

27

ARTICLE 27—FORM AND EFFECT OF THE AWARD

<i>I. Introduction</i>	27.01	D. Award is confidential, but redacted award may be published (Article 27(4) and (8))	27.09
<i>II. Textual commentary</i>	27.03	E. Award may be registered (Article 27(6))	27.12
A. Award is final and binding (Article 27(1))	27.03	F. Tribunal may make interim awards (Article 27(7))	27.14
B. Award must be reasoned (Article 27(2))	27.06		
C. Award must state date and place made and be communicated to parties (Article 27(3) and (5))	27.07		

ARTICLE 27

- 1. Awards shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties. The parties undertake to carry out any such award without delay.*
- 2. The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given.*
- 3. The award shall contain the date and the place where the award was made, which shall be the place designated pursuant to Article 13.*
- 4. An award may be made public only with the consent of all parties or as required by law.*
- 5. Copies of the award shall be communicated to the parties by the administrator.*
- 6. If the arbitration law of the country where the award is made requires the award to be filed or registered, the tribunal shall comply with such requirement.*
- 7. In addition to making a final award, the tribunal may make interim, interlocutory or partial orders and awards.*
- 8. Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.*

I. Introduction

- 27.01** Modelled on Article 32 of the 1976 UNCITRAL Rules, Article 27 of the ICDR Rules prescribes the basic requirements for the form, and the effect, of any ICDR arbitral award. The Article does not provide a comprehensive list of requirements for a valid award; rather, it prescribes certain general minimum standards, while also giving some deference to the potential application of the parties' agreement and the specific demands of the law at the place of arbitration or where enforcement is sought. A similar approach is taken in other institutional rules.¹ Particularly close attention should be paid to any form requirements under the potentially applicable national laws.
- 27.02** An award rendered under the ICDR Rules also is distinguishable from those made in arbitrations under the auspices of institutions such as the ICC² and SIAC,³ for which the ICC Court of Arbitration or the SIAC Registrar, respectively, will review the award and may suggest modifications or draw the tribunal's attention to matters of substance.⁴ Other institutions, such as the LCIA, while not providing in their Rules for formal review of an award, may permit the tribunal, of its own volition, to seek an informal review of matters of form or procedure.⁵ The ICDR Rules themselves do not envisage any role for the ICDR in reviewing awards rendered in ICDR arbitrations. However, as described above,⁶ the ICDR's practice is to have the administrator scrutinize a draft award to correct any clerical, typographical, or computation errors, and to ensure that all claims submitted to the tribunal have been addressed. But such assistance is voluntary and the comments are not binding in any way on the tribunal.

¹ See eg LCIA Rules, Art 26; SCC Rules, Art 36. See also AAA Commercial Rules, s R-42 ('Form of Award') and R-43 ('Scope of Award').

² See ICC Rules, Art 27.

³ See 2010 SIAC Rules, Art 28.2.

⁴ With respect to the scope of review and scrutiny under the ICC Rules, see eg Y Derains and E Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International, The Hague, 2005) 312–16.

⁵ See P Turner and R Mohtashami, *A Guide to the LCIA Arbitration Rules* (Oxford University Press, Oxford, 2009) para 7-21.

⁶ See discussion at para 1.113 above.

II. Textual commentary

A. Award is final and binding (Article 27(1))

ARTICLE 27(1)

Awards shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties. The parties undertake to carry out any such award without delay.

Article 27(1) requires that the award be ‘in writing’, following international arbitration practice and the requirements of many jurisdictions interpreting Articles III and IV of the New York Convention.⁷ **27.03**

The statement that an ICDR award is ‘final and binding’ corresponds with the established arbitral practice that such an award is conclusive of the issues determined, may not be appealed or challenged (except on whatever grounds may be provided for in the relevant jurisdiction), and creates obligations on the parties that are potentially enforceable as a matter of law.⁸ This may also be seen as the source of a duty on the tribunal to do all that it can to ensure that the award is valid and enforceable.⁹ In addition to being ‘final and binding’ the parties also undertake to ‘carry out any such award without delay’. Depending on the relevant applicable law, this obligation might also constitute a waiver of the parties’ rights to challenge the award or a waiver of sovereign immunity from enforcement.¹⁰ However, the language of Article 27(1) is not, on its face, as explicit in that respect as that which is found in other analogous rules.¹¹ Note also that the AAA Commercial Rules do **27.04**

⁷ See eg E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1,389; GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,352–53, 2,446–48.

⁸ See generally Born, op cit, 2,815–26; Gaillard and Savage (eds), op cit, 1,359; N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) paras 9-03–9-04; on ‘finality’, see G Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press, Oxford, 2004) para 3-104.

