ASCERTAINING THE CONTENT OF THE APPLICABLE LAW AND *IURA NOVIT TRIBUNUS*: APPROACHES IN COMMERCIAL AND INVESTMENT ARBITRATION†

Christian P. Alberti and David M. Bigge***

While there is good guidance, scholarly and otherwise, on how arbitral tribunals determine the content of the law applicable to the dispute, uncertainty still exists on the use of what we will call *iura novit tribunus* in the process. The traditional sources are of little or no assistance for tribunals in finding an answer to the question as to how the content of the applicable law is to be determined in the absence of party pleading on a particular legal issue. In fact, party agreements rarely, if ever, address this topic.[1] Institutional arbitration rules do not provide for guidance save one outlier,[2] although some institutional

---

† This article will also be published in the Spanish language as Alberti, Christian P./Bigge, David M., "Determinando el contenido del derecho aplicable y *Iura Novit Tribunus*: enfoques en arbitraje comercial y de inversión", in *Problemas Contemporáneos de Arbitraje Comercial*, (Héctor Flores Sentíes, ed.), Tirant lo Blanch and Instituto Tecnológico Autónomo de México, Ciudad de México, anticipated 2015.

* **Christian P. Alberti** is Assistant Vice President/Director, International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association, Inc. (AAA). The views expressed in this chapter are the author's personal views and do not necessarily represent the views of the ICDR/AAA or any of its employees.

** **David M. Bigge** is Attorney-Adviser, U.S. Department of State, Office of International Claims and Investment Disputes and an Adjunct Professor, Georgetown University Law Center. The views expressed in this chapter are the author's personal views and do not represent the views of the U.S. Department of State or the U.S. Government.

[1] At an ASA Conference in 2006 in Zurich, Prof. Gabrielle Kaufmann-Kohler proposed the following transnational rule in line with Rule 44.1 of the U.S. Federal Rules of Civil Procedure, which could easily be made part of an arbitration agreement: "The parties shall establish the content of the law applicable to the merits. The…tribunal shall have the power, but not the obligation, to conduct its own research to establish such content. If it makes use of such power, the tribunal shall give the parties an opportunity to comment on the results of the tribunal's research. If the content of the applicable law is not established with respect to a specific issue, the…tribunal is empowered to apply to such issue any rule of law it deems appropriate," Kaufmann-Kohler, Gabrielle: "The Governing Law: Fact or Law? – A Transnational Rule on Establishing its Contents", Best Practices in International Arbitration, in *ASA Special Series No. 26*, July 2006, p. 6.

[2] Article 22.1(iii) of the LCIA Arbitration Rules (2014) states in relevant part that "[t]he Arbitral Tribunal shall have the power…to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the

rules, while not expressly addressing the issue, provide tribunals with wide discretion.[3] Finally, national arbitration laws are mostly silent on the issue, again, with a few exceptions.[4] In any event, these exceptions would only apply if the dispute were to be subject to those particular jurisdictions.

However, this does not mean that the *iura novit tribunus* doctrine is not being utilized by international tribunals in the context of commercial and investment arbitration. Quite the contrary—arbitral tribunals routinely determine the content of the law beyond the parties' pleadings, and reviewing courts routinely sanction this practice. The following will address the question as to whether the *iura novit tribunus* doctrine should be viewed as a power of the tribunal or as a duty required of the tribunal, and will then focus on its limitations suggested in recent case law. First, however, we will address the impropriety of drawing on *iura novit curia* to determine the scope of *iura novit tribunus*.

I. The Limited Utility of Relying on Domestic Court Practices

Most scholarly analyses of an arbitrator's power to determine the content of the applicable law outside of the parties' pleadings start with a review of *iura novit curia* in civil and common law domestic courts. Indeed, national courts in the civil and common law regimes deal with the question as to who shall ascertain and/or prove the content of foreign law in international disputes differently, and the background of the arbitrator and/or the reviewing court may affect how the issue is addressed in arbitration.

Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute."

[3] Article 20(1) ICDR Rules (2014); Article 22 ICC Rules (2012); Article 14.5 LCIA Arbitration Rules (2014); Article 13.1 HKIAC Administered Arbitration Rules (2013); Rule 16.1 SIAC Rules (2013); Article 19(1) SCC Arbitration Rules (2010); *see* also Article 17(1) UNCITRAL Arbitration Rules (2010).

[4] Section 34(1) of the English Arbitration Act (1996) establishes that "[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter." Section 34(2)(g) goes on and clarifies that "[p]rocedural and evidential matters include whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law." While not explicitly addressed, wide discretion can be found in Article 19(2) UNCITRAL Model Law, Article 1460 of the French Code of Civil Procedure, Article 182 of the Swiss Federal Statute on Private International Law, Articles 21 and 22 of the Brazilian Arbitration Act, among others.

But viewing *iura novit tribunus* through the lens of domestic court practice is inapt. In court, the topic generally arises in the context of how a court is supposed to determine the content of domestic and foreign law, respectively. In the case of domestic law, the court is presumed to have *iura novit curia* powers in almost all jurisdictions, because the court is appointed by the state to interpret and apply the state's laws. That responsibility carries with it the requirement that the court go beyond the parties' pleadings and determine the content of the law (and apply that law) to its own satisfaction. It is insufficient, as a state court, to rely solely on the parties' arguments. Arbitrators, on the other hand, derive their jurisdiction not from the state but from the parties' agreement, and are not empowered by any state in particular to interpret or safeguard the application of its laws.[5] Although the disputing parties usually expect that the law will be applied correctly to the best of the arbitrator's ability, there generally is no significant threat to the state if the law is applied incorrectly, and of course—unlike in domestic courts—an error of law is rarely a basis for overturning an arbitral award.

Similarly, scholars writing on this subject in the context of arbitration often focus on a court's treatment of foreign law, correctly pointing out that, in some jurisdictions, foreign law is treated as a matter of law subject to *iura novit curia*, whereas in other jurisdictions, it is treated as a matter of fact that must be proven by the party asserting the content of the foreign law.[6] Again, this

---

[5] For an extensive discussion on the juridical nature of arbitration and the source of arbitrator powers *see*: Lew, Julian D. M./Mistelis, Loukas A./Kröll, Stefan M.: *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 2003, pp. 73-78.

[6] Some very well-respected authors have advanced the theory that tribunals should not reach beyond of what the parties have pled and proven, that applicable law should be treated as a fact, and, as such, the *iura novit tribunus* doctrine finds no application in arbitration. *See*, for example, Derains, Yves: "Observations - Cour d'appel de Paris (1re Ch. C) 13 novembre 1997 - *Lemeur v. SARL Les Cités invisibles*", in *Revue de l'arbitrage*, Volume 1998 Issue 4, Sirey, Paris, 1998, p. 710 ("L'adage *Jura novit curia* n'a pas sa place en matière d'arbitrage, et surtout pas en matière d'arbitrage international" or "The adage *iura novit curia* has no place in arbitration, especially not with regard to international arbitration."); *see* also Gaillard, Emmanuel/Savage, John: *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, The Hague, 1999, para. 1263 ("[The law] should be established as though it were an element of fact. The idea that foreign laws should be treated as issues of fact is well established in both common law and civil law systems and should apply in international arbitral practice"). This view is too rigid and is, in any event, contrary to the weight of authority. Even jurisdictions like the United Kingdom, where foreign law is treated as fact in court proceedings, have done away with this concept for examining applicable law

framework does not fit arbitration, where the question is not one of *foreign* law, but rather one of *applicable* law. The very concept of foreign law is misplaced in the context of international arbitration as tribunals have no nationality, forum or *lex fori*.[7] They operate under the applicable law, which may not always be known to the tribunal, but should not be treated as a "fact" to be proven by the parties.

Thus, we will dispense with an analysis of *iura novit curia* in domestic courts. In order to make the separation clear, we will refer to the relevant practice in arbitration as *iura novit tribunus.* That said, the most significant set of sources on the application of *iura novit tribunus* are (1) domestic court cases for enforcement or vacatur of arbitral awards, and (2) in the investment treaty context, ICSID annulment committee decisions. Thus, although we dispense with the usual analogies to *iura novit curia* in courtroom practice, domestic court decisions remain relevant to the below analysis.

II. May Tribunals Assume *Iura Novit Tribunus* Powers?

Absent the parties' agreement to the contrary, there is no known proscription against the arbitrator going beyond the parties' pleadings. The vast majority of courts and annulment committees examining the topic have affirmed that arbitral tribunals can, within the limitations discussed below, determine the content of the applicable law on their own, whether or not the specific legal issue was pled by the parties. In each of the cases discussed below, the notion that tribunals had this power was not questioned; the only question was whether it was applied correctly and fairly.

Reviewing courts have consistently held, for example, that a commercial arbitral tribunal can, in some circumstances, re-classify a claim,[8] vary the legal characterization of facts if reasonably connected

---

in arbitration. *See* Section 34(1) and (2)(g) of the English Arbitration Act (1996) and Article 22.1(iii) of the LCIA Arbitration Rules (2014).

[7] *See* Kaufmann-Kohler, Gabrielle: "The Arbitrator and the Law: Does He/She Know it? Apply It? How? And a Few More Questions", in *Arbitration International*, Volume 21 Issue 4, Kluwer Law International, The Hague, 2005, p. 632; Lew, Julian D.M.: "Iura Novit Curia and Due Process", in *Queen Mary, University of London, School of Law Legal Studies Research Paper No. 72/2010*, 2010, para. 8; also agreeing on this point, Fouchard/Gaillard/Goldman, *supra* note 8, p. 1263.

[8] *Urbaser v. Babcock*, Madrid Court of Appeal (27 October 2008), Case No. 542/2008-2/2008, commentated in *UNCIRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, United Nations Publication, Vienna, 2012, para. 90, http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf; *see* also *Bank*

to the arguments raised,[9] or engage in legal reasoning unrelated to the parties' legal arguments.[10] That is, a tribunal can exercise *iura novit tribunus* to replace the parties' legal reasoning with its own.[11] As the U.S. Court of Appeals for the Ninth Circuit pithily explained, a reviewing court is tasked to examine whether the award "exceeds the scope of the [arbitration agreement]", not whether the award "exceeds the scope of the parties' pleadings".[12] Thus, the exercise of *iura novit tribunus* powers by an arbitral tribunal by itself will not generally result in a successful challenge to the award. Similarly, as Christoph Schreuer has explained, ICSID annulment committees have "uniformly rejected the idea that the tribunals in drafting their awards are restricted to arguments presented by the parties."[13]

III. Must Tribunals Apply *Iura Novit Tribunus*?

Some learned colleagues follow a strict civil law inquisitorial approach and advocate that tribunals are not just empowered but rather *must* establish the content of the applicable law in order to fulfill their mandate.[14] Courts in a few civil law jurisdictions have

---

Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd., Swiss Federal Supreme Court (2 March 2001), Case No. 4P.260/2000, in *ASA Bulletin*, Volume 19 Issue 3, Kluwer Law International, The Hague, 2001, p. 535, para. 5(c).

[9] *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd,* Supreme Court of Singapore, High Court (23 September 2013), SGHC 186, p. 41, para. 65 ("If an unargued premise flows reasonably from an argued premise, I do not think that it is necessarily incumbent on the arbitral tribunal to invite the parties to submit new arguments. The arbitral tribunal would be doing nothing more than inferring a related premise from one that has been placed before it").

[10] *Not indicated v. Not indicated*, Ière Cour de droit civil (21 September 2007), Case No. 4A_220/2007, in *ASA Bulletin*, Volume 26 Issue 4, Kluwer Law International, The Hague, 2008, p. 753, para. 7.2.

[11] On this general topic, *see* Williams, David A.R.: "Defining the Role of the Court in Modern International Commercial Arbitration", in *Global Arbitration Review*, Law Business Research, London, 2012, p. 38 with more case references. To what extent this may impact a party's right to be heard will be addressed below.

[12] *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. et al.*, United States Court of Appeals for the Ninth Circuit (30 June 1992), 969 F.2D 764, p. 771.

[13] Schreuer, Christoph: "Three Generations of ICSID Annulment Proceedings", in *Annulment of ICSID Awards,* IAI Series in International Arbitration No. 1 (Emmanuel Gaillard/Yas Banifatemi, eds.), Juris Publishing, Huntington, 2004, p. 30.

[14] *See* discussion in von Wobeser, Dr. Claus: "The Effective use of Legal Sources: How Much is too Much and What is the Role for Iura Novit Curia", Paper submitted for *2010 ICCA Congress* in Rio de Janeiro, p. 7; *see* also Giovannini, Teresa: "International Arbitration and Jura Novit Curia – Towards Harmonization", in *Transnational Dispute Management*, Volume 9 Issue 3, OGEMID listserv, Maris BV, Voorburg, 2012, p. 6, http://www.transnational-dispute-management.com/article.asp?key=1819.

supported the idea that commercial arbitral tribunals are required to apply *iura novit tribunus* and determine the law themselves.[15] The Cour d'appel de Paris, for example, unmistakably stated in 1997 in *Société VRV v. Pharmachim* that arbitrators have an obligation to pursue the adequate rule of law *ex officio*.[16]

In contrast, most jurisdictions favor the notion that tribunals do not, at least not exclusively, have the burden to educate themselves on the content of the applicable law. Section 34(2)(g) of the English Arbitration Act, for example, empowers tribunals to decide to what extent they should ascertain the law, but this power does not advance to the degree of an obligation. Justice Thomas explained in *Hussman (Europe) Ltd. v. Al Ameen Dev. & Trade Co.* that, under Section 46(1)(a),[17] the tribunal is "free to decide the matter on the basis of the presumption that the applicable…law is the same as the law of England and Wales", unless the parties or the tribunal itself raise an issue that is treated differently under the law chosen by the parties.[18]

Interestingly, the Swiss Federal Supreme Court has evolved on this issue. In a series of earlier cases, the court held that a *iura novit tribunus* obligation existed, in line with the strict *iura novit curia* doctrine that is applied in Swiss courts.[19] But in 2005, the Swiss Federal Supreme Court changed its earlier position and agreed in *D. d.o.o. v. Bank C.* that the application of the *iura novit tribunus*

---

[15] As discussed in more detail in: Giovannini, *supra* note 16, pp. 5-6 with more case references.

[16] *Société VRV v. Pharmachim*, Cour d'appel de Paris (25 November 1997), in *Revue de l'arbitrage*, Volume 1998 Issue 4, Sirey, Paris, 1998, p. 687.

[17] Article 46(1)(a) provides that "[t]he arbitral tribunal shall decide the dispute (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute..."

[18] *Hussman (Europe) Ltd. v. Al Ameen Dev. & Trade Co.*, English Commercial Court (19 April 2000), in *2 Lloyd's Law Report*, Informa Subscriptions, London, pp. 83 et seq., para. 42.

