

CONSIDERATIONS IN INTERNATIONAL AWARD WRITING

Steven A. Certilman

1) GENERAL CONSIDERATIONS

- a) Write a reasoned award, even if it is a brief one
- b) Write for enforceability
- c) Do justice
- d) Develop your own style

2) PREPARING FOR THE DRAFTING PROCESS

- a) Familiarize yourself with governing procedural law (the *lex arbitri*) as it relates to an enforceable award
- b) Familiarize yourself with the award provisions of the governing arbitral rules
- c) Familiarize yourself with governing law of any jurisdictions where you have information that the award is likely to be enforced
- d) Re-familiarize yourself with the arbitration agreement to ensure that you take into consideration any award-related requirements contained therein
- e) Determine whether your award is to be a final award, or whether it is an interim/partial award, or a supplemental award or merely a procedural order. Then, ensure that it is clear as to which it is
- f) Ensure that you have addressed all claims and counterclaims – NO MORE AND NO LESS
- g) Remember that an award is subject to challenge at both the place where it is issued (the *arbitral situs*) and the place where it will be enforced
- h) Both form and content affect the outcome of a challenge to the award

3) TYPES OF AWARDS

- a) Final Awards
 - i) Usually completes the engagement of the arbitrator
 - ii) not to be rendered until the arbitrator determines that that his/her assignment and responsibilities are complete
- b) Interim Awards
 - i) Typically addresses preliminary issues such as jurisdiction, proper law
 - ii) Also used to effect interim relief (a pre-award remedy). The interim award for a pre-judgment remedy can generally be taken to court for enforcement
 - iii) Also often used if the arbitrator determines to bifurcate the hearings
 - iv) Make sure your governing rules allow it. Generally they do
 - v) Many state statutes, including CGS § 52-418 et seq. in CT, do not specifically address partial or interim awards so an Interim Award may not be considered a final award for purposes of enforceability in court. There may be lack of uniformity in how the courts address these.
- c) Default awards

- i) Should be carefully addressed as courts are most suspicious of them
- ii) Be sure to articulate the procedural history

4) BASIC DRAFTING

- a) Caption
- b) Title of award (Final, Interim etc.)
- c) Recitals
 - i) The arbitration agreement
 - ii) Method of service and other jurisdictional information
 - iii) Appointment of arbitrator and date of oath
 - iv) Particulars regarding default if applicable
 - (1) Material interlocutory matters such as dispositive motions and decisions.
- d) Briefly outline the dispute to give the big picture. Chronologically is often best but if Terms of Reference have been agreed, that is your guide.
- e) Organize and state the material issues and your findings of fact. This is the meat and potatoes of the award
 - i) It is often helpful to use the pleadings as a guide
 - ii) Address the material questions of fact and issues of law in a logical order. Make findings of fact as you go along and address the legal issues where they fit in
 - iii) As a matter of style, some arbitrators include the findings of fact within the outline of the case
 - iv) Include references to testimony, documents and other evidence, both credible and incredible
- f) Come to a well founded conclusion on all questions of fact and issues of law which lead you to the conclusion section
- g) Damages and Remedies:
 - i) Each particular remedy should be tied as a remedy to at least one particular claim
 - (1) E.g. duty → breach → loss suffered → remedy
 - ii) See the next section for specifics regarding remedies
 - iii) Spell out your calculations including the from-to dates and **double check your calculations**
 - iv) Some damages are clearly computable from the contract and others require the arbitrator to make an assessment of the damages. If you are making an assessment, indicate the methodology
 - v) Types of remedies
 - (1) Monetary damages
 - (2) Punitive damages and other penalties where appropriate and permitted
 - (3) Injunctive relief
 - (4) Restitution/Specific performance
 - (5) Declaratory relief
 - (6) Interest

- (a) Compound or simple? What is the rate? Check the agreement, the rules and the law
 - (b) Again, recite the from-to dates
 - (c) Unless prohibited by the *lex arbitri*, the governing rules or the agreement of the parties, you can generally include a post-award interest rate, with the interest to begin to run on the date after the date on which the payment of the losing party is due to be made. If there is one, I always use the rate established in procedural law, such as the 10% rate for detainer of money in CT.
- (7) Costs and fees
- (a) Generally, these are party costs, fees of the arbitral organization and arbitrator fees
 - (b) Check the *lex arbitri* and the rules for constraints on allocation
 - (c) Generally the arbitrator has the discretion to assess the costs in the manner deemed fair
- (8) Attorney fees
- (a) Usually a matter of substantive law (the *lex contractus*) but check the arbitration agreement
- h) Conclusion
- i) Summarizes the award: who is to do what, when. E.g. By reason of the foregoing, I hereby award the Claimant the sum of Ten Dollars (\$10.00) in full and final settlement of a all claims and counterclaims between/among the parties herein, such sum to be paid by the Respondent to the Claimant within fourteen (14) days of the date hereof.”
 - ii) In the damages area, this might differ if the parties have made preliminary payments addressing the claims or, in the area of costs if, e.g., one party paid the costs and they are being awarded against the other party
 - iii) To avoid failing to render an award as to some peripheral claim which you may have discounted but not written about directly, **always conclude** with an omnibus disposition clause such as “This Award is intended as full and final settlement of all claims and counterclaims between/among the parties herein **and all claims not expressly addressed herein are hereby denied.**”
- i) Sign and date the award and ensure that if the *lex arbitri* requires it, the award is notarized/acknowledged. This may also be important in some jurisdictions where the award is to be enforced
 - j) Deliver the award promptly as required. Determine how many original executed copies will be required. By default, my preference is to deliver a number of originals equal to the number of parties plus one for the administrative body.
 - k) Assuming that the award may be enforced outside of the seat, add something to the following effect:
 “This Award is a final award. It is effective immediately, without the necessity of further hearings and can be confirmed in any court having jurisdiction. The hearings have been declared closed and all claims with respect to which there has been no express disposition herein are denied. The seat of the arbitration is **New York, U.S.A.**”

- l) You MUST include a statement that: "This award is made at xxxx (the seat of the arbitration)."

5) ADDITIONAL CONSIDERATIONS

- a) Dissenting opinions
- b) Res judicata
- c) Effect on third parties
- d) After the award is rendered, further communication with the attorneys or parties is not ethically permitted.
- e) Functus officio

6) FOR ANOTHER DAY

- a) Challenges to the award
- b) Post award requests such as amendments, reconsideration, articulation