⁹ See eg discussion of analogous Art 32(2) of the 1976 UNCITRAL Rules (Art 34(2) in the 2010 revised UNCITRAL Rules) in D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006). See also ICC Rules, Art 35.

¹⁰ See eg *Creighton v Qatar*, Cour de Cassation, Appeal No A98019.068 (hearing on 6 July 2000), reproduced in English in (2000) 15 (10) Mealeys International Arbitration Reporter A1 (holding that a state waives its immunity from enforcement when agreeing to carry out the award without delay, and that the arbitration award was ‘enforceable’ as stated in Art 24 of the (then in force) ICC Rules of Arbitration under the heading ‘Finality and enforceability of award’). However, such an argument is unlikely to be accepted as a waiver of the recognized grounds for challenging an award under the New York Convention or applicable national laws.

¹¹ Compare LCIA Rules, Art 26.9:

All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay . . .

not contain language about the award being ‘final and binding’ or that the parties will ‘carry out any such award without delay’. Perhaps for this reason, US lawyers often include such an obligation in the arbitration clause itself.¹²

27.05 Article 27(1) has departed from the analogous language in the UNCITRAL Rules¹³ by requiring that the arbitrators render their award ‘promptly’, although the ICDR Rules offer no guidance on what constitutes ‘promptly’.¹⁴ This is a less specific requirement than the time limit provided in the ICC Rules (although such time limit is frequently extended).¹⁵ The AAA Commercial Rules provide that ‘the award shall be made promptly . . . and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing’.¹⁶ Absent party agreement, such deadline cannot be extended.¹⁷ Some jurisdictions may, of course, also have arbitration laws that require an award to be rendered within a certain time period or even provide judicial recourse in the event that an arbitrator fails to render an award within a reasonable time.¹⁸ From the ICDR’s experience, such inviolable fixed deadlines may not be appropriate in every case and any missed deadline could be used by a disappointed party to challenge the award.¹⁹ The ICDR instead relies on Article 27(1)’s admonition to render the award ‘promptly’ and uses its case managers to monitor the tribunal’s progress in drafting the award.

and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.

See also ICC Rules, Art 28(6) (‘By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made’).

¹² See P Friedland, *Arbitration Clauses for International Contracts* (Juris Publishing, Huntington, NY, 2007) 104–05; see also *Wartsila Finland OY v Duke Capital LLC*, 518 F3d 287 (5th Cir 2008) (affirming district court’s ruling denying stay of enforcement on grounds that parties agreed arbitration would be ‘final and binding’).

¹³ See 1976 UNCITRAL Rules, Pt IV (‘The Award’) (unchanged in 2010) (not providing any deadline for issuing the award).

¹⁴ See Introduction, para 1.58 ff (average duration of ICDR arbitration proceedings and citing 35–45 days as an average time from close of the proceedings to issue of an award).

¹⁵ See ICC Rules, Art 24(1) (providing that, unless extended, the final award must be rendered within six months of the operative date of the terms of reference); WL Craig, WW Park, and J Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications, New York, 2000) 143. See also 2010 SIAC Rules, Art 28.2 (providing that the tribunal shall submit the draft award to the registrar within 45 days from the date on which the proceedings are declared closed).

¹⁶ See AAA Commercial Rules, s R-41.

¹⁷ See *ibid*, s R-38.

¹⁸ See E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1,384.

¹⁹ See *eg Lagstein v Certain Underwriters at Lloyd’s, London*, 607 F3d 634 (9th Cir 2010) (holding that arbitrators had power to determine interpretation of AAA Commercial Rules on whether time for making an award had to be extended where additional hearing was to be held on quantification of punitive damages).

B. Award must be reasoned (Article 27(2))

ARTICLE 27(2)

The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given.

Article 27(2) requires the tribunal to ‘state the reasons upon which the award is based’ unless the parties have agreed otherwise. The language is almost identical to 1976 UNCITRAL Rules, Article 32(3).²⁰ This provision represents an important departure from the AAA Commercial Rules in that it recognizes the international practice of expecting a ‘reasoned’ award.²¹ US domestic arbitral practice has, at least historically, been less consistent in expecting that an award will be reasoned.²² However, the requirement to provide reasons in an award has become standard in contemporary international arbitration practice.²³ **27.06**

C. Award must state date and place made and be communicated to parties (Article 27(3) and (5))

ARTICLE 27(3)

The award shall contain the date and the place where the award was made, which shall be the place designated pursuant to Article 13.

ARTICLE 27(5)

Copies of the award shall be communicated to the parties by the administrator.

