



## Decisions of the Arbitral Tribunal

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# Outline

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# I. Introduction

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- An arbitrator's primary role is to issue a decision.
- Arbitrators issue a variety of decisions throughout the course of an arbitration:
  - Decisions ruling on questions of procedure;
  - Decisions ruling on the substance, known as awards; and
  - Decisions dictated by urgency.

## II. Types of Decisions Issued by Arbitral Tribunals

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### A. Arbitrators' Decisions of Procedural Nature: Procedural Orders

- **Arbitral tribunals enjoy full discretion to determine the arbitral procedure where the parties do not have an agreement.**
- **Article 22(2) of the ICC Rules**  
"In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."
- **Article 21(1) of the 2014 Ljubljana Arbitration Rules**  
"The tribunal shall conduct proceedings in accordance with these Rules, the agreement reached by the parties and as it deems appropriate..."
- **Any decision pertaining to questions of procedure arising during the course of the arbitration will be made in the form of a procedural order.**

## II. Types of Decisions Issued by Arbitral Tribunals (cont'd)

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- **Procedural orders typically cover:**
  - (i) administrative or logistical matters;
  - (ii) scheduling of hearings or submissions; and/or
  - (iii) Communication, disclosure or discovery issues.
  
- **Procedural orders are made:**
  - (i) upon the parties' requests; or
  - (ii) on the arbitral tribunal's own initiative.
  
- **Arbitrators can issue as many procedural orders as needed. Generally, procedural orders are numbered sequentially (PO No. 1, PO No. 2, etc.).**

## II. Types of Decisions Issued by Arbitral Tribunals (cont'd)

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- **Procedural orders should be distinguished from arbitral awards:**
  - Generally, procedural decisions do not require a majority vote and can be decided by the chairman alone, after consultation with his co-arbitrators if he deems so appropriate.
  - Procedural orders deal with purely procedural and administrative considerations, where awards deal with substance.
  - For the most part, procedural orders are not subject to annulment, recognition or enforcement.
  - Procedural orders are not subject to institutional review.
  - Generally, procedural orders are also not subject to the same formal and substantive requirements to which awards are subjected.

## II. Types of Decisions Issued by Arbitral Tribunals (cont'd)

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### B. Arbitral Tribunals' Decisions of Substantive Nature: Awards

#### 1. What types of awards?

- *Final awards*
  - Decisions generally resolving all or the remaining part of the dispute, with a preclusive effect.
  - In most international arbitration conventions and national arbitration statutes, “final” awards refer to decisions that have achieved a sufficient degree of finality in the arbitral seat (e.g. through confirmation or exequatur) or that are no longer subject to appeal or annulment.
- *Partial (final) awards*
  - Decisions finally disposing of part of the parties' substantive claims.

## II. Types of Decisions Issued by Arbitral Tribunals (cont'd)

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- *Interim awards*
  - Decisions on issues (not claims) such as jurisdiction or applicable law. Interim awards do not finally dispose of the claim.
  
- *Consent awards*
  - Decisions recording the parties' agreement to end the arbitration without a decision from the arbitral tribunal.
  
- *Default awards*
  - Decision where one party failed to participate in the proceedings.



## II. Types of Decisions Issued by Arbitral Tribunals (cont'd)

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### 2. What types of reliefs?

- International arbitrators are bound by the prayers for relief set forth by the parties.
- The remedies covered by arbitral awards are e.g. as follows:
  - Monetary compensation;
  - Punitive damages and other penalties;
  - Specific performance and restitution;
  - Injunctions;
  - Declaratory relief;
  - Rectification;
  - Adaptation of contracts and filling gaps;
  - Interest; and
  - Costs.

## II. Types of Decisions Issued by Arbitral Tribunals (cont'd)

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### 3. Validity of the Award

- To be valid, awards must conform with:
  - the parties' agreement;
  - the chosen rules; and
  - the applicable law.
- Awards must also meet a number of formalities, which may vary depending on the applicable rules. E.g., under Article 41 of the 2014 Ljubljana Arbitration Rules, awards must essentially be:
  - In writing;
  - Final and binding;
  - Signed by the arbitrators (and if one arbitrator's signature is missing, reason must be stated);
  - Dated, and seat of arbitration named; and
  - Communicated to both parties (by the Secretariat).

## II. Types of Decisions Issued by Arbitral Tribunals (cont'd)

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- **Should the award contain a reasoning?**
  - **It is a nearly universal principle that arbitral awards should :**
    - (i) State the reasons for the tribunal's decision; and**
    - (ii) Contain a dispositive section specifying the relief ordered by the tribunal.**
  - E.g. Article 31(1) of the 2012 ICC Rules: "The award shall state the reasons upon which it is based."**
  - Note Article 41(1) of the 2014 Ljubljana Arbitration Rules which provides that:**
    - "... The tribunal shall state the reasons upon which the arbitral award is based, unless the parties have agreed that the arbitral award does not have to be reasoned."**
- **Communication of the award**
  - **Having the award communicated to the parties is essential. Parties could not be bound by or challenge an award that was not communicated to them.**
  - **Most arbitration legislation provides for requirements for delivery, notification and/or service.**

## II. Types of Decisions Issued by Arbitral Tribunals (cont'd)

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### **C. Arbitrators' Decisions Dictated by Urgency: Interim Measures and Emergency Arbitrators**

#### 1. Interim Measures

- Most laws and conventions authorize arbitral tribunals to grant temporary reliefs to protect a party's rights pending resolution of the dispute.

