Drafting Awards in ICC Arbitrations

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Foreword

In November 2003 the ICC Commission on Arbitration agreed, on the proposal of Dr Robert Briner, Chairman of the ICC International Court of Arbitration, to set up a small group to consider the production of a guide to the drafting of awards in ICC arbitrations. As will be seen below, the origin of this initiative was a report on the subject by the ICC French national committee. This article is the result of the work of that group.

The members of our group were chosen to reflect various legal traditions. The co-chairmen[1] (Mr Marco Darmon and Judge Humphrey LLoyd QC) came from the civil law and the common law traditions. They were joined by *Président* Jean-Pierre Ancel,[2] Lord Dervaird,[3] Mr Christoph Liebscher[4] and Mr Herman Verbist.[5] The terms of reference of the group were

> The drafting group should start from the articles by Humphrey LLoyd and Marcel Fontaine published in the ICC Bulletin[6] and the report of the French National Committee prepared by Marco Darmon. The document to be produced should indicate guidelines for the drafting of arbitral awards rather than fix standards.

In the course of its work our group consulted widely. We circulated draft reports on its work. We received valuable contributions from numerous members of the Commission on Arbitration and from ICC national committees, many endorsing the results of the group's work. We are most grateful to all who took the time and trouble (some considerable) to submit comments. Our group's draft reports were presented to and discussed by the Commission on two occasions (November 2004 and May 2005).

It must however be emphasized that this article represents only the views of its authors. It is not an official statement by the ICC Commission on Arbitration which, in encouraging and authorizing the authors to publish their views in the form of this article, wished also to make it clear that responsibility for the contents is ours alone. Nor is it, of course, approved by the ICC International Court of Arbitration. As we make clear, the Court respects the freedom of arbitrators to write their awards in the way they think best, provided certain basic requirements are observed (which we set out). Nevertheless, we believe that the guidance given, being based on lengthy and widespread consultation, fairly represents the opinions of others highly experienced in international arbitration. For that reason we do not provide references for a number of recommendations since the source is what is thought by us (and others) to be good practice.

The authors wish to acknowledge the assistance and support that they received from Mr Peter Wolrich, Chairman of the ICC Commission on Arbitration; Mr Emmanuel

1 Both nominated by Dr Robert Briner.

2 Nominated by Mr Darmon.

3 Nominated by Judge LLoyd.

4 Nominated by Mr Peter Wolrich, Chairman of the ICC Commission. on Arbitration

5 Nominated by Mr Peter Wolrich.

6 (1994) 5:1 ICC ICArb. Bull. 38 (LLoyd) and 30 (Fontaine).

Jolivet, General Counsel and Editor of the *ICC International Court of Arbitration Bulletin*; Ms Katherine González Arrocha, Senior Counsel, ICC Dispute Resolution Services; Ms Anneliese Poulain and Ms Olivia MacAngus, Assistants to the Commission on Arbitration.

Introduction

1. Our purpose is to provide basic guidance concerning the drafting of an award in an arbitration conducted under the ICC Rules of Arbitration ('the ICC Rules').[7] This article is in principle written for an arbitrator who has not previously had to write an award in an international arbitration or who has not written an award in an ICC arbitration. Nevertheless, we believe that parts of this article, at least, will also be of interest to experienced arbitrators. We hope that, if the guidance given is followed, the arbitral tribunal will be assisted in preparing a draft award so that such a draft award will thus be more readily approved by the ICC International Court of Arbitration ('the Court') and the risk of it having to be referred back to the arbitral tribunal will be averted or at least minimized. We also believe that the article may be of assistance to arbitrators who are not bound by the ICC Rules since many of the points covered commonly arise in international commercial arbitration.

2. This is not, however, a treatise on drafting awards. Although the suggestions given in it may be expressed as what ought or ought not to be done, they are only recommendations based on the practice and experience of others. They are not official, mandatory or prescriptive. Nevertheless, certain matters are essential[8], either because of the requirements of the ICC Rules, or because the law applicable to the procedure may make them mandatory. Established practice in international arbitrations may require certain matters. Otherwise, within the ICC Rules the arbitral tribunal and the Court decide what the circumstances of the case require.

3. There is no single 'correct' form of an award in an ICC arbitration. The actual form, style and content of an award will depend on various factors, such as the nature of the dispute, the composition of the arbitral tribunal,[9] and the needs of the parties, as well as legal considerations. Arbitrators appointed or confirmed by the Court come from many countries and legal systems. Their awards will be influenced by the systems with which they are familiar. They will also have their own personal styles. They are therefore entitled to expect—and are allowed—a high degree of autonomy by the Court in the way they will make their awards. Accordingly, this article does not suggest what might be a model form of an award that might be required under the ICC Rules. Some awards are reproduced—generally in the form of extracts—in the *ICC International Court of Arbitration Bulletin* and in some other works,[10] but to use them as models can be of limited value, and in some instances it may be misleading or even wrong to do so.

4. Certain matters are indispensable, notably appropriate reasoning: Article 25(2) says: 'The award shall state the reasons upon which it is based.' In addition, Article 25(3), in order that the award can be deemed to have been made at the place of the arbitration, requires the place of arbitration to be stated and the award to be dated. We would also add that it is obviously essential that the award must set out the subject

7 No other rules are considered. All references to Articles and Appendices are to the 1998 ICC Rules of Arbitration.

8 Our use of the word 'must' does not necessarily indicate such an essential requirement.

9 In this article the term 'arbitral tribunal' covers both sole arbitrators and three-member tribunals.

10 e.g. *Collection of ICC Arbitral Awards* published by ICC Publishing/Kluwer Law International, *Yearbook Commercial Arbitration*, and many national publications. Care should however be taken in consulting them, for not only are they generally extracts but also are sometimes not typical.

matter of the award, i.e. the disputes or differences that have been referred to the arbitral tribunal and which have had to be decided, and the reasons for the decisions, i.e. what has been decided and why it has been decided in that way.

5. We also consider that the award should inform the reader that the arbitral tribunal has acted in a judicial manner, not just in the way in which it heard the dispute but in the manner in which the dispute was decided, i.e. the reasoning must be both thorough and self-sufficient. The award must therefore be—and be seen to be—the product of compliance by the arbitral tribunal with the fundamental principles of the processes by which civil disputes are to be resolved (insofar as they apply to arbitration[11]). Thus the arbitral tribunal must allow each party the opportunity to answer the case against it and also any pertinent point raised by the arbitral tribunal on its own initiative, as well as to deal with any fact or allegation brought to the attention of the tribunal.[12] The award must in addition show that the arbitral tribunal has respected the principle of party autonomy (and its implications): only a party has the right to initiate the proceedings; the parties may terminate them at any time; they determine the subject matter of the dispute; the arbitral tribunal must render proper decisions on all the claims and the issues that result from them; the arbitral tribunal must not give a party what it has not asked for, nor more than what it has asked for.[13]

6. We wish to stress that an award is unlikely to be of value unless it is enforceable. Although an arbitral tribunal is not concerned with the mechanics of enforcement, Article 35's 'General Rule' is relevant. It obliges an arbitral tribunal (and the Court) '[i]n all matters not expressly provided for in these Rules, . . . [to] act in the spirit of these Rules and [to] make every effort to make sure that the Award is enforceable at law'. Although this is a general obligation, the arbitral tribunal may only need to see that the award is valid and enforceable at the place of arbitration and, if made in international proceedings, is otherwise enforceable under the New York Convention of 1958. Although the arbitral tribunal is not obliged to be concerned about how and whether the award may be enforceable elsewhere, it may also wish to see that the award might be enforceable where the debtor resides or has assets (if known to the arbitral tribunal). Obviously, the award will also have to show that the arbitral tribunal duly and sufficiently took into consideration public policy rules and the limits of its own competence. On this last point, since an arbitral award can only decide on rights which the parties have the capacity to enjoy, the arbitral tribunal has therefore to decide what are those rights and their source. The award must therefore have a structure or way by means of which all these essential matters can easily be recognized.

