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Types of Final Arbitration Awards: Why the Choice Matters

Arbitration is a well-accepted form of alternative dispute resolution (ADR) when parties wish to avoid litigation. Although arbitration may be court-ordered, it frequently occurs because the parties have agreed by contract to resolve disputes using arbitration. The parties are free to agree on the powers that the arbitral tribunal (typically either a sole arbitrator or a panel of three arbitrators) may exercise during the proceedings. When parties are drafting a contract and agree upon arbitration to resolve disputes arising under that contract, one of the characteristics of the arbitral proceeding to be defined is the type of final arbitration award that the tribunal will issue. (The related procedure by which the tribunal issues a tentative or draft award to give the parties an opportunity to comment before issuance of the final award is beyond the scope of this article.) Unfortunately, many parties neglect to make a conscious choice about the type of final award they want.

A. What is a final arbitration award?

The award is the determination on the merits (i.e., the decision) by the tribunal in an arbitration. The decision is called an "award" even though all the claims may fail, and thus neither party pays any money, or the award is nonmonetary in nature. The award is almost always, although not necessarily, given to the parties in writing (rather than orally) and is typically just as final and binding as a court judgment. Therefore, the award is critically important; it resolves the dispute.

B. What types of final awards are available?

Broadly, parties may choose among three types of awards:

1. A "standard" award that simply states the decision or announces the result in a conclusory manner and does not provide any insight into or details about how the tribunal viewed the evidence and arguments and applied the law;
2. a "reasoned" award in which the tribunal sets out the bases or reasoning for its decision; and
3. an award that includes detailed findings of fact and conclusions of law (a relatively exacting standard familiar to the courts and lawyers).

The varying types of awards may be considered along a spectrum of increasingly detailed documents, with a standard award requiring the least explanation and findings of fact and conclusions of law requiring the most. The parties may contract to receive from the tribunal one of these three types or any other specific type of award that might be imagined. Silence will result in a standard award. If parties to a contract that includes an arbitration clause wish for a more detailed final arbitral award, they should clearly state in the contract the degree of specificity required.

C. Why does the choice of award type matter?

The type of award may impact the parties in a number of significant ways, and therefore the type of award matters. Arguably, the more detailed the award, the more likely the tribunal will have carefully considered the evidence, arguments and law and issued an

objectively "correct" award. More detailed awards also enable the parties to better understand the award and may give them "ammunition" should they choose to challenge an adverse award in a subsequent court action. On the other hand, more detailed awards often take longer and cost the parties more money. They also risk unwanted court challenges to the award based both on the substantive analysis reflected in the award and on the form of the award itself. Each of these potential impacts is grouped into three factors favoring more detailed awards and three countervailing factors against more detailed awards, as discussed more fully below.

Perhaps the most important factor favoring more detailed awards, at least in the author's experience, is the very practical point that more detailed awards force the tribunal to put pen to paper (or fingers to keyboard). For many writers, including the author, a good sense of what the writer is writing about comes through the actual writing process. The writer might begin with a concept of what will be written (i.e., a certain analysis and outcome), but often that concept changes and molds into a coherent analysis — and sometimes a different outcome — as the author writes. This factor is encompassed by the statement, "That opinion won't write." Whether the author's view is correct may not be all that important, for it is undeniable that parties typically believe that if a tribunal must render a reasoned award or find facts and state conclusions of law, then the tribunal will be more likely to base the award on the evidence presented, coupled with applicable legal principles, and less likely to ignore evidence, arguments or the law.

Another factor favoring more detailed awards may be less important, but warrants mention. More detailed awards enable the parties to better understand the award. Having a better understanding of the award increases the parties' faith and trust in the arbitration process. It is one thing for a party to learn that it has lost a case; it is perhaps a better thing for that party to understand why it has lost.

There is a third, and even less important factor favoring more detailed awards. Some parties might request a reasoned award or an award that contains specific findings of fact and conclusions of law as a "hedge" against an award that rules against them. The losing party might be able to use the substantive details of a more expansive award in a later court proceeding attempting to vacate the award. Thus, by agreeing to have the tribunal issue a more detailed award, the parties may be setting the stage for a later court challenge of the award. (The parties should understand, however, that the courts will usually uphold and enforce an arbitration award because the grounds for vacating an arbitration award are very limited. Absent a "manifest disregard" of the law, courts will not heighten their otherwise deferential review of arbitral awards even if the tribunal were to misapply the law or reach what the court views as an incorrect or even unjust result.)

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On the other hand, several factors counsel against more detailed awards and suggest that parties think twice before they agree to something other than issuance of a standard award. One practical downside of requesting a detailed award is that the tribunal must spend more time drafting the award. A request that the tribunal issue a reasoned award or, worse, provide findings of fact and conclusions of law can significantly increase costs to the parties and can delay the issuance of the final award. The process of drafting detailed awards can be time-consuming, especially in large, complex cases such as the intellectual property cases within the author's experience. For example, when faced with a request for findings of fact and conclusions of law, the tribunal will typically ask each party to submit individually their proposed findings of fact and conclusions of law for the tribunal to consider. The tribunal will then use these submissions as a guide to facilitate deliberations and drafting of the findings of fact and conclusions of law. If the submissions are made after the conclusion of the evidentiary hearing, the tribunal will not officially close the hearing until after the submissions are received. That process will delay the final award because the deadline to issue the award is generally fixed by the date the hearing is officially closed. In short, more details increase costs and take longer to write.

