

# Writing Awards in International Commercial Arbitrations

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The aspects of an award that are most likely to cause difficulty are the formulation of the declarations, orders or other relief made or granted as the outcome of the arbitral process, and the expression of the reasons for the result.

Before developing these topics, it is convenient to refer to certain formal and structural requirements of an award.

## Formal requirements

Article 31 of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), which is picked up by the *International Arbitration Act 1974* (Cth), deals with the form and contents of an award. It makes only a small number of requirements. The award must be in writing and must be signed by the arbitrator or arbitrators. It must state the reasons on which it is based. It must state its date and the place of arbitration. (The award is deemed to have been made at that place.) After the award is made, a signed copy is to be delivered to each party.

In some foreign jurisdictions there are additional formalities, such as registration of the award.

The practical significance of the place of arbitration is that it will normally identify the jurisdiction to which the arbitration is subject, and the law of the arbitration. Furthermore, the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards turns upon where an award is made.

Article 20 of the Model Law deals with establishing the place of arbitration. Deeming the award to have been made at the stated place of arbitration serves a useful purpose where, as often happens in international arbitrations, there are three arbitrators from different jurisdictions and the award may be signed in three different localities.

## Structural requirements

To an extent, these are dictated by practical considerations related to recognition and enforcement. They also flow, in some respects, from the express obligation to state reasons and the implied necessity to produce a coherent instrument that satisfies the description of an arbitral award.

As to recognition and enforcement, it is the coverage given by the New York Convention that is one of the main reasons parties agree to international arbitration. Many States, including some of Australia's major trading partners, which are reluctant to commit to the enforcement of judgments of foreign courts,

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have bound themselves by international agreement to the enforcement of foreign arbitral awards. This is not the occasion to go into the reasons for that. When an Australian arbitrator is writing an award in an international arbitration there is the prospect that it may need to be enforced in a jurisdiction with a legal culture that is not the same as our own. Internationally accepted standards, even if not essential to the validity of an award, create expectations that should be respected in order to facilitate enforcement.

In the field of international arbitration, arbitral institutions play a role in setting standards for the conduct of arbitrations and the form of awards. If the arbitration in question is an institutional, as distinct from an ad hoc, arbitration, the degree of involvement in the production of the award varies between institutions. The International Chamber of Commerce Court of Arbitration, for example, involves itself closely in the form of the award. Even though an award is not an award of the institution itself, it is not unusual for the rules of an institution to provide that the form of the award requires the approval of the institution. The rules of the Singapore International Arbitration Centre are typical. A draft award must be submitted to the Registrar, and no award shall be made until it has been approved by the Registrar as to its form. The requirements of such institutions reflect, and influence, international practice. This, in turn, creates expectations about what an award will look like. One consequence is that awards of arbitrators tend to be in some respects more formalistic and standardised than judgments of courts.

It needs to be kept in mind that not all arbitrators are lawyers. This may be why it has been felt useful to develop a format which, although not prescriptive and inflexible, provides a precedent available to people of varying backgrounds, which do not necessarily include expertise in drafting legal documents. For example, the ICC has produced a checklist for drafting ICC awards. It is neither mandatory nor exhaustive, but it is a convenient point of reference, and it also facilitates the process of scrutiny that is part of the ICC system.

As a matter of structure the award needs to identify the parties, the dispute, and the member or members of the arbitral tribunal. It should make manifest the jurisdiction of the tribunal. It must state the declarations and/or orders made, or other relief granted by the tribunal, in the exercise of that jurisdiction.

The heading will name the parties and will normally refer to the rules under which the arbitration is taking place. The award should state whether it is a Final Award or Interim or Partial Award. (Where both are apt, I prefer the term 'partial'. 'Interim' may carry a suggestion that there is something provisional about the award).

The identification of the parties in the body of the award (which is accompanied by their addresses and contact details) will reveal whether the arbitration is domestic or international. The award will also identify their representatives (normally their lawyers), and give their contact details.

