitration rules have a default provision in the event that the parties do not explicitly designate a place of arbitration.[26] Alternatively, if the parties cannot agree on the place of arbitration, not even by a default mechanism, in institutional arbitration it is either the institution (e.g., the court in proceedings under the ICC Rules pursuant to Article 18(1)) or the tribunal (e.g., under

20 It should be noted that 'designation' may include both an express choice as well as an implied choice; e.g., by designating the law applicable to the main contract.

21 See, for further discussion, Wilske and Fox, in Wolff, op. cit. note 6, Article V, para. 111 et seq.; Haas and Kahlert, in Weigand and Baumann, op. cit. note 16, para. 21.442 et seq.

22 Poudret and Besson, op. cit. note 12, para. 755.

23 The most well-known time limit is probably that as described in the ICC Rules at Article 31.

24 See Model Law, Article 33(2); and Vienna Rules, Article 39(3).

25 'Delocalised' arbitration: see, e.g., Poudret and Besson, op. cit. note 12, paras. 125–30.

26 See, e.g., LCIA Rules, Article 16.2 or Vienna Rules, Article 25(1).

Article 22.1 of the DIS Rules[27]) that determines the seat. Arbitration laws commonly provide for the tribunal's competence to decide this question absent any agreement of the parties. The place of arbitration thus determines which law is applicable to arbitration and consequently the mandatory rules for any setting-aside claim (or other legal remedies against the award).

Furthermore, under the concept of the NYC, a contracting state has the obligation to recognise and enforce a foreign award; that is, an award that has been rendered or that has been made under the laws of a country other than the jurisdiction of enforcement.[28] Therefore, indicating the place of arbitration entails important legal implications particularly with regard to the determination of the legal provisions for setting-aside and enforcement proceedings.

Another substantive mandatory requirement that is regularly mentioned in arbitration laws and arbitration rules is the reasoning.[29] The reasoning is not limited to the legal reasons for the decision on the parties' requests, but should also include an overview of the procedure and the tribunal's finding of the relevant facts based on the taken evidence. In comparison to other arbitration laws, Articles 1481 and 1482 of the French New Code of Civil Procedure indicate in some detail the various items that should be included in an award. Arbitrators should pay attention to whether parties are allowed to waive the reasoning[30] or whether even in the case of an award on agreed terms, the reasoning must be included unless otherwise agreed by the parties.

Although, in general, the 'wrong' finding of facts or a simple 'wrong' application of the law would not lead to a successful challenge of the award (be it in setting-aside or enforcement proceedings), the lack of the entire reasoning or an insufficient reasoning might lead to the conclusion that the proceedings were not conducted in a fair manner or that a party's right to be heard has been violated. Thus, based on the NYC, a flawed reasoning of the award might constitute a ground for refusal under Article V(1)(b)[31] or the corresponding ground for setting aside under Article 34(2)(a)(ii) of the Model Law.

Many institutions in the arbitration community have developed helpful tools for arbitrators to draft proper and complete awards.[32] Even though it is rarely explicitly mentioned in arbitration laws and arbitration rules, one part of an award that is of essential relevance to the parties is the dispositive section, in which the arbitrators phrase the actual orders regarding what a party must do or should refrain from doing. The dispositive

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27 2018 Arbitration Rules of the German Arbitration Institute (DIS).

28 For the purpose of this chapter, the authors discuss only the territorial concept under the NYC and do not engage further in the 'procedural' concept of the NYC, which is practically no longer relevant; for further discussion, see Haas and Kahlert, in Weigand and Baumann, op. cit. note 16, para. 21.30 et seq.

29 Poudret and Besson, op. cit. note 12, paras. 746–50.

30 For example, Article 32(2) ICC Rules does not allow the parties to waive the reasoning.

31 See Scherer in Wolff, op. cit. note 6, Article V, para. 185.

32 See, e.g., the 'ICC Award Checklist' (https://cms.iccwbo.org/content/uploads/sites/3/2016/04/ICC-Award-Checklist-English.pdf (last accessed 28 Feb. 2023)) or the International Bar Association's 'Toolkit for Award Writing' (https://www.ibanet.org/MediaHandler?id=C2AF46AA-5D7A-4DF3-817E-F94149004219 (last accessed 28 Feb. 2023)).

section is usually the most relevant part, or at least the starting point for the enforcement court and for any measures of execution to be taken in that country. The most common order is the order for payment of a specific amount of money. However, questions may arise if the award orders payment in a specific currency and if and how that currency may or should be converted if it is not the official currency in the country of enforcement or not even recognised in that country. In recent times, an enforcement creditor might also face – be it practical or legal – challenges if the award orders the payment or transfer in a cryptocurrency.

Another aspect in the dispositive section is the order that the debtor should pay interest. Particularly in countries where Islamic law is relevant, interest could be an issue, and it may be advisable to make a distinct separation in the award so that a partial enforcement would be an option for the enforcement creditor.

