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THE AWARD AND POST-AWARD ISSUES

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1. What guidance do the statutes and provider rules provide for the form and content of awards?

A. STATUTORY REQUIREMENTS:

The UAA, RUAA and other state statutes state only that the award must be in writing and signed by the arbitrator(s). No specific form or content is required. See, e.g. UAA Sec. 8(a); RUAA Sec. 19 (a); Cal. Code Civ. Proc. Sec. 1283.4; NY Civ. Prac. Act Sec. 7507. The FAA does not expressly require a written award, but such is implied. Compare FAA Sec. 9 and 13(b).

B. AMERICAN ARBITRATION ASSOCIATION RULES:

1. AAA Commercial Rule 46(a): “Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.”
2. AAA Commercial Rule R-46 (b): “The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.”
3. AAA Construction Rule R-47(b): “In all cases, unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards and ... a line item disposition of each non-monetary claim or counterclaim.”
4. AAA Construction Rule R-47 (c): The parties may request a specific form of award, including a reasoned

opinion, an abbreviated opinion, findings of fact or conclusions of law no later than the conclusion of the first Preliminary Management Hearing. ... If the parties disagree with respect to the form of award, the arbitrator shall determine the form of award.

5. AAA Construction Rule L-5: “In addition to the award requirements set forth in R-44(a) and (b) unless the parties agree otherwise, the arbitrator shall issue a reasoned award.”
6. AAA Employment Rule 39(c): “The award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise. It shall be executed in the manner required by law.”
7. JAMS Comprehensive Arbitration Rule 24(h): “The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.”
8. CPR Administered Arbitration Rule 15.2: “All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise. The award shall be deemed to be made at the seat of arbitration and shall contain the date on which the award was made.

Question: What authority for the form or content of award, if any, is provided in the typical arbitration agreement?

2. **From counsel’s point of view what form of award is preferred and what points should it contain?**
 - A. CASE LAW
 1. “We agree with our sister Circuits, and hold today that a reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings

of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties.” *Leeward Construction Co., Ltd. v. American University of Antigua-College of Medicine*, 826 F.3d 634 (2d Cir. 2016).

2. But it can’t be a simple line item award even if labeled “reasoned”. *Tully Construction v. Canam Steel Corp.*, U.S. Dist. Lexis 25690 (S.D. N.Y. Mar. 2, 2015) (arbitrator issued award with line item damages only although arbitration agreement required reasoned award. Court vacated and remanded finding that arbitrator exceeded his powers by ignoring parties’ agreement)

B. CONTENT OF REASONED AWARD

1. Describe Parties, Representatives, Arbitration Agreement, Main Proceedings, Governing Rules and Date Hearing Was Closed.
2. State That Parties Confirmed That They Had No Further Proofs Or Witnesses To Offer at close of Hearings. *See, e.g.,* AAA Comm’l Rule R-39(a).
3. Summarize Facts, Legal Analysis and Reasons for Conclusions.
4. Incorporate Any Partial or Interim Awards.
5. Specify Relief Granted and to Whom, Including Interest, Costs and Attorney Fees.
6. State that All Claims and Defenses Not Expressly Determined are Denied.
7. Practical Considerations. AAA Guidance re making length of award consistent with size of the case.

Question: Should the arbitrator circulate a draft of an award for comment by the parties? What are the pros and cons?

3. When is an award considered final?

A. FINALITY OF AWARD IN GENERAL

“The *functus officio* doctrine dictates that, once arbitrators have fully exercised their authority to adjudicate issues submitted to them, ‘their authority over those questions is ended, and the arbitrators have no further authority, absent agreement by the parties, to redetermine th[ose] issue[s].” *Trade & Transp., Inc. v. Natural Petroleum Charterers Inc.*, 931 F. 2d 191, 195 (2nd Cir. 1991);

B. SUBSTANCE MATTERS, NOT FORM

“...[the] consistent use of the label “award” [in relevant rules and treaties] when discussing final arbitral decisions does not bestow transcendental significance on the term. ... The content of a decision—not its nomenclature—determines finality.” *Publicis Communication et al. v. True North Communications, Inc.*, 206 F.3d 725, 728 (7th Cir. 2000). (Arbitrators “order” compelling turnover of tax records was final and ripe for confirmation although other claims remained to be decided by arbitrators).

C. MODIFICATION BY THE PARTIES’ AGREEMENT OR PROVIDER RULES

“*Functus Officio* is merely a default rule, operative if the parties fail to provide otherwise. There is no legal bar to authorizing arbitrators to reconsider their decision, and some rules for arbitrators ... do authorize reconsideration.”) *T.Co, Metals LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 343 (2nd Cir. 2010), citing *Glass Molders etc. v. Excelsior Foundry Co.*, 56 F.3d 844, 848 (7th Cir. 1995). (Under ICDR rules, arbitrator’s issuance of amended award correcting damage calculations in original award was not in excess of his powers.)