The identification of the dispute normally commences with an overview, and is developed in the course of explaining the competing arguments as part of the tribunal's reasoning. If the dispute arises out of a contract, then it is usually convenient to begin by describing the nature of the transaction between the parties, setting out the contractual provisions that are of most relevance, explaining in outline the events that gave rise to the dispute, and relating them to the material provisions of the contract.

Often the arbitration agreement will be contained in the principal contract. Whether that is so, or whether

it is in a separate agreement, the award should set it out, verbatim. Sometimes the rules of the arbitration are specified in the arbitration agreement. Sometimes they are agreed upon separately. However that may be, the award should also refer to the rules of arbitration.

Having given an outline of the relations between the parties and the contractual provisions governing that relationship, and having referred in particular to their arbitration agreement, the award may then become more particular about the dispute in order to relate it to the arbitration agreement. This may involve reference to a notice of dispute or arbitration, or a series of claims or demands, and the responses to those, culminating in the constitution of an arbitral tribunal.

In manifesting the jurisdiction of the tribunal, the objective is to demonstrate the relationship between the dispute, the arbitration agreement, the tribunal, the arbitral process that has been undertaken, and the outcome of that process. One of the reasons this is a useful exercise is that it may alert the tribunal, and the parties, to any possible jurisdictional difficulties that may need to be dealt with. Arbitration is a notable exception to the general rule that jurisdiction cannot be conferred by consent. The exception is not complete, because not all forms of possible dispute are arbitrable. Subject to that qualification, the jurisdiction of an arbitral tribunal is founded upon consent, although often reinforced by legislation, and many jurisdictional problems can be overcome by agreement between the parties. The process of drafting an award may expose the need for such agreement. For that reason I would recommend that a tribunal commence preparing a draft of the uncontroversial parts of an award in advance of the hearing. It may help to identify procedural or jurisdictional matters that need to be attended to. At least one of the parties is likely to lose its appetite for agreement after the award has been made.

The introductory account of the nature of the dispute, including a reference to the material contractual provisions and an outline of the facts and circumstances resulting in disagreement between the parties, should be given in a way that is sufficient to demonstrate that the dispute falls within the scope of the arbitration agreement.

The award should recount the process by which the arbitral tribunal came to be constituted and given jurisdiction to resolve the dispute.

Many arbitration agreements in modern commerce are part of a wider contractual dispute resolution scheme. For example, the contract may provide for a process of consultation between senior management of the parties, or attempted mediation, as a preliminary step. In such a case the award will refer to what has occurred in that respect, usually in a brief and general way, in order to show that the arbitration process has been properly invoked.

Similarly, the steps taken to constitute the arbitral tribunal will be set out. Typically in the case of a three-member tribunal, these will involve an appointment of one arbitrator by each party and the selection of a third (and usually presiding) arbitrator by the process specified in the arbitration agreement or the rules of arbitration. Again, the purpose is to enable a reader (such as a judge called upon to enforce the award) to see how the people who made the award came to have the authority to do so.

It is usual to set out the procedural history of the arbitration. This is likely to include references to preliminary conferences and procedural directions, exchanges of documents intended to define the issues

(such as a Statement of Claim, a Defence and Counterclaim, and perhaps a Defence to a Counterclaim, or a Memorial and Counter-Memorial), exchanges of witness statements, document production, oral hearing, and, perhaps, post-hearing exchanges.

The award will then go on to elaborate and refine the questions which the tribunal is asked to decide. The issues raised by a Claim or Counterclaim may be explained, first by reference to the formal documents (in the nature of pleadings) exchanged by the parties, then by reference to the evidence and arguments on either side. This is also part of the process of giving reasons, and is a matter to which I shall return.

Identifying the issues that require decision may or may not be straightforward. It may depend not only upon the nature of the dispute but also upon the level of assistance which the tribunal receives from the parties and their lawyers. An important part of the task of the tribunal, to which it should be alert at all stages from the commencement of the process, is to satisfy itself that it has a sufficiently clear understanding of the issues in dispute. This may require interaction between the tribunal and the lawyers before, during, and perhaps even after, the hearing.

