



Practice Guideline 18: The Formalities for Drafting an Arbitral Award.

1 Introduction

1.1 In order to be effective and enforceable every arbitral award should comply with appropriate formalities, which will vary in accordance with the terms of the relevant arbitration agreement and the applicable procedural law.

1.2 There are a series of common requirements:

The award must generally be in writing

The award must be signed by the Arbitrators

The award must indicate the place and date it was made

The award must contain reasons (apart from in the USA)

2 The Award must generally be in writing

2.1 Most national laws and institutional rules of arbitration require the award to be in writing, including Article 31 of the UNCITRAL Model Law, which has been adopted by Australia, Sweden, Germany and other UNCITRAL countries such as Hong Kong, Singapore and Scotland (for international arbitrations). Article 32.2 of the UNCITRAL Arbitration Rules contains similar requirements.

2.2 Section 52 of the Arbitration Act 1996, applicable to England, Wales and Northern Ireland, gives the parties the right to determine the form of the award but in the absence of specific agreement to the contrary the award must be in writing. This is the approach also adopted in Switzerland under Article 189 of the LDIP.

2.3 The requirement for the award to be in writing also applies in the Netherlands, France (in domestic arbitrations), Italy, the PRC and the UAE. In contrast the US Federal Arbitration Act contains no such requirement, although US state arbitration statutes usually have such a provision. Section 19 of the Revised Uniform Arbitration Act ("RUAA") (adopted widely by US States) assumes the award will be in writing. There are also no formal requirements in domestic cases in Hong Kong or

international arbitrations in France, although good practice would of course dictate that the award should be in writing.

2.4 Institutional Rules such as those of the ICC, LCIA, ICDR International Rules, CIETAC and the Stockholm Chamber of Commerce all contain provisions for the award to be in writing.

2.5 The New York Convention makes indirect reference to the award being in writing by requiring "*the duly authenticated original award or a duly certified copy thereof*" to obtain enforcement (Article IV.1) and it refers to the need for a translation where the award is not made in the official language of the country within which enforcement is sought. This is an obvious reason why in countries where an award does not need to be in writing, it should be presented in this form.

3 The Award must be signed by the Arbitrators

General

3.1 Most national laws and institutional rules require the arbitrators' signatures and as such provide for the eventuality that some arbitrators may refuse to sign.

3.2 Article 31(1) of the UNCITRAL Model Law provides that the signatures of the majority of all the members of the tribunal suffice provided that the reason for any omitted signature is stated. This applies to those countries who have adopted the Model Law as set out in Paragraph 2.1 above. Under Section 31 of the Swedish statute the parties may decide that the chairman of the tribunal alone shall sign the award.

3.3 Article 32.4 of the UNCITRAL Rules also requires that the award be signed and that reasons for absence of any arbitrator's signature be provided.

3.4 The position in England and Wales is slightly less restrictive and Section 52(3) of the Arbitration Act 1996 makes provision for either all the arbitrators to sign the award or only those assenting to it.

3.5 In French international arbitrations there is no requirement that the award must be signed by all the arbitrators. This was confirmed by a decision of the Court of Appeal of Paris of 11 April 2002 in an ICC case (cf *Revue de l'Arbitrage*, 2003 p 143), where the Court relied expressly on Article 25 of the ICC Rules.

3.6 In French domestic arbitrations, Article 1473 of the French Code of Civil Procedure (which may be applied to international arbitrations if the parties have chosen French law as the procedural law and have not agreed otherwise) provides for the award to be signed by all the arbitrators. If, however, a minority refuses to sign it, this fact is to be referred to in the award which will then have the same effect as though it had been signed by all the arbitrators. In international arbitrations governed by French law a failure to observe this will not be fatal to the validity of the award.

3.7 In some countries, provision is made for the award to be valid if signed by a majority of the arbitrators only if the fact of the refusal of a minority to sign is noted in the award. This is the case in Italy (under Article 823 of the Code of Civil Procedure), Belgium (under Article 1701 of the Code Judiciaire) and the Netherlands (under Article 1057 of the Burgerlijke Rechtswordering, where the reference to the refusal must be made beneath the award signed by the arbitrators and must itself be signed by them).

3.8 Under Swiss law, Article 189.2 of the LDIP simply requires a majority to sign or, in the absence of a majority, the chairman alone may sign. However, if an arbitrator acting under the Swiss Rules of International Arbitration of the Swiss Chamber of Commerce fails to sign, the award must state the reasons for his signature being omitted.

3.9 In addition to the requirement that the award be signed, in Scotland the signatures should also be witnessed by two witnesses. In the United States, Section 19(a) of the RUAA provides specifically for the award to be signed "*or otherwise authenticated*" by the arbitrators. This allows for electronic signatures to be used. There are no requirements otherwise for the arbitrator's signature to be witnessed. This is, however, to be encouraged to remove any doubts about signature.

3.10 Under Article 43.6 of the CIETAC Rules, the majority of the arbitrators or the sole arbitrator must sign unless the award is that exclusively of the president of the tribunal (in breaking a deadlock on the panel). On similar lines, Article 26.1 of the LCIA rules provides that the award must be signed by all arbitrators assenting to it. Article 32.4 of the UNCITRAL Rules follows a similar approach expecting the arbitrators to sign but providing for the award to contain any reason given by an arbitrator who has refused to sign. The ICC Rules do not contain a rule requiring the arbitrators to sign the award although it is assumed in Article 27 that they will. At least under the ICC Rules, the absence of a signature will not prove fatal to the award if the law of the place of arbitration permits it.

