


THE ART OF WRITING DOMESTIC ARBITRATION AWARDS

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WHO ARE YOU WRITING FOR?

- The parties
 - The winner – “I WON!!! I hope it stands up in court!”
 - The loser – “Why did I lose?”
 - The objective – “I can accept this result”
 - Counsel
 - “I was right to recommend this arbitrator to my client”
 - “The arbitrator understood my client’s position”
 - The Courts
 - The process was fair
 - The conclusion was reasonable
 - There was no “arbitral error” or “extricable error of law” per *Sattva*
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WHAT IS AN AWARD?

- *Arbitration Act (British Columbia)*
 - **"award"** means the decision of an arbitrator on the dispute that was submitted to the arbitrator and includes
 - (a) an interim award,
 - (b) the reasons for the decision, and
 - (c) any amendments made to the award under this Act;

Interim award

9 During an arbitration, an arbitrator may make an interim award respecting any matter on which the arbitrator may make a final award.

Award binding

14 The award of the arbitrator is final and binding on all parties to the award.

WHAT IS NOT AN AWARD?

- Whether a decision is an award or something else depends on its substance, not its form or title.
- An award finally determines all (Final Award) or a part (Partial Award) of the dispute that was submitted to arbitration.
- What is an “Interim Award???” – just another name for a “Partial Award”?
- The following are not “awards”
 - A decision on a matter of procedure is a “Procedural Order”
 - A decision that only temporarily decides something, even if called an “interim award,” is not an award as it is not final.
- The preferred lexicon is “Procedural Orders,” “Partial Awards” and “Final Awards” (says me....).

WHERE DO I FIND THE FORMAL REQUIREMENTS OF AN ENFORCEABLE DOMESTIC AWARD?

- Applicable Arbitration Law (if seated in BC, the *Arbitration Act*)
 - The arbitration agreement
 - Applicable arbitration rules
 - Possibly, the law of the place of enforcement?
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WHERE DO I FIND THE FORMAL REQUIREMENTS? (2)

- **Arbitration Act (British Columbia)**

Majority decision

12 (1) If there are more than 2 arbitrators in an arbitration, the award may be made by a majority of arbitrators.

(2) If there is no majority decision on any matter to be decided in an arbitration, the decision of the chair is the decision on that matter.

Time for arbitrator's decision

13 (1) If the parties have agreed to a time limit for the making of an award, the arbitrator or the court may extend the time limit, whether or not the time has expired and despite the agreement.

WHERE DO I FIND THE FORMAL REQUIREMENTS? (3)

- **Arbitration Act (British Columbia)**

Legal principles apply unless excluded

23 (1) An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.*


(2) Despite any agreement of the parties to a family law dispute, a provision of an award that is inconsistent with the Family Law Act is not enforceable

Arbitrator's decision

25 An award must be in writing and must be signed by the arbitrator.

* See *British Columbia v Teal Forest Products*, 2013 SCC 51 at para. 40.

WHERE DO I FIND THE FORMAL REQUIREMENTS? (4)

- **the arbitration agreement**
 - time for award?
 - reasoned or unreasoned?
 - limited choices – e.g. final offer (baseball arbitration)?
 - mandatory unanimity or majority?
 - **the applicable arbitration rules** (e.g. *BCICAC Rules per s. 22 of Act* or the *ADRIC national Arbitration Rules*)
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WHERE DO I FIND THE FORMAL REQUIREMENTS? (4)

BCICAC Domestic Rules

36. Arbitral Award

(1) Pursuant to Section 12 of the Act, where the arbitration tribunal consists of three or more arbitrators, an award shall be made by a majority of the tribunal. Where there is no majority decision, the decision of the chair of the arbitration tribunal shall be the award.


(2) The arbitration tribunal may make a partial award.

(3) The arbitration tribunal may make an interim order that shall be merged or addressed in the award when all issues, including costs, have been determined.


(4) The arbitration tribunal shall make its final award within 60 days after the hearings have been closed.

(5) An award shall be in writing and include the reasons. The arbitration tribunal shall file a copy of each award with the Centre.