Arbitral rules sometimes contain a provision for a formal announcement by the tribunal which closes the proceedings. A time for delivery of the award may be fixed by reference to that announcement. One reason for that procedure is to fix a cut-off date after which the parties may not put forward further material. Another reason is to give the tribunal an opportunity, before it is committed to a time for finalising the award, to satisfy itself that it has a clear picture of what has to be decided.

Unless there is a sole arbitrator, the principal responsibility for drafting an award is usually undertaken by the presiding member of the tribunal. Before the arbitrators return from the place of the hearing to their respective home jurisdictions, they will have conferred and probably reached a general understanding on the likely result, but the process of drafting may throw up further matters for consideration. The writing of the award is intimately connected with the conduct of the hearing. The arbitrators should use the hearing as their best opportunity to clarify the matters of fact and law they need to decide. This may involve some questioning of the lawyers. It may even involve requiring the lawyers to agree, or at least comment on, a set of questions framed by the arbitrators. Although the drafting of the reasons for an award may take place weeks, or even months, after the hearing, the tribunal should regard the conduct of the hearing as part of the process of preparing the award, and not merely as an occasion for paying polite attention to what the lawyers want to say. Clarification of issues is not always to the advantage of both parties, and achieving it may require some active engagement on the part of the tribunal.

Formulating or elaborating the issues may require discussion of legal principle, evidence, and the competing arguments of the parties. How this is done as a matter of form varies with personal preference and writing style. How it is done as a matter of substance is related to the obligation to give reasons, dealt with below.

As to form, an award in a commercial arbitration, whether domestic or international, should be direct and businesslike. Extensive quotation of evidence or legal authority is normally unnecessary and out of place.

Following a statement of the issues, the material evidence, and the arguments of the parties, the award will state, and explain, the findings of the tribunal on material questions of fact, and the principles of law to be applied, including, if there are material questions of law in dispute, the reasoning of the tribunal on those issues. The issues may include questions as to the nature and form of other relief to which a party is entitled.

Two matters that may need to be dealt with are interest and costs. I will return to these when dealing with matters of substance.

The award will then conclude with a formal statement that ‘For these reasons’ the tribunal awards, orders, declares and directs in the manner then set out.

In brief, the structure of the award is likely to cover the following topics:

- The Parties and their representatives.
- The Contract and the Arbitration Agreement.
- An Overview of the Dispute.
- The Arbitral Tribunal.
- Procedural History.
- The Issues raised in respect of the Claim (and any Counterclaim).
- Relevant Contractual Provisions.
- Relevant Background or Contextual Matters.
- Summary of the Arguments of the Parties.
- Evidence and Findings on Factual Issues.
- Legal Issues.
- Conclusions on Substantive Issues.
- Claims and Arguments on Relief.
- Interest.
- Costs.
- Disposition.

## **Reasons**

An arbitral award creates no binding precedent and is normally not published. In the context of international arbitration, the possibility of review of the merits of a decision by a process like a judicial appeal is restricted, in the interests of finality. Even so, the Model Law requires that an arbitral award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. This is intended primarily to serve the purposes of promoting good decision-making and informing the parties as to how the outcome of the arbitral process was reached.

The legal requirement is for the award to ‘state the reasons on which it is based’. In a well-known passage,

Donaldson LJ said:

*All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. (Bremer Handelsgesellschaft mbH v Westzucker GmbH [No.2]).<sup>2</sup>*

The topic was discussed by the High Court of Australia in *Westport Insurance Corporation v Gordian Runoff Ltd.*<sup>3</sup> Obviously, what is required depends upon the nature of the dispute and the circumstances of the case. A succinct account of what happened in a dispute about alleged breaches of time provisions in a charterparty may occupy four or five pages whereas a succinct account of what happened in a dispute about a breach of a contract for the design and construction of an industrial facility may occupy 40 or 50 pages.

A useful way of indicating what is **not** required is to note some of the differences between an arbitral award and a judgment of a court. The differences may vary according to the level in the judicial hierarchy at which a judgment is given.