7. The guidance that we offer is principally for whoever has the task of drafting the award, i.e. the sole arbitrator or, typically, the chairman[14] in the case of an arbitral tribunal of three. However the drafting of an award in a complex case is frequently shared between the members of the arbitral tribunal,[15] each of whom will also read and comment on the work of others. This article does not cover the form or content of any dissenting opinion.[16] Although dissenting opinions are rare and are to be discouraged, we will however deal with aspects of how dissenting views might be handled by the tribunal.[17] Where the arbitral tribunal has engaged an administrative secretary to assist it, there are differing views about the extent of participation of such a person in the drafting of the award. The general view seems to be that the administrative secretary ought not to draft, except under close supervision, any part of the award, nor ought the administrative secretary to take part in the discussion of the

11 For example, the principle that requires proceedings to be held in public is inapplicable.

12 The tribunal must inform the parties of any such fact or matter.

13 i.e. it must not decide what has not been claimed.

14 But see sections 2.4 and 2.5 below. The majority may not include the chairman.

15 The award must however be in the language of the arbitration (on which see Article 16) and each section that is drafted by a different member must be in harmony with the remainder.

16 The subject of dissenting opinions is covered in the principal textbooks and commentaries and in the Final Report on Dissenting and Separate Opinions, (1991) 2:1 ICC ICArb. Bull. 32.

17 See section 5.8 below.

facts or the law or the reasoning. The arbitral tribunal will obtain guidance from the Secretariat of the ICC Court about administrative secretaries.

8. This article does not differentiate between a final award and other, earlier awards.[18] Therefore, the guidelines it contains apply to all types of award. A final award deals with all issues and matters which have not been finally decided by another award, including questions as to interest, costs and the allocation of costs.[19] Depending on the jurisdiction, other awards may be termed partial, interim, interlocutory or provisional.[20] They are likely to cover preliminary matters upon which a final decision is required, for example when they concern the jurisdiction of the arbitral tribunal or the admissibility of claims, questions of liability (as opposed to subsequent awards that determine finally quantum), individual claims by a party,[21] or the choice of the rules of law. We do not however give guidance on which matters might be the subject of such an award[22] (or a procedural order[23]), or how the arbitral tribunal ought to handle them.

9. Many disputes that have been referred to arbitration under the ICC Rules are subsequently resolved by agreement. In such circumstances Article 26 provides: 'If the parties reach a settlement after the file has been transmitted to the Arbitral Tribunal . . . the settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and if the Arbitral Tribunal agrees to do so.' The arbitral tribunal may therefore be faced with such a request, perhaps even before the Terms of Reference have been drafted or signed. We set out in section 7 below some guidance on the points that the arbitral tribunal ought to bear in mind in such an eventuality.

Guidelines

1. Preliminary considerations

1.1 Role of the ICC Court

1.1.1 An ICC arbitration is usually an international arbitration (as defined in Article 1 of the UNCITRAL Model Law on International Commercial Arbitration[24]). An award made in it may well be a foreign arbitral award for the purposes of the New York Convention.[25] The international norms that such an arbitration and the award have to meet are well covered by the ICC Rules. It is not therefore necessary to look outside them. Compliance with them ought to avert or minimize the possibility that recognition and enforcement of the award might be refused for reasons of public policy or, for example, because (as set out in Article V.1(c) of the New York Convention):

> The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . .

One of the main advantages of the ICC system is to reduce substantially the risk that recognition or enforcement of the award might be refused under the provisions of this paragraph. Accordingly, the initial examination of the award by the Court is essential. Under the terms of Article 27 the Court scrutinizes the award:

18 Article 2(iii) states: '"Award" includes, *inter alia*, an interim, partial or final Award.'

19 See section 5.13 below.

20 For which, in certain jurisdictions, there may need to be an express power.

21 For example, whether a particular defence is available, such as prescription or limitation.

22 See e.g. Final Report on Interim and Partial Awards, (1990) 1:2 ICC ICArb. Bull. 26.

23 But see section 1.4 below.

24 A list of the countries that have adopted the UNCITRAL Model Law is published on the UNCITRAL website (www.uncitral.org).

25 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.

> Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.

1.1.2 The ICC Rules do not contain any special provisions about the form of the award, apart from the essential requirements of Article 25(2) which requires the award to 'state the reasons upon which it is based', and of Article 25(3) which, by referring to where and when the award is deemed to be made, requires the place of arbitration and date to be stated. The ICC Rules therefore recognize the freedom of the arbitral tribunal to adopt an appropriate form. However, the Court expects a basic minimum in terms of form and, as provided by Article 27, may require more where it is necessary. In carrying out its function the Court is likely to examine the award, to see, for example, whether, taking into account all the information available to it:

- the award complies with the requirements of Article 25;[26]
- the arbitral tribunal had the power to decide as *amiable compositeur* (where it validly exercised that power[27]);
- the award reveals a possible violation of the law at the place of arbitration in so far as it relates to its procedural public policy;
- the award discloses a possible lack of reasoning or inadequate reasoning;
- the dispositive section of the award is consistent with the reasoning and conclusions given elsewhere in the award;
- the calculations in the award are apparently accurate, e.g. as to amount of damages awarded, interest, etc.;
- any decision as to the costs of arbitration complies with Article 31;
- all issues and claims that were identified in the Terms of Reference (Article 18(1)(c) and (d)) and possible new claims (Article 19) have been dealt with or an explanation has been given in the award why they have not been dealt with.

This list is not exhaustive. In carrying out this scrutiny the Court will take into account, to the extent practicable, the requirements of mandatory law at the place of arbitration.[28] However, it must be emphasized that responsibility for compliance with any such requirements ultimately remains with the arbitral tribunal.

1.1.3 In relation to the last point in the list above, we consider that before drafting the award the arbitral tribunal should remind itself of the Terms of Reference that were drawn up by the arbitral tribunal and signed by it and the parties (or, in certain cases, approved by the Court[29]). Article 18(1) (as relevant) provides:

> As soon as it has received the file from the Secretariat, the Arbitral Tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:
>
> . . . (c) a summary of the parties' respective claims and of the relief sought by each party, with an indication to the extent possible of the amounts claimed or counterclaimed;

26 See Introduction, paragraph 4 above.

27 Under Article 17(3) the parties must have agreed expressly to confer this function on the arbitral tribunal.

28 See Appendix II, Article 6.

29 See Article 18(3).

(d) unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined;

. . .

(f) the place of the arbitration; and

(g) particulars of the applicable procedural rules . . .

If, for example, the Court believes that the award does not deal with all the claims and issues[30] recorded in the Terms of Reference, it may, if necessary, require the arbitral tribunal to modify the draft award so that it records adequately the arbitral tribunal's decisions in relation to each claim and issue.

1.2 Requirements of the place of arbitration

The place of arbitration[31] may require that an award has to comply with certain formalities. For example, French law[32] says that

the arbitral award shall indicate:

- the names of the arbitrators who made it;
- its date;
- the place where it was made;
- the last names, first names or denomination of the parties, as well as their domicile or corporate headquarters;
- if applicable, the names of the counsel or other persons who represented or assisted the parties.

Article 31(1)–(3) of the UNCITRAL Model Law (which has been widely adopted) contains similar requirements:

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration . . . The award shall be deemed to have been made at that place.

. . .

In terms of form, the award must therefore comply with the requirements of the law of the place of arbitration (and, where that is silent, with international practice[33]). As the arbitral tribunal is primarily responsible, it ought to satisfy itself of any special requirements of the law of the place of arbitration by obtaining the necessary information from the parties or making its own inquiries.[34] The Court may not know certain requirements as to form or content that may be called for by the law of the place of arbitration, especially if those requirements exist as a result of interpretation of the law by the courts of that jurisdiction.