[19] In 1994, the Swiss Federal Supreme Court had found in *Westland v. Arab British Helicopter Co.* that an adjudicator is *obligated* to apply the law on its own motion without being limited to the grounds advanced by the parties. *Westland Helicopters Ltd v. The Arab British Helicopter Company*, Swiss Federal Supreme Court (19 April 1994), Case No. ATF 120 II 172, p. 175, para. 3(a). The Swiss Federal Supreme Court also made an explicit reference to the *iura novit curia* doctrine in its decision, which marked the starting point for numerous decisions as to the scope of this doctrine in arbitration. It confirmed this general notion in 2001 in *N.V. Belgische Scheepvaartmaatschappij-Compagnie Maritime Belge v. N.V. Distrigas*, Swiss Federal Supreme Court (19 December 2001), Case No. ATF 4P.114/2001, paras. 3(a) and 5(a); *see* also *Bank Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd.*, *supra* note 10, para. 5(c).

doctrine should not be mandatory. It found that not applying this doctrine does not of itself put the award at risk for being set aside. It further clarified that a tribunal does not have to conduct its own research and may entirely rely on the parties' arguments if believed to be sufficient to ascertain the content of the applicable law.[20] It reaffirmed this notion in *X. A.S. v. Z. S.A.* in 2014.[21]

Nor is the application of *iura novit tribunus* viewed as mandatory in investment treaty arbitration. The ad hoc annulment committee in *Patrick H. Mitchell v. Democratic Republic of Congo provided the clearest statement on this issue,*[22] writing that a tribunal "is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; this is but an option…."[23] A similar delineation was recognized by the tribunal in *CME Czech Republic B.V. v. Czech Republic*, which was heard under the UNCITRAL rules. In *CME*, the tribunal made clear that it was not "bound to research, find and apply national law which has not been argued or referred to by the parties and has not been identified by the parties and the Tribunal to be essential to the Tribunal's decision."[24]

The 2010 annulment decision in *Enron Creditors Recovery Corporation and Ponderosa Assets L.P. v. Republic of Argentina*[25] suggests a possible alternative approach in investment arbitration. The *Enron* annulment committee paid lip service to the *iura novit tribunus* rule announced in *Mitchell*, but nonetheless annulled the underlying arbitral decision on the ground that the tribunal failed to apply the applicable law, faulting the tribunal for overlooking arguments on the customary international law of necessity *that were not raised by the parties*.[26] Thus, by the *Enron* ad hoc committee's logic, the award

---

[20] *See D. d.o.o. v. Bank C.*, Swiss Federal Supreme Court (27 April 2005), Case No. 4P.242/2004, in *ASA Bulletin*, Volume 23 Issue 4, Kluwer Arbitration Law, The Hague, 2005, p. 724, para. 7(3).

[21] *X. A.S. (Turkey) v. Z. S.A. (Belgium)*, Swiss Federal Supreme Court (5 February 2014), Case No. 4A_446/2013, Reasons, para. 3.

[22] *Patrick H. Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment (November 1, 2006).

[23] *Id.,* para. 57.

[24] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award (March 14, 2003), para. 411.

[25] *Enron Creditors Recovery Corp. and Ponderosa Assets L.P. v. Republic of Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment (July 30, 2010).

[26] *Id.,* paras. 376-377.

was annullable because the underlying tribunal failed to utilize *iura novit tribunus*, suggesting that—despite the reference to *Mitchell*—*iura novit tribunus* is mandatory.

The *Enron* decision has been frequently criticized, but it was not the first case to find a *iura novit tribunus* obligation in the investor-state context. In *BP Exploration Co (Libya) Ltd. v. The Government of the Libyan Arab Republic*,[27] Judge Lagergren found that an arbitrator is "both entitled *and compelled* to undertake an independent examination of the legal issues deemed relevant by it, and to engage in considerable legal research going beyond the confines of the materials relied upon by the Claimant," at least in the context of a respondent's default. There is also the interesting case of the ICSID ad hoc annulment committee decision in *RSM Production Corporation v. Grenada*.[28] In determining that an ICSID annulment committee has *iura novit tribunus* powers (not addressing whether those powers rise to the level of duty), the *RSM* committee relied on the ICJ decisions in *Fisheries Jurisdiction* and *Military and Paramilitary Activities in and against Nicaragua*.[29] These ICJ decisions stand for the proposition that *iura novit curia* is not only a power held by the ICJ, but an obligation on the court. In *Fisheries Jurisdiction*, the ICJ wrote that "[t]he Court…, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required…to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute."[30] In the *Nicaragua* case, the ICJ held that it was "bound" to apply *iura novit curia* in order to determine whether it had jurisdiction in the absence of an appearance by the respondent state.[31]

Along these lines, Jan Paulsson, in his article on the generation of legal norms in investment treaty arbitration, expressly advocates for a

---

[27] *BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic*, 53 ILR 297 (1979).

[28] *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14, Decision on Application for Preliminary Ruling (October 29, 2009), para. 23.

[29] *Fisheries Jurisdiction (Federation of Germany v. Iceland)*, Merits, Judgment (25 July 1974), in *I.C.J. Report 1974*, pp. 175 et seq.; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment on the Merits (27 June 1986), in *I.C.J. Report 1986*, pp. 14 et seq.

[30] *Fisheries Jurisdiction (Federation of Germany v. Iceland)*, *supra* note 31, p. 181, para. 18.

[31] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, *supra* note 31, pp. 24-25, para. 29.

iura novit tribunus obligation for investment-treaty arbitrators. As Paulsson explains, "a tribunal in an investment dispute cannot content itself with inept pleadings, and simply uphold the least implausible of the two."[32] He cites to Article 38 of the ICJ Statute and *Fisheries Jurisdiction* to support that argument.[33]

As a policy matter, should it be mandatory for tribunals to conduct their own research and confirm the content of the law outside of the parties' pleadings? The answer, in international commercial arbitration at least, is no. Most of the time, the applicable domestic law is unfamiliar even to the most experienced of arbitrators.[34] Placing such burden of education solely on tribunals would be a disservice to international parties in highly technical commercial disputes in need of industry-specific experts rather than lawyers to serve as arbitrators. To then expect acquaintance with specific legal notions, possibly based on unfamiliar law, is ill conceived. Such an expectation could also add significantly to the costs of arbitration, a concern raised by Justice Thomas in *Hussman*.[35]

The considerations may be different in investment treaty arbitration, but the conclusion is the same. While investment arbitration tribunals are more likely to feature international legal scholars and experienced practitioners capable of researching the applicable law, which is often international law, there is no rule requiring the appointment of such arbitrators. Indeed, it is not unheard of for parties to appoint investment treaty arbitrators not because of their acumen in international law, but because of their industry experience or familiarity with domestic law relevant to the case. In addition, international arbitrators are not themselves responsible for the protection or advancement of any particular system of law, international or domestic.

Finally, and perhaps most importantly, a mandatory *iura novit tribunus* obligation would be contrary to well-established law on the challenge of arbitral awards. It is almost universally accepted that errors of law, absent other factors, cannot sustain a motion to vacate

---

[32] Paulsson, Jan: "International Arbitration and the General of Legal Norms: Treaty Arbitration and International Law", in *ICCA Congress Series*, No. 13, Kluwer Law International, The Hague, 2007, p. 879.

[33] *Id.*

[34] *See* Kaufmann-Kohler, *supra* note 9, p. 1.

[35] *Hussman (Europe) Ltd. v. Al Ameen Dev. & Trade Co., supra* note 20, para. 42.

or annul an arbitral award (commercial or investment), and cannot be a basis to avoid enforcement. If that is the case, it would be inconsistent to *require* arbitrators to assure themselves of the legal correctness of their award outside the parties' pleadings.

IV. Limitations to the *Iura Novit Tribunus* Doctrine

The tribunal's core responsibility is to render a fair and enforceable award while ensuring that due process is preserved. As such, a tribunal applying the *iura novit tribunus* doctrine is well advised to do so against the backdrop of national arbitration laws[36] (see also Article 34 of the UNCITRAL Model Law) and/or the New York Convention,[37] which set the stage for questions of enforceability of foreign awards. The Washington Convention similarly provides the bases for annulment of an investment treaty arbitration award rendered under the ISCID Rules.[38] Typically, these laws and conventions provide that enforcement may be refused if the award contains decisions on matters beyond the scope of what has been submitted to arbitration,[39] if the tribunal manifestly exceeded its powers,[40] or if the negatively affected party was unable to present its case.[41] The following sections will address these limitations.

A. Scope of the tribunal's mandate and the ne ultra petita *principle*

The arbitration agreement empowers the tribunal but, at the same time, can also remove certain remedies from the tribunal's sphere of adjudication. In addition, the claimant fixes and delimits the subject matter of the arbitration with its prayer for relief from which the

[36] Local courts that review challenges will in all likelihood be influenced by the application of the principle of *iura novit curia* in court litigation at the seat of the arbitration. For example, Sections 33 and 34 of the Swedish Arbitration Act (1999), Article 1059 of the German Code of Civil Procedure, Sections 67 and 68 of the English Arbitration Act (1996), Art. 190(2) of the Swiss Federal Code on Private International Law, Section 41 of the Finnish Arbitration Act, Articles 1502 and 1504 of the French Code of Civil Procedure, and Article 1065 of the Dutch Code of Civil Procedure.

[37] United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

[38] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement of Investment Disputes of 1965, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[39] *See, e.g.,* Article V(1)(c) of the New York Convention.

[40] *See, e.g.,* Article 52(1)(b) of the Washington Convention.

[41] *See, e.g.,* Article V(1)(b) of the New York Convention.

tribunal cannot deviate. At the outset, it must be clarified that the *iura novit tribunus* doctrine and the *ne ultra petita* (not beyond the request) principle are two maxims that co-exist and complement each other. Put differently, the *ne ultra petita* principle confines the matter in dispute and, as such, the outer limits of relief a tribunal may grant. If the tribunal exceeds these limits by awarding a different or higher relief than requested, it puts the award at risk.[42]

The Cour d'appel de Paris, for example, found in *Société GFI informatique SA v. Société Engineering Ingegneria Informatica SPA et al.* that the tribunal cannot go beyond the mission entrusted to it and that its mission is limited to the subject matter of the dispute as set out in the parties' claims.[43] Similarly, Spanish courts have stated that the parties' prayer for relief binds the tribunal and that its decision must echo the prayer for relief, though there does not have to be literal identity between the prayer for relief and the award.[44] The Italian Corte di Cassazione Civile in *Soc. Profilglass v. Nerozzi et al.* clarified that a judge violates the *ne ultra petita* principle when he interferes with the dispositive powers of the parties by altering the elements of identification of the claim or exception which may result in a decision not requested or exceeds the limits of the request or exception.[45] A U.S. court applying the "excess of powers" doctrine similarly found that "the Arbitrator exceeded his power by declaring the contract void as against public policy—an issue not raised by the parties or *subject to arbitration*."[46]

Variations on the *ne ultra petita* principle can be found in investment arbitration jurisprudence as well. The annulment committee in *Klöckner v. Republic of Cameroon* recognized that an ICSID tribunal cannot, "by formulating its own theory and argument,…[go] beyond

---

[42] For example, the tribunal finds that the parties' agreement is void whereas Claimant merely asked for it to be amended.

[43] *Société GFI Informatique SA v. Société Engineering Ingegneria Informatica SPA et al.,* Cour d'appel de Paris (27 November 2008), Case No. 07/11672, in: *Revue de l'arbitrage*, Volume 2009 Issue 1, Sirey, Paris, p. 231.

[44] *See* Giovannini, *supra* note 16, p. 4, citing Audiencia Provincial de Madrid (29 June 2004), Case No. 524/2004; Audiencia Provincial de Madrid (17 November 2004), Case No. 632/2004.

[45] *Soc. Profilglass v. Nerozzi et al.*, Cass. Civ. Sez. II (12 July 2005), Giust. Civ. Mass. 2005, p. 6.

[46] *Depascuale Building & Realty Co. v. Rhode Island Board of Governors for Higher Education*, Superior Court of Rhode Island (June 29, 2009), Case No. PC07-6393, 2009 R.I. Super. LEXIS 79 (R.I. Sup. 2009) (unpublished opinion) (emphasis added).

the 'legal framework' established by the Claimant and Respondent," for example by deciding the case "on the basis of tort while the pleas of the parties were based on contract."[47] The *Caratube* annulment committee reiterated this concept in 2014: "a tribunal (and also a committee) is only free to adopt its own solution and reasoning without obligation to submit it to the parties beforehand, if it remains within the legal framework established by the parties."[48]

On the other hand, some courts have found that as long as the *iura novit tribunus* doctrine operates within the limits of *ne ultra petita*, it allows the tribunal to fully investigate the law applicable to the parties' requests for relief.[49] The interaction between *iura novit tribunus* and *ne ultra petita* is best explained by examining the much debated *Werfen Austria GmbH v. Polar Electro Europe B.V.*[50] case. The claimant in the underlying arbitration requested the tribunal to find that it should be indemnified for the violation of the parties' distribution agreement. In order to be able to claim a payment, it asked the tribunal to declare void (under Section 28 of the Finnish Act on Commercial Representatives and Salesman) a clause that would have otherwise nullified that payment due to termination. The tribunal denied that request, but nonetheless awarded the claimant corresponding compensation by *sua sponte* interpreting and amending the agreement based on a different provision (Section 36 of the Finnish Contracts Act), which the claimant had never addressed. The Finnish Supreme Court found that the tribunal did not grant anything more or different than what the claimant had requested, and that this outcome therefore did not violate the *ne ultra petita* principle, even though the legal basis of the award was different than what was pled.[51] What the tribunal arguably did here was to apply the *iura novit tribunus* doctrine within the limitations set by the *ne ultra petita*

---

[47] *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision of the ad hoc Committee (October 21, 1983), para. 91.

[48] *Caratube International Oil Co. LLP v. Republic of Kazakhstan,* ICSID Case No. ARB/08/12, Decision on Annulment (18 February 2014), para. 93.

[49] *See* Alberti, Christian P., "Iura Novit Curia in International Commercial Arbitration – How much justice do you want?", in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, (Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas, Vikki Rogers, eds.), Kluwer Law International, The Hague, 2011, pp. 4-6, 18-19.

[50] *Werfen Austria GmbH v. Polar Electro Europe B.V.*, Supreme Court of Finland – majority decision (2 July 2008), Case No. S2006/716, no. 1, 517.

[51] *Id.*, paras. 12-13.

principle. The tribunal *de facto* granted what had been requested but, in doing so, did not limit itself to the claimant's pleading, searched the law on its own accord, and found a fitting legal concept under the same applicable law.[52]

The Swiss Federal Supreme Court came to a similar conclusion in *Bank Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd.* In that case, the tribunal awarded corresponding damages based on a contractual breach theory while the claimant requested indemnification for non-compliance with the parties' guarantee agreement. The Court found that the tribunal did not violate *ne ultra petita* principle so long as the re-characterization of the claim is covered by the claimant's original request.[53] In a previous decision the same Court distinguished between court and arbitral practice on this issue. The Court found that a judge does not violate the *ne ultra petita* principle if he legally qualifies a claim differently from what the claimant had advanced and that, under the *iura novit curia* doctrine, he is not limited to the pleadings advanced by the parties.[54] An arbitral tribunal, on the other hand, is limited to the subject matter and the amount requested; particularly, when the claimant qualifies or limits its claims in the conclusions themselves.[55]

In conclusion, there is a very fine distinction to be made between pleadings and prayers of relief and attention must be given on how the parties have expressed themselves in their legal conclusions and prayers. If the claimant has legally characterized its prayers for relief

---

[52] Wiegand also provides for two examples which illustrate the interaction between these two maxims: If the claimant had requested for an amendment of the parties' contract and the tribunal instead declares it void, it has violated the *ne ultra petita* principle. It should have simply denied the claimant's request if it did not agree with the grounds for amendment. If, in turn, the claimant had asked for the contract to be annulled and the tribunal disagreed but declared it void, then the *ne ultra petita* principle has not been violated as the tribunal has not granted anything more than what the claimant had requested. But it came to such conclusion by applying the *iura novit curia* doctrine. *See* Wiegand, Wolfgang: "Iura novit curia vs. ne ultra petita – Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der jüngsten Rechtsprechung des Bundesgerichts", Rechtsetzung und Rechtsdurchsetzung – Zivil- und schiedsverfahrensrechtliche Aspekte – Festschrift für Franz Kellerhals zum 65. Geburtstag (Monique Jametti Greiner, Bernhard Berger, Andreas Güngerich, eds.), Stämpfli Verlag AG, Bern, 2005, pp. 133-134.

[53] *Bank Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd.*, *supra* note 10, p. 535, para. 5(c).

[54] *P. GmbH (Germany) v. S. (Syria),* Swiss Federal Supreme Court (1 November 1996), in *ASA Bulletin* Volume 20 Issue 2, Kluwer International Law, The Hague, 2002, p. 262.

[55] *Id.*, p. 263.

it has excluded all other bases for the award and the tribunal cannot go beyond these limitations. If, on the other hand, the prayer for relief is fashioned as a particular remedy or outcome, but is not anchored to a particular legal theory, it may be possible to look beyond the parties' pleadings for law supporting the requested remedy.