Commercial arbitration is a form of private dispute resolution founded upon the consent of the parties. The theoretical basis was recently considered by the High Court of Australia in *TCL Air Conditioners (Zhongshan) Co. Ltd. v Judges of the Federal Court of Australia.*<sup>4</sup> The legal effect of the parties' agreement to arbitrate is that the award, which is the outcome of the arbitral process, becomes the future source of their rights and obligations. The process is usually confidential. The award is normally not intended to be made public.

Judges exercise the judicial power of government. By the exercise of that power a judge's order is imposed upon the parties. It is a legal principle that, save in exceptional circumstances, such power should be exercised in public. The reasons for judgment of a court are for the information of the public as well as the parties. What is sufficient to provide a complete explanation to the parties to an arbitration of why a certain outcome was reached may be very different from what is necessary to explain to a stranger to the proceedings, with no understanding of the industry in question, and no access to the record, what the case was about and how the final decision was arrived at. It is not necessary for a reasoned award to attempt the second task, although it is the sort of thing a judge may feel obliged to do in some court cases.

Because of the significance of precedent, judgments of a court may serve the purpose of clarifying, or developing, or, on occasion, altering the law. Arbitral awards serve no such purpose. They do not create precedents, and because they are almost always intended to remain private, they have no educational function.

Judgments of all courts except courts of final resort are routinely subject to appellate review. Appeals are commonly by way of rehearing (although that term does not mean exactly what it says), and appellate

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2 [1981] 2 Lloyds Rep. 130, 132-133.

3 2011] HCA 37, [49]-[55].

4 [2013] HCA 5.

courts have extensive powers of substituting new relief for that granted by a primary judge. Trial judges are exhorted by appeal courts to make findings on matters which may not be necessary for the original decision in order to facilitate the possible substitution of different relief and to avoid the necessity of remitting the case for a further hearing at first instance.

An award in an international commercial arbitration is intended to be final, subject to the relatively limited grounds for recourse set out in the Model Law and in applicable legislation.

A statement of the reasons on which an award is based does not require findings about, or discussion of, factual or legal issues that are not relevant to the basis for the award. If, for example, the tribunal considers a particular argument advanced by one party to be decisive, while the tribunal must deal with all the arguments advanced by the other party as to why that is not so, it does not need to deal with different or alternative reasons advanced by the successful party for reaching the same conclusion. Nor does the tribunal need to make findings of fact or express conclusions of law about matters which are not material to the basis upon which it decides an award should be made. Of course, the tribunal may need to make findings of fact or express conclusions of law in order to explain why it is rejecting an argument against the course it intends to adopt. In short, the tribunal must cover all the arguments advanced by the losing party in opposition to the relief it grants but it may not need to cover all the arguments advanced by the successful party in support of such relief.

There may be some questions of fact or law which, however the case is regarded, must be resolved in order to justify the course which the tribunal has taken. The award must explain, succinctly, what those questions are, how they were resolved, and why.

Some matters that may be of particular significance in the context of giving reasons are as follows:

**(a) Governing law**

The provision dealing with the governing law will be one of the material contractual provisions to be set out. The governing law may very well be different from the law of the place of arbitration. (I expect that, of the arbitrations dealt with at the Singapore International Arbitration Centre, many and perhaps most would concern contracts whose governing law was that of some other place). This may affect, among other things, questions as to the relevance (and therefore admissibility) of evidence. For example, the principles relating to contractual interpretation, and the relevance of evidence of pre-contractual negotiations, vary between common law and civil law jurisdictions. Even within Australia that question may be affected by the application of *The United Nations Convention on Contracts for the International Sale of Goods* (the Vienna Sales Convention) which has been ratified by Australia, and which establishes principles of contractual construction that are not the same as those of the common law. In some Australian export industries, frequently used forms of contract exclude the application of that Convention, but it is a simple example of the need to pay attention to the governing law.

**(b) Pitch**

A characteristic of an effective advocate, and good drafter of legal reasons (whether in the form of an opinion, or an award, or a judgment) is the capacity to express arguments, and propositions of fact and law, at what I would describe as an appropriate pitch.