**Article 28(1) of the ICC Rules: "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."**

**Article 25(1) of the LCIA Rules: "The Arbitral Tribunal shall have the power, unless agreed by the parties in writing, on the application of any party..."**

**Article 17 of the UNCITRAL Model Law: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."**

**Article 37(1) of the 2014 Ljubljana Arbitration Rules: "The tribunal may, at the request of a party, grant any interim measure it considers necessary. The tribunal may impose the provision of an appropriate security from the parties in connection with the requested interim measure."**

## II. Types of Decisions Issued by Arbitral Tribunals (cont'd)

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- Tribunals generally have a wide discretion in determining the appropriate measures. The various types of measures can be categorized as follows:
  - Orders preserving status quo;
  - Orders requiring specific performance;
  - Orders requiring security for underlying claims;
  - Orders requiring security for legal costs;
  - Orders for preservation or inspection of property;
  - Enforcement of confidentiality obligations;
  - Orders for interim payment; or
  - Antisuit orders.

## II. Types of Decisions Issued by Arbitral Tribunals (cont'd)

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### 2. The new ICC / Ljubljana Arbitration Rules “Emergency Arbitrator” procedure

- Article 29(1) of the ICC Rules:

“A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (‘Emergency Measures’) may take an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. [...]”

- Article 29(2) of the ICC Rules:

“The emergency arbitrator’s decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.”

- Article 38(1) of the 2014 Ljubljana Arbitration Rules:

“When a party requires an emergency interim measure that cannot wait for the constitution of the tribunal, they may request emergency arbitrator proceedings that are provided for in Annex III.”

- Article 38(2) of the 2014 Ljubljana Arbitration Rules:

“The Rules on Emergency Arbitrator Proceedings shall not apply if the parties agree on the exclusion of the application of Annex III.”

### III. The Decision-Making Process

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#### A. The Majority Rule

- **A generally accepted rule: decisions should be made by a majority of arbitrators, i.e. unanimity is not required.**
  - Almost all developed arbitration legislation permits awards to be made by a majority of the arbitrators:
    - Article 31(1) of the 2012 ICC Rules: "When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone."
    - Article 40(1) of the 2014 Ljubljana Arbitration Rules: "When the tribunal is composed of more than one arbitrator, it shall make the arbitral award or decision with a majority of the votes of its members. If a majority of the votes cannot be achieved, the arbitral award or decision shall be made by the Chairman of the tribunal."
- **Most arbitration laws provide that the parties can agree otherwise, e.g. require that unanimity be reached, but in practice this seldom occurs.**

### III. The Decision-Making Process (cont'd)

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- **What happens when majority cannot be reached?**

- Most rules will allow the president of the arbitral tribunal to decide alone to avoid blockage.

See e.g. Article 31(1) of the 2012 ICC Rules or Article 40(1) of the 2014 Ljubljana Arbitration Rules.

- **Dissenting opinions**

- The fact that an arbitrator signed the award does not necessarily mean that he approves the award, but merely confirms that the arbitrator took part in the deliberations.
- Most arbitration legislation is silent on the subject of dissenting opinions. But in some countries (e.g. UAE), dissenting opinions must be attached to the final award for it to be valid.

- **Is a decision made by a truncated tribunal valid?**

- If not all the arbitrators sign an award, some arbitration legislation provides that an award may be made by less than all members of the arbitral tribunal, but this is not a generally agreed principle.
- In these circumstances, arbitrators should be attentive to any relevant provisions of law that might mandatorily apply at the place of arbitration.



### III. The Decision-Making Process (cont'd)

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#### B. Deliberations (Communications within the Arbitral Tribunal)

- There is no general principle with regard to deliberations but it is commonly admitted that awards should be preceded by deliberations among all of the arbitrators.
- How, where, should arbitrators deliberate?
  - Institutional rules do not specify the form of the deliberation (meeting, telephone/video conference, exchange of emails, etc.) but the drafting of some provisions suggests that the deliberation should take place face to face.

Article 18(3) of the ICC Rules: “The arbitral tribunal may deliberate at any location it considers appropriate.”

Article 16(2) of the LCIA Rules: “The Arbitral Tribunal may hold hearings, meetings and deliberations at any convenient geographical place of its discretion.”

- Failure to participate in the deliberations can lead to the eviction of an arbitrator.

### III. The Decision-Making Process (cont'd)

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- How long may the arbitral tribunal deliberate?

- Most national arbitration legislation contains no provision regarding the time limits for making an award.
- Some arbitration rules do however provide for time limits, although, in practice, time limits tend to be extended frequently.

Article 30.1 of the 2012 ICC Rules: “The time limit within which the arbitral tribunal must render its final award is six months... from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference...”

Article 42 of the 2014 Ljubljana Arbitration Rules: “The tribunal shall make the final arbitral award within a period of nine months after the case was submitted to it...”

- What arbitrators will base their decision on:

- The contract, and, generally, written and oral evidence presented by the parties during the course of the arbitration.
- The law applicable to the merits and to the procedure.
- The terms of reference.
- The parties' correspondence with the arbitral tribunal during the course of the arbitration.
- Mandatory / national law.

## Conclusion

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- **The issuance of the final award usually closes the arbitral proceedings.**
- **However, matters might not end with the award and enforcement issues might arise.**
- **Thus, while focus is usually put on the substance of a case, the importance of formalities in arbitration should not be underestimated, especially when it comes to awards.**

**Thank you for your attention.**

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