There is also a risk that having a more detailed award will invite a later court challenge to the award by the losing party. More details may give a party more "ammunition" for a request that a court substantively overturns the award as manifestly unjust. Although it may be very unlikely that a reasoned award or an award that contains specific findings of fact and conclusions of law will result in judicial vacatur, a subsequent attempt to vacate the award adds time, significant cost to the arbitration process and threatens the finality of the process. Thus, the third factor favoring more detailed awards for some parties (discussed above) might actually be a negative factor disfavoring such awards for other parties. In other words, this factor can cut both ways, depending on the case and parties.

A third factor disfavoring more detailed awards is that such awards risk unwanted court challenges to the award based on the form of the award itself (as opposed to the substance of the award). The requirement of a more detailed award

increases the risk that a court might vacate the award, or at least remand it to the tribunal, as insufficient to meet the level of detail required by the parties. See, *e.g., Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258 (9th Cir. 1992). In *Jefferies*, the parties had agreed that a statement of findings of fact and conclusions of law would be included in the arbitration award. The final award did not include any findings of fact or conclusions of law. Accordingly, the appellate court held: "By failing to provide Western with findings of fact and conclusions of law, the . . . panel clearly failed to arbitrate the dispute according to the terms of the arbitration agreement. In so doing, the panel exceeded its authority . . . ." *Id.* at 262. The appellate court reversed the district court and vacated the award.

The issue involved in *Smarter Tools, Inc. v. Chongqing SENCI Import & Export Trade Co.*, 2019 U.S. Dist. LEXIS 50633 (S.D.N.Y. Mar. 26, 2019) was whether the arbitral award was sufficiently reasoned. Smarter Tools, Inc. (STI) sought to vacate an arbitration award on the ground that the arbitrator exceeded his authority by failing to provide a reasoned award as requested by the parties. The district court summarized the six-page award, stated the applicable legal standards and denied the motion to vacate, but it remanded the case to the arbitrator so that he could issue a reasoned award in accordance with the parties' agreement. (Of course, this remand is problematic as a matter of arbitral law because the arbitrator is without continued authority once the final award is issued; that problem was apparently not argued to the court.)

According to the court, reasoned awards are not required in arbitration: "If the parties have not requested a specific form of award, the arbitrator may issue an award that does nothing more than 'announce[] the result.'" *Id.* at 6 (citation omitted). The parties are free, however, to contract for a more detailed award, and if they do, they are entitled to receive such an award. A reasoned award "requires 'something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel.' In other words, '[a] reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it' but 'need not delve into every argument made by the parties.'" *Id.* (citations omitted). The district court held that the arbitrator's award did not meet the standard for a reasoned award because the award contained no rationale for rejecting STI's claims.

Despite the *Jefferies* case, and consistent with the *Smarter Tools* case, courts have generally been reluctant to vacate awards challenged on the ground that their form was improper. The case law warrants the conclusion that if the tribunal addresses the issues raised by the parties in some fashion, even if not in excruciating detail, then the tribunal is much less subject to a credible motion to vacate. This conclusion is supported by many cases, including, for example, *Rain CII Carbon, LLC, v. ConocoPhillips Company*, 674 F.3d 469 (5th Cir. 2012). Following an arbitration involving parties to a long-term supply agreement, which resulted in the arbitrator adopting Rain's price formula, ConocoPhillips moved to vacate, and Rain moved to confirm the arbitration award. The Fifth Circuit Court of Appeals affirmed the district court's decision to confirm the award. ConocoPhillips asserted that the arbitrator exceeded his powers by failing to render a reasoned award as requested by the parties. The Fifth Circuit defined a reasoned award with reference to *Sarofim v. Trust Co. of the W.*, 440 F.3d 213, 215 n.1 (5th Cir. 2006) ("[A] reasoned award is something short of findings and conclusions but more than a simple result."). *Id.* at 473. The court then framed the question to be decided: "[I]t is clear that, in eight pages, the arbitrator rendered more than a standard award, which would be a mere announcement of his decision. Thus, the remaining question is whether the arbitrator's award is sufficiently more than a standard award so as to be a reasoned award." *Id.* at 474. The court answered yes to that question, stating, "Given the deference employed when evaluating arbitral awards, and as all doubts implicated by an award must be resolved in favor of the arbitration, the award in this case is sufficient to withstand Conoco's request for vacatur." *Id.* Regardless of the ultimate outcome of a judicial review of the form of the award, the risk of having to endure such a review merits avoidance.

In summary, a more detailed award may delay a final determination of the claims and counterclaims, which will increase the fees of the tribunal and may provide the basis for embroiling the parties in post-award court proceedings. But a more detailed award may also be more likely to reach the "correct" result, will enable the parties to better understand the award, and may give them grounds should they choose to challenge an adverse award in a subsequent court action.

D. Conclusion

On balancing the factors outlined above, many parties who consciously elect a type of award choose a reasoned award as opposed to the default standard type of award or the most detailed "findings-conclusions" type of award. One or more of those factors might prompt parties to elect a different type of award in a particular case, however, and such election should be carefully considered and reflected in the agreement to arbitrate.