B. The right to be heard: surprise v. foreseeability

The application of the *iura novit tribunus* doctrine may lead to a violation of the right to be heard, a fundamental rule of due process. Thus, in application, tribunals should be careful to provide the disputing parties with notice of the possible application of legal principles that were not presented in the pleadings, at least if the application of those principles would come as a surprise to the parties.

In *Systembolaget v. V&S Vin & Spirit*, for example, the Swedish Court of Appeal set aside an award based on Section 34, first paragraph, sub-section 2 of the Swedish Arbitration Act (1999). The underlying Stockholm Chamber of Commerce tribunal had based its award on an argument that was not advanced by either side. The Court found that the decisive argument could not have been inferred by the parties' submissions.[56] Systembolaget's expert, Professor Lars Heuman, explained that the right to be heard was violated, as one must be able to understand the claim being made against him in order to be able to defend himself (rather than fighting in the fog).[57]

The right to be heard was also the basis of the decision of the Swiss Federal Supreme Court in *José Ignacio Urquijo Goitia v. Liedson da Silva Muñiz*. The underlying arbitration before a Court of Arbitration for Sport ("CAS") tribunal involved a Brazilian football player and his Spanish agent. The contract was governed by the FIFA rules and, secondarily and only as a gap-filling measure, by Swiss law. It provided the agent with the exclusive right to represent the player in the European market. The player later signed with a Portuguese football club without the agent's involvement. The agent brought arbitration to collect his fees, but the FIFA Players' Status Committee and, upon appeal, the CAS tribunal rejected the agent's claim. The

[56] *Systembolaget v. V&S Vin & Spirit*, Svea Court of Appeal (1 December 2009), Case No. T4548- 08, p. 19.

[57] *See* James Hope, "Sweden: Fighting in fog - when a party does not know the case against it", in *Global Arbitration Review*, Volume 5 No. 1, Law Business Research, London, http://globalarbitrationreview.com/journal/article/27636/sweden-fighting-fog-when-party-does-not-know-case-against-it.

latter relied in its decision on Article 8(2)(a) Swiss Federal Law on the Employment Exchange and the Hiring-out of Personnel, a mandatory Swiss law provision under which exclusivity clauses in agency agreements leading to employment contracts are null and void. Neither side had invoked this provision in the arbitration. The agent argued in court that the CAS decision constituted a violation of his right to be heard. The Court agreed, finding that the agent could not have anticipated that this law would apply (arguably, it was not even applicable); even less that it would be decisive for its case. The Court set the award aside finding that the agent was taken by surprise, as the CAS tribunal should have at least provided the parties with an opportunity to submit comments on this law.[58]

The Quebec Superior Court addressed *iura novit tribunus* and the right to be heard in *Louis Dreyfus S.A.S. v. Holding Tusculum B. V. et al.* The respondent in the court case had pursued arbitration before an ICC tribunal for breach of the shareholders' agreement, after a failed reorganization attempt of a joint venture. The agreement included a remedy clause the parties sought to apply. Instead, the ICC tribunal fashioned a valuation and buyout remedy of its own making "on the ad hoc application of broad principles of justice and fairness"[59] and terminated the joint venture. The claimant then asked the Quebec Superior Court for partial annulment of the award arguing that the ICC tribunal decided the dispute based on a remedy neither party had pled. The Court agreed that the ICC tribunal violated the parties' right to be heard, as it dealt with a dispute not contemplated by the parties, and set the award aside in part.[60] Note that this decision, although not addressing the *ne ultra petita* principle, could just as easily have been decided on that basis.

In *Société Engel Austria GmbH v. société Don Trade et al.* the Cour d'appel de Paris partially set aside an award, again, on the grounds that an ICC tribunal violated the right to be heard. While the ICC tribunal rejected part of the claimant's claims, it upheld one claim resulting in a partial annulment of the parties' contract. It based its decision *sua sponte* on the principle of frustration of the contractual

---

[58] *José Ignacio Urquijo Goitia v. Lidson da Silva Muñiz*, Swiss Federal Supreme Court (9 February 2009), Case No. 4A_400/2008, in *ASA Bulletin*, Volume 27 Issue 3, Kluwer Law International, The Hague, 2009, pp. 498-499.

[59] *Louis Dreyfus S.A.S. v. Holding Tusculum B. V. et al.*, Quebec Superior Court (8 December 2008), Case No. 2008 QCCS 5903, para. 36.

[60] *Id.*, paras. 76-88.

basis (*Wegfall der Geschäftsgrundlage*) under Austrian law, a doctrine that neither side had pled. The respondent consequently requested the Court to set aside this decision, arguing *inter alia* that it had never been given the opportunity to be heard on this legal principle. The Court agreed that the parties were not given such opportunity and that the ICC tribunal violated the right to be heard after having introduced a new legal basis for its decision *ex officio*.[61]

U.S. courts have likewise grappled with the concept of *iura novit tribunus* and the right to be heard in arbitration. In *Township of Montclair v. Montclair PBA Local No. 53*, the appellate division of the Superior Court of New Jersey wrote:

> By predicating his ruling upon an issue that neither party raised nor had notice of, the arbitrator effectively denied the parties the right to marshal evidence and be heard on the pivotal issue identified by the arbitrator. Fundamental fairness requires, at the very least, notice of claim and the right to be heard. No matter how innocently conceived, the arbitrator's election to decide the case before him without reference to the issues of law raised by the parties, and upon an issue of law that neither side relied upon nor had the opportunity to address, deprived the Township of notice and an opportunity to be heard.[62]

Some courts, on the other hand, have refused to vacate (or have granted enforcement) even where *iura novit tribunus* was applied without prior notice, finding that there was no violation of the right to be heard. The previously-addressed *Werfen* decision is on point. In that case, the Finnish Supreme Court addressed the question of whether the respondent had sufficient opportunity to present its case. It found that the tribunal was not bound by the parties' legal arguments and that the tribunal had not awarded anything beyond of what the claimant had asked for. It also stated that the respondent had the opportunity to state its position on the factors that eventually led to the tribunal's decision. In particular, it noted that the legal nature of

---

[61] *Société Engel Austria GmbH v. société Don Trade et al.*, Cour d'appel de Paris (3 December 2009), Case No. 08/13618, p. 114; *see* also Kirby, Jennifer/Bensaude, Denise: "A View from Paris – March 2010", in *Mealey's International Arbitration Report*, Volume 25 No. 3, LexisNexis Mealey's Publications, King of Prussia, 2010, p. 9.

[62] *Township of Montclair v. Montclair PBA Local No. 53*, Superior Court of New Jersey – Appellate Division (May 22, 2012), Case No. A-0657-1154, 2012 N.J. Super. Unpub. LEXIS 1122 (Sup. Ct. N.J. 2012) (unpublished opinion).

the parties' agreement itself was in dispute so that the outcome could not have come as a surprise.[63]

The Swiss Federal Supreme Court denied a similar vacatur request in *X (Switzerland) v. Y (Hungary)* in 2009. The respondent argued that the tribunal had based its findings on contractual terms and legal provisions that neither party had advanced. More importantly, it argued that neither party could have anticipated what would become the basis for the tribunal's decision. The Court found that the claimant had in fact indirectly referred to the relevant contractual terms by arguing the consequences of their application. The Court concluded that the respondent had sufficient opportunities to respond. Notably, it also found that the respondent had an experienced counsel who should have anticipated the application of the contractual terms addressing the contract termination.[64]

In 2010, the Swiss Federal Supreme Court upheld another award in *X SA. (Belgium) v. Y SA. (Spain)*. The respondent contended that its right to be heard had been violated because the tribunal's decision was based on legal reasoning and notions neither party had advanced. The Court found that a party must be granted the opportunity to present its arguments on legal issues only under exceptional circumstances and that otherwise the *iura novit tribunus* doctrine applies. It clarified that the right to be heard is only violated where neither party has invoked the relevant legal concept and an award based on it would come as an unforeseen event. The respondent failed this test, having been represented by Swiss counsel who had referred in its submissions to notions similar to the one on which the tribunal had based its decision.[65]

The "right to be heard" argument also failed in a federal case in the Northern District of California. The arbitration underlying the decision in *Weiner v. Original Talk Radio Network, Inc.,* involved a contract dispute between a prominent radio personality and his employer.[66] The arbitrator in that case issued an award that included

---

[63] *Werfen Austria GmbH v. Polar Electro Europe B.V.*, *supra* note 52, para. 16.

[64] *X (Switzerland) v. Y (Hungary)*, Swiss Federal Supreme Court (9 June 2009), Case No. 4A_108/2009, in *ASA Bulletin*, Volume 28 Issue 3, Kluwer Law International, The Hague, 2010, pp. 557-559.

[65] *X SA. (Belgium) v. Y SA. (Spain)*, Federal Supreme Court (3 August 2010), Case No. 4A_254/2010, pp. 809-811.

[66] *Weiner v. Original Talk Radio Network, Inc.*, U.S. Federal Court for the Northern District of California (May 2, 2013), Case No. 10-cv-05785, 2013 U.S. Dist. LEXIS 63083 (N.D. Ca. 2013) (unpublished opinion).

back pay, even though back pay was not addressed by the parties. The Court held that the arbitration agreement was broad enough to include the back pay issue, and that the respondent was "on notice" that it may have to address that issue.

At least one reviewing court has held that, in order to vacate an award, the complaining disputant must show not only that the new legal authorities in the award came as a surprise, but that "with adequate notice it might have been possible to persuade the arbitrator to a different result."[67]

Finally, it should be noted that ICSID annulment committees have not annulled any awards based on the right to be heard in the context of the application of *iura novit tribunus*,[68] even though violations of fundamental rights of procedure are bases for annulment.[69] For example, the 2002 annulment committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* explained that while the reasoning adopted by the underlying tribunal "came as a surprise to the parties, or at least to some of them…this would by no means be unprecedented in judicial decision-making" and was not a basis for annulment.[70] That language was later quoted and applied by the ad hoc annulment committee in *Helnan International Hotels A/S v. Arab Republic of Egypt*.[71] This line of precedent was affirmed in February 2014 by the annulment committee in *Caratube International Oil Company LLP v. Kazakhstan*.[72] As another example, in *Wena Hotels Ltd. v. Arab Republic of Egypt,*[73] the tribunal exercised its assumed *iura novit*

---

[67] *Trustees of Rotoaira Forest Trust v. Attorney-General*, New Zealand High Court (30 November 1998), [1999] 2 NZLR 452, para. 463.

[68] The right to be heard was at issue, for example, in *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment (Dec. 23, 2010), but the underlying concern was the submission and consideration of new evidence, not *iura novit tribunus*.

[69] Article 52(1)(d) of the Washington Convention.

[70] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002), para. 84.

[71] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee (June 14, 2010), para. 23.

[72] *Caratube International Oil Co. LLP v. Republic of Kazakhstan, supra* note 50, paras. 90-96.

[73] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision – Annulment Proceeding (February 5, 2002).

tribunus power in utilizing compound interest to calculate damages, despite the fact that neither party argued for compound interest.

A few observations can be made from the decisions where the right to be heard was examined as a basis for vacatur of the award. All courts seem to agree that the right to be heard is fundamental and that it is violated if a surprising decision has been rendered. But unforeseeability is a matter of appreciation. Indeed, some authors see no possible violations of the right to be heard in the application of *iura novit tribunus*, as "in principle, there is no violation…of due process as the parties should know that the…arbitrators know the law and will apply it."[74] Certainly, whether the decisive legal issue could have been inferred by the parties' submissions and whether the parties could not have otherwise anticipated or contemplated its application is a case-by-case determination. Factors such as the nature of the newly introduced notion and the qualifications of the representatives may certainly play a role here. This becomes all the more conspicuous if the parties had explicitly agreed on that law and the newly introduced legal notion or provision is fundamental or mandatory in nature.

Indirect references made by counsel or discussions of similar legal notions during the course of the proceeding may also have weight in the evaluation of what is foreseeable. As the High Court in *TMM Division Maritima SA de CV* stated:

> There is…a nuanced difference between deciding the dispute on a ground that has never been expressly raised or contemplated, and deciding the dispute on a premise which, though not directly raised, is reasonably connected to an argument which was in fact raised.[75]

Nonetheless, all arbitral tribunals would be wise to heed the advice provided in a 2008 report on the ascertainment of the content of applicable law published by the International Law Association ("ILA"). The ILA specifically recommended, as a best practice, that where a tribunal intends to invoke *iura novit tribunus*, it should bring

---

[74] Lévy, Laurent: "Jura Novit Curia? The Arbitrator's Discretion in the Application of the Governing Law", in *Kluwer Arbitration Blog*, Kluwer Law International, The Hague, 2009, http://kluwerarbitrationblog.com/blog/2009/03/20/jura-novit-curia-the-arbitrator%e2%80%99s-discretion-in-the-application-of-the-governing-law.

[75] *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd, supra* note 11, pp. 39-40, para. 63.

the new legal authorities to the attention of the parties and invite their comments, "at least if those sources go meaningfully beyond the sources the parties have already invoked and might significantly affect the outcome of the case."[76]

V. Conclusion

In conclusion, it is indisputable that arbitral tribunals have the power to invoke the *iura novit tribunus* doctrine. That is, arbitrators may look beyond the parties' pleadings to determine the content of the applicable law. The weight of authority and public policy considerations suggest that, while arbitrators *may* invoke this power, there is no obligation to do so. The power has limits, however, largely related to whether the exercise of *iura novit tribunus* offends the *ne ultra petita* principle, and whether the right to be heard has been preserved. In particular, all tribunals are advised to alert the disputing parties if they are considering new legal authorities in order to preserve the enforceability of their awards. Finally, the parties themselves should address this issue with their tribunals as early as possible, and even work it into a procedural order, so that both the parties and the tribunal have the same expectations with respect to *iura novit tribunus*.

[76] International Law Association: "Final Report – Ascertaining the Contents of the Applicable Law in International Commercial Arbitration", Rio de Janeiro Conference (2008), p. 23.

RULES-of-THUMB

for

DELIBERATIONS and AWARD DRAFTING

Richard L. Mattiaccio,
F.CIArb, C. Arb
Allegaert Berger & Vogel LLP
111 Broadway, NY, NY 10006
Tel: +1.212.616.7085

RULE 1

- Keep an open mind throughout the proceedings

 richard@mattiaccio.com www.mattiacio.com
www.abv.com

RULE 2

- Avoid discussing ultimate conclusions with Tribunal members while the record is still open
  - Discussing unanswered questions, demeaner can be OK
    - so long as it does not reflect a closed mind as to the ultimate questions submitted to the tribunal for decision

 richard@mattiaccio.com www.mattiacio.com www.abv.com

RULE 3

- Make sure all tribunal members are working with the same record
  - Put counsel to the task, before the record is closed, to keep the tribunal organized

 richard@mattiaccio.com www.mattiacio.com www.abv.com

RULE 4

- *Prepare* for deliberations
  - Re-read
    - The pleadings
    - Witness statements and exhibits
    - Any post-hearing briefs and make a list of questions / discussion topics for the tribunal
  - Prepare a list of Decision Points
    - Cover what the Parties raise – No More, No Less
  - If there is a transcript – read it thoroughly
  - Take notes, highlight, flag points for discussion
  - Read the exhibits with the transcript
  - Annotate your Decision Points with transcript and exhibit references

If there is no transcript, make sure you take good notes and read them in connection with deliberations and drafting

RULE 5

- "Arbitral discretion" is no substitute for reasoning
  - Reasoning explains why arbitrators exercise discretion in a certain manner
  - "The Tribunal, in the exercise of its wide discretion, finds that…" is excess verbiage
    - except to remind counsel and a reviewing court of the standard of review
    - comes across as defensive
      - or worse, *lazy*

RULE 6

- Resolve any doubts as to applicable law long before the parties brief the law
- Be comfortable with the briefing before the record closes
- Limit yourself to the law as it has been briefed, unless you disclose and obtain consent *in advance* authorizing you to independent legal research
  - *Iura novit curia* is for the *courts* in civil law countries
  - In common law countries, the typical party expectation is that, in arbitration, the arbitrators will confine themselves to the law as briefed
- Do not check your prior knowledge at the door – make use of it before and during the hearing process to make sure the briefing is adequate

RULE 7

- Never compromise on essential points
- Compromise on non-essential points to achieve consensus

RULE 8

- Listen carefully to your tribunal colleagues
- Remain collegial even if a disagreement is heartfelt
- Look for points of agreement in the midst of any disagreement

RULE 9

- THINK AGAIN
  - Sleep on it

RULE 10

- Have your draft of the award reviewed
  - By co-arbitrators (INSIST) and/or by the institution
    - Language
    - Sense
    - Reasoning
    - Calculations

 richard@mattiaccio.com www.mattiacio.com www.abv.com

Supplemental Rules for the

Preservation of Arbitrator Sanity

(the "Sanity Rules")

 richard@mattiaccio.com www.mattiacio.com www.abv.com

SANITY RULE 1

- In the pre-hearing phase, maintain an up-to-date chronology of procedural developments
  - Avoid the need to re-construct it at the end of the case
  - Keep it concise, but include dates
    - American parties tend to find lengthy procedural preambles to be an infuriating waste of time and money in commercial cases
    - A detailed procedural history may be necessary or helpful to enforce the award in some countries, so strike an appropriate balance

 richard@mattiaccio.com www.mattiacio.com www.abv.com

SANITY RULE 2

- Have counsel for the parties keep you organized
  - Stipulated chronology
    - Stated in the most neutral terms possible
    - Temporal relations of events to one another – nothing more or the parties will not agree
  - A list of the named parties with essential descriptions
    - Alignment of each party
    - Legal nature/nationality of the party
    - Legal headquarters/ relevant place(s) of operations
    - Membership in any Corporate Group
      - Affiliates relevant to the case

 richard@mattiaccio.com www.mattiacio.com www.abv.com

SANITY RULE 2 cont.