Article 27(3) requires that the award state the date on which, and place where, the award was made. Unlike other institutional rules, this requirement is not tied to an explicit obligation on the arbitrators to sign the award, although where an arbitrator does not sign the award, the signing arbitrators must give a statement of **27.07**

²⁰ See also LCIA Rules, Art 26.1; cf ICC Rules, Art 25(2) (requiring that the award state the reasons upon which it is based, which seems a logical necessity in order to pass the scrutiny of the ICC Court).

²¹ See AAA Commercial Arbitration Rules, R-42(b) (“The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate”).

²² See H Smit, ‘International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards’, 15 Am Rev Intl Arb 9, 16 (2004). See also *Gerstle v Merry X and Co*, Cour de Cassation, 22 November 1966 (confirming that an AAA arbitral panel’s failure to provide a reasoned award was not per se contrary to French international public policy).

²³ See generally GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,450–59.

reasons for the absence of such signature.²⁴ The omission of an explicit duty might be intended to overcome an argument that the award must be signed at the place of arbitration.²⁵ Article 27(3) specifically states that the place where the award is made shall be the place designated pursuant to Article 13—that is, the seat of the arbitration—although this might have been made clearer by stating that the place where the award is made shall be *deemed* to be the seat.²⁶

27.08 Article 27(5) requires that copies of the award shall be communicated to the parties by the ICDR (rather than the tribunal). Unlike with some other institutions, release of the award to the parties is not dependent on all arbitration costs first having been paid.²⁷ Receipt of the award triggers the 30-day period for seeking an interpretation, correction, or additional award pursuant to Article 30. The date of the award or the date of receipt of the award may also trigger certain deadlines for setting aside or enforcement as provided for in the applicable local laws.²⁸

D. Award is confidential, but redacted award may be published (Article 27(4) and (8))

ARTICLE 27(4)

An award may be made public only with the consent of all parties or as required by law.

ARTICLE 27(8)

Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.

27.09 Article 27(4) confirms, but provides common limitations on, the presumption that an award shall remain confidential—that is, that awards may be made public with the consent of all parties or as required by law. This provision addresses only the confidentiality of the award and not other aspects of confidentiality of the proceeding.²⁹ The inclusion of the ‘as required by law’ caveat envisages situations in

²⁴ See Art 26(1), discussed above at paras 26.02–26.06 above.

²⁵ See *Hiscox v Outhwaite* [1991] 3 All ER 641 (holding that, despite the seat being London, an award signed by the chairperson of the tribunal in Paris would be considered French).

²⁶ See ICC Rules, Art 25(3).

²⁷ Comment made by ICDR senior management; cf LCIA Rules, Art 26.5.

²⁸ See eg *Oberwager v McKechnie Ltd*, Civ No 06-2685, 2007 US Dist LEXIS 90869, *16–*24 (ED Penn, 10 December 2007) (reviewing ICDR Rules, Art 27, in deciding that the statute of limitations under the FAA for filing a challenge to an award ran from the date of the ‘Final Award’ as opposed to the arbitrator’s subsequent decision under ICDR Rules, Art 30, denying a request for interpretation).

²⁹ See Art 34 regarding confidentiality. That provision also places a duty on the ‘members of the tribunal and the administrator [to] keep confidential all matters relating to the arbitration or the

which a party may need to make an award public, for example, in the course of collateral litigation (such as setting aside or enforcement proceedings) or due to disclosure obligations incumbent on publicly traded companies.

Article 27(4) and (8) analogous to 2010 UNCITRAL Rules, Article 34(5). Both provide that an award may be made public only upon consent of the parties, or where disclosure is required by a legal duty, or to pursue a legal right. Disclosure in this last instance is a provision added in the 2010 revisions to the UNCITRAL Rules. LCIA Rules, Article 30.3, provides that an award will be published only upon consent of the parties and the tribunal. ICC Rules, Article 1(5) and (6), provide that researchers may publish awards only upon consent of the Secretary General of the Court. There is no analogous provision in the SIAC Rules. **27.10**

On a related issue, Article 27(8) provides that the ICDR may ‘publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details’. This power exists unless the parties agree otherwise.³⁰ This default rule mirrors ICC Rules, Article 28(2). As with other institutions, the AAA/ICDR has commenced a project to publish selected awards and decisions in order to help all users of AAA/ICDR arbitration to understand the various sets of rules and arbitral practice under such rules.³¹ The awards are redacted to protect confidentiality. A few of these published awards are currently available on the Westlaw database, although the AAA/ICDR is undertaking a project to expand this resource. **27.11**

E. Award may be registered (Article 27(6))

ARTICLE 27(6)

If the arbitration law of the country where the award is made requires the award to be filed or registered, the tribunal shall comply with such requirement.