N.B. the ICDR rule in this case was the same as AAA Commercial Rule R-50.

D. RISK OF PREMATURE OR TIME-BARRED MOTION TO CONFIRM OR VACATE

1. “BCS is not entitled to a mid-arbitration review of the choice between separate and consolidated proceedings. If a party could run to court and contest every procedural ruling that it believes is erroneous and not squarely covered by the contract (which rarely tells the arbitrators what procedures to use), arbitration would fail to offer an attractive alternative to litigation.” *Blue Cross Blue Shield of Mass. v. BCS Ins. Co.*, 671 F.3d 635 (7th Cir. 2011) (consolidation of related cases not reviewable by court prior to award).

4. Can counsel seek an interim/partial award and under what circumstances?

A. INTERIM AND PARTIAL AWARDS

1. Partial Final Award: E.G. The arbitration is bifurcated so that there are separate awards on liability and damages.
2. Interim Non-Final Award: E.G. An award on the merits with a decision on attorneys fees and costs reserved for the final award. AAA Rule 47(d)
3. Interlocutory Order or Decision: E.G. A ruling on a motion for dispositive motion which dismisses a claim(s). AA Rule 47(b).
4. Query: Can arbitrator issue award on the merits with further briefing required on issue of pre/post-judgment interest before final award? AAA Rule 47(d)
5. Query: Can arbitrator issue an award on the merits with reservation of jurisdiction to enforce compliance with award of equitable relief?

B. AUTHORITY FOR PARTIAL AWARD

1. Federal Arbitration Act: “An appeal may be taken from ... an order ... confirming or denying confirmation of an award or **partial award.**” 9 USC Sec. 16(a)(1)(D).”
2. Uniform Arbitration Act

- a. Authorizes interim awards for a provisional remedy to the same extent and under the same conditions as if in a civil action. Sec. 8(b);
- b. Upon request of a party a pre-award ruling in its favor may be incorporated into an award which is subject to expedited confirmation proceedings in court. Sec. 18.

3. STATE STATUTES

The California Arbitration Act is silent. See Code of Civil Procedure Sec. 1283.4. The New York Civil Practice Act is similar. *Id.* at Sec. 7507.

4. AAA COMMERCIAL RULES

- a. “In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders and awards.” R-47(b). AAA Construction Rule 48(b) is the same.
- b. Other providers have similar rules. See, e.g. CPR Ad Hoc Rule 15.1; JAMS Rule 24(d).

Question: How often do arbitrators issue interim/ partial awards?

5. Can a party move to confirm or vacate an interim or partial award?

A. BIFURCATION OF LIABILITY FROM DAMAGES

1. See, e.g. *Hart Surgical, Inc. v. Ultracision, Inc. et al*, 244 F.3d 231 (1st Cir. 2001) (Award on liability is a partial final award reviewable by district court where parties had stipulated to bifurcation.)
2. *Contra*, see, e.g., *Savers Property Etc. v. National Union Fire Ins. Co.*, 748 F.3d 708 (6th Cir. 2014): “Here, the arbitration panel issued an interim award resolving only the matter of liability; the panel retained jurisdiction to compute National Union’s damages. Under these

circumstances, the arbitration award was not complete because there was no final award.” (Under FAA and Michigan law, final award on liability of reinsurer was not reviewable on motion to confirm.)

B. RESERVATION OF JURISDICTION IN PARTIAL FINAL AWARD TO ENFORCE IT AND DETERMINE REMAINING CLAIMS

1. *See, e.g. Hightower v. Superior Court*, 86 Cal. App. 4th 1415, 1440-1441 (2001). “We therefore hold that the arbitrator’s “Partial Final Award” was entirely proper, even though there remained a number of potential and conditional issues that the arbitrator will have to address in a “Final Order” in order to give total and complete relief ... This process was impliedly authorized by ... [the] agreement (or at least the arbitrator could reasonably so conclude) and it is consistent with the “broad authority” granted by the applicable rules.” (Under AAA Commercial Rules, partial final award finding breach of shareholder buy-sell agreement and authorizing respondent to make new buy-out offer with conditions can be confirmed as interlocutory judgment.)
2. *Accord: Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1220 (5th Cir. 1991) (Panel has continuing jurisdiction to determine future price adjustments of natural gas sales contract.)
3. *Compare, KX Reinsurance Co. v. General Reinsurance Corp., et al.*, 2008 U.S. Dist. Lexis 92717 (Reservation of jurisdiction to monitor compliance with award was not proper where award determined all claims submitted to panel.)

Question: Can the parties move to confirm or vacate a partial award on arbitrability of a claim?