In general, both the parties when phrasing their final requests for relief (for instance in the post-hearing briefs) and the arbitrators when writing the award should pay particular attention to the language of the dispositive section. In a recent decision of the Swiss Federal Court as the final instance in enforcement proceedings, the enforcement of a cost decision against two award debtors was denied, as it was unclear whether the debtors were jointly and severally liable.[33]

Form of the award

Under most arbitration laws and particularly under the NYC (as well as under the Model Law), an arbitral award should be in writing.[34] In other words, an oral announcement of the tribunal's decision would – other than with court judgments in many jurisdictions – not qualify as an award. If a tribunal is empowered to render an oral award, that award would not be enforceable under the NYC, although it might be enforceable under applicable domestic provisions.[35]

Although the 'writing requirement' may be undisputed in a theoretical sense, and having hard copies of the arbitral award has been the rule until recently, digitalisation of the legal industry can lead to new technical possibilities that entail new legal challenges: particularly during the covid-19 pandemic, the electronic signing and transmission of documents has become a vital part of conducting proceedings. Although modern arbitration laws and rules have adopted explicit language to include electronic communication, explicit provisions regarding the electronic or digital condition or transmission of arbitral awards are still rare. For instance, Article 36(5) of the Vienna Rules[36] allows the Secretary General of the Vienna International Arbitral Centre to send a copy of the award in electronic form 'if it is not possible or feasible to send the award in hardcopy form within a reasonable time'. Article 26.7 of the Arbitration Rules of the London Court

33 Decision of 19 July 2022, 5A_335/2021.

34 As an exception to the 'in writing' requirement, the English Arbitration Act, at Section 52, and the Stockholm Chamber of Commerce Rules, Article 42(1), allow the parties to agree on a different form from a written award.

35 Poudret and Besson, op. cit. note 12, para. 744.

36 In force since 1 July 2021.

of International Arbitration (the LCIA Rules)[37] goes one step further and considers electronic notification to be the rule and even to prevail in the event of any disparity between the electronic and hard copy of the award.

Although the NYC does not explicitly mention that an arbitral award needs to be signed by the arbitrators, Article IV(1)(a), which stipulates the 'duly authenticated award' as a requirement for enforcement, implies the assumption that the award must bear the arbitrators' confirmation in some manner. All relevant arbitration laws and arbitration rules explicitly require the signatures of the arbitrators. Until recently, this has been understood as a wet-ink signature on a paper hard copy. It is interesting to note that Article 26.2 of the LCIA Rules provides that the award may also be signed electronically.

In this context, there is also the eIDAS Regulation of the European Union,[38] which regulates technical requirements and legal effects of electronic signatures. More specifically, Article 25.2 stipulates that a qualified electronic signature (QES) has the 'equivalent legal effect of a handwritten signature'. This provision may be relevant where arbitration laws and arbitration rules refer to the 'signature' of the arbitrators as a requirement of an arbitral award. There are good reasons to assume that a QES fulfils the signature requirement under the various provisions in any event, but that other forms of electronic signing, such as an 'advanced electronic signature' under Article 26 of the eIDAS Regulation would be subject to interpretation by the relevant state authorities.

Effects of an arbitral award

An arbitral award must be notified to the parties to the arbitration in order to become final and binding on them. Both arbitration laws and arbitration rules usually stipulate that an arbitral award must be notified to the parties. When an institution administers the arbitration, the rules usually provide that the institution notifies the award. In *ad hoc* proceedings, this is the duty of the arbitrators. Where a party has not participated in the arbitration, or the factual delivery of documents, including the arbitral award, faces difficulties, it might be questionable whether the notification can be effectuated by the application of (legal) fictions of notification. Questions could also arise when an award orders that the debtors are jointly and severally liable but the award cannot be notified to all award debtors.

An arbitral award is binding not only on the parties but also on the arbitrators. Thus, with the exception of the limited grounds for a correction of the award, which may also be performed on the tribunal's own initiative, the arbitrators may not amend or revise the award.

In some jurisdictions, an award may be deposited, or perhaps must be deposited, with a competent authority. Although this may have legal implications for the domestic legal effects of the award, it is generally recognised that the fulfilment of any such requirement

37 In force since 1 October 2020.

38 Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

is not relevant under the NYC.[39] In other jurisdictions, the arbitral award requires a declaration of enforceability in order to have the same, or at least comparable, legal effects as a court judgment in that jurisdiction. In any event, the intention of the NYC was clearly to facilitate the enforcement of foreign awards. Thus, whatever might be necessary for a domestic award to become final and binding or enforceable may not be construed as an additional legal impediment that is not provided under the NYC.[40]

Whether an award is truly 'final' and only subject to setting-aside proceedings at the place of arbitration is a matter of party agreement and the law at the place of arbitration. Although it is conceivable that parties could agree on an 'appeal tribunal' that reviews the award as an appellate body, this is rarely the case and would undermine the advantages of arbitration proceedings.

39 Poudret and Besson, op. cit. note 11, para. 759; *Redfern and Hunter*, op. cit. note 7, para. 9.177.

40 See in particular Article III, which obliges the contracting states of the NYC that there may not be 'substantially more onerous conditions or higher fees or charges' for foreign awards than for domestic awards.