While increasingly uncommon, some jurisdictions require that the award be deposited with, typically, a court in order to be recognized as a binding award.³² If the arbitration law of the seat so requires, Article 27(6) obliges the tribunal to file or register the award. This duty, mirroring Article 32(7) of the 1976 UNCITRAL Rules, is arguably already encompassed within the tribunal’s directive to ensure that the award is final and binding for purposes of Article 27(1). The 2010 UNCITRAL **27.12**

award’. See discussion in Chapter 34 below. See also ICDR Rules, Art 20(4) (regarding privacy of hearings) (discussed at paras 20.09–20.10 above).

³⁰ To opt out of this requires agreement of the parties; cf eg ICSID Arbitration Rules, Rule 48(4).

³¹ See discussion above at Introduction, para 1.65 above.

³² See eg discussion in J Lew and L Mistelis, *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (Kluwer Law International, The Hague, 2006) paras 19-103–19-109.

revisions deleted Article 32(7) in the replacement provision in Article 34. The drafters explained that Article 32(7) was ‘unnecessary’, because it merely provided that the tribunal should comply with the registration requirements contained in the relevant national law.³³

- 27.13** Article 27 does not contain the language found in the AAA Commercial Rules, confirming that the parties ‘are deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof’.³⁴ This is a hangover from a line of US cases that required the parties’ consent before an award could be recognized as a judgment. Although now distinguished for cases arising in the context of ‘international awards’ for the purposes of Chapters II and III of the US Federal Arbitration Act, one still often sees such language incorporated into arbitration clauses drafted by US lawyers.³⁵

F. Tribunal may make interim awards (Article 27(7))

ARTICLE 27(7)

In addition to making a final award, the tribunal may make interim, interlocutory or partial orders and awards.

- 27.14** Article 27(7) empowers the tribunal to make not only a ‘final award’, but also any ‘interim, interlocutory or partial orders and awards’. Notably, the rule includes ‘orders’ and not only ‘awards’.³⁶ There is no agreement on the exact distinctions between these potentially different types of award and order. Even in debating the drafting of the 1976 UNCITRAL Rules, the terms were used interchangeably in Committee discussions and:

the flexible nomenclature envisioned by the drafters was meant to promote efficiency, effectiveness and expediency in the tribunal’s decision-making process by avoiding overly technical and unnecessarily time-consuming disputes about the appellation of a particular decision.³⁷

The 2010 revisions to the UNCITRAL Rules in new Article 34(1) replaced ‘interim, interlocutory or partial awards’ with the more generic ‘separate awards on different issues at different times’. The drafters of the revision considered it unnecessary to list the types of award, and modelled the new Article 34(1) on LCIA Rules,

³³ See UNCITRAL, *Report of the Working Group on Arbitration and Conciliation* (UN Doc No A/CN.9/641, 25 September 2007) 105.

³⁴ See AAA Commercial Rules, s R-48(c).

³⁵ See P Friedland, *Arbitration Clauses for International Contracts* (Juris Publishing, Huntington, NY, 2007) 103.

³⁶ Compare 1976 UNCITRAL Rules, Art 32(1). Of course, for reasons of enforcement or otherwise, arbitrators may prefer to issue an ‘award’ rather than an ‘order’.

³⁷ See D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 792–93.

Article 26.7.³⁸ Whether an interim, partial, or interlocutory award is treated any differently from a final award is a matter likely to be determined by the law of the enforcing court.³⁹ The nature and enforceability of awards other than ‘final awards’ on the merits are further discussed in relation to Article 21 (‘Interim Measures of Protection’)⁴⁰ and Article 37 (‘Emergency Measures of Protection’).⁴¹

³⁸ See UNCITRAL, *Report of the Working Group on Arbitration and Conciliation* (UN Doc No A/CN.9/641, 25 September 2007) 79–80.

³⁹ See eg CH Yu, ‘Final, Interim, Interlocutory or Partial Award: Misnomers Apt to Mislead’, 13 *Sing Acad LJ* 467 (2001) (discussing *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 3 SLR 237). See also *Metallgesellschaft AG v M/V Capitan Constante*, 790 F2d 280 (2d Cir 1986) (holding that an award that finally and definitively disposes of a separate independent claim may be confirmed even though it does not dispose of all of the claims that were submitted to arbitration); *Sperry Int Trade, Inc v Israel*, 532 FSupp 901, 909–910 (DCNY 1982) (interpreting the AAA Commercial Rules).

⁴⁰ See discussion in Chapter 21.

⁴¹ See discussion in Chapter 37.

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