The facts of a case are almost always capable of being stated at different degrees of generality. In former times this was reflected in the difference between pleadings, particulars and evidence. The statement: ‘The defendant drove his car negligently and in consequence injured the plaintiff’ is an averment at the highest level of generality. It is similar to what would have appeared in the plaintiff’s declaration in a pre-Judicature Act proceeding in tort for negligence. An assertion that the defendant was driving at an excessive speed and without keeping a proper lookout, and that the defendant’s car ran into the plaintiff and broke the plaintiff’s leg, gives particulars of the averment. The statements of witnesses to the collision describing how fast the defendant was driving when the accident occurred, and of a medical practitioner who examined the plaintiff, are evidence of the allegation. A legal argument, or opinion, or decision, may move between these three levels (pleadings, particulars and evidence) as necessary, but an understanding of the difference, and of which is appropriate in a particular context, is the key to clearly expressed reasoning.

Whether an award is dealing with facts, or with legal propositions, it should do so at the appropriate pitch. In some contexts, excessive detail, or particularity, may obscure reasoning. Just as patriotism has been said to be the last resort of a certain class, unnecessary factual detail or legal complexity is often the last resort of the advocate with a weak case. A sense of when elaboration is necessary, and when it is to be avoided, is an important quality in legal opinions and decisions, including arbitral awards.

### **(c) Evidence and Findings of Fact**

The ICC Rules of Arbitration refer to an obligation of the tribunal ‘to establish the facts of the case by all appropriate means’. The IBA Rules on the Taking of Evidence in International Arbitrations provide that the tribunal ‘shall determine the admissibility, relevance, materiality and weight of evidence’. The SIAC Rules contain a provision to like effect, and add that ‘[e]vidence need not be admissible in law’.

If questions arise in the arbitration as to the admissibility of evidence then the tribunal may need to consider the principles that govern the resolution of such questions. This will be a matter for argument between the parties. Even if the common law rules as to admissibility of evidence do not apply, it is worthwhile bearing in mind the basic rule, which is that if evidence is irrelevant it is inadmissible. Relevant evidence may also be inadmissible by reason of the application of some exclusionary rule, but the starting point is that the only information that will be received as evidence is that which is relevant to an issue in the case. The decision-maker must have an appreciation of how the information tendered as evidence will, or may, bear upon a process of reasoning involved in the resolution of the dispute. In the far-distant times when most civil actions were tried before a jury, a trial judge who was invited to receive evidence had to consider how he or she was going to explain to the jurors the way in which they might properly take account of the evidence in reaching their decision. That was a useful discipline. Some of the length and complexity of modern litigation is the result of procedural changes that have made it unnecessary. Evidence is often received on the basis that the decision-maker will hear argument later as to its relevance. That may be convenient, but when it comes to writing an award an arbitral tribunal will have to form a view as to the relevance of the information it has been given.

The award should state the material facts found by the tribunal and, where such facts are in dispute, explain, by reference to the evidence, why such facts have been found. If some of the evidence is found to be irrelevant, the tribunal should say so and indicate why. On occasion, assessing the evidence may



require findings about the credibility of a witness. It is generally inappropriate to make adverse findings about the credibility of a witness unless they are material to the outcome.

In commercial arbitrations, as in commercial litigation, it is common for a tribunal to be provided with extensive documentation including pre-contract exchanges between the parties. Ultimately the tribunal will have to indicate what, if any, part this played in its decision-making process. This may be capable of being dealt with briefly. Sometimes the best way to do this is to state in a summary from the relevant principles of contractual interpretation, which may in themselves be sufficient to demonstrate the irrelevance of some of the material relied on. In some cases, for example, a brief explanation of the common law's objective approach to contractual interpretation will serve to demonstrate why subjective material is not of assistance.

#### **(d) Legal argument and authorities**

The award should state the legal principles relied on in support of its conclusion and, in so doing, it may be necessary to explain why legal arguments of the losing party have been rejected. It is the tribunal's reasons for its decision that must appear; not its doubts, hesitations or speculations. An arbitral tribunal does not set out to refine, or develop, let alone change the law. Of course, there may be occasions when the law to be applied is uncertain, and the tribunal may have to do its best to resolve for itself the uncertainty but, for the reasons earlier given, this is different from some of the functions that judges are called upon to perform.

