

TRICKY BUSINESS: AVOIDING PITFALLS IN DRAFTING AWARDS

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Section I

The Form of Award:

Considerations

Three typical forms of award

- Standard Award (a/k/a “Bare Bones”)
 - Similar to jury verdict - no discussion of the issues.
 - Reduces the risk of a motion to vacate, but provides no summary of facts or analysis of issues.
- Reasoned Award
 - Similar to Statement of Decision after a bench trial.
 - Summarizes facts and issues, arbitrator’s analysis and conclusions.
 - While informative, if poorly drafted, may provide losing party with basis to file vacatur motion.
- Findings of Fact and Conclusions of Law.
 - The most detailed form of award.
 - May expose award to a motion to vacate.

Content of award: statutory requirements

- Statutes (UAA, RUAA, states) only require award to be in writing and signed by arbitrator.
- No specific form mandated.
 - See, e.g., UAA § 8 (a); RUAA § 19 (a); Cal. Code of Civil Procedure § 1283.4; NY Civ. Prac. Act § 7507.
- FAA does not expressly require written award, but so implies.
 - Compare FAA §§ 9 with 13(b).

AAA Rules

- **Commercial:**
 - “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.” (Rule 46(a))
- **Construction:**
 - “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**.” (Rule 47(b))
 - **Large Cases:** “In addition to the award requirements set forth in R-47 (a) and (b) unless the parties agree otherwise, the arbitrator shall issue a **reasoned award**.” (Rule L-6)
- **Employment:**
 - “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 a manner required by law.” (Rule 39 (c))

JAMS and CPR Rules

- JAMS:

- *“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.” JAMS Comprehensive Arbitration Rule 24(h).*

- CPR:

- *“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.” CPR Administered Rule 15.2.*

International arbitration

- **Default:**
 - *The default in international arbitration is a **reasoned award** unless the parties agree otherwise.*
- **New York Convention:**
 - *The Convention **does not expressly address reasoned awards.***
- **UNCITRAL Model Law and US law:**
 - *“the award **shall state the reasons on which it is based** unless the parties agree that no reasons are to be given.” Model Law Article 31(2).*
 - *US law is an exception to the norm **and allows non-reasoned awards** (unless required by the agreement). See *United Steelworkers v. Enter. Wheel & Car Corp*, 363 US 593 (1960).*
- **International Rules:**
 - *Typically require **reasoned awards**. See ICC Art. 31(2) – generally mandatory. ICDR Art. 30(1) – unless the parties otherwise agree.*

QUERY:

What does the typical arbitration agreement provide with respect to the form of award?

II

Content Of Reasoned Award

What judicial decisions tell us

- No need for a full blown opinion: Second Circuit
 - *“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).
- But, it can’t be a simple line item award, even if labeled ‘reasoned’.
 - See *Tully Construction v. Canam Steel Corp.* where the S.D.N.Y vacated an award that **provided only line items of damages, but no explanation whatsoever of how the result was reached** (where the arbitration agreement required a reasoned award). The basis of vacatur: the arbitrator exceeded his powers by ignoring the parties’ agreement. **Remedy: remand for clarification.** U.S. Dist. Lexis 25690 (S.D.N.Y. Mar. 2, 2015)

Elements of reasoned award

- Describe parties, representatives, arbitration agreement (jurisdiction), main proceedings, governing rules and date hearing closed.
- State that parties confirmed they had no further proofs or witnesses to offer at close of hearings. See, e.g., AAA Commercial Rule R-39 (a).
- Summarize facts, legal analysis and reasons for conclusions.
- Incorporate any partial or interim awards.
- Specify relief granted and to whom, including all aspects of relief (e.g., interest, attorneys' fees).
- State that all claims and defenses not expressly determined are denied.

QUERY:

*Should the Arbitrator Circulate a Draft Award
for Comment by the Parties?*

Section III

Functus Officio

Doctrine

What is it?

What's its importance?