CHECKLIST FOR A DOMESTIC AWARD

1. Overview of the dispute
 2. The parties and their representatives
 3. The applicable commercial agreement(s) and arbitration agreement
 - a. description and definitions of the commercial agreement(s)
 - b. text of the arbitration agreement
 - c. applicable substantive law
 - d. applicable rules of procedure
 - c. place of arbitration
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CHECKLIST FOR A DOMESTIC AWARD (2)

4. The procedural history
 - a. how and when arbitration commenced
 - b. appointment of arbitrators and due constitution of tribunal
 - c. pleadings (what delivered when/amendments)
 - d. jurisdiction (describe any objections or say there were none)
 - e. procedural conferences (one or two sentences about each procedural conference)
 - f. procedural orders (one or two sentences about each procedural order)
 - g. pre-hearing steps (perhaps describe delivery of witness statements and expert reports, pre-hearing briefing etc.)
 - h. evidentiary hearing (where and when; how evidence was presented; oral argument or post hearing argument)
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CHECKLIST FOR A DOMESTIC AWARD (3)

5. claims, defences (counterclaims) and issues
 - a. summary of claimant's main contentions
 - b. description of award sought by claimant
 - c. summary of respondent's main contentions (in answer to claimant or otherwise)
 - d. description of award sought by respondent
 - e. perhaps a list of issues or an outline of the headings under which you will do your analysis
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CHECKLIST FOR A DOMESTIC AWARD (4)

6. evidence/statement of facts/findings of fact
 - a. many possible approaches e.g.
 - can leave out altogether and discuss evidence and findings of fact as part of the analysis of each claim or issue
 - can set out a chronological/or issue by issue statement of the facts that are not in dispute, flagging those events/issues concerning which there is an evidentiary conflict
 - can set out a comprehensive “conclusory” statement of facts relevant to your decision, including your findings of fact
 - b. make it clear what you are doing – are you just reporting what the evidence was without necessarily accepting it, or are you setting out your findings of fact, or both.
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CHECKLIST FOR A DOMESTIC AWARD (5)

7. analysis

- a. organize analysis under appropriate headings
- b. summarize positions of each party on each issue
- c. set out your analysis (i) your findings of fact and law and (ii) the reasons for those findings
- d. deal with both liability and (if necessary) damages or other relief sought
- e. deal with each claim made in one way or another
 - accepted/allowed
 - rejected
 - unnecessary to decide
 - abandoned
- f. deal with costs, or say they will be dealt with separately later.

CHECKLIST FOR A DOMESTIC AWARD (6)

8. award (*dispositif*) (e.g.)
 - a. “For the reasons stated my award is as follows:
 - (a) the respondent will pay to the claimant the sum of \$100,000.00 as damages for breach of contract;
 - (b) the claimant will pay to the respondent the sum of \$4500.00 as damages for breach of contract;
 - (c) The respondent will pay to the claimant the sum of \$35,000.00 as costs;
 - (d) All other claims and counterclaims are rejected.”
9. reservation of jurisdiction (e.g. if you are reserving jurisdiction to decide costs after receiving further submissions)

CHECKLIST FOR A DOMESTIC AWARD (7)


10. Sign and date [and for international award say that you are doing so at the place of arbitration]

“Made at the place of arbitration, Vancouver, British Columbia, Canada.


This XX day of XXXX 201X

Jane Smith
Arbitrator”

WHAT CAN THE PARTIES AND COUNSEL DO TO ASSIST THE WRITING OF THE AWARD?

1. A concise written argument of fact and law, cross-referenced to the evidence (witness statements, oral evidence, Exhibits, earlier submissions)
 1. An objective (chronological?) statement of the facts that are not in dispute.
 2. A statement of what it contends are the issues
 3. The findings of fact that it asks the arbitrator to make on the contentious factual issues, and the evidentiary basis for those findings
 4. A statement of the law and how it should be applied to the case.
 5. A statement in precise terms of the awards sought, and of any claims or arguments that are abandoned.
 2. A binder of key documents.
 3. The whole case on a USB stick.
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A POTPOURRI OF PUZZLERS

1. How lengthy should a domestic award be?
 2. What is an acceptable period of time for delivering an award?
 3. Should I decide before I start writing or decide as I write?
 4. What do I do if I realize that counsel have missed (i) an important case authority?
(ii) a winning argument?
 5. When should I declare the evidentiary record closed?
 6. How can I make sure that the parties' written or oral submissions address the key issues I have to decide?
 7. What should I say about bad counsel work, procedural misconduct or witnesses who are not credible?
 8. Is there any value in writing a dissent?
 9. What can the chair of a tribunal do to achieve consensus?
 10. At what stage of the proceeding should three arbitrators begin to deliberate or confer about the substance of the case?
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THANK YOU

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