#### **(e) Expert witnesses**

The proper function of expert witnesses is to express opinions, upon the basis of assumed facts, as to matters within their field of expertise. Sometimes witnesses go further than that. In such a case the tribunal's award may need to explain what use, if any, has been made of the evidence. As with other evidence, the tribunal may come to the view that some (or all) of the expert evidence in a case does not touch the question that the tribunal regards as decisive. Conflicts between relevant and legitimate statements of expert opinion will need to be resolved by stating which has been preferred and why.

#### **(f) Assistance from counsel**

Arbitrators are entitled to be reasonably demanding in the level of assistance they seek from the parties and their lawyers. For example, in a case where the issues are complex, it may be useful for the tribunal, during or following the hearing, to frame a draft of the issues as they appear to the tribunal and invite the comment of counsel. It will often be useful to make a list of what the tribunal regards as matters, including formal matters, on which the parties appear to be agreed, and invite confirmation on the record.

### **Relief**

The relief to be awarded to a successful claimant or counterclaimant, which might be an award of damages, or an order for payment of a liquidated sum, or a declaration, or an injunction, or some other form of relief, may or may not be contentious. If it is, then the reasons for the award will need to deal with the evidence, legal principles, and arguments on that topic also. Some potentially significant matters are:

### **(a) Currency of the award**

An award of a liquidated sum pursuant to a contract, or of damages for breach of contract, will normally be made in the currency of the contract, and this is a matter on which, if there is disagreement, the parties will have made submissions.

### **(b) Separating issues**

An agreement of the parties to separate issues of liability and quantification of damages is often a reason for there to be a Partial Award to be followed by a Final Award. This is sometimes a convenient course, but I would offer one warning. Before accepting such a separation of issues, the tribunal needs to be satisfied that nothing in the evidence contemplated for the second stage will bear upon the questions to be decided in the first stage.

### **(c) Jurisdiction**

The jurisdiction to grant certain forms of relief may be straightforward, but in other cases it may be necessary to consult the law of the arbitration. For example, section 12 of the Singapore International Arbitration Act provides that a tribunal may make or award any remedy or relief that could be ordered by the Singapore Court.

The Model Law contains a Chapter dealing with Interim Measures which include, for example, orders to maintain the status quo pending determination of a dispute or orders to preserve assets out of which a subsequent award may be satisfied.

Some forms of claimed relief may raise questions of arbitrability. For example, depending upon the governing law of a contract there may be legislation that applies to the dealings between the parties, but the powers of a court to provide remedies in the event of contraventions of the legislation may not necessarily be co-extensive with those of an arbitrator engaged in private dispute resolution.

### **(d) Interest**

A claim for an order for payment of a liquidated sum will normally be accompanied by a claim for interest, and a claim for damages may also involve interest.

The tribunal will need to consider the basis of its jurisdiction to award interest. Rates of interest may be affected by the currency of the contract and the award. It may be that a contractual provision will govern the rights of the successful party up until payment of the amount claimed.

Statutes and rules dealing with a tribunal's power to award interest commonly distinguish between interest up to the date of the award and interest from then until time of payment. One reason for this is that, if a particular legal system assimilates the enforcement of an award to the enforcement of judgments, its regime for interest on unpaid judgments may need to be taken into account. The policy considerations that affect the fixing of rates of interest on judgment debts in some jurisdictions mean that they are not always in line with commercial rates of interest. Sections 25 and 26 of the *International Arbitration Act 1974* (Cth) deal with interest up to the making of an award and interest on a debt under an award.

In order to avoid the obvious risks involved in making its own calculation it is prudent for a tribunal to

seek agreement from the parties as to an amount or formula to be reflected in the award. This should form part of the draft disposition referred to below. I would add that the same recommendation applies to any aspect of the relief requiring calculation.