1.3 Compliance with fundamental principles

National courts throughout the world also expect or require certain fundamental principles to be followed by arbitral tribunals, such as the right of a party to know and

30 Even if it considered it inappropriate to set out issues in the Terms of Reference, the arbitral tribunal ought nevertheless to do so in the award itself.

31 Article 14.

32 *Nouveau Code de procédure civile*, Article 1472. This illustration has been selected solely because many arbitrations have their seat in France. The arbitral tribunal ought to ascertain the requirements of the relevant law.

33 A list of the points ordinarily expected is given in W.L. Craig, W.W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, 3d ed. (Oceana, 2000) at para. 19-04, but it includes items which are not strictly matters of form.

34 The Secretariat of the Court will assist where it can. The results of any inquiries made by the tribunal must of course be brought to the attention of the parties before the proceedings are closed.

to be able to deal with the case against it. The award must make it clear that these principles have been observed by the arbitral tribunal and how the tribunal did so. Under Article V.1(d) of the New York Convention recognition or enforcement may be refused if 'the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'. In particular, if the arbitral tribunal believes that the procedure that it adopted might be challenged then it ought to explain what it did and whether this affected its ultimate conclusions.

1.4 Awards and procedural orders

The arbitral tribunal ought to see that procedural orders are dealt with separately from any award.[35] It ought to be very clear from the document whether the decision is a procedural order or whether it is an award.[36] The arbitral tribunal may need to consider carefully whether to make an order or award.[37] An award is generally a decision about the rights and obligations of the parties in the relationship, normally contractual, that gave rise to the dispute and to the arbitration. It is not about the rights and obligations of the parties under the procedure resulting from the arbitration agreement; such rights and obligations will necessarily be the subject of procedural orders.[38] In general, if the arbitral tribunal has any doubt as to whether an order or an award is appropriate, it is better to express the decision in the form of an award.[39] It is good practice to provide reasons for every order, even if it is concerned with a matter of procedure (the reasons may be briefly expressed). However, in some cases reasons are required. For example, Article 23 states that an interim or conservatory measure must be in 'the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate'. Thus, reasons are required for interim or conservatory measures, whether the measure is in the form of an order or an award.

2. Mechanics of making the award

2.1 Timing and approach

It is good practice to create at an early stage a draft of the award insofar as it will record the basic data, the chronology, the respective positions of the parties,[40] and other matters that are not contentious. This ought to be started soon after the Terms of Reference have been approved and it ought to be kept up to date as the case proceeds.

2.2 Arrangements for tribunals of three

2.2.1 Where the arbitral tribunal comprises three members, the chairman usually is responsible for drafting the award. If the case is complex the work may be split, although one person—usually the chairman—ought to be responsible for the coordination of the work and the consistency of reasoning and the result. A decision to split the work ought to be taken well prior to any hearing and always before the proceedings have been closed. Of course, if by then it is clear that there is or may be a difference of opinion, it may be necessary to make other arrangements.

35 me arbitrators, usually with the greement of the parties, include procedural orders in an award.

36 However, a national court may still regard an order as an award: see *Braspetro Oil Services Company (Brasoil) v. The Management and Implementation Authority of the Great Man-Made River Project (GMRA)*, Paris Court of Appeal, 1 July 1999, Rev. arb. 1999.834; (1999) XXIVa Y.B. Comm. Arb. 296.

37 See also Final Report on Interim and Partial Awards, *supra* note 22. The difference between an award and a procedural order is discussed in a number of works such as E. Schäfer, H. Verbist & C. Imhoos, *ICC Arbitration in Practice* (Kluwer Law International/ Staempfli, 2005) at 119ff.; Y. Derains & E.A. Schwartz, *A Guide to the New ICC Rules of Arbitration*, 2d ed. (Kluwer Law International, 2005) at 29–32; W.L. Craig, W.W. Park & J. Paulsson, *International mber of Commerce Arbitration*, 3d ed. (Oceana, 2000) at 360–61; J. Lew, L Mistelis & S Kröll *Comparative International Arbitration* (Kluwer Law International, 2003) at 629–30; C. Liebscher, *The Healthy Award—Challenge in International Commercial Arbitration* (Kluwer Law International, 2003) at 123, 129, 136.

38 In some jurisdictions (e.g. certain common law jurisdictions) time bar is considered to be a matter of procedural law, whereas elsewhere (notably civil law jurisdictions) it is sometimes considered to be a matter of substantive law.

39 It may of course be necessary to wait until the award is approved (although the ICC Court tries to minimize any such delay). In some instances it may be more convenient to incorporate the decision in a subsequent award.

40 But of course no conclusions should be reached, still less recorded, until all the parties' submissions have been received and considered.

2.2.2 An arbitral tribunal of three must also decide whether to meet physically to complete its deliberations and to complete the final draft or whether it can do so effectively by some other method of communication (and cost-effectively, since a physical meeting or a long videoconference adds to the costs of the arbitration[41]).

2.3 Time for deliberations

Arbitral tribunals commonly arrange[42] to deliberate immediately after the hearing is finished and as soon as any final written submissions have been received[43] and the proceedings have been closed.[44] Before the arbitral tribunal starts to write the decisive parts of an award, the parties will have completed their submissions by the time fixed by the arbitral tribunal.[45] In addition, the arbitral tribunal ought to ensure that no procedural steps or issues are incomplete or unresolved.[46]

2.4 Submission of draft award

Once the proceedings have been closed, Article 22(2) requires the arbitral tribunal to set an approximate date for the submission of the draft award and to notify the Secretariat of it. The Secretariat ought to be informed of any known contingencies or delays that could affect that date and, of course, of any postponement of it.
A timetable must therefore be devised for the production of the draft award. This is one of the responsibilities referred to in Article 7(5).[47] The approximate date and the timetable are usually confidential to the arbitral tribunal.[48] The timetable must allow sufficient time for the arbitral tribunal to complete its deliberations (especially where the arbitral tribunal comprises three members and if differing views are expected), for the production of a first draft of the award, for comments on the first draft, for discussion and agreement of the final draft, and for its submission to the Court for scrutiny under Article 27. The period ought to be no longer than is absolutely necessary. Whilst the right of a member to differ must be respected, that member ought to observe the timetable, which, if necessary, should provide for the submission and circulation of differing views to the other members of the tribunal. Article 25 provides that an award is to be made by a majority and, if there is no majority, then by the chairman. The arbitral tribunal has to decide whether including a dissenting opinion in the award (whether directly or indirectly) would endanger its validity. The submission to the Court of a draft award should not be delayed on account of a dissenting arbitrator.

2.5 Participation of all members of the tribunal

If the award (or any section of it) has been drafted by one member of the arbitral tribunal, then the other members must carefully read and comment on the draft. If a member does not agree with the substance of the draft it is usually helpful to provide an alternative draft on the substance, even if the disagreement is fundamental. If the award has to be made by a majority[49] (or by the chairman in the absence of a majority), the award ought to take into account the grounds for the minority view and, if appropriate, provide reasons for rejecting them. In this way the minority may not have to express a dissenting opinion. A final draft may have to use wording that is acceptable to all or to the majority but the wording ought to be free from doubt or ambiguity.

41 As defined in Article 31.

42 It is sometimes sensible to do so even as early as the time of the provisional timetable required by Article 18(4). See the next section for Article 22(2) and the need for confidentiality.

43 Including transcripts and other records of any hearing.

44 See Article 22(1).

45 See Article 22(1). (Of course, if by then it is clear that there is or may be a difference of view it may be necessary to select another member.)