Finality of award

- Your job is over once the Award is issued!
 - “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)
 - “Generally when the arbitrators have delivered their award they are said to be *functi officio*.” *Jannis v. Ellis*, 149 Cal. App 2d 753 (Cal. Ct. App. 2d, 1957)
 - [Without more,] **an arbitrator’s attempt to reopen the arbitration must fail**, since in such case he would be *functus officio* and would have no power to change his award. *Lewis v. County of Suffolk*, 70 A.D. 2d 107(NY App. Div.1979) appeal heard, 77 A.D. 2d 599 (NY App. Div.1980)

Ripeness for confirmation/vacatur purposes

- Substance matters – not form.
 - “[...] 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). (arbitrator’s ‘order’ compelling turnover of tax records was final and ripe for confirmation even though other claims remained to be decided by arbitrators).

Can the parties alter the rule?

- Short answer: yes.
 - “*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 in this case, arbitrator’s issuance of amended award correcting damage calculations in original award was not in excess of his powers. Also see AAA Commercial Rule 50).

Section IV

Interim Awards

What are they?
In all of their various forms

Partial awards

- **Partial final award**
 - e.g., arbitration is bifurcated so that there are separate awards on liability and damages
- **Partial non-final award**
 - e.g., award on the merits with a decision on attorneys' fees and costs reserved for the final award
- **Interlocutory order or decision**
 - e.g., ruling on a dispositive motion which dismisses a claim(s)

Can the parties seek confirmation or vacatur?

- Short answer: no - *if* premature.
 - “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 and 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).

Query:

How Often Do Arbitrators Issue A Partial
Final Award?

A Partial Non-Final Award?

An Interlocutory Order?

When is a partial final award appropriate? Statutes

- *Federal Arbitration Act*
 - “An appeal may be taken from ... an order ... confirming or denying confirmation of an award or partial award.” 9 USC §16(a)(1)(D).
- *Uniform Arbitration Act*
 - Authorizes interim awards for a provisional remedy to the same extent and under the same conditions as if in a civil action. §8(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. §18.
- *State Statutes*
 - California Arbitration Act silent. See Cal. CCP §1283.4
 - New York Civil Practice Act similar. See §7507.

When is a partial final award appropriate? Provider Rules

- AAA Commercial Rules
 - “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): the same
- Other providers have similar rules
 - *See, e.g.* CPR Ad Hoc Rule 15.1; JAMS Rule 24(d).

Bifurcation of liability from damages: effect on reviewability

- It depends on substance of Award (and the Court!)
 - 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).
 - *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).

Reservation of jurisdiction

- May be appropriate where necessary to enforce or determine remaining claims.
 - See, e.g. *Hightower v Superior Court*, 86 Cal. App. 4th 1415, 1440-1441 (2001). “We ...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.**” (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).
 - **Continuing jurisdiction** of arbitrators after final award **allowed** where the agreement and the award contemplated continuing performance. *Ajida Technologies v. Roos Instruments*, 87 Cal. App. 4th 537 (2001).
 - *But see*, *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).

Queries:

- Should the arbitrator seek a stipulation providing for a partial final award?
- What is a decision on arbitrability of claim?
 - What is a decision on joinder of non-signatory party?

When is a non-final partial award appropriate?

- Award on the merits with reservation of further final award on attorneys' fees and costs?
- Award on the merits with further briefing required on issue of pre/post-judgment interest before final award?
- Award on the merits with reservation of jurisdiction to enforce compliance with award of equitable relief?

Section IV

Practical Tips for Drafting Awards

At the preliminary hearing

- Require early filing of statement of claims, issues and specific relief sought by each party.
- Seek stipulation on form of award at preliminary hearing; e.g. standard award, reasoned award or findings of fact and conclusions of law.
- Discuss cost and proportionality of form and extent of award.
- Raise issue of possible interim awards.

At the evidentiary hearing

- Confirm stipulation, if any, regarding form of award.
- If no stipulation, determine the form of award pursuant to applicable rules and inform parties.
- Seek stipulation 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 cost claims and interest recovery.

If issuing an interim award

- Expressly state what is and what is not being decided.
- If intended to be final, state that award is a partial final award and subject to confirmation proceedings.
- If not intended to be final, so state and state what issues are reserved for further award.

Questions?