- Witness Lists
  - Identity
  - Affiliation(s)
  - Citizenship; place of business
  - Topic areas of testimony
  - For experts, short description of areas of expertise
  - Date(s) of witness statement(s), testimony
- Exhibit Lists
  - In a logical order
  - Brief description of each document with other identifiers
  - Area(s) of relevance
  - Cross-references, if used with multiple witnesses

SANITY RULE 3

- Persuade the parties to arrange for a verbatim transcript
  - Explain that a transcript will empower the tribunal to provide more detailed reasoning
    - If necessary, explain that the lack of a transcript will adversely impact the level of detail in the award or will increase the time and cost of deliberations, or both

SANITY RULE 4

- Develop a workplan with tribunal members while you are all still together at the hearing
  - Ensure that all tribunal members have their calendars with them on the last day of the hearing
  - Agree on a workplan to ensure completion of the award, taking into account the institutional review process, within the deadline set by the applicable rules
    - Confirm the workplan in writing as soon as you get back to your computer
      - Use your computer to deny your colleagues deniability – send them calendar appointments with the deadlines and with generous reminders.

 richard@mattiaccio.com www.mattiacio.com www.abv.com

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Drafting Arbitral Awards
Part I — General

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators
12 Bloomsbury Square
London, United Kingdom
WC1A 2LP
T: +44 (0)20 7421 7444
E: info@ciarb.org
www.ciarb.org
Registered Charity: 803725

The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Founded in 1915 and with a Royal Charter granted in 1979, it is a UK-based membership charity that has gained international presence in more than 100 countries and has more than 14,000 professionally qualified members around the world. While the Chartered Institute of Arbitrators has used its best efforts in preparing this publication, it makes no representations or warranties with respect to the accuracy or completeness of its content and specifically disclaims any implied warranties of merchantability or fitness for a particular purpose.

TABLE OF CONTENTS

MEMBERS OF THE DRAFTING COMMITTEE

Practice and Standards Committee

Tim Hardy, Chair
Andrew Burr
Bennar Balkaya
Ciaran Fahy
Jo Delaney
Karen Akinci
Lawrence W. Newman
Michael Cover
Mohamed S. Abdel Wahab
Murray Armes
Nicholas Gould
Richard Tan
Shawn Conway
Sundra Rajoo, ex officio
Wolf Von Kumberg, ex officio

Drafting Arbitral Awards
Part I — General

Drafting Arbitral Awards Part I — General

Introduction

1. This Guideline sets out the current best practice in international commercial arbitration for drafting arbitral awards. It is divided into three parts dealing with (1) arbitral awards in general, (2) awards of interest,[1] and (3) awards of costs.[2]
2. Part I of this Guideline provides guidance on:
   i. how to draft and communicate arbitral awards (Article 1);
   ii. the titles that are most commonly used (Article 2);
   iii. the conduct of deliberations (Article 3);
   iv. the form and content of awards (Article 4); and
   v. issues arising after a final award has been communicated (Article 5).

Preamble

1. Parties resort to arbitration to obtain a final and binding resolution of their dispute. It is the arbitrators' role to resolve the dispute by deciding all of the disputed issues and recording their decision in a document, called an arbitral award. Arbitral awards should be prepared with the greatest care to ensure they conform with the terms of the arbitration agreement, including any arbitration rules and the law of the place of arbitration (*lex arbitri*), and are enforceable under the New York Convention.[3] Any failure to comply with the agreed process and the requirements as to form and content may lead to challenges and create difficulties with enforcement.
2. Arbitrators have a wide discretion to resolve the disputes in arbitration by issuing different types of awards. Consequently, most national laws and arbitration rules do not define the various types of awards that are available but, when they do, they have taken an inconsistent approach to the labelling of awards. Even though the title of the award does not determine its legal effect, choosing the wrong title may lead to misunderstandings. Accordingly, arbitrators should be careful to use the

appropriate title in order to avoid being prematurely and unintentionally deprived of power.

3. This Guideline addresses the issues that arbitrators need to consider when drafting awards with the aim of minimising any difficulties in their recognition and/or enforcement.

Article 1 — General principles

1. **Arbitrators should make it clear that a decision is an award by including the word 'Award' in the title, if it is indeed intended to be an award.**
2. **Arbitrators should structure an award in a logical sequence and express their decision in a clear, concise and unambiguous manner.**
3. **Arbitrators should endeavour to make an award that is valid and enforceable.**
4. **Arbitrators should make their award in a timely and efficient manner.**
5. **Once arbitrators have made their award, they should communicate it to the parties and to any arbitral institution administering the arbitration following the method provided for in the arbitration agreement, including any arbitration rules and/or the *lex arbitri*.**

Commentary on Article 1

Paragraph 1

Arbitrators' decisions

In the course of an arbitration arbitrators normally issue various decisions. Decisions relating to the organisation and general conduct of the arbitral proceedings which are purely procedural and/or administrative in nature should be made in the form of procedural orders or directions.[4] Such decisions should be clearly distinguished from arbitral awards, which are intended to include a determination on the

merits or affect the parties' substantive rights and which can generally be enforced under the New York Convention (see Article 2 below).

Paragraph 2

Structural requirements

a) Arbitrators should keep in mind at all times that awards are first and foremost written for the parties. The clearer an award is, the more likely it is to be accepted by the parties and the less likely it is to be challenged. For these purposes, awards should be in a format and layout which aids the communication of the arbitrators' decision and invites reading. They may be written as a flowing narrative dealing with the evidence as it arises naturally in the sequence of things or, where there are many different issues, on an issue-by-issue basis, dealing with the evidence and argument applicable to each issue separately.

b) Arbitrators should consider using short sentences. As soon as a sentence ceases to have a clear and logical link to the preceding sentence, arbitrators should write a new paragraph. Arbitrators should use numbered paragraphs. The award should also include informative headings and sub-headings. A table of contents is especially helpful in lengthy awards. To the extent possible, awards should avoid using technical or legalistic expressions and should be written in plain and simple language which sets out the decision in a coherent and unambiguous manner.

c) When drafting an award arbitrators should also consider the wider audience who may read and are invited to take actions in relation to the award, including judges exercising a supportive or supervisory role and/ or third parties (such as insurers) whose interests may be affected by it. An award should contain sufficient information to enable its audience to understand the issues and/or its meaning without the need to make further enquiry into the matter. They should not give rise to any

questions as to their interpretation and they should not need clarifications.[5] Arbitrators should not attach extensive documents to the award and/or refer to documents attached to the award. If it is necessary to refer to key documents it is good practice to quote the relevant passage(s)/part(s) in full. However, sometimes, arbitrators may attach certain documents to the award, such as the terms of reference, provisional orders and/or earlier awards when required under the relevant rules and/or *lex arbitri*[6] or for ease of reference.

Paragraph 3

Making a valid and enforceable award

a) Awards are of no value if they are invalid and of limited value if they are not enforceable internationally. To be valid, an arbitral award needs to conform with the arbitration agreement, including any arbitration rules and the *lex arbitri*. To be enforceable internationally an award should also comply with the requirements of the New York Convention. If one of the parties makes it clear that it may intend to enforce the award in another jurisdiction, the arbitrators may consider it appropriate to take account of any procedural requirements of the law of that jurisdiction to the extent that they are made aware of these. Additionally, arbitrators may consider it appropriate to consider the law of the place where the debtor resides and/or has assets, and/or any other place(s) of likely enforcement, if known and, if so, to seek assistance from the party expecting to enforce as to any particular requirements in such places.[7]

b) Arbitrators are not expected to consider the laws of every possible country where enforcement may be sought by the parties, it suffices to seek to minimise the risk that their award is set aside and/or refused recognition and/or enforcement under the New York Convention.

Paragraph 4

Time limits for making awards

a) Many national laws and arbitration rules do not specify any time limits within which the arbitrators must make their final award, leaving the matter to the arbitrators' discretion. However, some expressly include provisions regarding time limits to expedite the arbitral proceedings and avoid delays in concluding the final award.[8] Parties to the arbitration agreement may also prescribe a time limit, albeit this is less common.

b) If any time limits for issuing a final award are specified in the arbitration agreement, including any applicable rules and/or the *lex arbitri*, arbitrators should manage the whole of the arbitration with this in mind. If they are unable to comply, they should apply for or order an extension following any mechanism set out in the applicable rules and/or the *lex arbitri*. If there is no specified mechanism for granting an extension of time limit, arbitrators should address the matter as early as possible and ask the parties to grant them the power to extend it. Alternatively, arbitrators may invite one or more of the parties to approach the national courts at the place of arbitration to extend it, or apply themselves, if the *lex arbitri* so permits.[9]

c) In the absence of any specified time limit arbitrators should determine the appropriate time frame for making an award after taking into account the particular circumstances of the case, bearing in mind that good practice is to conduct the arbitral proceedings without delay and make awards in a timely manner. Additionally, arbitrators should, at the end of a hearing, inform the parties of the time frame within which they expect to make their award.

d) The rules of some arbitral institutions administering arbitrations provide that they must review all awards in draft before they are communicated to the parties and/or their representatives. In those situations arbitrators must take the delay this may cause into consideration. If an award is not

made and communicated within the time specified, it may be set aside on the grounds that it was not made in accordance with the procedure agreed by the parties.[10]

Paragraph 5

Communication of an award

a) The communication of the award is generally governed by the arbitration agreement, including any arbitration rules and/or the *lex arbitri*. Some arbitration rules may require the arbitrators to send the award to the arbitral institution administering the arbitration for it to communicate the award to the parties. In the absence of any agreement and/or specific provisions, it is for the arbitrators to determine the mode by which they will communicate the award to the parties.

b) In any case, arbitrators should make sure that the award is communicated to all parties and/or the arbitral institution at the same time and by the same means. Arbitrators should not withhold an award pending the payment of their fees, unless the arbitration agreement, including any arbitration rules and/or the *lex arbitri*, provide that they may do so.[11]

Methods of communication

c) The traditional method is to send physical originals of the signed award by courier to the parties and/or their representatives and any arbitral institution administering the arbitration. The advantage of this method is it makes it easier to prove service through the delivery acknowledgment which may be produced in evidence in setting aside and/or enforcement proceedings. Most arbitration rules require service of a physical original of awards. Even where electronic communication is permitted to ensure simultaneous receipt, hard copy originals should still be sent to the parties and/or their representatives by courier.[12]

Article 2 — Titles for arbitral awards

The most common titles given to awards made by arbitrators are:

i) interim awards;

ii) partial awards;

iii) final awards;

iv) consent or agreed awards; and

v) default awards.

Commentary on Article 2

a) Arbitrators have a wide discretion as to the different types of awards that they may make. However, they should always check the arbitration agreement, including any arbitration rules and/or the *lex arbitri*, which may impose limitations on their discretionary powers and/or require decisions to be made in a particular form. It is also good practice for arbitrators to consult the parties as to whether they would like the decision to be made in a particular form.

b) Great care must be taken when choosing the title for an award, particularly the titles 'interim' and 'partial'. This is because there is no universally accepted definition for these titles of awards. Some jurisdictions distinguish between these titles in the following way: an interim award is considered to be an award made at an interim stage of the proceedings which does not finally dispose of a particular issue and is subject to later revision;[13] a partial award is considered to be an award that finally determines some, but not all, of the issues in dispute and the issues determined are not subject to later revision.[14]

c) In other jurisdictions both 'interim' and 'partial' awards are considered to be final as to the issues they deal with and incapable of later revision. In these jurisdictions decisions that are capable of later revision are sometimes described as provisional orders rather than awards. An added complication is that in some jurisdictions awards that are intended to be

capable of later revision are described as 'provisional awards'.[15]

d) A further complication is that to be enforceable under the New York Convention, a decision must be an 'award' and not an order. To assist parties enforce provisional orders, such as security for costs, a practice has arisen of describing these as 'interim awards'.

e) In light of the above, arbitrators should be careful when deciding what title to give to an award because it can have different meanings in different jurisdictions. They should consider whether the relevant rules and the applicable *lex arbitri* contain definitions or specific provisions as to the labelling of arbitral awards.

f) One way to avoid complications is to make it clear in the title of the award whether it is intended to be 'provisional' such as, for example, 'Interim Award on Provisional Measures'. Additionally, the text of the award should spell out whether it is a 'provisional' or a 'final' determination of the issues. If it is intended to be 'provisional' determination, it is helpful for arbitrators to expressly reserve their right to reconsider the issue at a later stage. Conversely, if it is intended to be 'final', it may be helpful, subject to the applicable rules, *lex arbitri* and/ or the law of the place of enforcement, if known, for arbitrators to state that it is not capable of later revision.

i) Provisional decisions

Examples of provisional decisions include decisions to preserve a factual or legal situation necessary to secure the claim which is the subject of the arbitration.[16] These types of decisions are interim or provisional in the sense that they are made pending the final determination of the issues in the arbitration. These may be variously described as provisional orders, interim provisional awards or interim awards. However, the title is not determinative and that is why it is helpful to describe the nature of the award in the text.

ii) Partial awards

Partial awards are most frequently used to record the determination of specific issues where the dispute is complex and can be divided into different stages, each concluded with a separate partial award. For example, if the arbitrators bifurcate the liability and quantum issues, they may make a partial award on liability and another partial award on quantum. If there are several awards, arbitrators should consider numbering their awards consecutively to avoid any confusion. These awards are sometimes called 'partial final' awards to aid understanding of the fact that it is both 'partial' (ie it does not dispose of all issues in dispute) and 'final' in respect of the issues it does decide in the sense that the decision cannot be changed.

iii) Final awards

a) An award should be described as a 'Final Award' when it is intended to bring the arbitration to an end by deciding and disposing of all or the outstanding issues in dispute between the parties. A final award may be the first award dealing with all of the disputed issues or the last in a series of awards which deal with different issues sequentially. If a final award is the last one in a series of awards, arbitrators should summarise any decisions made in earlier awards, so that enables all of the arbitrators' decisions are consolidated into one stand-alone document.
b) A final award should also deal with the costs of the arbitration and their allocation as well as interest, if applicable.[17] If arbitrators decide to deal with the merits before dealing with the costs they should make a partial award containing their decision on the merits and expressly state that they are going to deal with costs in a separate award.[18] Alternatively, they should make a final award save as to costs and deal with the costs in a later award.
c) A critically important consequence of issuing the final award is that

from then on the arbitrators have no jurisdiction to decide issues between the parties[19] except that they may have a very specific and narrow jurisdiction to correct, interpret, supplement and/or reconsider the award in limited circumstances pursuant to the applicable law and/or arbitration rules (see Article 5 below).