Dissenting Opinions

3.11 Provided that the award meets the relevant criteria for signature either by the majority arbitrators or, where provided for, the Chairman of the tribunal, most national laws and institutional rules make no specific provision for dissenting opinions. However, under Article 43.5 of the CIETAC Rules any dissenting opinion is to be docketed into the file and may be attached to the award, but does not form any part of the award. Under Article 43.6, any arbitrator giving a dissenting opinion may or may not sign his or her name on the award. Similarly, under Rule 47.3 of the ICSID Rules, an arbitrator may attach his individual opinion to the award, whether he dissents from the majority or not, or simply add a statement of his dissent.

3.12 There are a number of interesting provisions in individual jurisdictions. For example, in Bolivia the Law of Arbitration and Conciliation obliges a dissenting arbitrator to record in writing his reasons for dissent, and if any arbitrator refuses to sign an award the sanction is the loss of his fees, a similar sanction being applied to a dissenting arbitrator who fails to provide written reasons for his dissent. Similarly, under the Columbian Law of Arbitration and Conciliation, there is provision for the forfeiture of the fees owing to any arbitrator who refuses to sign the award, with the dissenting arbitrator having the obligation to provide reasons for his dissent in writing in a separate document.

3.13 In most countries, though, the arbitrator may, but is under no obligation to, append a dissenting opinion. Nor is the tribunal required to include it within or attached to the award. It is a matter for the rules agreed upon by the parties or in the absence of them, the decision of the majority and in the absence of one, the chairman.

4 The Award must indicate the place and date it was made

4.1 Article 31 of the UNCITRAL Model Law requires the place and date the award was made to be stated expressly within the award, as does Article 32 of the UNICTRAL Rules. Under Article 20 of the Model Law the "place" of the award can be chosen by the parties or determined by the tribunal, having regard to the circumstances of the case, including the convenience of the parties.

4.2 Most jurisdictions have the requirement that the award state the place and date that it was made. This is the case in the Netherlands, France (in domestic arbitrations), as well as those countries which have adopted the Model Law.

4.3 Under Section 52 of the Arbitration Act 1996, in the absence of agreement between the parties, both the seat of the arbitration and the date the award is made should be included in the award, although it is not a requirement that the award be signed at the seat of arbitration – Section 53. The requirement that the seat of the arbitration also be set out in the award is found in other countries, for example, Belgium, Italy and the UAE. In some jurisdictions, there is no requirement that the place of the arbitration should be stated: this is the case in the PRC (under Article 54 of the 1994 Arbitration Law) and Switzerland (under Article 189.2 of the LDIP).

4.4 Most institutional rules have similar requirements. The ICDR International Rules (Article 27.3) and the CIETAC Arbitration Rules (Article 43.2) both provide for the award to state the date and place it was made. Article 25.3 of the ICC Rules deems the award to have been made at the place of the arbitration and on the date stated in the award. Article 26.1 of the LCIA Rules provides for the date of the award and the seat of the arbitration to be stated. A similar requirement is to be found in Article 36(2) of the Stockholm Chamber of Commerce Rules.

4.5 The place of the award should be the seat of arbitration. Ideally, the award should be made there to avoid any complications as to where the award was rendered for New York Convention purposes. However, under Section 53 of the English 1996 Act, the award is rendered at the seat regardless of where it was physically signed.

5 Reasons

5.1 Most jurisdictions and institutional rules require the award to contain reasons unless otherwise agreed by the parties or (explicitly in some cases and surely impliedly in most others) the award is merely recording the terms of settlement agreed by the parties. This is the position under Article 31.2 of the UNCITRAL Model Law, Article 32.3 of the UNICTRAL Rules and Section 52(4) of the Arbitration Act 1996. The position is the same in Belgium, the PRC, Switzerland and the UAE.

5.2 There are slightly different provisions in Italy and the Netherlands. In the former, under Article 823(3) of the Code of Civil Procedure only a "brief statement" of the reasons is required. In the latter, under Article 1057(4)(e) of the Burgerlijke Rechtswordering, reasons are required except in relation to a decision regarding the quality or condition of goods or the recording of a settlement between the parties.

5.3 The major institutional rules all require reasons to be given save where agreed between the parties or where the award records a settlement. This is the case under Article 25.2 of the ICC Rules and Article 43.2 of the CIETAC Rules (where the scrutiny by the ICC Court and CIETAC makes the giving of reasons all the more important), Article 27.2 of the ICDR International Rules, Article 26.1 of the LCIA Rules and Article 36.2 of the Stockholm Chamber of Commerce Rules.

5.4 The major exception to this is the US Federal Arbitration Act which does not require reasons to be given although of course it does not prevent them. Traditionally, the explanation for the prevalence of unreasoned awards in England and the US was a desire to avoid subsequent court challenges. Indeed, an agreement not to have a reasoned award in England is tantamount to an agreement excluding the right of appeal on a question of law. In the US, it may be used to avoid a challenge on the basis of manifest disregard of the law.