46 Although outside the scope of this article, it ought to be remembered that if, in the course of drafting the award, the arbitral tribunal has well-founded doubts about whether it has all the relevant facts or has doubts about the case of a party, it ought to consider re-opening the proceedings to resolve those doubts. It must do so if it considers that the award would otherwise be flawed.

47 A member may therefore have to make arrangements to meet these obligations.

48 A provisional indication, but not of course a commitment, may be given to the parties of the likely time within which the award may be made if the arbitral tribunal is sure of that time. It must be provisional since the tribunal cannot commit the Court.

49 See above. As noted, the majority might not include the chairman.

2.6 Languages

Under Article 16 the parties may agree on the language or languages of the arbitration or, in the absence of agreement, the arbitral tribunal will make a determination. The agreement or decision is usually also recorded in the Terms of Reference. If more than one language is used, then a decision has to be made as to the language in which the award is to be made. Again, the language may be agreed by the parties but, if it is not agreed, then the arbitral tribunal, having given each party an opportunity to present its case,[50] must decide which language is to be used in drafting the award. If the parties request (and if the arbitral tribunal agrees) that the award should be made in more than one language, the arbitral tribunal should state which is the definitive language governing the award.

2.7 Confidentiality of drafts

The working draft or drafts of the award must be circulated only within the arbitral tribunal and be kept absolutely confidential.[51] They must never be sent to or seen by the parties or any of their representatives or any witness or expert (including an expert appointed by the arbitral tribunal). The Secretariat should only be sent the draft which the arbitral tribunal has agreed is to be submitted to the Court for its scrutiny.[52] The prohibition on the circulation of drafts applies equally to disagreements within the tribunal and dissenting views and opinions. A dissenting view or opinion, or the reasons for it, must never be communicated to any party by the arbitral tribunal or any of its members. If communication is permitted, it will be carried out by the Secretariat.

3. General points on drafting the award

3.1 Needs of the parties

In drafting the award the arbitral tribunal needs to have in mind the people who are to read it. The parties come first. The award is intended for them. They contracted for arbitration. The award is the result of that contract or the relationship or circumstances that led to the arbitration. The parties will have to observe it and to carry it out. A party may perhaps have to resort to a State court for recognition or enforcement. However, most awards made by arbitrators appointed under the ICC Rules are complied with voluntarily. The arbitral tribunal ought to facilitate voluntary compliance by producing an award which explains clearly and persuasively how and why it has arrived at its conclusions. The award must also state the result clearly and simply so that there is no doubt about the outcome. This ought to be done in a separate section—the dispositive part of the award.

3.2 Clarity, precision, brevity and ease of use

Above all, the award must be concise and must be confined to the points that need to be decided in order to reach the final conclusions. Wherever possible the award ought to use simple, but precise, language and terms and ought to avoid legal or technical terminology which might be difficult to understand (or to translate).[53] There should be consistency in the use of words, phrases and terms, and in the expression of reasoning. Repetition ought to be avoided. Expressing the same points of

50 This will apply also if the parties do not agree on the language of the arbitration.

51 Arrangements may need to be made to preserve confidentiality when transmitting drafts, especially when e-mail or other electronic means are used. For the position of an administrative secretary, see paragraph 7 of the Introduction above.

52 The Secretariat of the Court may give advice only on *form* when the draft award is submitted.

53 Obviously, if the subject matter is technical the correct words and terminology must be employed.

reasoning in different ways can be confusing and can lead to doubt or ambiguity. All paragraphs ought to be numbered; sections ought to have titles or headings; a table of contents (or index) is helpful if the award deals with a number of issues and is voluminous; so far as practicable, the award should not be a bulky document.

3.3 Some other points

Generally, awards are written impersonally ('the arbitral tribunal [arbitrator] finds . . .'; 'the arbitral tribunal [arbitrator] decides . . .'). The award is not to be written for the benefit of the arbitral tribunal. Obviously, it ought not to be an exercise in self-justification in which the arbitral tribunal demonstrates to its satisfaction that it has overcome its internal wrangling. It ought not to become, in effect, a treatise whicl records the various arguments that took place during the arbitral tribunal's deliberations (unless necessary to deal with the parties' claims and issues).

3.4 Annexing documents

As a general rule, the arbitral tribunal ought to avoid attaching documents to the award. Documents must not be incorporated by reference.[54] If a proper explanation has been given in the award, it may be permissible to attach, for example, a table or schedule prepared by the arbitral tribunal for the evaluation of certain claims. However, these documents must physically be made part of the award[55] and signed by the arbitral tribunal as part of the award. In this way, there would be no doubt that they have formally been incorporated in the award. The award ought to be a completely self-contained document. Thus, relevant terms of the arbitration agreement and any other document of importance should be set out fully in the award.[56]

3.5 Discussions and decisions that are not relevant

Care ought also to be taken not to have a discussion of points which, although interesting in themselves, are not relevant in the context of the award as a whole. The arbitral tribunal must therefore resist the temptation to express opinions on matters of fact or of law which do not need to be decided in order to arrive at the final conclusions. Such opinions or discussions are, in effect, only advisory but they may be used to cast doubt on the primary decisions and reasons. Nonetheless, there may be occasions when an arbitral tribunal will acknowledge that the parties themselves (and not their legal or other representatives) expect to know the views of the arbitral tribunal on a point of law or of fact which, strictly, does not have to be decided. An arbitral tribunal is not generally obliged to meet such expectations of the parties (still less those of their advisers). Should the arbitral tribunal decide to include in the award discussion and opinions on such points, it ought to ensure that they cannot be used to undermine the central reasoning and that such parts of the award are clearly separated from the parts that contain the core reasoning and the decisions that are binding.

3.6 Position of national courts and others

Others may also read the award. The document must therefore not be written only for the benefit of the parties to the arbitration. Although, unlike the decision of a State court, an arbitral award is not a public document, it may have to be enforced in or by a State court. It must therefore be sufficiently clear to be understood and to be

54 e.g. by way of a footnote.

55 e.g. by binding the documents with the main part of the award.

56 Exceptionally, in order to understand an award such as a final award, it may be necessary to attach a previous award.

enforced without difficulty in ascertaining its meaning or effect. In addition, the arbitral tribunal may know of other parties who could exceptionally be affected by the award, such as insurers, funders or sub-contractors who, if a claim is made and if they were held liable in other proceedings, might then be bound to pay an amount that was awarded in the arbitration. However, the arbitral tribunal ought not to write the award with their interests in mind as they are not parties to the arbitration. The general principle is that only the parties to an arbitration are bound by decisions of the arbitral tribunal and that principle ought to be observed. Thus, the award must not include anything which cannot be justified as necessary for the resolution of the dispute that has been referred to arbitration. Nonetheless, it might be desirable to express or to expand the reasoning so that another person to whom a party might legitimately show the award will not have difficulty in understanding it.

4. The award itself

4.1 Preliminary: the status of the award—final or not?

The award ought, at the outset, to state whether or not it is the final award. If it is not the final award then it must clearly state its subject matter by reference to the claims or issues in the Terms of Reference (and what claims or issues will or may be the subject of a further or final award). In certain jurisdictions it is common for an award to be final on all issues other than costs.[57] Such an award is not the final award and it ought not to be so described. In addition, it is not usual in an ICC arbitration for the costs of the arbitration to be the subject of a further—and thus the final—award (costs are discussed later[58]).