Termination of proceedings without a ruling on the merits

d) In certain situations, a final award can put an end to the proceedings without a ruling on the merits. For example, in cases where the arbitrators conclude that they do not have jurisdiction[20] or where the subject matter of the proceedings has ceased to exist or where the proceedings have been terminated because the parties have failed to provide security for costs.[21]

iv) Consent or agreed awards

a) If the parties to a dispute settle their differences during the arbitration proceedings, they may ask the arbitrators to make a consent award or an award on agreed terms. When dealing with such requests, arbitrators should be satisfied that a settlement agreement has in fact been reached by the parties and both parties consented to it.
b) In addition, arbitrators should be satisfied that the matters which are dealt with in the settlement agreement were within the scope of the arbitration agreement pursuant to which they have jurisdiction. If the settlement agreement extends to matters beyond the ambit of the arbitration agreement, arbitrators should ask the parties to agree to broaden their jurisdiction to encompass these new matters before issuing a consent award.
c) Arbitrators should be satisfied that the agreement between the parties is not illegal or otherwise contrary to public policy. If the arbitrators have unresolved concerns, they may decline to record the settlement as an

award without giving reasons. Arbitrators should be particularly wary of requests for consent awards in respect of disputes involving large monetary claims which settle very quickly after the commencement of the arbitration as they may be used as a money laundering device.[22]

d) If the arbitrators are satisfied that they should make a consent award, they do not need to include any reasons for the award except to record that the award reflects the parties' agreement on different issues including, if appropriate, what has been agreed in respect of all of the costs of the arbitration and, more specifically, who is to pay the arbitrators' fees and expenses and when.

v) Default awards

a) Before issuing an award in proceedings where a party fails to appear or otherwise fails to take part in the proceedings, arbitrators should make sure that the dispute is within the scope of the arbitration agreement and they have jurisdiction.[23] For further guidance on proceedings where one or more parties do not appear or cooperate, please refer to the *Guideline on Party Non-Participation*.[24]

b) Even where there is no formal obligation on arbitrators to warn a non-participating party of their intention to consider issuing a default award, it is a sensible precaution against potential challenges to give a non-participating party reasonable notice that arbitrators may be making a default award in their absence unless they participate within the period specified.

c) A default award does not differ from an award made by the arbitrators except that it should include a detailed description of the efforts which have been made to give the non-participating party a fair opportunity to present its case. This is necessary in order to show that the requirements of due process and equal treatment of the parties have been satisfied in order to reduce the risk of later successful challenges to the validity of

the award by the non-participating party.

Article 3 — Deliberations and voting

1. **At the end of a hearing or if there is one followed by written submissions, after submission of the last written statement, arbitrators should declare the proceedings closed. It is good practice to notify the parties at the same time when the arbitrators will be deliberating and when the parties should expect their award. Arbitrators should always deliberate before making any decision. Deliberations should be confidential and should not be disclosed to the parties except for the decision itself and the reasoning as reflected in the award.**
2. **Arbitrators should attempt to make a decision unanimously. If they cannot reach a decision unanimously, the decision may be rendered by the majority, pursuant to any applicable arbitration rules and/or the *lex arbitri*.**
3. **An arbitrator may issue a dissenting or separate opinion to explain a disagreement with the outcome and/or the reasoning of the majority, as long as it is not prohibited under the arbitration agreement, including any arbitration rules and/or the *lex arbitri*. Dissenting or separate opinions should be carefully drafted to avoid any appearance of bias.**

Commentary on Article 3

Paragraph 1

Conduct of the deliberations

a) Arbitrators should agree on a process for deliberations and decide whether to deliberate in person, by videoconference, by teleconference, or in writing. Deliberations can take place at any location the arbitrators consider appropriate. It is good practice to deliberately set aside time,

immediately after the close of proceedings, for at least initial deliberations.

b) The extent of the deliberations necessarily varies depending on the nature of the dispute, the number of claims, the issues to be decided, the type of decisions required and the preferences of the individual arbitrators. In any case, arbitrators should deliberate in a collegiate manner. Each arbitrator should be given an opportunity to express their non-biased and independent view and all of the arbitrators should engage in a constructive dialogue with the aim of reaching a well-reasoned and thorough decision. Arbitrators cannot delegate their responsibility to participate in the deliberations or the decision-making process.

Obstructionist arbitrator(s)

c) If one arbitrator refuses to participate in the deliberations without good reason, the other arbitrators may proceed in the arbitrator's absence after giving appropriate notice of the meeting and offering an opportunity to submit comments on the issues to be decided. In the case where the remaining arbitrators proceed with the deliberations, they should draft the award and ask the arbitrator who refuses to participate to review it, giving that arbitrator another opportunity to submit comments. All these steps should be recorded in any award. If the two co-arbitrators refuse to participate, the presiding arbitrator can proceed by rendering the award alone, if the applicable arbitration rules and/or *lex arbitri* so permit.

Privacy and confidentiality of deliberations

d) Deliberations should take place in private with only the arbitrators present but others, such as a tribunal secretary appointed to assist the arbitrators, may attend if all of the arbitrators agree and after informing the parties. Arbitrators, and others present, should keep all aspects of the

deliberations confidential. Clearly, a party-appointed arbitrator should not communicate any aspect of the deliberations to the party who appointed them. A breach of the duty to keep the deliberations confidential may result in a claim for damages for breach of confidentiality against the arbitrator responsible.

Paragraph 2

Voting

If at the end of the deliberations, the arbitrators are not in agreement and are therefore unable to reach a unanimous decision, then the presiding arbitrator should summarise the opposing opinions and ask the other arbitrators to vote. If there is a majority, this should be reflected in the award without the need for a dissenting opinion. If there is no majority, under some arbitration rules the presiding arbitrator may reach a decision alone.[25] If, however, the presiding arbitrator is not empowered to do so, the presiding arbitrator should engage in further discussions and try to reach a majority. If no majority is reached, there is a risk that there may be no award at all.

Paragraph 3

Dissenting and concurrent opinions

a) An arbitrator may wish to make an individual separate opinion expressing disagreement with the reasoning and/or the conclusions of the majority. There is no required form in which dissenting or concurring opinions should be made. They may be annexed to the final award or included in the award itself; however, they do not have any legal effect and they do not form part of an award.[26]
b) It is good practice for an arbitrator to issue a written draft of any separate opinion for consideration by the other arbitrators before any award is made. The separate opinion should not disclose any details of

the deliberations. It should be clearly identified as the personal opinion of its author; it should be limited to explaining the basis of the opinion; and it should not raise any new arguments that the arbitrator failed to raise at the deliberations.

Article 4 — Form and content of awards

1. **Arbitrators should comply with any requirements as to form and content set out in the arbitration agreement, including any arbitration rules and/or the *lex arbitri*. In any event, an award should:**
   - **i) be in writing;**
   - **ii) contain reasons for the decision, unless the parties have agreed otherwise or if it is a consent award;**
   - **iii) state the date and the place of arbitration; and**
   - **iv) be signed by all of the arbitrators or contain an explanation for any missing signature(s).**
2. **Awards should also contain the following essential elements:**
   - **i) the names and addresses of the arbitrators, the parties and their legal representatives;**
   - **ii) the terms of the arbitration agreement between the parties;**
   - **iii) a summary of the facts and procedure including how the dispute arose;**
   - **iv) a summary of the issues and the respective positions of the parties;**
   - **v) an analysis of the arbitrators' findings as to the facts and application of the law to these facts; and**
   - **vi) operative part containing the decision(s).**

Commentary on Article 4

Paragraph 1

Requirements as to form and content vary according to the arbitration agreement, including any arbitration rules and/or the applicable *lex arbitri*. Therefore, arbitrators should check the relevant law(s) and rules before making an award. Generally speaking, there are certain minimum requirements which are almost universally recognised.

i) Awards in writing

Arbitrators should make an award in writing in order to record their decision. It is an obvious and practical requirement which will avoid dispute as to what actually has been decided. The New York Convention implicitly refers to the written form of an arbitral award pursuant to Article IV(1)(a) requiring 'the duly authenticated original award or a duly certified copy thereof' to obtain enforcement.

ii) Reasons

a) All arbitral awards should contain reasons, unless otherwise agreed by the parties or where the award records the parties' settlement. The inclusion of reasons is necessary to demonstrate that arbitrators have given full consideration to the parties' respective submissions and to explain to the parties why they have won or lost. Most national laws and arbitration rules expressly require arbitrators to include reasons in their awards. Even where they are silent on the matter, it is good practice to provide reasons, unless the parties agree otherwise or where the award records the parties' settlement (see Article 2(iv) above).
b) Arbitrators have a wide discretion to decide on the length and the level of detail of the reasons but it is good practice to keep the reasons concise and limited to what is necessary, according to the particular circumstances of the dispute. In any event, arbitrators need to set out

their findings, based on the evidence and arguments presented, as to what did or did not happen. They should explain why, in the light of what they find happened, they have reached their decision and what their decision is.

c) Arbitrators should also consider whether it is appropriate to include a statement that the parties have had a fair and equal opportunity to present their respective cases and deal with that of their counterparty.

iii) Date and place

a) An award should include the date on which it is made. The date indicated has important consequences for the commencement of any time limits with which applications for a correction or annulment must be made.[27] The date of the award may be the date on which the award is finally approved, the date on which it is signed by all the arbitrators (if it is signed by way of circulation, the date of the last signature), or the date on which it is sent to the parties depending on the relevant rules and/or *lex arbitri*. If the arbitration rules require that an arbitral institution administering the arbitration scrutinises an award before it is communicated to the parties, the award should only be dated after the institution has reviewed the award.[28]

b) The award should also state the place of arbitration. In international arbitration awards are deemed to be made at the place of arbitration and not where they are actually signed,[29] unless the parties have agreed otherwise, or if the applicable arbitration rules provide that awards are made in a specific place.

iv) Signatures

a) The act of signing an award expresses endorsement of its content. The general principle is that all arbitrators should sign the award regardless of whether or not it was rendered unanimously. Arbitrators do not need to sign the award at the same place or at the same time, unless otherwise

required by the applicable rules and/or the *lex arbitri*. In addition, arbitrators should always check for any specific requirements related to signing, including if there is a requirement for their signatures to be witnessed by one or more people, or that arbitrators sign every page of the award.[30]

b) Sometimes, however, arbitrators may be unable to sign an award, or may refuse to do so, to express their disagreement with the decision. In these cases, it is sufficient that the remaining arbitrators or the presiding arbitrator sign the award. If the presiding arbitrator refuses to sign the award, the majority will suffice. It is often a requirement of national laws and/or the arbitration rules, and it is good practice, for an award to include an explanation as to why any of the arbitrators have not signed the award.

Paragraph 2

i-v) Other content requirements

a) It is good practice to start preparing and regularly update as the arbitration develops the narrative paragraphs of an award at an early stage so as to set out the basic information including the names and addresses of the arbitrators, the parties and their representatives, the chronology of the facts, the respective positions of the parties and any agreed matters. The award should describe the process by which the arbitrators have been appointed and basis for their jurisdiction to resolve the dispute.[31] It should also contain a brief procedural history of the main stages in the arbitration, referring to preliminary conferences, exchanges of documents, hearing and post-hearing exchanges. The purpose of this is to enable the reader, such as a judge called upon to enforce the award, to see how the arbitrators came to have the authority to issue an award and understand whether the procedure followed was in accordance with the agreement of the parties, including any arbitration rules and/or the *lex arbitri*.[32]

b) The award should also clearly identify and present in a logical order the issues which need to be decided. They are often phrased as questions. The issues can be found in the parties' submissions or the arbitrators themselves can draft a list based on the parties' submissions.[33] It is good practice to request the parties to provide a list, preferably agreed between them, and/or ask them to comment on the list prepared by the arbitrators in order to make sure that all of the disputed issues have been included and that all matters fall within the arbitrators' jurisdiction. In any case, the list of issues should be presented in a logical sequence and in the order in which they will be discussed.

c) In addition, arbitrators should include a description of all claims and counterclaims, if any. This can be done by way of paraphrasing the relevant sections from the request for arbitration or the submissions made by the parties. Arbitrators should be careful to avoid considering matters that were not raised by the parties and/or leaving out matters which were raised by the parties.

vi) Operative part of an award

a) The award should conclude with a section, known as the operative or dispositive part, setting out the arbitrators' decision and orders issue by issue. This section should be short and clearly separated from the rest of the award. It should be consistent with the conclusions on the issues expressed earlier in the award.

b) The operative part of an award should be drafted using mandatory language that requires compliance from the parties, such as 'we award', 'we direct', 'we order' or the equivalent.[34] In cases of non-monetary awards, where arbitrators have been asked to determine certain factual or legal situation(s), they may use the wording 'we declare'.

Article 5 — Effect of a final award

The arbitrators' mandate is terminated when the final award has been rendered subject to power:

i) to correct, interpret and/or supplement the award; and/or

ii) to resume the arbitral proceedings after a remission order by a court during challenge proceedings in order to eliminate a ground for setting aside or invalidating an award.

Commentary on Article 5

Correction

a) Virtually all arbitration rules and national laws allow corrections of awards.[35] This is necessary to correct unintended consequences of, for example, errors in computation or denomination, and clerical, typographical or similar errors. When correcting an error arbitrators should be very careful not to alter the content of the award beyond correcting that error.

b) To avoid the need for corrections, it is good practice for arbitrators to check that any calculations are correct and the currency is correctly denominated. They should also make sure that the names of the parties are accurate.

Interpretation

Arbitrators may be requested to clarify their decision or remove ambiguities in the award in limited circumstances. Their powers are usually limited by the applicable *lex arbitri* and/or the arbitration rules to interpreting specific parts of the operative part of the award or where it is unclear how the award should be executed.[36] Therefore, arbitrators may be able to reject any request for interpretation which goes beyond that.

Additional award

Arbitrators may be requested to make an additional award where they have failed to decide one of the issues raised by the parties. The purpose of an additional award is to prevent an award from being set aside because of that failure. Before making an additional award, arbitrators should always check the arbitration agreement, including any arbitration rules and/or the *lex arbitri*, in order to make sure that they have the power to do so.

ii) Remission of an award

When a party has applied to a local court to set aside an award, the court may remit an issue or issues back to the arbitrators with a direction that they take appropriate steps to rectify a defect in the award.[37] In such cases, arbitrators need to make a fresh award in respect of the matters remitted to them within the specified time under the applicable rules and/or *lex arbitri* or within a time indicated by the court. When doing so, arbitrators need to be very careful not to change the content of the award beyond the scope of the remitted matters.[38]

Conclusion

Arbitral awards are of great practical importance because they have a direct legal effect on the parties to the dispute and may be enforced under the New York Convention. While there is no prescribed style and form that arbitrators should follow when drafting awards, they should ensure that their award complies with the minimum requirements as to the form and substance laid down in the arbitration agreement, including any arbitration rules and/or the *lex arbitri*, and the New York Convention. To disregard them could create difficulties in enforcing the award or invalidate it.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Last revised 22 November 2016

Endnotes

1. See CIArb Guideline on Drafting Arbitral Awards Part II — Interest (2016).
2. See CIArb Guideline on Drafting Arbitral Awards Part III — Costs (2016).
3. One of the principal advantages of arbitration over court proceedings is that arbitral awards can be enforced in over 150 jurisdictions around the world pursuant to the UN Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958) (also known as the New York Convention), see Status of the New York Convention available at <www.uncitral.org/>.
4. For a useful list of matters that can be addressed and clauses that can be included in the procedural orders, see ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders (2015), available at <www.arbitration-icca.org>.
5. Peter Aeberli, 'Awards and Their Drafting', available at <www.aeberli.co.uk>.
6. See e.g., Articles 215(1) and 216(1) of the UAE Civil Procedure Code, Federal Law No 11 of 1992 (stating that the arbitrators' award may be set aside or refused enforcement where it has been issued without the terms of reference.)
7. Humphrey LLoyd and others, 'Drafting Awards in ICC Arbitrations' (2005) 16(2) ICC Bulletin, p. 21 and Günther J. Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18(2) Journal of International Arbitration, p. 148.
8. See e.g., Article 30 ICC Rules (2012); Article 37 SCC Rules (2010); Rule 28.2 SIAC Rules (2013). It is important to note that the ICC has introduced a new policy, for all cases registered as from 1 January 2016, which allows the ICC Court to impose cost sanctions for

unjustified delays in submitting draft awards for scrutiny. For more details, see <www.iccwbo.org>.

