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Dispute Settlement

International Commercial Arbitration

5.6 Making the Award and Termination of Proceedings



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NOTE

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WHAT YOU WILL LEARN

The major difference between arbitration and other alternative dispute resolution (ADR) techniques is that arbitration leads to a final and binding decision by the arbitral tribunal in the form of an award that can be executed under the New York Convention. While an award embodies a decision of the arbitral tribunal, not all decisions are awards. In Part I you will learn the difference between decisions that are awards and those that are not.

This module will describe in Part II the various types of awards the tribunal may issue, while Parts III and IV will discuss how they are made and their form and content.

Part V discusses the termination of the arbitration. Issuance of a final award is the most common of the events that terminate an arbitration. The exceptions to that rule are discussed in Part II when discussing additional awards, as well as the correction and interpretation of awards. The arbitration may terminate for other reasons, including the request of the parties to the arbitral tribunal to terminate the proceedings without issuing an award, or by a request of the parties to include their settlement of the dispute in an award. You will learn when the parties might prefer to end the proceedings without an award, and when it is better for them to request the inclusion of a settlement agreed upon in an award.

Arbitral awards often involve matters of general legal interest. Their publication contributes to the development of the law, both of international commercial arbitration and of the substantive law in question. However, publication brings in question the confidentiality of the arbitration. Part VI discusses the reconciliation of these two concerns.

1. DECISIONS AND AWARDS

1.1 Decisions and awards

The award of the arbitral tribunal is the instrument by which the tribunal records its decision in the arbitration. An award is not a mere recommendation. It is a final settlement of the matters contained in it. The award may simply declare the rights of the parties, for example, that the goods delivered in a long-term supply contract conformed to the contract. Such a declaration settles the dispute and permits the parties to continue the contract peacefully. The award may order one of the parties to pay a sum of money to the other party, to perform an act or to refrain from performing an act.

Not all decisions of the arbitral tribunal are awards. The tribunal will make many decisions during the course of the arbitration. Some of them are simply administrative, such as the scheduling of a hearing. Such decisions will normally be in the form of a procedural order. Other decisions are of more significance. A determination as to the seat of the arbitration or the language of the arbitration, if the parties have not made the determination, will normally be labelled as a decision. Yet other decisions may have a determinative effect on the arbitration without being a full and complete settlement of it. It is sometimes unclear whether such decisions should be denominated as “awards” or alternatively as “orders” or “decisions”.

ICC Arbitration Rules, Article 23.1 provides that:

“Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.”

It is important whether a decision of the arbitral tribunal is an award or whether it is some other type of decision. An award takes on a *res judicata* effect. It can be executed if the debtor of the award does not comply voluntarily. If the debtor has assets in one of the 134 countries party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it can be executed in that country under the terms of the Convention. Conversely, the party against whom an award is rendered can commence set aside proceedings, while normally the courts will not entertain any proceedings against other forms of decisions taken by the tribunal except as may occur in regard to the final award.

During the drafting of the UNCITRAL Model Law the importance of the term “award” led the Working Group to attempt to define it.¹ The proposal was that “Award means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.” There was general agreement on the first part of the definition, but serious concerns were expressed about the latter part, in particular the last portion referring to decisions on questions of procedure. In the end no agreement could be reached and the term was left undefined in the Model Law.

Although the ICC Arbitration Rules, Article 23.1, cited above authorize a tribunal to take a conservatory measure either in the form of an order or of an award, in an ICC arbitration there is a significant difference between the two in respect of the procedure that must be followed. An order can be made by the tribunal with no further ado. There is no need to notify anyone other than the parties of the order. However, before the tribunal can issue an award it must submit it to the ICC International Court of Arbitration. According to ICC Arbitration Rules, Article 27, 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.” Because submission of the draft award to the Court for its review delays its issuance, it appears that most conservatory measures ordered by ICC tribunals are in the form of an order. While this deprives the conservatory measure of the possibility of court enforcement in most countries, that is probably of little importance. A conservatory measure is issued while the arbitration is still in progress and few parties would wish to antagonize the tribunal by failing to follow its order.

The UNCITRAL Arbitration Rules and UNCITRAL Model Law also distinguish between the procedure for adopting a procedural decision and adopting an award or other decision. The Model Law in Article 29 provides:

“In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.”

A conservatory measure, even in the form of a decision, would be enforceable under the new Spanish law on arbitration, which provides in its Article 23(2) that “[t]he provisions relating to the setting aside and enforcement of awards shall apply to the arbitral decisions in respect of interim measures, regardless of the form of those measures.”²

¹ Report of the Working Group on International Contract Practices on the work of its seventh session, A/CN.9/246, paras. 192-194.

² Law 60/2003 of 23 December 2003.

In addition to conservatory measures, decisions as to whether the arbitral tribunal has jurisdiction to consider the dispute may also be in the form of an award on that issue or the tribunal may determine that it has jurisdiction but prefer to formalize its decision only in the final award. UNCITRAL Arbitration Rules, Article 21(4) provides:

“In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.”

It will be noticed that the UNCITRAL Arbitration Rules do not say in what form a ruling on jurisdiction as a preliminary question should be given. Since a decision that the tribunal does not have jurisdiction would bring the arbitration to an end, it would always be in an award. That would not necessarily be true of a decision that it does have jurisdiction. The question then arises whether such a decision should be subject to immediate review by a court or whether it should be reviewable by a court only when the court at the place of arbitration reviews the final award in set aside proceedings or when a court is requested to enforce the award. Immediate review raises the possibility that the respondent will appeal to the court simply as a means to delay the arbitration. Waiting until there is a final award raises the possibility that considerable time and money will be expended in an arbitration that the court later decides the arbitral tribunal did not have the jurisdiction to consider.

The UNCITRAL Model Law, Article 16(3) solved the problem without reference as to whether the arbitral tribunal’s decision that it had jurisdiction was in the form of an award or not:

“The arbitral tribunal may rule on a plea [that it does not have jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

The characterization given by the arbitral tribunal to any decision it may make does not bind a court if one of the parties attempts to bring it before a court, either to have it set aside or to have it enforced:

Publicis Communication v. True North “Communications, Inc., 3 F.3d 725 (U.S. 2d Cir., 2000). A joint venture between a French and an American firm had broken down. During the course of the arbitration to settle accounts between them the American firm requested the arbitral tribunal to issue an award ordering the French firm to turn over tax records to the American firm that the American firm said it needed in order to file with the tax authorities and the Securities and Exchange Commission. The tribunal granted the request, but in the form of a procedural order signed by the chairman “for and on behalf of the Arbitrators.” When the American firm sought confirmation of the procedural order as an award under the New York Convention as a precedent to enforcement, the French firm argued that it was a mere procedural order for which enforcement was not available. The trial court and the court of appeals held that the label given by the arbitral tribunal to its order was not binding on the court. Since the order of the arbitral tribunal was a final disposition of an issue that was in dispute, it was an award and could be enforced.

1.2 Summary

Awards constitute a final resolution of the dispute or of an aspect of it. They are subject to control by the courts in set aside proceedings or when the successful party requests a court to enforce it. There is no statutory definition as to what constitutes an award as distinguished from a decision or procedural order. The arbitral tribunal makes many other decisions during the course of the arbitration. As a general proposition, decisions are not subject to the control by the courts. Some decisions, such as a decision by the arbitral tribunal that it has jurisdiction or ordering an interim measure of protection may take the form either of an award or of a decision/procedural order. The characterization of a decision as an award or not is not binding on a court before which it is brought. Some arbitration laws specifically allow a party to seek review or enforcement of such decisions whatever form they may take.

1.3 Test your understanding

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