4.2 Structure: basic data

The award ought to have a clear and coherent structure. Awards ought to contain, usually at the beginning, a summary of certain basic data:

- the name(s) of the arbitrator(s);
- the manner in which the tribunal came to be appointed;
- the names and addresses of the parties (including any company or commercial registration number) and of their legal or other representatives;
- how the dispute arose (and thus why an arbitral award is required);
- the terms of the arbitration agreement (and any variations)—these are best set out in full[59] as they establish the basis for the jurisdiction of the arbitral tribunal;
- any decision of the Court taken under Article 6(2), especially if the arbitral tribunal has to decide, in whatever way, any aspect of its own jurisdiction;
- the place of the arbitration together with how it came to be chosen;[60]
- the law or rules of law applicable to the merits of the dispute and whether they were agreed by the parties[61] or decided by the arbitral tribunal[62] (in the latter case, the reasons considered to be appropriate by the arbitral tribunal must be given at some point in the award);
- the date upon which the Terms of the Reference became effective (the later of the two possible dates in Article 24(1)[63]);

57 Interest is sometimes also excluded.

58 See sections 5.12 and 6.2 below.

59 See also section 3.3 above.

60 As required by Article 25(3), noted above. See also Article 14. The award will therefore need to reproduce parts of the Terms of Reference.

61 See Article 17(1).

62 See Article 17(2).

63 Note that this is the last of various possible dates from which the time to make the award is calculated. The Secretariat will have notified the date to the arbitral tribunal.

- any extension granted by the Court for making the award where the award was likely to be made[64] more than six months after the date of Terms of Reference[65] (so that it will be clear that the award was validly made before that date);
- the procedural rules agreed under Article 18(1)(g) or determined by the arbitral tribunal;[66]
- the language or languages of the arbitration (and any departures therefrom and the reason for any such deviation);
- the principal chronology both of the dispute and of the proceedings, i.e. a very brief description[67] of the main steps both before and after[68] the Terms of Reference[69] (including the request for arbitration, the answer, and any counterclaim, etc.);
- the steps that the arbitral tribunal took, in accordance with the procedural rules, to ascertain the facts of the case;[70]
- the dates of any evidentiary or other hearings and previous awards;
- the date when the proceedings were closed.[71]

4.3 Purpose of summary of data

The arbitral tribunal ought to make such a summary as uncontroversial as possible. The basis for any factual statements in the summary (e.g. agreed facts, undisputed facts, and evidence) ought to be provided. If, for example, an expert was appointed under Article 20(4), then the circumstances of that appointment and the submission of the expert's report ought to be mentioned. It may also be necessary or desirable to record decisions on certain procedural objections, referring where necessary to the ICC Rules or other applicable procedural rules. The purpose of providing such a history is to ensure that the award will contain the arbitral tribunal's position if it were ever suggested that, for example (as set out in Article V.1(d) of the New York Convention) 'the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'.

4.4 Claims and issues

The award must also set out the dispute and its nature. This ought to be done by using the statement of the parties' claims as set out in the Terms of Reference[72] and any list of issues included in them.[73] Where necessary, these statements must be brought up to date as they define (or redefine) the dispute and the points which the arbitral tribunal has had to decide. If there was no list of issues in the Terms of Reference or if it was general, then the arbitral tribunal ought to set out the issues which it considers that it has to decide. As previously mentioned, when the Court scrutinizes the award under Article 27 it will wish to be satisfied both that the arbitral tribunal has done all that is expected of it and that it has not exceeded its mandate. It will pay great attention to the Terms of Reference.

For the purposes of the scrutiny by the Court it is therefore essential that the draft award must record:

- any changes to the claims or to the issues and when and how they were made;[74]
- new claims or counterclaims authorized by the arbitral tribunal under Article 19

64 Note Article 24 for the date.

65 See Article 24(1).

66 At any stage—whether then or thereafter.

67 As they are fully documented elsewhere in the files of the arbitral tribunal, the Secretariat and the parties.

68 The history could commence with the provisional timetable that was established under Article 18(4) and any modifications made to it. Modifications have to be communicated formally—see Article 18(4).

69 Details relevant only to the question of costs may be left to the section on that topic.

70 As provided by Article 20(1).

71 In accordance with Article 22(1).

72 Article 18(1)(c).

73 Article 18(1)(d).

74 If it would be cumbersome to do so, the final text should be set out.

- any abandonment, withdrawal, modification or waiver[75] by a party of any claim or counterclaim,[76] together with the details;[77]
- decisions by the arbitral tribunal affecting a claim (such as striking it out, dismissing it or declining to hear evidence or submissions about it);
- the remedies or relief ultimately claimed by each party.

In this way the arbitral tribunal will provide the reader with its agenda for the decisions that it is going to take and there ought to be no doubt as to the mandate of the arbitral tribunal.[78]

5. The core of the award

5.1 Objectives

The award ought now to have set the scene for the decisions of the arbitral tribunal and the reasons upon which its decisions were based. Some prefer to discuss the issues first and thus to arrive at conclusions. Some prefer to state the arbitral tribunal's final conclusions and then to set out the reasons. Both (or even mixtures) are acceptable.[79] Whatever route is chosen, the arbitral tribunal must nevertheless ensure that in the award:

- the claims and all the issues which derive from them are completely and finally resolved; and
- its reasons for every relevant conclusion are expressed clearly and without doubt.

5.2 Reasons

5.2.1 It is worth emphasizing again that Article 25 requires that '[t]he Award shall state the reasons upon which it is based', i.e. the essential reasons for the award, not reasons for accepting or rejecting points that are not relevant for the award.[80]

5.2.2 The extent to which reasons are given varies.[81] If a national court has ever to examine an award, for example for the purposes of recognition or setting aside, it will naturally be less likely to be critical if the reasoning adopts a pattern with which it is familiar. However, an award cannot be drafted merely to please some national court and on the assumption that it, or its recognition or enforcement, will be challenged. When scrutinizing the award, the Court will wish to understand the logic of the reasoning so that it can find the real reasons for a decision. If it is not satisfied in this respect, then it may treat such a deficiency as a matter of form which it can control by withholding approval—see Article 27.

5.2.3 Throughout the discussion and reasoning the arbitral tribunal must be sure to record in the award the final claims of and the relief sought by each party.[82] It is good practice to request each party to state exactly what it considers ought to be included in the dispositive part of the award. In this way the arbitral tribunal ought to be able to avoid such claims and requests for relief being described by reference to any final written submissions (e.g. after the conclusion of any hearing). If the case is simple and where there are no such submissions, but where there is an oral hearing, the arbitral tribunal ought to summarize the positions of the parties in their presence

75 See Article 33.

76 Under the ICC Rules 'claims' include defences.

77 This is particularly important if the party's intentions were not expressed clearly.

78 Claims and relief previously claimed may be relevant to decisions about costs, so the award must record their history.

79 The choice is often the result of following the practice of State courts in the jurisdiction with which whoever drafts the award is familiar.

80 It is possible that the law of the place of the arbitration makes it mandatory for reasons to be given on points that were debated or considered but are not essential for the ultimate decision.

81 It can be affected by the practice of State courts which may have (or have had) the task of examining the award, e.g. in the case of a challenge against it.

82 See also Article 4 and Article 5.

before closing the hearing and include that summary in the award. The arbitral tribunal must be sure that it bases its decisions on only the facts and law presented to it by the parties or which it has ascertained (where it is permissible for it to do so) and which the parties have been given a proper opportunity to challenge.

5.2.4 The award must always make a clear distinction between the submissions of the parties and the arbitral tribunal's findings. The award ought therefore to avoid repeating the parties' submissions when setting out the findings or conclusions of the arbitral tribunal.

5.3 Points on order

It is customary first to set out all the key questions or issues so that the analysis of the case by the parties and by the arbitral tribunal is clearly presented.[83] Some questions may have to be framed as potential alternatives, depending on earlier conclusions, for example: 'If the answer to issue 1 is in the affirmative, then the following question arises: . . .; but if the answer to issue 1 is in the negative then the next question that arises is: . . .'[84] In a complex case it may be convenient to deal separately with each claim or group of related claims and to set out the conclusions of the arbitral tribunal on each before turning to the next claim or group of claims, whereas in a simple case the award would set out and consider in turn all the facts, the law, and the cases of each party.