9. See e.g., Section 50 English Arbitration Act 1996 which permits courts to extend a time limit for making the award.
10. Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International 1999), p. 759. See also UNCTAD, 'Making the Award and Termination of Proceedings' UNCTAD/EDM.Misc.232/Add.41 (2005), p. 18.
11. See e.g., Section 56 English Arbitration Act 1996 which expressly states that arbitrators may withhold the award until full payment of their fees. See also, Article 34(1) ICC Rules (2012) which provides that the Secretariat will not send the award to parties until full payment of the costs of arbitration is received.
12. See e.g., under the ICC Rules, an electronic transmission of the award does not constitute official notification of an award and official notification is deemed to occur when a party receives the original signed award, see Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC Publication 729 2012), p. 341.
13. Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014), p. 3020; Philipp Peters and Christian Koller, 'The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion in Christian Klausegger and others (eds), Austrian Yearbook on International Arbitration (2010), p. 162 and Fry, n 12, pp. 330-331; Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), pp. 634-635.
14. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), pp. 1272-1273; Born,

n 13, p. 3021 and Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015), para 9.26.

15. See e.g., Section 39 English Arbitration Act 1996 entitled 'Power to make provisional awards'. However, commentaries suggest that provisional decisions are properly entitled 'provisional orders', see Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5th ed, Wiley Blackwell 2014), p . 204 and Robert Merkin and Louis Flannery, *Arbitration Act 1996* (5th ed, Informa 2014), pp. 155-156.
16. See CIArb Guideline on Applications for Interim Measures (2015). However, the national laws of certain jurisdictions provide that interim measures can be granted only by way of procedural orders. See, for example, Article 12 Singapore International Arbitration Act and Article 19B Singapore International Arbitration Act; see also, Section 39 English Arbitration Act which provides for provisional awards which can be used for granting relief on a provisional basis and expressly states that they can be subsequently changed.
17. See generally, CIArb Guideline on Drafting Arbitral Awards Part II — Interest (2016) and CIArb Guideline on Drafting Arbitral Awards Part III — Costs (2016).
18. Hilary Heilbron, *A Practical Guide to International Arbitration in London* (Informa 2008), p. 111 and Blackaby, n 14, para 9.18.
19. Greg Fullelove, 'Functus Officio' in Julio Cesar Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), chapter 24.
20. See CIArb Guideline on Jurisdictional Challenges (2015).
21. See CIArb Guideline on Applications for Security for Costs (2015).
22. Lew, n 13, p. 247 and Waincymer, n 14, p. 1285. See also UNCTAD, n 10, p. 10.
23. See CIArb Guideline on Jurisdictional Challenges (2015).

24. See CIArb Guideline on Party Non-Participation (2016).
25. See eg., Article 31 ICC Rules (2012); Article 26.5 LCIA Rules (2014) and Article 33 UNCITRAL Rules (2010/2013). See also, Section 20(4) English Arbitration Act 1996.
26. Blackaby, n 14, para 9.130.
27. Born, n 13, p. 3037.
28. See, for example, Article 33 ICC Rules (2012) which states that an award can be made only after the Court has approved it. Fry, n 12, p. 323.
29. See e.g., Article 18(2) UNCITRAL Arbitration Rules (2010/2013), Article 31(3) ICC Rules (2012), Section 53 English Arbitration Act 1996.
30. See e.g., in Dubai arbitrators sign every page of the award. Blackaby, n 14, paras 9.148-9.149.
31. For the process of dealing with challenges to jurisdiction, see generally CIArb Guideline on Jurisdictional Challenges (2015).
32. LLoyd, n 7, p. 20; Ray Turner, *Arbitration Awards: A Practical Approach* (Blackwell 2008), p. 30; See Article V(1)(d), New York Convention.
33. In ICC arbitrations, a list of issues is usually included in the Terms of Reference, see Article 23 ICC Rules (2012). See also, Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings which encourage arbitrators to prepare a list of issues based on the parties' submissions, available at <www.uncitral.org/>.
34. Bernardo M. Cremades, 'The Arbitral Award' in Lawrence Newman and Richard Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Juris 2014), p. 818 and Blackaby, n 14, para 9.154. There is an exception where the parties have agreed upon the inclusion of a conditional element in the award. However, such awards should be avoided. See Peter Ashford, *Handbook on*

International Commercial Arbitration (2nd ed, Juris 2014), p. 426.

35. See e.g., Article 38 UNCITRAL Rules (2010/2013), Article 35 ICC Rules (2012), Article 27 LCIA Rules (2014), Article 37 HKIAC Rules (2013), Article 29 SIAC Rules (2013). See also, Article 33 UNCITRAL Model Law and Section 57 English Arbitration Act 1996.
36. Born, n 13, p. 3148 and Lew, n 13, p. 658.
37. Born, n 13, p. 3153 and Fullelove, n 18.
38. See e.g., *Goldenlotus Maritime Ltd v European Chartering and Shipping Inc* [1993] SGHC 262 (where an award was remitted so that the arbitrators recalculate the damages to be paid. However, when doing so, arbitrators also changed the basis on which they previously awarded the damages. Consequently, the revised award was not binding because the arbitrators exceeded the jurisdiction conferred to them by the court which remitted the original award.) See Leng Shun Chan, *Singapore Law on Arbitral Awards* (Singapore Academy of Law 2011), p. 137.

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Drafting Arbitral Awards
Part II — Interest

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators
12 Bloomsbury Square
London, United Kingdom
WC1A 2LP
T: +44 (0)20 7421 7444
E: info@ciarb.org
www.ciarb.org
Registered Charity: 803725

The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Founded in 1915 and with a Royal Charter granted in 1979, it is a UK-based membership charity that has gained international presence in more than 100 countries and has more than 14,000 professionally qualified members around the world. While the Chartered Institute of Arbitrators has used its best efforts in preparing this publication, it makes no representations or warranties with respect to the accuracy or completeness of its content and specifically disclaims any implied warranties of merchantability or fitness for a particular purpose.

TABLE OF CONTENTS

MEMBERS OF THE DRAFTING COMMITTEE

Practice and Standards Committee

Tim Hardy, Chair
Andrew Burr
Bennar Balkaya
Ciaran Fahy
Jo Delaney
Karen Akinci
Lawrence W. Newman
Michael Cover
Mohamed S. Abdel Wahab
Murray Armes
Nicholas Gould
Richard Tan
Shawn Conway
Sundra Rajoo, ex officio
Wolf Von Kumberg, ex officio

Drafting Arbitral Awards
Part II — Interest

Drafting Arbitral Awards Part II — Interest

Introduction

1. This Guideline sets out the current best practice in international commercial arbitration for awarding interest. It provides guidance on:
   i. how to deal with claims to award interest (Article 1);
   ii. over what period interest should accrue (Article 2);
   iii. at what rate interest should be awarded (Article 3); and
   iv. whether simple or compound interest should be awarded (Article 4).
2. This Guideline should be read in conjunction with the *Guideline on Drafting Arbitral Awards Part I — General* and the *Guideline on Drafting Arbitral Awards Part III — Costs*.[1]
3. In this Guideline references to 'paying party' should be understood as the party who is directed to make a payment to another party and references to 'receiving party' should be understood as the party who receives a payment.

Preamble

1. The purpose of an award of interest is to compensate a party for loss of the opportunity to use money to which it is entitled and, at the same time, to prevent the counterparty from being unjustly enriched as a consequence of wrongfully withholding money that did not belong to it. In international commercial arbitration where there is often a significant interval between the origin of a dispute and the time when a final award is issued by the arbitrators, interest may play an important role in compensating the receiving party for the delay in receipt of money and it can represent a significant proportion of the total sum awarded.
2. One of the main challenges for arbitrators considering whether to award interest is that different legal systems apply different approaches to the same issue. Further, most national laws and arbitration rules provide little guidance as to how to deal with a request for an award of interest and do not specify how interest is to be calculated.[2] Complications may

also arise due to the fact that some countries prohibit interest altogether because it is inconsistent with their religious beliefs and other countries consider certain types of interest to be contrary to public policy.[3]

3. In the absence of express provisions allowing the arbitrators to award interest and provided that there is no prohibition under the arbitration agreement, including the applicable arbitration rules, and/or the the law of the place of arbitration (*lex arbitri*), it is widely accepted that arbitrators have a broad discretion whether to award interest, as part of their inherent powers.[4]
4. This Guideline examines the relevant factors that arbitrators should take into account when deciding whether interest should be awarded, for what periods, on what sums and at what rates.

Article 1 — General principles

1. **Arbitrators should establish what powers they have, if any, to award interest under the arbitration agreement, including any arbitration rules and the *lex arbitri* as well as the substantive law applicable to the contract (*lex causae*).**
2. **Arbitrators should invite the parties to make submissions and present evidence as to whether interest should be awarded and if so, at what rates, on what sums and for what periods, at an early stage of the proceedings.**
3. **When determining interest, arbitrators should have regard to all the circumstances of the case and take into account the economic reality within which the parties operate with a view to reaching a decision which is both just and fair to all parties.**
4. **An award of interest should compensate the receiving party. It should not punish the paying party.**
5. **An award of interest should state the arbitrators' decision as to interest and should contain reasons for any determination of rates**

and dates as well as whether interest awarded is simple or compound.

Commentary on Article 1

Paragraph 1

Applicable law(s)

a) Some national laws provide that the right, if any, to interest is a matter governed by the substantive law of the contract, while others provide that it is a matter governed by the procedural law of the arbitration. Accordingly, when considering the issue as to whether to award interest arbitrators should take into account: (1) the substantive law applicable to the contract (*lex causae*),[5] (2) the *lex arbitri*, (3) the applicable arbitration rules and (4) any provisions in the arbitration agreement. They may also choose to consider the law of the place of likely enforcement, if known.

b) Arbitrators have to be wary that the laws of certain countries forbid the application of interest because of public policy or overriding mandatory rules and therefore an award ordering interest may be unenforceable in such a country. Arbitrators who anticipate that the receiving party may seek to enforce their award in such a country should consider whether it is appropriate to make a separate partial award in respect of interest[6] or to award interest as a form of 'compensation' without any specific reference to interest.

Express or implied terms of the agreement between the parties

c) Arbitrators should also determine whether the contract between the parties contains express or implied terms as to interest to which they should give full effect, subject to any mandatory provisions of the applicable law prohibiting interest. If an express term as to interest exists, it may assist the arbitrators in determining such issues as (1) the

period for which interest may be awarded, (2) the rate and (3) whether interest should be simple or compound. Alternatively, interest may be awarded on the basis of a term implied by a trade usage.

Paragraph 2

Early consideration of matters related to the award of interest

a) Arbitrators should encourage the parties to agree, or at least to discuss, the issue of interest at an early stage in the arbitral proceedings, such as the preliminary meeting or case management conference. If no claim at all is made for interest and the arbitrators consider that this is an oversight, they would be justified in drawing the oversight to the attention of the parties, subject to the provisions of the arbitration agreement including any arbitration rules and/or the *lex arbitri*.

b) Issues to discuss should include the rate of interest, the date from which interest should start to accrue and the type of interest. In cases where there is a disagreement as to the currency in which award should be made or there are multiple currencies, arbitrators should invite submissions and consider the matter because this may affect the rate of interest.

Scope of arbitrators' powers to order interest

c) Arbitrators may apply interest to any amounts awarded, including (1) a pecuniary sum awarded to one of the parties, (2) an amount claimed in the arbitration and outstanding at the commencement of the arbitration but paid before the award was made up to the date of payment and (3) costs.[7]

Paragraph 3

Just and fair compensation

When awarding interest, arbitrators should, as far as possible, seek to award an appropriate level of compensation for the receiving party, without unfairly injuring the paying party. They should avoid either overcompensating or undercompensating the receiving party and unfairly benefiting the paying party. Arbitrators should decide what is just and fair for both the paying and the receiving parties based on both parties' commercial circumstances. In exercising any broad discretion that they have in awarding interest, arbitrators should use the same level of care and diligence as they do in determining awards of damages and awards of costs.

Paragraph 4

Compensatory nature of interest

The purpose of awarding interest is to compensate the injured party by placing it in the same position as it would have been in if no breach had occurred. Accordingly, the amount of interest should be designed purely to compensate a receiving party for being kept out of its money and provide it with a form of commercially realistic restitution without punishing the paying party. Courts in some jurisdictions may refuse to enforce awards of interest that they consider punitive or usurious according to their national laws.[8]

Paragraph 5

Treatment of interest in awards

In the award on interest arbitrators should describe the basis of their power to decide on the matter and any agreed and/or adopted procedure. They should summarise the parties' positions and arguments regarding interest and provide reasons for their decision.[9] Arbitrators should

calculate the amount(s) of interest payable up to the date of the award, applying the relevant interest rates. They should also provide sufficient information so that interest can be calculated for the period between the date of the award and final payment of all sums due. Finally, the decision as to interest should be repeated in the dispositive part of the award in order to be enforceable.

Article 2 — Period of interest accrual

1. **Arbitrators should determine the date or dates when liability for interest starts to accrue.**
2. **Arbitrators should include in their award of interest:**
   i) **the amount of interest payable up to the date of the award ('pre-award interest'); and**
   ii) **the information required to calculate the interest payable between the date of the award and the date of payment ('post-award interest').**

Commentary on Article 2

Paragraph 1

Time from which interest accrues

In their award, the arbitrators should identify the date or dates from which interest started running and state the interest rate or rates to be applied to the amounts in question for the applicable time periods. Generally, interest should be awarded from the date or dates of default or breach of contract if the damage started to accrue on that date. Alternatively, if the arbitrators conclude that it is not possible to establish the exact date or dates when the damage started to accrue, for example, where damages were incurred over a period of time, they may conclude that it is just and fair to both parties to award interest from a middle or average date from which the damage started to accrue. In the

absence of evidence as to when damage began to be incurred, the arbitrators may conclude that it is just and fair to both parties to award interest from the date of the formal demand for payment (ie demand of payment made in writing with notice to the debtor) or from the date of the commencement of the arbitration. In the case of debts, interest should normally be awarded from the date when the debt fell due.

Paragraph 2

Period over which interest accrues

Pre-award interest accounts for the time between the original breach and the award. Post-award interest accounts for the period between the date of the award and the date on which the sums awarded are actually paid. To encourage prompt payment, arbitrators may decide to allow the paying party a grace period say, for example, of 30 to 60 days, during which interest will not accrue.[10] Additionally, they may specify that interest should accrue for the grace period in the event that the award is not satisfied before the grace period expires.

Article 3 — Rate of interest

1. **Once the date or dates for which interest accrues have been determined, arbitrators should decide the applicable interest rate or rates.**
2. **Arbitrators frequently award the same rate for both pre-award and post-award interest, although they should consider in all cases whether it would be more appropriate to charge a different rate for each period.**

Commentary on Article 3

Paragraph 1

a) If the parties do not agree on the rate of interest in their contract or during the arbitration, it is up to the arbitrators to determine the appropriate rate. The rate should be reasonable and take into account all relevant circumstances, in particular applicable contractual provisions and interest rates prevailing in the markets for the relevant currency during the relevant period.