### (e) Costs

In Australia, the United Kingdom, Singapore, Hong Kong, and some (but not all) other common law jurisdictions it is normal for a court, or an arbitral tribunal, to have a discretionary power to award costs. Such discretion is to be exercised judicially, in accordance with certain broad principles, the first of which is that, in general, costs follow the event. Costs are awarded, not to penalize the losing party, but to indemnify the successful party for the expense of vindicating its legal rights. In many cases, neither party may have enjoyed complete success. Identifying ‘the event’ is not always easy where there are multiple issues. A just exercise of the tribunal’s discretion may be a matter of some complexity. Sometimes arbitral rules make provision for argument and the decision about costs to follow the making of an interim or partial award which deals with the other issues, so that the parties may make their submissions in the light of the outcome on the merits. Sometimes the competing possibilities as to the outcome on the merits are clear and the parties have no difficulty in making their costs submissions at the same time as their other arguments. Within the scope provided by any applicable legislation or rules the procedure can be tailored to suit the individual case.

Section 27 of the *International Arbitration Act 1974* (Cth) deals with costs. It empowers a tribunal to make an award as to costs and also to tax or settle the amount of costs to be paid and to award costs as between party and party or solicitor and client. The language of this provision is similar to that of older State statutes dealing with domestic arbitration. Its references to taxing costs on a party and party or solicitor and client basis are somewhat outmoded, in terms of current practice in international arbitration, although it may be noted that these are expressed as powers.

Rules 31, 32 and 33 of the SIAC Rules, and Article 31 of the ICC Rules, insofar as they relate to the legal and other costs incurred by the parties, are expressed in broad and flexible terms. (In those institutional arbitrations the fees and expenses of the arbitrators are fixed by the institutions, whereas in an ad hoc arbitration they are matters for agreement between the parties and the arbitrators).

An award of an amount of legal costs and expenses will normally be governed by considerations of reasonableness. The parties may provide information and argument to the tribunal to enable it to form a judgment on this matter. Often this is done by requiring both parties, before they know the result, to inform the tribunal of the legal costs and expenses that have actually been incurred, and inviting comment. The theory upon which this proceeds was expressed by Judge Holtzmann, in *Sylvania Technical Systems Inc. v Islamic Republic of Iran*<sup>5</sup> as follows:

*A test of reasonableness is not, however, an invitation to mere subjectivity. Objective tests of reasonableness of lawyers’ fees are well known. Such tests typically assign weight primarily to the time spent and complexity of the case. In modern practice, the amount of time required to be spent is often a gauge of the extent of the complexities involved. Where the Tribunal is presented with copies of bills for services, or other appropriate*

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5 (1985) 8 Iran US CTR 39, 332-333.

*evidence, including the time spent, the hourly billing rate, and a general description of the professional services rendered, its task need be neither onerous nor mysterious. The rate of typical hourly billing rates is generally known and, as evidence before the Tribunal in various cases including this one indicates, it does not greatly differ between the US and countries of Western Europe, where both claimants and respondents typically hire their outside counsel. Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and preparation. While legal fees are not to be calculated on the basis of the pounds of paper involved, the Tribunal by the end of a case is able to have a fair idea, on the basis of the submissions made by both sides, of the approximate extent of the effort that was reasonably required. Nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. That is a classic test of reasonableness.*

That approach seems to me better to reflect the legitimate expectations of parties to international commercial arbitration, and their lawyers, than references to taxing costs on a party and party or solicitor and client basis. However, so far as I am aware it has not been considered by an Australian court. A reconsideration of section 27 of the Australian Act, with a view to expressing it in broader and more flexible terms, in line with the institutional rules earlier mentioned, may be worthwhile.

Although I personally have not seen this done, arbitral rules may empower a tribunal to engage experts, and it may be that this is a course that is open to resolve complex costs questions.

#### **(f) Draft dispositive clauses**

In cases where there is any complexity about the form of relief to be granted, a party claiming relief should be required to provide, by no later than the end of the hearing, a draft of the dispositive award, declarations, orders or other relief sought and the opposing party should be required to provide any comments it wishes to make. The level of assistance likely to be received from the representatives of parties may not be uniform, but this is the least they can be expected to do.