5.4 The facts

Each arbitral tribunal will decide whether the award should first consider the law or the facts (or should combine the discussion of both). Whatever approach is adopted, the award, in recording the facts upon which the arbitral tribunal proceeds, should make it clear which facts were agreed or not and which facts were in question and have been found by the arbitral tribunal. Facts that are not relevant to the decision should not be included or discussed, unless it is necessary to do so in order to explain why the arbitral tribunal considers that a particular fact has been proved. Therefore, the arbitral tribunal ought to avoid setting out every fact agreed or proved (e.g. by referring to all the documents or by reciting the evidence of witnesses as to fact or the opinions of experts) unless, perhaps, the reasoning later identifies the specific facts that are agreed or found proved that are relevant to that section of the reasoning. Where the fact was contentious, the arbitral tribunal should briefly outline the respective positions of the parties before setting out its conclusions. Where necessary, it ought to state the rules of evidence that have been applied. It is not necessary to provide a long explanation on a decision of fact. It might be sufficient, after a short explanation, to say: 'The tribunal finds proved that at the meeting on 1 April Mr A said that he accepted the change, as this is consistent with later letters both from him and from Mr B, such as the letters of 14, 17 and 30 April.' It may however be preferred, especially if there is little or no dispute about the facts, to include the relevant facts in the legal reasoning. If this is done, then care must be taken to see that only the evidence pertinent to the reasoning is referred to.

5.5 The law

Where the parties differ about the rules of law applicable to the merits of the dispute or about the interpretation of the contract, then the award ought to set out the respective positions of the parties before discussing them and arriving at its reasoned

83 Unless, perhaps, the claim or defence depends on the interpretation of the contract or some point of law or other decisive issue so that it is unnecessary to have an analysis of the remainder of the case.

84 See section 5.7 below for further discussion of alternative issues.

conclusions. The arbitral tribunal ought to take care to see that any discussion of the law is related to the rules of law[85] applicable to the merits. If there is discussion about the possible application of other rules of law, then the relevance of that discussion should be made clear. Again, it is neither necessary nor desirable for the award to discuss issues of law that are irrelevant.

5.6 Application of the law to the facts

5.6.1 The material decisions of the arbitral tribunal will be the product of a reasoned application of the relevant legal principles to the facts. They will normally be expressed as answers to the issues and will show how the dispute has been resolved.

5.6.2 In all but the simplest cases the final conclusions of the arbitral tribunal ought to be summarized and answers given to the issues in their final form and to the dispute as a whole. It is good practice to provide cross-references back to the relevant paragraphs where the facts, the law, the contractual provisions and the reasoning are set out. This ought to help in ensuring that the award is complete and coherent.

5.7 Alternative issues

Alternative issues, whether of fact or of law, can cause difficulties. Some State courts consider and express opinions about alternative issues. Since generally there is no appeal or recourse from an award,[86] it is normally not necessary for the arbitral tribunal, when drafting its award, to consider what the position would be if it were wrong in a decision of law or of fact. Discussion of the consequences of an alternative version of the facts or of an alternative position is especially to be avoided. There are few exceptions. It may occasionally be desirable to express a view on an alternative position in order to assure a party that it would not have won on it, even if the arbitral tribunal's conclusion on the primary position were wrong. Thus, if the decision was that the claim was not admissible (because it was barred by time or outside the limits of the Terms of Reference), the arbitral tribunal might nevertheless consider it appropriate to express its decision on the merits of the claim (if it had been admissible) where it had received full argument on it.

5.8 Dissenting opinions

If a member of the tribunal differs about any of the central reasoning or conclusions in the award and if that member asks for that difference to be recorded in the award, whether or not as a dissenting opinion,[87] the other members of the tribunal or the chairman[88] have first to decide if that reasoning (or those conclusions) can be taken into account in the award without imperilling its validity.[89] If this can be done, then the majority (or the chairman) have the opportunity to present their reasons clearly so that the award deals with the difference of views.[90]

5.9 Justification of calculations

The practice of the Court is that an award must contain reasons for the calculation of any figure that the arbitral tribunal arrives at (including, of course, the amount of any sum awarded). The arbitral tribunal must therefore be sure to give reasons for the calculation of any figure. In evaluating the amount of money due, it may at times be possible only to arrive at an estimate or a figure which is the best judgment of fact that

85 i.e. as the term is used in Article 17.

86 Article 28(6) provides that the right to recourse is waived (insofar as it can validly be done).

87 The member who dissents is often not identified by name.

88 Where the award is made by the chairman alone.

89 See e.g. Final Report on Dissenting and Separate Opinions, *supra* note 16.

90 Sometimes the dissenting member does not then seek to present a dissenting opinion.

the arbitral tribunal can make. Nevertheless, the arbitral tribunal must explain its reasoning.[91] If the amount is reached by the application of some agreed principle or approach, then such principle or approach ought to be stated. Similarly, if there is agreement on some, but not all, of the constituent elements of a calculation, the award ought to make it clear what is agreed and what is a matter of the tribunal's best judgment. However, the arbitral tribunal ought not to say that any decision has been arrived at *ex aequo et bono* unless the arbitral tribunal has been given power to act *ex aequo et bono* (or as *amiable compositeur*) in accordance with Article 17(3).[92]

5.10 Taxes

Where liability for tax was an issue between the parties, the arbitral tribunal ought have established whether or not there was such a liability. The award must make it clear whether or to what extent any amount awarded includes or excludes any amount payable by way of a tax.[93]

5.11 Interest

Before closing the proceedings the arbitral tribunal ought also to have established if interest can be awarded under the law that is applicable[94] and, if so, any limitations on the award of interest (e.g. whether compound interest can be awarded and/or whether post-award interest may be ordered[95]). The arbitral tribunal must give each party a proper opportunity to make submissions—where these have not already been provided—on interest rates, dates and periods that the tribunal is considering. The draft award must either set out the applicable rate(s) of interest[96] and the date from which interest will commence to be payable, or it will state the decision of the arbitral tribunal as to the amount of interest payable up to a given date, applying the relevant interest rates and periods, and the relevant interest rate(s) for the time after that date. The latter course may be appropriate where there are a number of decisions on claims and a different rate or date (or both) applies to each. The award will then be clear as to the interest payable. Reasons for any decision on rates, dates or periods must be provided.

5.12 Costs: procedure

Similarly, the arbitral tribunal ought to have obtained the parties' claims in relation to the costs of the arbitration as defined in Article 31. This will include not only the arguments on allocation[97] but also the amounts which are claimed as 'reasonable legal and other costs'. The arbitral tribunal must give each party the opportunity to make submissions on each side's statement of its costs. For example, the arbitral tribunal might require each party to present written submissions (and, if appropriate, counter-submissions). These are usually required to be submitted swiftly after the final hearing (and before the proceedings are closed[98]) as until then a party is unlikely to know how much it wishes to claim. The arbitral tribunal may need to make clear how (and how far) a party is to substantiate the amount of its costs that it wishes to recover.

5.13 Decisions on costs and allocation

5.13.1 The final award[99] must then deal with the costs of the arbitration and their allocation. As with interest, it is usually better to deal with questions relating to costs

91 The applicable law may permit the tribunal to make an award on an equitable basis, i.e. without the justification that would ordinarily be necessary. In such a case the reasoning of the award must refer to the law that permits the award to be made on that basis.

92 In some legal systems the law permits judges and arbitrators to assess damages or compensation other than in accordance with ordinary law, even though the parties have not expressly agreed that the arbitral tribunal should have the power to do so.