Question: Or a partial award on joinder of a non-signatory party?

Question: Should the arbitrator seek a stipulation providing for a partial final award?

6. What can counsel and the arbitrator do to assure the award meets the expectations of the parties?

A. AT THE PRELIMINARY HEARING:

1. Require early filing of statement of claims, issues and specific relief sought by each party.
2. Seek stipulation on form of award at preliminary hearing; e.g. standard award, reasoned award or findings of fact and conclusions of law.
3. Raise issue of possible interim/partial awards.

B. AT THE EVIDENTIARY HEARINGS:

1. Confirm stipulation, if any, regarding form of award.
2. If no stipulation, determine the form of award pursuant to applicable rules and announce to parties.
3. Seek stipulation on or determine if there will be an interim award on the merits and a subsequent final award which includes a determination of attorneys' fees and costs claims and interest recovery.

C. IF ISSUING AN INTERIM/PARTIAL AWARD:

1. Expressly state what is being decided and what is not being decided.
2. If intended to be final, state that award is a Partial Final Award and subject to confirmation proceedings.
3. If not intended to be final so state and state what issues are reserved for further final award.

7. May the arbitrator's award include punitive damages?

- A. In general the availability of punitive damages in arbitration depends on the scope of the arbitration agreement and underlying contract, the merits of the underlying claim and local law.

- B. The AAA Rules permit broad relief, including punitive damages: “The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including , but not limited to, specific performance of a contract. Rule R-47(a).
- C. The FAA does not specifically mention punitive damages but has been interpreted to allow them if permitted by the rules of the provider organization. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (NASD Rules permit award of punitive damages and FAA preempts contrary state law prohibiting award of punitive damages); See, also, *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir., 1991).
- D. In making a punitive damages award the arbitrator should consider whether the Due Process Clause of the U.S. Constitution requires limits on the amount of punitive damages which may be awarded. See, e.g., *Mave Enterprises , Inc. v. the Travelers indemnity Company of Connecticut*, 162 Cal. Rptr. 671 (2013) (Limits on punitive damages under the Due Process Clause do not apply in arbitration.)
- E. But the terms of the parties’ contract or the arbitration agreement may limit or preclude the arbitrator’s power to award punitive damages.

8. If the parties settle their dispute during arbitration may the award include the terms of the settlement?

- A. If the parties settle their case during arbitration they may request that the arbitrator incorporate the terms of the settlement in a “consent award”.
- B. One advantage of a consent award is that, on motion to confirm, it may be entered by a court as a judgment thus making the settlement enforceable.
- C. AAA Rules expressly permit the parties to stipulate to consent award. However such an award must include an allocation of the arbitrator’s fees and costs as well as any administrative fees and expenses. See AAA Rule R-48.

D. If the arbitrator issues a consent award he/her should first obtain written consent of each party confirming that the terms of the award accurately reflect their settlement.

9. May an award by a panel of arbitrators include a dissenting opinion?

A. Provider rules typically require that an award be signed by a majority of the arbitrators, usually two in a three-person panel. See AAA Rule R-46.

B. However dissents are generally disfavored in arbitration because, a dissent may encourage the losing party to seek vacature of the award.

C. Further, unlike an appellate judicial decision, a dissent in arbitration does not assist in development of the law.

D. The chair of the panel can play a substantial role in seeking to dissuade an arbitrator on the panel from writing a dissent.

E. If an arbitrator insists on issuing a dissent it should be concise and courteous, and avoid the appearance of any bias. It should also maintain the confidentiality of the arbitration hearings and arbitral deliberations of the panel.

10. What practice tips are recommended for drafting an award?

A. Before the hearings are closed ask the parties to brief those issues which the arbitrator wants to address in the award.

B. On close issues consider which party has the burden of proof before deciding the issue.

C. For damage calculations ask the parties to crunch the numbers in their briefs before the hearing is closed.

D. Ask the parties to include in their briefs the specific relief they request be included in the award.

E. Consider whether independent research is an option for the arbitrator?

- F. Consider whether the award should cite to the record and or legal authorities?
- G. Consider whether there are any unconscious biases at play in the deliberations?

11. May the arbitrator modify the award after it is issued?

- A. The FAA permits modification of an award upon motion by a party on limited grounds such as: evident miscalculation of figures or material mistake in description of a person, thing or property in the award; the award is imperfect in a matter of form not affecting the merits; or the award is upon a matter not submitted to arbitration. 9 U.S.C. Sec. 11.
- B. The AAA rules permit modification of an award, on motion of a party, for clerical, typographical or computational errors in the award. However the arbitrator may not redetermine the merits of any claim already decided, and tight deadlines apply. Rule R-50.
- C. One court gave the arbitrator a fair amount of leeway in correcting an award:

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