Determining the interest rate

b) It is good practice to assess the rate of interest by reference to the rate at which a party in the position of the receiving party would have had to pay to borrow the sum awarded for the period in question.[11] The starting point for that assessment is the rate of interest applicable to short term unsecured loans prevailing for the currency of payment at the place of payment.

c) In the absence of evidence of that rate, reference may be made to rates in the country of the relevant currency, place of performance or the domicile of the receiving party. An alternative approach is to consider the rate of interest at which a party in the position of the paying party would have to borrow to pay the sum awarded.[12] If arbitrators consider that the parties intended to avoid the norms of their respective jurisdictions, they may conclude that it is more appropriate to award the rate or rates used on the international financial market for that currency.[13]

d) In any case, arbitrators should avoid determining a rate of interest that it is so low that the paying party will have little incentive to pay. At the same time, arbitrators should also avoid determining a rate of interest so high that the receiving party may be disinclined to pursue enforcement of its award vigorously.

e) The fact that a particular claimant was in a special position such that it could only borrow the money at a very high rate or it was able to borrow at favourable rates is only relevant if it was known or ought to have been known at the inception of the relationship when the contract was entered into. The arbitrators may wish to enter into this type of analysis only if they are provided with persuasive evidence by the parties.

Currency of compensation

f) The question of what is the currency of compensation is usually fixed in the contractual provisions for payment. If it is not, arbitrators may consider that another currency is more appropriate for compensation depending on the specific circumstances of the case. Arbitrators have a wide discretion in determining the currency of the award and in dealing with issues of currency conversion. However, arbitrators need to be wary of the fact that interest rates may vary significantly depending on the currency to which they are applied. When deciding the question of currency, it is good practice for arbitrators to state the reasons for their choice.

Paragraph 2

Consistency between the rate of pre-award and post-award interest

Arbitrators should consider separately what to award in respect of pre-award interest and post-award interest and should also decide whether to choose a fixed or floating rate for both the pre-award and post-award interest. Arbitrators may consider it appropriate to award a single rate for both periods, making no distinction between pre-award and post-award interest,[14] particularly if interest rates are the same in both periods. Alternatively, if interest rates are fluctuating, arbitrators may consider it more appropriate to award different rates which better reflect increases or decreases in the value of money over the period(s) in

question. Arbitrators should be wary of the fact that awarding post-award interest at a higher rate may be argued to be punishing the paying party which is contrary to the general principle that awards of interest should be to compensate and not punish (see Article 1.4 above). In the event that arbitrators consider it appropriate to award post-award interest at a higher rate, they should explain the reasons for their decision in order to reduce the risk of challenge.

Article 4 — Simple or compound interest

Arbitrators should decide whether to award interest on a simple or compound basis. If they determine that the application of simple interest will not provide adequate compensation to the injured party, they may award compound interest, in the absence of any contrary provisions in the arbitration agreement, including any applicable rules and the *lex arbitri*.

Commentary on Article 4

'Simple interest' is interest payable only on the principal sum awarded and not on the accumulated interest. 'Compound interest', on the other hand, is interest that is applied periodically, depending on the compounding period, on both the principal sum awarded and accumulated interest.

Simple interest

a) Arbitrators should award simple interest where they consider that it provides the appropriate level of compensation to the receiving party for the delayed receipt of the principal sum awarded.

Compound interest

b) Arbitrators should award compound interest where they consider that it provides the appropriate level of compensation to the receiving party for the delayed receipt of the principal sum awarded to include, for example, circumstances where: (1) the parties have agreed on the payment of compound interest; (2) a party's failure to fulfil its obligations caused the receiving party to incur financing costs on which it paid compound interest; (3) the receiving party has established that it would have earned compound interest in the normal course of business on the money owed if it had been paid on time.[15]

c) However, before awarding compound interest, arbitrators should always check the applicable law(s) and rules because certain jurisdictions may prohibit the payment of compound interest or limit the circumstances in which it may be awarded.

Compounding period

d) If compound interest is awarded, arbitrators should state the length of the compounding period. The compounding period is the frequency with which interest is calculated and added to the principal sum outstanding. As a result, the principal sum on which interest is calculated for the next compounding period is increased by reference to the interest earned from the previous period. Arbitrators should be aware that the impact of the choice of compounding period can be substantial, since the more frequent the compounding, the greater the amount of interest.

Conclusion

The availability and rate of interest in arbitration can have substantial practical importance, especially where the amount in dispute is large and/or the time periods involved are extended. This Guideline summarises the various considerations arbitrators should take into

account when considering whether to award interest with the objective of reaching a decision that takes into account the financial and economic realities of each case.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Last revised 8 June 2016

Endnotes

1. See generally CIArb Guideline on Drafting Arbitral Awards Part I — General (2016) and CIArb Guideline on Drafting Arbitral Awards Part III — Costs (2016).
2. See Article 26(4) LCIA Rules (2014) as well as Section 49 English Arbitration Act 1996 which provide a broad discretion for awarding interest.
3. For an overview of countries which prohibit the payment of compound interest or limit the circumstances in which it may be awarded, see John Yukio Gotanda, 'Compound Interest in International Disputes' (2003) Law and Policy in International Business, pp. 403-407.
4. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), p. 1177; Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International, 2014), p. 3103; International Law Association (ILA), 'The Practice of Inherent and implied Powers', Report from the Biennial Conference in Washington DC (April 2014), p. 10.
5. Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015), para 9.73; Born, n 4, pp. 3104-3108 and John Yukio Gotanda, 'Awarding Interest in International Arbitration' (1996) 90 The American Journal of International Law, p. 52;
6. Blackaby, n 5, paras 9.81-9.82; Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), para 24-89.
7. It is important to note that under the English Arbitration Act 1996, interest on costs may only be awarded in respect of the period after they have been awarded. See Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: Commentary* (Blackwell

2014), p. 256.

8. Steven H. Reisberg and Kristin M. Pauley, 'An Arbitrator's Authority to Award Interest on an Award until "date of payment": Problems and Limitations' (2013) 16(1) International Arbitration Law Review, p. 27.
9. See CIArb Guideline on Drafting Arbitral Awards Part I — General (2016).
10. See e.g., Final Award in Case No 16015 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXXVIII (Kluwer Law International 2013), p. 201.
11. See e.g., Article 7.4.9 of the UNIDROIT Principles of International Commercial Contracts.
12. Lawrence W. Newman and David Zaslowsky, 'Awards of Interest in International Arbitration', New York Law Journal, 22 May 2014.
13. See e.g., ICC Case No 11849, 2003 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXXI (Kluwer Law International 2006), pp. 148-171.
14. See Final Award in Case No 16015, n 10, para 106 and Blackaby, n 5, para 9.83
15. Gotanda, n 3, p. 440; Rutsel Silvestre J. Martha, *Financial Obligations in International Law* (OUP 2015), p. 469; T. Senechal, 'Time Value of Money: A Case Study' (2007) 4(6) Transnational Dispute Management, p. 4 and Michael Knoll, 'A Primer on Prejudgment Interest' (1996) 75(2) Texas Law Review, pp. 307-308.

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Drafting Arbitral Awards
Part III — Costs

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators
12 Bloomsbury Square
London, United Kingdom
WC1A 2LP
T: +44 (0)20 7421 7444
E: info@ciarb.org
www.ciarb.org
Registered Charity: 803725

The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Founded in 1915 and with a Royal Charter granted in 1979, it is a UK-based membership charity that has gained international presence in more than 100 countries and has more than 14,000 professionally qualified members around the world. While the Chartered Institute of Arbitrators has used its best efforts in preparing this publication, it makes no representations or warranties with respect to the accuracy or completeness of its content and specifically disclaims any implied warranties of merchantability or fitness for a particular purpose.

TABLE OF CONTENTS

MEMBERS OF THE DRAFTING COMMITTEE

Practice and Standards Committee

Tim Hardy, Chair
Andrew Burr
Bennar Balkaya
Ciaran Fahy
Jo Delaney
Karen Akinci
Lawrence W. Newman
Michael Cover
Mohamed S. Abdel Wahab
Murray Armes
Nicholas Gould
Richard Tan
Shawn Conway
Sundra Rajoo, ex officio
Wolf Von Kumberg, ex officio

Drafting Arbitral Awards
Part III — Costs

Drafting Arbitral Awards Part III — Costs

Introduction

1. This Guideline sets out the current best practice in international commercial arbitration for awarding costs. It provides guidance on:
   i. arbitrators' powers to decide on costs, including the use of techniques for controlling costs (Article 1);
   ii. matters to take into account when allocating costs between the parties (Article 2);
   iii. determining what costs are recoverable (Article 3); and
   iv. the timing and content of costs awards (Article 4).
2. In this Guideline, the terms 'costs of the arbitration' or 'costs' include two broad categories of costs:
   i. procedural costs, which include the arbitrators' fees and expenses and the administrative charges of any arbitral institution; and
   ii. party costs, which include legal costs and other expenses incurred by a party in respect of the arbitration, including the fees and expenses of outside counsel, experts and witnesses and so on.[1]
3. This Guideline should be read in conjunction with the *Guideline on Drafting Arbitral Awards Part I — General* and the *Guideline on Drafting Arbitral Awards Part II — Interest*.[2]

Preamble

1. Arbitrators' powers to make costs awards derive from the terms of the arbitration agreement including any arbitration rules and/or the law of the place of arbitration (*lex arbitri*). Alternatively, if there are no express powers, provided that making a costs award is not prohibited,[3] arbitrators may conclude that they have an inherent power to do so. Even where there are express powers, most national laws and arbitration rules provide little or no guidance as to the standards, criteria or procedures for awarding costs. This gives arbitrators a wide discretion to take into account the particular circumstances of the case when

addressing these issues and, at the same time, allows them to manage the costs of the arbitration.

2. Managing the costs of arbitration is a very important element of the arbitrators' role in the light of criticism that arbitration takes too long and is too expensive. Accordingly, new practices are being adopted to encourage more efficient conduct of the arbitration. For example, arbitrators are increasingly likely to invite the parties to discuss costs issues at the earliest opportunity rather than leaving it to be the last issue addressed at the end of the arbitration.[4]
3. Even though at an early stage it may be difficult to have a clear picture as to the course of the arbitration and the costs that will be incurred, such a discussion can nevertheless be helpful in arbitrations involving parties and/or counsel from different jurisdictions who have different expectations as to how costs will be dealt with. Additionally, arbitrators may make interim costs awards relating to the costs incurred in connection with discrete issues as they are dealt with rather than leaving the decision on all costs issues to the final award.
4. There are two primary opposing approaches for allocating costs. These are the English rule of 'costs follow the event' according to which the losing party has to compensate the winner for its costs and the American rule that each party will bear its own legal costs regardless of the outcome of the dispute.[5] The 'costs follow the event' rule is reported to be almost universally recognised in both common and civil law countries.[6] It is also argued that there is an emerging trend to use it as a default rule in international arbitration.[7] However, in practice, it is used only as a starting point which leads to a much moderated approach taking into account various factors and subject to a test of reasonableness and proportionality.[8]
5. This Guideline addresses all aspects of costs awards, interim and final, as well as how best to address costs issues at the outset of arbitration so

as to encourage efficient management of the process to speed it up and manage its costs.

Article 1 — General principles

1. **Arbitrators should consider and discuss with the parties, at the outset of the arbitration, how best to manage and control the costs of the arbitration.**
2. **At the same time, arbitrators should address the matter of costs recovery and invite the parties to agree on an approach according to which costs should be assessed and/or allocated.**
3. **If there is no agreement, arbitrators should inform the parties as to the principles and criteria they propose to adopt when awarding costs, taking into consideration any specific requirements provided in the arbitration agreement including any arbitration rules and/or the *lex arbitri*.**
4. **Arbitrators should remind the parties that they may make interim decisions on costs, unless otherwise stated in the arbitration agreement including any arbitration rules and/or the *lex arbitri*.**

Commentary on Article 1

Paragraph 1

Cost control techniques

a) Arbitrators should discuss with the parties at the first opportunity, such as the preliminary meeting or case management conference, the various measures and techniques that can be used to control the procedure and consequently the costs.[9] Even though it may be difficult to take any definitive approach as to certain procedural aspects of the arbitration at such an early stage, arbitrators may, for example, seek an agreement as to the length of a hearing, requests for document production, number of witnesses, use of experts and number of pages in written submissions.

b) If the arbitrators conclude that normal case management techniques will be insufficient to control costs to an acceptable level, they may consider whether it is within their inherent powers to use cost capping, so long as it is not prohibited under the arbitration agreement, including any arbitration rules and/or the *lex arbitri.*

Cost capping

c) The objective of this technique is to put a ceiling on the costs recoverable by a successful party so that, while parties may spend as much as they wish, they would not be able to recover more than the set limit. This can be used to discourage parties with more dominant positions from putting pressure on their counterparty by incurring costs that would be beyond the counterparty means.

d) Arbitrators may therefore prospectively limit the recoverable costs either for the whole of the arbitration or any part of the proceedings and, in doing so, they should take into account the amount in dispute, the complexity of the case and the likely cost of work required. Before imposing any cost cap, arbitrators should have sufficient information about the dispute, including the nature of the work and expenses that parties may require for the particular stage of the arbitration to which the cap may relate. This is necessary in order to enable them to determine what amount of costs would be reasonable for each party to incur.

e) Normally, the same cap is set on the costs recoverable by each party. However, it may be appropriate, in exceptional circumstances, to set different caps for each party. Any differentiation should be expressly fixed to reflect the different tasks to be performed by each party. For example, if the arbitrators are satisfied that the work required to be undertaken is likely to be significant, they may conclude that, in fairness, different caps should be set for the costs recoverable by each party. Alternatively, arbitrators may set the limit at the higher figure for

both parties and, in those circumstances, they should warn the parties that, when considering what costs to award in respect of that work, they will consider their reasonableness and proportionality which may result in party recovering less than the cap.

f) Once a cap is set, arbitrators should be wary of any application subsequently to increase it. They should only contemplate an increase to costs not yet incurred and they should only agree to an increase if they are satisfied that there are good reasons for the increase.

g) A cost cap should be recorded in a procedural order. The order should expressly state the amount of the cap for each party's costs. To be effective, the cap should be set sufficiently in advance of the parties' incurring the costs to which it relates.

Paragraph 2

Consultation with the parties

a) Arbitrators should also discuss other matters related to costs, including the information that will be required to support any future application for costs as well as the timing and sequence of submissions on costs. Arbitrators should warn the parties that, towards the end of the arbitration, they will usually require each party to submit an accounting of its costs to inform them of the exact amount sought and the reasons as to why any costs claimed are justified.

b) Arbitrators may indicate their preliminary views as to what costs they are likely to allow or disallow because, depending on their legal background, parties and/or their counsel may claim different types of costs.[10] In addition, arbitrators should use the discussion as an opportunity to advise the parties that their conduct and other relevant factors may be taken into account when they are considering any application for an interim or final decision on costs (see Article 3 below).[11]

Paragraph 3

Arbitrators' directions as to costs

Following the discussion with the parties, arbitrators should include their directions in relation to costs issues, preferably in the first procedural order.[12] They should indicate the principles which they intend to adopt when considering applications for costs taking into account any specific requirements contained in the parties' agreement including any arbitration rules and/or the *lex arbitri*.

Paragraph 4

Interim decisions on costs

The final award of the costs of an arbitration should be decided at the end of the arbitration (see Article 4 below). However, a party may apply for a costs order in respect of an interim stage of the arbitration, where, for example, the arbitrators have found in its favour on an application for interim measures. In such a case, arbitrators may make an interim costs order in favour of the successful party, provided that they have power to do so.[13] Alternatively, they may defer their decision in order to decide that application in light of their decision on the merits in the context of the whole arbitration.

Article 2 — Allocation of liability for costs between the parties

1. Arbitrators should consider whether it is appropriate to order that a losing party pay some or all of a winning party's recoverable costs taking into consideration the following factors:

i) the outcome of the proceedings in terms of relative success of the parties;

ii) the conduct of the parties;

iii) any offers to settle the dispute; and

iv) any other factor which they consider to be relevant.