93 Such as value added tax.

94 Sometimes the relevant law is that which is to be applied to the substance of the dispute; sometimes it is the law of the place of the arbitration. In some jurisdictions an arbitral tribunal is not permitted to award interest unless it has been claimed formally or the arbitral tribunal is authorized in law to do so. In some jurisdictions the arbitral tribunal ought not to calculate the amount but ought only to decide the relevant dates and rate or rates as a matter of principle. On the subject of interest see: J.O. Rodner, 'The Applicable Interest Rate in International Arbitration' (2004) 15:1 ICC ICArb. Bull. 43; L. Hammoud & M. Secomb, 'Interest in ICC Arbitral Awards: Introduction and Commentary' (2004) 15:1 ICC ICArb. Bull. 53; 'Extracts from ICC Arbitral Awards dealing with Interest' (2004) 15:1 ICC ICArb. Bull. 63.

95 The arbitral tribunal should be sure not to award compound interest unless it clearly has the power to do so.

96 For example, if a party would not have had to borrow the money, a lower rate of interest will be or may be applicable.

97 Where allocation may depend on decisions on the merits of the dispute, and especially where there are numerous or complex claims, the parties will not be able to make submissions until they have the award containing the decisions.

98 It is possible to close the proceedings for all but submissions on costs, provided that this is made clear.

99 See Article 31(3).

in a separate section of the award. Article 31 deals with costs. Under the Rules 'the costs of the arbitration' have three main elements.

5.13.2 First, there are the ICC administrative expenses and the arbitrators' fees and expenses. The amounts of the costs in this category are fixed by the Court and not the arbitral tribunal. The Secretariat will provide the arbitral tribunal with the figures for inclusion in the award once the draft award has been approved by the Court.

5.13.3 Second, there are the 'reasonable legal and other costs incurred by the parties for the arbitration'. Here the arbitral tribunal must decide not only the allocation but also the amount of such costs. Reasons must therefore be given for the decisions on the amounts awarded in respect of the costs in the second category. The arbitral tribunal may need to be particularly careful in its reasoning where the amounts claimed by one party in respect of legal costs or other costs are significantly higher than the amounts claimed by another party for comparable services.

5.13.4 Third, there may also be fees and expenses of any experts appointed by the arbitral tribunal. The arbitral tribunal must decide not only on the amount of such fees and expenses that are to form part of the costs of the arbitration, but also their allocation.

5.13.5 As regards allocation, the arbitral tribunal has to decide in relation to the costs in each category which party has to bear such costs or how the costs are to be apportioned between the parties. Apportionment may be by share (e.g. by the use of percentage) or by amount. As a matter of practice, Article 31 is considered to give the arbitral tribunal a certain discretion in the allocation of costs (in all three categories), but the award must give sufficient reasons to justify the exercise of that discretion. The reasons will therefore provide an explanation if, for example, there is a difference between the arbitral tribunal's decision as to the allocation of the ICC administrative expenses and arbitrators' fees and expenses and the allocation of other costs. In the next section some models are given for the dispositive section of the award as regards costs. They show how payment by way of an advance on costs might be dealt with.

5.14 Checking of figures, calculations and spelling

Before the draft is submitted to the Court, all figures and calculations must be double-checked (as regards basic amounts, interest, liability for taxes, such as value added tax, and figures for costs). Spelling and typography must also be checked.

6. Dispositive part of the award

6.1 Model for claims

The award must contain, often at the very end,[100] a section containing the dispositive part of the award. This sets out the results in simple terms so that a court responsible for enforcement ought to be able to give effect to them without difficulty. This section is usually prefaced by wording such as: 'For these reasons the arbitral tribunal makes the following award . . .' The arbitral tribunal then sets out its decision and orders, point by point. For an award that is about money, the following wording is typical where the claimant and the respondent each succeeds in part and both are awarded simple interest[101] on the amount outstanding until the date of full payment:[102]

100 But it can be earlier, such as at the beginning of the reasoning.

101 These are illustrative.

102 In some legal systems interest can only be granted by an arbitral tribunal until the date of the award.

For these reasons the arbitral tribunal makes the following award:

1. Claims 1, 2 and 3 of the Claimant [name] are upheld and the Respondent [name] shall pay [or is to pay] the Claimant [name] €_____ by [date];

2. Claims 4, 5 and 6 of the Claimant are rejected;

3. Claims 7, 8 and 9 of the Respondent [name] are upheld and the Claimant [name] shall pay [or is to pay] the Respondent [name] €_____ by [date];

4. The Respondent [name] shall pay the Claimant [name] interest on the amount awarded under paragraph 1 above at the rate of [___%] per annum from [date] until the date of full payment;

5. The Claimant [name] shall pay Respondent [name] interest on the amount awarded under paragraph 3 above at the rate of [___ %] per annum from [date] until the date of full payment;

6. All other claims of the Claimant and the Respondent, including claims by way of defence and counterclaims, are dismissed.

If the award resulted in one or more declarations about the rights and obligations of the parties, then other wording would be used, for example in relation to jurisdiction: 'The arbitral tribunal decides and declares that it has jurisdiction over the claims made by the claimant in its Request for Arbitration dated . . . and as further defined in section . . . of the Terms of Reference dated . . .'; or in relation to the applicable law: 'The arbitral tribunal decides and declares that the dispute is to be decided in accordance with the law of [jurisdiction].' There must be complete consistency between the contents of the dispositive part of the award and the final conclusions on the issues. Wherever possible, the same wording ought to be used. Where an award deals with some but not all of the claims, and therefore the remaining claims are to be the subject of a further award, the wording set out above—'All other claims . . . are dismissed'—must not be used, unless it is clear from the earlier parts of the award that the arbitral tribunal has confined itself to those claims (or counterclaims) that it regarded as correct. The award ought to make it clear in such a case that, for example: 'All other claims and counterclaims are reserved for decision in a later award.' Otherwise, it could be maintained that the award had disposed of all the claims over which the arbitral tribunal had jurisdiction.

6.2 Models for costs

In relation to costs, the following models illustrate the points made (in section 5.13 above) about how the final award might deal with costs.[103] If, as is usual, the final award disposes of all claims, the section concerning costs ought to follow the section that disposes of the claims.[104] For example, if the arbitral tribunal were to decide that the costs shall be borne equally by the parties, the following text could be used:[105]

For the reasons given the arbitral tribunal further awards and orders that:

1. Each party shall bear 50% of the ICC administrative expenses as well as the Arbitrator's fees and expenses, fixed by the ICC International Court of Arbitration at US$ _____.

2. As the Claimant [or the Respondent] has paid US$ _____ as advance on costs to the ICC, the Respondent [or the Claimant] is ordered to pay the Claimant [or the Respondent] the amount of US$_____.

103 However, they do not cover the possibility that there may be a set-off, as provided by Article 30(5).

104 Note that the ICC administrative expenses and the arbitrators' fees and expenses are always fixed in US dollars.

105 The reasons will be given elsewhere.

3. Otherwise, each party shall bear its own legal costs and expenses.

4. All other claims relating to costs are dismissed.

Here is a further example where the arbitral tribunal has decided that the costs shall be borne in different proportions between the parties, i.e. 75%/25% in relation to costs other than the parties' legal costs and expenses (for which a specific amount is ordered[106]):

For the reasons given the arbitral tribunal further awards and orders that:

1. The Claimant shall bear 25% of the ICC administrative expenses as well as the Arbitrator's fees and expenses fixed by the ICC International Court of Arbitration at [US$ 100,000], namely [US$ 25,000], and the Respondent shall bear 75% of this amount, namely [US$ 75,000]. As each party has paid US$50,000 as advances on costs to the ICC, the Respondent is ordered to reimburse the Claimant the amount of US$ 25,000.

2. The Respondent shall pay to the Claimant the amount of US$ _____ as a contribution to the Claimant's legal costs and expenses.

3. All other claims relating to costs are dismissed.

In the second example,[107] the arbitral tribunal will have made a reasoned decision elsewhere about the amount of legal costs and expenses which it was satisfied were properly and reasonably incurred.

