

DRAFTING THE ARBITRAL AWARD

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Introduction

Arbitration has emerged as a favored approach for resolving commercial and investment disputes, primarily due to its efficiency, confidentiality, and binding characteristics.

However, the true importance of arbitration goes beyond simply obtaining an award; it fundamentally revolves around the ability to enforce that award effectively. This necessitates precise drafting of the Arbitral Award.

The Arbitral Award

The Arbitral award is a document written by an arbitrator which sets out clearly and concisely the means by which all the issues in a dispute between certain parties are to be resolved. It should be drafted in such a way that if the decisions made are not complied with, it would then be recognised and enforced as a legal document.

General Requirement for drafting the Arbitral Award¹

An award should be drafted through a rational process so that, in respect of the matters it is dealing with:

- a) Complete;
- b) Certain;
- c) Consistent;
- d) Cogently reasoned; and
- e) Final.

However, it should not deal with matters which have not been referred to the determination of the arbitrator by the parties.

The contents of an award are dictated mainly by:

- a) The arbitration agreement;
- b) The law governing the arbitration;
- c) The Rules of Arbitration, if any; and

¹ Please refer to Dr. Nael G. Bunni presentation in Dubai International Arbitration Centre (DIAC) - Award Writing with reference to the UNCITRAL Model Law

- d) For an international contract, then the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards can be added to the above list.

Court general requirement to enforce the Arbitral Award

- a) Cogency
- b) Completeness
- c) Certainty
- d) Finality
- e) Enforceability

Details and requirements to be consider when drafting International Arbitral Award

Drafting an International Arbitral Award requires attention to legal standards, procedural fairness, and clarity. Below are the main requirements and details to be consider by the arbitrator during drafting ²:

Fulfilling its purpose

- a) Clearly State the Nature of the Award: Identify whether the Award is Final, Partial, Interim, Consent, or otherwise.
- b) Define the Function: The primary purpose of the Award is to formally document the Arbitrator's determinations on the issues in dispute.
- c) Support with Reasoning: Every decision rendered must be accompanied by coherent and legally sound reasoning.
- d) Consider the Audience: Draft with both the disputing parties and any potential enforcement or appellate court in mind, ensuring clarity, completeness, and legal sufficiency.

Ensuring technical accuracy

- a) Attention to Detail is Essential: While often overlooked, technical accuracy is critical to the credibility and enforceability of the award.
- b) Accurate Party Identification: Ensure all names, titles, and contact details of the parties are correctly recorded.
- c) Applicable Laws and Rules: Clearly identify the governing substantive law and procedural rules.
- d) Procedural History: Provide a concise but complete account of the procedural steps taken throughout the arbitration.

² Please refer to Dr. Karen Akinci's presentation titled "*Writing an International Arbitration Award*," delivered during the *Hakem Kararlarının Hazırlanması* event held on February 11, 2025, by the Istanbul Arbitration Center (ISTAC).

- e) **Language and Structure:** Maintain correct grammar, clear sentence construction, and consistent terminology throughout.
- f) **Dates and Currencies:** Use consistent date formats and clearly specify currencies, including applicable exchange rates if relevant.
- g) **Precise Calculations:** Double-check all numerical computations, including interest, damages, and costs.
- h) **Professional Formatting:** Apply consistent and legible formatting to enhance readability and presentation.

Demonstrating compliance with due process

- a) **Document All Key Elements:** Ensure that all challenges, evidence submissions, and corresponding decisions are clearly recorded in the award.
- b) **Proactive Case Management:** Manage the proceedings efficiently to minimize procedural complications and delays.
- c) **Facilitate Party Engagement:** Encourage the parties to collaborate on procedural decisions where appropriate, fostering transparency and fairness.
- d) **Close All Procedural Matters:** Address and resolve all outstanding procedural issues, including challenges, routine applications, and financial administration.
- e) **Respect Confidentiality:** Consistently uphold the principle of privacy and confidentiality that is fundamental to arbitration.

Withstanding legal scrutiny ³

- a) **Valid Arbitration Agreement:** Cite the arbitration clause or agreement in full and clearly demonstrate its validity under the applicable law.
- b) **Procedural Fairness:** Provide a comprehensive procedural history to show that both parties were treated fairly and had equal opportunity to present their case.
- c) **Limits of Jurisdiction:** Ensure the tribunal rules strictly within the scope of the arbitration agreement—deciding only the matters submitted and nothing beyond.
- d) **Proper Tribunal Composition and Procedure:** Highlight the proper constitution of the arbitral tribunal and confirm that the proceedings followed the agreed or applicable rules, particularly within the procedural history.