2. **Arbitrators should consider whether it is appropriate to allocate liability for both the procedural and party costs following the same approach. If arbitrators decide to treat them differently, they should provide an explanation for their decision.**

Commentary on Article 2

Paragraph 1

i) Relative success of the parties

When allocating costs, arbitrators should take into account the relative success of each party rather than a broad-brush approach as to who won or lost. In purely monetary awards, arbitrators may determine success by comparing the amounts claimed (including any counterclaims) and the amounts, if any, ultimately recovered. However, in other cases, especially those involving counterclaims, it may not be possible or adequate to simply examine the relationship between the amounts claimed and the amounts recovered. That is why, arbitrators should look at whether parties have won or lost on issues and claims advanced in light of their importance and relevance to the case. For example, if a party has succeeded in part, but not all, of its case, arbitrators should consider whether it was reasonable for that party to have raised these issues on which it was unsuccessful and, provided that they have not led to significant extra costs , then it may be fair to award to that party the whole of its costs on the basis of the principle that costs follow the event. However, where a generally successful party has failed on issues it unreasonably raised on which significant costs were incurred dealing with them, arbitrators may decide the successful party is not entitled to its costs in respect of those issues; in extreme cases the arbitrators may decide the unsuccessful party is entitled to its costs in respect of those issues.

ii) Parties' conduct

Arbitrators should consider whether it is appropriate to take into account the conduct of the parties. Factors that may have an adverse impact on costs allocation include instances where a party and/or its counsel has acted unreasonably or has obstructed the proceedings, for example, by advancing spurious arguments or making unreasonable applications for interim measures as a delaying tactic, or presenting grossly exaggerated claims leading to an unnecessarily high cost and unwarranted document production requests. Where a party and/or its counsel has behaved unreasonably, arbitrators should decide whether and to what extent such conduct has led the counterparty to incur additional costs and/or delayed the proceedings. Conversely, arbitrators may also take into account the fact that a party acted reasonably and contributed to the efficient conduct of the proceedings and conclude that their costs claims are reasonable and proportionate.[14]

iii) Settlement offers

a) Arbitrators may take into account any offer to settle made prior to the final award brought to their attention. When faced with a settlement offer, arbitrators should determine whether the claimant has achieved more by reasonably rejecting the offer and proceeding with the arbitration. This therefore requires arbitrators to assess the value of the offer which was made and make a comparison of the benefit to the claimant in accepting the offer as compared with the final award, so that if the claimant achieves more, the offer will have no effect, unless of course there are special circumstances which affect the matter.
b) In a purely monetary award, if the offer was made in a form which included a fixed sum together with interest to the date of the offer plus payment of the claimant's recoverable costs to be assessed, then it should be relatively simple for the arbitrator to reach a conclusion.

However, if the offer is for a fixed sum which includes costs and/or is silent as to a counterclaim, it may be difficult for arbitrators to determine whether, taking the claimant's costs into account at the stage when the offer could have been accepted, the remaining sum would have been more or less than the sum eventually awarded. In such circumstances, the offer may have to be disregarded. Similarly, if there is no offer to pay interest on top of the sum which is offered, this will also need to be evaluated when comparing the offer with the total sum awarded.

c) If arbitrators find that the claimant would have achieved the same or more by accepting the offer than by proceeding with the arbitration, the claimant will generally recover its costs up to the time when the offer could have been accepted and, after that date, the respondent is to recover its costs from the claimant. However if the claimant has achieved a more favourable outcome by proceeding with the arbitration, arbitrators may conclude that the offer should have no effect on the arbitrators' order as to costs.

d) Where the respondent has made a counterclaim and the claimant's offer is silent as to whether a counterclaim was taken into account, arbitrators should consider whether in light of all of the surrounding factors, the offer should be presumed to refer only to the claim. If it refers also to the counterclaim, arbitrators should consider whether it is appropriate to make a single order for costs; where this is the case, arbitrators should compare the success which the claimant has achieved in both pursuing the claim and resisting the counterclaim with that which it would have achieved in both respects by accepting the offer.

iv) Other factors

The factors outlined in Article 2.1(i)-(iii) are not exhaustive. Arbitrators may also consider the parties' conduct before the arbitral proceedings, including, for example, whether one party triggered the dispute by

repeatedly acting in bad faith or unreasonably failed to take steps to settle the dispute.

Paragraph 2

Consistency between procedural costs and party costs

Arbitrators should allocate both procedural and party costs following the same approach, unless the parties have agreed otherwise. Sometimes, however, arbitrators may consider it appropriate to order each party to bear its own legal costs in order to achieve overall fairness. In such a case it is usually appropriate to order that each party bear half the procedural costs.

Article 3 — Determination of recoverable costs

1. **After determining the allocation of liability for costs, arbitrators should consider what types of costs should be recoverable in the particular circumstances of the arbitration.**
2. **Once the arbitrators have determined what costs are recoverable, they should consider whether, in light of all of the circumstances of the case, the costs claimed have been reasonably incurred and are proportionate to the matters in issue.**

Commentary on Article 3

Paragraph 1

Types of recoverable costs

a) For the purposes of determining what types of costs are recoverable, arbitrators should first consider the parties' arbitration agreement, including any arbitration rules and/or the *lex arbitri*, which may contain provisions limiting and/or listing range of expenditures which constitute costs. Subject to any such limitations, arbitrators may award any costs which they consider have been properly and reasonably incurred in the

pursuit or defence of the issues in the arbitration. Indirect costs are not generally recoverable. The burden of satisfying the arbitrators that costs were reasonably incurred or reasonable in amount rests on the receiving party and if that party does not discharge that burden then the decision should be resolved in favour of the paying party.

Legal costs

b) Parties to arbitration are normally represented by lawyers or other legal practitioners. In order to assess whether the legal costs are reasonable and related to the arbitration, arbitrators should compare the amounts claimed by each party, taking into account the time spent, hourly rates and level of skill engaged in the light of the complexity and duration of the case as well as the amount in dispute. If arbitrators are of the view that the number of representatives or the fees claimed are in excess of what is reasonable, they may disallow some or all of the claims for costs made in respect of individual representatives.

c) Depending on the relevant jurisdiction, lawyers may claim contingency fees or similar success fees. Arbitrators faced with such an issue, should always check whether such an arrangement is permissible under the *lex arbitri* and under the law of the place or places of likely enforcement.

Costs for party-appointed experts

d) Parties may appoint experts to assist them in proving their case. Costs will include experts' fees in producing a report, travel, accommodation and ancillary expenses. When considering whether to include in their award the costs of the receiving party's expert evidence, arbitrators may consider the extent to which the experts' evidence assisted them in their understanding the case and/or whether the expert evidence was material for the case.

Costs for witnesses and evidence

e) The costs of evidence include those for preparing witness statements, attendance of witnesses at the hearing, preservation of physical evidence, tests, etc. The costs of needless duplication and evidence to prove facts admitted in the pleadings may be disallowed. In cases where the witnesses are not employees of a party, the parties may agree to reimburse them for loss of income and for their time. Such expenses can be claimed and recovered, if reasonable.

Parties' internal costs

f) The staff of a company or firm involved in arbitration proceedings often dedicates substantial time to the case. These costs, except for reasonable out-of-pocket expenses necessarily incurred in the arbitration, are normally irrecoverable on the general principle that they fall under the general operational expenses of the company or firm. However, arbitrators have discretion to allow the recovery of such costs, if they are satisfied that the work done internally obviated the need for outside counsel or experts to do it and hence led to an overall saving of costs.[15]

Costs of ancillary proceedings

g) Costs incurred in relation to ancillary judicial proceedings, especially in another jurisdiction (e.g. to obtain security for a claim) are normally excluded from the costs of arbitration, since they are not directly related to the arbitration. However, where the local courts have been seized in support of the arbitration, for example in relation to applications for interim measures, such costs may be recoverable, if they can not be dealt with by the local court, or the court has referred them to the arbitration tribunal for decision.

Costs incurred prior to the arbitration

h) Costs incurred prior to the commencement of arbitration proceedings, including costs related to any negotiations or mediation initiated prior to the notice of arbitration, are usually not considered recoverable. Arbitrators may, however, take into account costs which contributed to the arbitration, such as, for example, any activities linked to the preparation of the arbitration, including the drafting of the request for arbitration.[16]

Paragraph 2

Reasonableness and proportionality

a) The only costs that arbitrators can award are those which have been reasonably incurred by a party to the arbitration in connection with the arbitration. Arbitrators should therefore determine to what extent the recoverable costs are reasonable or necessary in light of all of the circumstances of the arbitration.

b) The test of reasonableness consists of (1) deciding whether each and every activity for which the costs were incurred was necessary or prudent for the arbitration in light of the complexity of the case; and (2) if so, whether the amounts claimed for such activities were reasonable from an objective point of view. As a result, if certain expenses are deemed to be unreasonable or unnecessary, arbitrators have the discretion to reduce the amount or decide not to reimburse such expenses.

c) Arbitrators should also consider whether the reasonable costs are proportionate to the sums in dispute. When deciding whether the costs are proportionate, arbitrators should take into account the complexity of the case and the amount in dispute. Where the costs are disproportionate to the sums in dispute, arbitrators should consider whether the receiving party could have incurred less costs and whether it was evident to the

party at the time those costs were incurred. If the costs as a whole appear disproportionate, arbitrators should seek to limit the recoverable costs to the amount which would have been incurred if the arbitration had been conducted in a proportionate manner.

Article 4 — Timing and content of decisions on costs

1. **Arbitrators may make interim decisions on costs at any time during the course of the arbitration.**
2. **Final decisions on costs should be included in the final award at the conclusion of the arbitration.**
3. **Final decisions on costs should record and take account of all earlier decisions on costs.**
4. **Final awards of costs should be for a quantified amount.**

Commentary on Article 4

Paragraph 1

Form of interim decisions on costs

When arbitrators decide to issue an interim decision on costs during the course of the arbitral proceedings and before the final award, they should carefully consider what the appropriate form in which to record such a decision is. If they do not intend it to be enforceable immediately, they should issue a procedural order. If, on the other hand, they intend it to be paid immediately they should record their decision in an interim or partial costs award to facilitate the enforcement of the decision under the New York Convention. Arbitrators should always check the applicable *lex arbitri* and arbitration rules for any specific requirements as to the form of costs decisions. Depending on the jurisdiction, awards expressed as interim and/or partial may be recognised as final for enforcement purposes.

Paragraph 2

Final awards on costs

It is good practice to include the final award on costs in the same award that deals with the merits because to do otherwise may cause delay and expense. However, depending on the circumstances of the case, arbitrators may consider it more appropriate to decide to issue their award on the merits first and deal with costs separately in a subsequent award. In that case, it is therefore good practice to describe the award as 'final award save as to costs'. Arbitrators should be mindful that their mandate ends when they issue their final award. The main advantage of this approach is that it enables the parties to focus their submissions on costs in light of the decision on the merits. Alternatively, the arbitrators can order the parties to send them their submissions on costs contained in sealed envelopes or password protected electronic files immediately after the merits hearing on express terms that the arbitrators will only open the submissions when they have completed their deliberations and drafting of the award on the merits. The arbitrators will then deliberate on the issues of costs and draft the award on costs which will be incorporated into the award on the merits.

Paragraph 3

If arbitrators have made an interim decision on costs during the proceedings, such a decision should be taken into account and incorporated in the final award and/or any subsequent separate award on costs.

Paragraph 4

Content of a final decision on costs

a) The final award on costs should describe the basis for arbitrators' power to award costs and make reference to any agreed and/or adopted

procedure (see Article 1 above). The arbitrators should summarise the parties' submissions as to costs and then set out any factors which they took into account when dealing with costs and give reasons for their decision, unless the parties have agreed that reasons are not required.

b) Arbitrators should specify the items of recoverable costs and the amount referable to each item of recoverable cost.[17] They should also state the date by which such sums should be paid and the consequences in terms of interest, if applicable, of late payment.[18] The decision as to costs, including the amounts, should be repeated in the dispositive part of the final award.[19]

Conclusion

One of the most important tasks which arbitrators have to perform relates to the making of awards on costs. There are a great variety of ways in which costs are allocated and numerous factors that are likely to influence the arbitrators' decision. This Guideline aims at assisting arbitrators in formulating their decisions as to costs in a more consistent manner.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Last revised 8 June 2016

Endnotes

1. These costs are also referred to as 'central costs', see Colin Ong and Michael O'Reilly, *Costs in International Arbitration* (LexisNexis 2013), p. 5 and Michael O'Reilly, 'The Harmonization of Costs Practices in International Arbitration: The Search for the Holy Grail' in Julio Cesar Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), chapter 25. These costs are also sometimes referred to as 'tribunal costs', Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015), paras 9.87-9.88.
2. See generally CIArb Guideline on Drafting Arbitral Awards Part I — General (2016) and CIArb Guideline on Awarding Part II — Interest (2016).
3. Even though this is not common, there may be cases where the parties stipulate that the arbitrators have no power to award party costs. See Ong and O'Reilly, n 1, p. 25.
4. See ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs in Arbitration* (2012), para 82; ICC Arbitration and ADR Commission Report, *Decisions on Costs in International Arbitration* (2015), paras 30-35.
5. Ong and O'Reilly, n 1, pp. 13-14.
6. Michael Bühler, 'Awarding Costs in International Commercial Arbitration: an Overview' (2004) 22 ASA Bulletin, p. 250.
7. Ong and O'Reilly, n 1, pp. 69-70. See Queen Mary and White & Case Survey, *Current and Preferred Practices in the Arbitral Process* (2012), p. 40; David Williams and John Walton, 'Costs and access to International Arbitration' (2014) 80(4) Arbitration, p. 432. See also, Annette Magnusson and Celeste E. Salinas Quero, 'Recent Developments in International Arbitration Allocation of Costs: a

Case Study' paper presented at the International Conference on Arbitration and Mediation (Taipei, 30-31 August 2014).

8. Ong and O'Reilly, n 1, p. 20 (suggesting that there is a trend towards a moderated cost follow the event policy.) ICC Arbitration and ADR Commission Report, *Decisions on Costs*, n 4, p. 20.
9. See ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs*, n 4, which lists a number of techniques available to arbitrators to reduce costs.
10. Difficulties may arise when counsel from different legal traditions claim costs that are in other jurisdictions considered as legally problematic, such as contingency or success fees.
11. Article 37(5) ICC Rules (2012), for example, specifically states that arbitral tribunal may take into account whether 'each party has conducted the arbitration in an expeditious and cost-effective manner'. See also, ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs*, n 4, para 82.
12. ICC Arbitration and ADR Commission Report, *Decisions on Costs*, n 4, p. 8.
13. See e.g., Article 37(3) ICC Rules (2012) which provides that arbitrators may make decisions on party's costs and order payment during the course of the proceedings; Article 17G UNCITRAL Model Law on International Commercial Arbitration.
14. See e.g., Article 37(5) ICC Rules (2012) and Article 28(4) LCIA Rules (2014) which include express references as to parties' conduct. See also, ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs*, n 4, para 82 which includes a non-exhaustive list of examples of behaviour which is considered to be unreasonable and the ICC Arbitration and ICC Arbitration and ADR Commission Report, *Decisions on Costs*, n 4, p. 19 and pp. 23-24.
15. Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's*

Guide to ICC Arbitration (ICC Publication No. 729E, 2012), p. 409. See also, Marie Berard, '"Other Costs" in International Arbitration: A Review of the Recoverability of Internal and Third-Party Funding Costs' in Julio Cesar Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), chapter 27.

16. Ong and O'Reilly, n 1, p. 98-99; Fry, n 15, p. 410.
17. In institutional arbitrations, the arbitrators' and administrative fees are fixed by the institution pursuant to a pre-established fee schedule or scale which forms part of the cost provisions in the applicable arbitration rules and therefore arbitrators can only determine the allocation of such costs. See e.g., Article 37(1) ICC Rules (2012) which reserves the power to the ICC Court and Article 28(1) LCIA Rules (2014) which reserve the power to the LCIA Court.
18. See CIArb Guideline on Drafting Arbitral Awards Part II — Interest (2016).
19. See CIArb Guideline on Drafting Arbitral Awards Part I — General.