6.3 Final formalities: place, signing and dating the award

Finally, the award must state the place of the arbitration (using, preferably, the customary form 'Place of Arbitration . . .', rather than 'Done at . . .'). The names of the arbitrators should be given below their signatures. The award must be dated after the Court has approved the draft.

6.4 Correction and interpretation of the award

6.4.1 Occasionally, a request may be made for an award to be corrected or interpreted in accordance with Article 29.[108] On receipt of such a request, the Secretariat will inform the arbitral tribunal and will provide it with a note on the subject prepared by the Court in 1999. The arbitral tribunal will then have to decide whether or not to accede to the request. If it does so, then the document containing the correction or interpretation becomes an addendum to the award, as provided by Article 29(3). Little guidance can be given since the requests cover a variety of circumstances. However, an arbitral tribunal should be cautious about such requests. Some are of course innocuous but others are intended to provide the basis for an attack on the award. Only about half the requests result in an addendum.

6.4.2 In such event, the provisions of Article 27 also apply.[109] The arbitral tribunal must submit to the Court for approval a draft of any decision to correct or to interpret an award and of any decision to reject any request for correction or interpretation.

106 The amount might or might not be the product of a similar apportionment. Provided that adequate reasons are given, the arbitral tribunal is free to reach the decision that it considers just.

107 Note that the claimant will always have paid at least the initial minimum amount of US$ 2,500, so that if the arbitral tribunal allocates liability to it, allowance for amounts paid by it will have to be made.

108 It is very rare for an arbitral tribunal to make a correction on its own initiative.

109 Article 29(3).

7. Awards by consent

7.1 General

When a dispute referred to arbitration under the ICC Rules is resolved by agreement of the parties, it may be in the interests of one or other party that an award recording the agreement be made by the arbitral tribunal. Article 26 enables this to be done. It provides:

> If the parties reach a settlement after the file has been transmitted to the Arbitral Tribunal . . ., the settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and if the Arbitral Tribunal agre to do so.

An award by consent is treated as any other award. It has to be submitted to the Court for approval. Obviously, some of the requirements that have been set out above in the general guidelines will not apply (notably the inclusion of reasons; the statement that the award is made to implement a settlement agreement is sufficient justification for the purposes of Article 25(2)). Otherwise, the award ought to contain the basic data referred to in those guidelines, such as how the dispute arose, the arbitration agreement, the composition of the tribunal, and the general procedural and other history,[110] as well as the background to the settlement (insofar as it is applicable and relevant). If the consent award is approved, then under the New York Convention it may be recognized and enforced like any other final award. If the parties are content with the settlement[111] and do not request an award by consent, they ought nevertheless to inform the arbitral tribunal, which will then formally order the termination of the proceedings. On receiving that order, the Court will bring the matter to an end by making its decision on the costs of the arbitration.

7.2 Conditions for an award by consent

There are two principal prior conditions before a consent award may be made: first, a consent award may only be made if the parties (i.e. all parties affected) make a request; secondly, the arbitral tribunal has to agree. There will generally be little problem about the second condition.[112] The arbitral tribunal will have to be satisfied that every party has requested the award. Silence or apparent acquiescence by a party (e.g. the party liable to make a payment) is not sufficient. In addition, if the request is made before the Terms of Reference have been drawn up, the arbitral tribunal may wish to be satisfied about the authority or competence of a person or party making the request. In addition, in such a case the arbitral tribunal must be satisfied that the parties have waived in writing the requirement to have Terms of Reference drawn up.

7.3 Parties' agreement

Since the parties have made the settlement, then—unless the settlement agreement can easily be made into an award—an arbitral tribunal may wish the parties to draft the consent award or at least to set out its main provisions. An award by consent usually reproduces the operative parts of the settlement agreement, and it will record in the dispositive part the obligations which the parties have agreed to carry out, for example

110 See also section 4 above, including a reference to the Terms of Reference, where they were signed or approved. However, an award by consent may be made even before the Terms of Reference are signed. It is a waste of time and money to prepare Terms of Reference solely for the purposes of a consent award. However, the parties or the award ought to confirm formally that there is no need for Terms of Reference.

111 e.g. where it is self-executing.

112 See, however, section 7.6 below.

the making of a payment, its currency and any interest payable, just like an ordinary award. If the arbitral tribunal agrees to draw up the draft consent award, it may wish, if appropriate, to submit it[113] to the parties for their agreement before submitting it to the Court for approval. The parties' agreement to the form of the award ought to be recorded in the award and the documents evidencing this ought to be sent to the Court. In addition, in accordance with Article 31(3), the award will deal with the costs of the arbitration. It will state what the parties have agreed about their payment or in what proportions they are to be split.[114]

7.4 Further agreement necessary to assist the parties

It is not uncommon for an apparent settlement to unravel or to turn out to be incomplete when the parties are confronted with the need to set out their agreement in a formal document such as an award. Except where the consent award embodies a prior decision of the arbitral tribunal, the arbitral tribunal ought to be careful to see that it only helps the parties to record their agreement (as provided by Article 26). It ought to obtain the further express agreement of the parties if it finds itself doing more and thus no longer acting judicially when assisting the parties to a final resolution of their differences.

7.5 Examination of award by the arbitral tribunal

The arbitral tribunal must notify the parties if it believes that the text submitted to it does not completely cover the agreement which it is being asked to endorse.[115] It ought not to submit to the Court for approval a consent award which leaves matters unresolved that were apparently intended to be resolved. It ought at least first to obtain clarification from the parties. However, scrutiny of this kind may need to be conducted with great care and sensitivity since many settlements are deliberately worded to skirt round such questions and the effect of some settlements may not be fully appreciated by a party. It is not the function of an arbitral tribunal to advise a party about a settlement. Settlements also frequently deal with matters that have not been referred to arbitration or which are the subject of other proceedings. There is no objection to a consent award recording such a settlement agreement, even though it goes beyond the dispute referred. In such event the award must also record clearly that the parties have agreed that the additional matters have been treated as falling within the overall dispute. In this way, problems over enforcement may be avoided or minimized.[116] This can be done in a variety of ways. The parties must decide on the appropriate course.[117] Unless authorized, the arbitral tribunal ought not to involve itself in such a decision, which is beyond its mandate.

7.6 Refusal to make an award by consent

Article 26 does not oblige an arbitral tribunal to make an award but, bearing in mind the obligation in Article 35, the discretion conferred by Article 26 to refuse to make a consent award must be exercised on reasonable grounds. Clearly, it must decline to make a consent award if it reasonably thought that the settlement agreement that was to be recorded in the award was contrary to mandatory law or public policy, or if it was otherwise thought that there were circumstances which would make the award unenforceable in law. There may be other good reasons, such as if the arbitral tribunal considered that the award would be used for a fraudulent or colourable purpose.[118]

113 Assuming that it contains no decisions of the tribunal of which the parties are unaware. If it does (see later) only those parts that rd the settlement agreement or elate to it ought to be submitted.

114 The parties may of course decide to bear their own costs, but in such a case the award must still say what is to be done with the advance.

115 This will apply equally if the settlement is partial only.

116 As noted in the main text of these guidelines, under Article 35 the arbitral tribunal has a duty to 'make every effort to make sure that the Award is enforceable at law'. This applies also to a consent award.

117 Where the additional matter was referable to arbitration it is sometimes possible to invoke Article 19.

118 For example, the arbitral tribunal should never include in a consent award a reference to a document which it has not seen or about whose authenticity or purpose it has doubt. In addition, it should be wary that parties sometimes use a consent award to try to circumvent the consequences of the applicable law.

In the main body of this article guidance is given about the duties of the arbitral tribunal in relation to its jurisdiction, adherence to principles of public policy, and observance of restrictions on the parties' ability to exercise their rights. These points must also be recalled by the arbitral tribunal before acting under Article 26.