Ensuring logical and consistent reasoning

- a) **Structured Reasoning:** Develop a clear, step-by-step argument that logically leads to each conclusion.
- b) **Maintain Analytical Rigor:** Apply sound methodology and legal reasoning; academic discipline enhances credibility.

³ Guidance from the New York Convention NYC

- c) **Avoid Vague Statements:** General phrases such as “having regard to all evidence” or “in my considered opinion” are insufficient. Mere quotations of evidence followed by conclusions do not satisfy reasoning standards.
- d) **Issue Identification – Agreed/Disputed Approach:** Distinguish clearly between agreed facts and disputed issues to frame the scope of each analysis.
- e) **Use the F-L-A-C Method for Each Issue:**
 - **Facts:** Determine the relevant facts for the issue.
 - **Law:** Identify the applicable legal principles.
 - **Application:** Apply the law to the established facts.
 - **Conclusion:** Reach a reasoned outcome logically supported by the above analysis.

Addressing all Financial matters

- a) **Quantification of Claims and Counterclaims:** Ensure that all financial aspects of the parties’ claims and counterclaims are fully assessed and determined.
- b) **Costs of the Arbitration:** Clearly address all cost-related issues, including:
 - Any cost agreements between the parties or tribunal orders on costs
 - Arbitration administration fees and expenses (if applicable)
 - Legal and other costs incurred by the parties
 - Arbitrators’ fees and reimbursable expenses
- c) **Interest Awards:** Specify and justify the award of interest, including:
 - **Pre-Award Interest:** Interest accruing before the date of the award
 - **Post-Award Interest:** Interest accruing from the date of the award until payment
 - **Interest for Non-Compliance:** Interest applied in cases of delayed or partial compliance with the award

Staying within the mandate

- a) **Stay Within Scope:** Address all issues submitted for determination—no more, no less.
- b) **Tribunal Authority:** Ensure that all findings and decisions reflect the reasoning of the tribunal, whether unanimous or by majority.
- c) **Evidence Consideration:** Acknowledge and evaluate all submitted evidence relevant to the issues in dispute.
- d) **Respond to All Requests and Challenges:** Provide clear rulings on all procedural and substantive applications, objections, and challenges.
- e) **Clarity and Precision:** Draft the award to be clear, concise, and free from errors, inconsistencies, or ambiguities that could undermine enforceability.

The Award final draft

- 1) Work through the Check Lists of the relevant Institute (if applicable),
- 2) Summarize Key Determinations: Clearly summarize all final decisions on liability and quantum, including the allocation of costs and the award of interest.
- 3) Ensure Mathematical Accuracy: Carefully review and verify all calculations to eliminate mathematical errors.
- 4) Final Interest Decision:
 - Calculate all applicable interest (pre-award and post-award) where possible.
 - Clearly state interest rates, calculation periods, and bases
 - For unquantifiable interest, provide sufficient information for later computation
 - Consider setting a compliance deadline and specifying interest for non-compliance.
- 5) Final Costs Decision: Deliver a comprehensive ruling on costs, taking into account:
 - Any interim costs orders.
 - Cost consequences of specific issues.
 - The payments of arbitral costs and the arbitrator's fee.
- 6) Draft the Dispositive Section: Prepare a clear and concise dispositive clause that sets out:
 - All liabilities.
 - Financial awards.
 - Consequences of non-compliance.
- 7) Close the Proceedings:
 - Formally declare the closure of the arbitration proceedings in accordance with the applicable rules.
- 8) Finalise the Award:
 - Check the mandate requirement for enforcing the International Arbitral Award according to New York Convention (1958).
 - Explicitly state that the award is final.
 - Indicate the seat of arbitration.
 - Ensure the award is properly signed and dated.
 - Confirm compliance with any legal or procedural requirements of the seat of arbitration.

Conclusion

The implementation of arbitration is essential for its efficacy. While international treaties like the New York Convention have created a broadly favorable framework, effective enforcement requires careful drafting, strategic legal preparation, an awareness of local judicial attitudes, and often, perseverance. Arbitrators must focus on enforceability from the outset of the Award drafting process to guarantee that the parties can reap the benefits provided by this form of dispute resolution.

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