# Breaking Down Arbitration Awards

By Theo Cheng

***Resolution Alley is a column about the use of alternative dispute resolution.***

I have always been an avid follower and watcher of entertainment awards shows like the Grammys, the Golden Globes, and the Oscars. The first quarter of the year are filled with them, highlighting some of the biggest and most popular music, television, and films of the past year. Watching these shows this year got me thinking about a different kind of award – an arbitration award (I am, after all, an arbitrator!). I think there is a fair amount of confusion and lack of clarity when it comes to what an arbitration award actually is, so this column will try to shed a little light on that.

After all the testimonial and documentary evidence have been submitted to an arbitral tribunal (either a sole arbitrator or a panel of arbitrators) and after any post-hearing submissions from the parties have been presented, and perhaps even an oral argument has been held, the tribunal will "close" the hearing. It will then proceed to render the award, which is usually delivered in written form.

Arbitration awards are generally accorded a high degree of finality for two reasons. First, finality respects party autonomy to vest the power of adjudication in a specific, agreed-upon third party. Second, finality also honors the parties' agreement to ensure that a tribunal's award will not be disturbed or second-guessed. Accordingly, there are only limited grounds for a subsequent court to review an arbitration award for potential overturning (or vacatur).[1] Specifically, neither the Federal Arbitration Act nor any state arbitration procedural statute affords review of an arbitration award for errors of law or fact or, more generally, on the merits. Rather, all of them focus on ensuring that the process was fundamentally fair to the participants.

Parties are accustomed to receiving an award at the end of the arbitration proceeding that declares who prevailed on the claims, counterclaims, and defenses and the relief awarded (if any). Such an award – issued, of course, after the hearing has closed – is usually referred to as a *final award*. A final award is meant to complete the tribunal's service. It is the last word from the tribunal, leaving nothing left for it to do on the matter. After the issuance of a final award, the tribunal's authority over the proceeding terminates – more on that later.

However, there are times where there is unfinished business. A tribunal will issue a *partial final award* to decide a discrete claim, issue, or a portion of the case, on which the tribunal does not expect to have anything more to say. For example, in a case where a prevailing party might be entitled to reimbursement of its attorney's fees and/or costs (either by party agreement or by statute), a tribunal might, in the first instance, issue a partial final award. Such an award would communicate the tribunal's decision on the substantive claim and then provide additional instructions regarding the submission of the prevailing party's attorneys' fees and/or costs petition. The tribunal's award addressing the fees and/or costs petition would then be its final award.

If the tribunal anticipates perhaps changing its mind on a ruling, it may also leave open that claim, issue, or portion of the case by instead issuing an *interim award*. An interim award typically addresses some preliminary or threshold issue that might be affected or impacted by changed circumstances. For example, disputes over arbitrability or jurisdiction, the applicable law, and the issuance of provisional or preliminary relief (e.g., injunctions, attachments) all present a tribunal with the possibility that changed circumstances (facts and/or law) might warrant the tribunal's reconsideration or modification of its earlier ruling. In such a case, an interim award would be the correct nomenclature.

Separate from the type of award, arbitration awards come in three basic forms: (1) standard, (2) findings of fact and conclusions of law, and (3) reasoned. The parties' agreement or the alternate dispute resolution (ADR) provider's ruleset might specify a particular form for the award.[2]

*A standard award* – also known as a bare award or simple award – is the most common form of award in arbitration proceedings. It merely announces the result (i.e., the identity of the prevailing party, the nature of the claim(s), and the relief awarded, if any) and provides no explanation or reasons, or otherwise sets forth the grounds for the outcome.

A standard award requires very little input from the parties after a hearing is completed. In fact, in many cases, the parties and the tribunal may elect to dispense with extensive post-hearing submissions (or even eliminate them altogether) when the form of the award will be so bare. As a result, a standard award is the most cost-effective and, in fact, the least costly option for the parties. At the same time, however, a

standard award provides the worst basis for later judicial review because, absent a transcript or some other record of the proceeding, a reviewing court has nothing substantive upon which to base its review.

Notwithstanding the foregoing, a standard award also helps preserve the privacy and confidentiality of the proceedings.[3] As the tribunal will not be engaging in any real substantive writing about the proceeding, a standard award will reveal very little about the proceeding aside from the identity of the parties, the nature of the claim(s), and the relief awarded (if any).

By contrast, an *award containing findings of fact and conclusions of law* provides detailed factual findings based upon the evidentiary record. Such an award also contains specific conclusions of law based upon the foregoing factual findings and the applicable legal framework. It could look very much like a trial court's decision on a preliminary injunction motion, which is usually set forth in numbered paragraphs, with citations to the evidentiary record for each factual finding and citations to applicable authority for each conclusion of law.

Unlike a standard award, an award with findings of fact and conclusions of law requires an extensive amount of input from the parties after a hearing is completed. Typically, parties need to provide post-hearing submissions containing their respective proposed findings and conclusions, with meticulous citations to record evidence and applicable authorities. The tribunal will then review those submissions in crafting its own findings and conclusions.

As a result, an award with findings of fact and conclusions of law is the least cost-effective and, in fact, the most expensive option for the parties. At the same time, however, such an award provides the best basis for later judicial review, because a reviewing court will usually have a tremendous amount of material within the award itself upon which to base its review.

Siting somewhere in between a standard award and an award with findings of fact and conclusions of law is a *reasoned award*. Like the name suggests, a reasoned award provides the tribunal's reasons for the outcome. In that regard, it is certainly more detailed than a standard award. However, it need not be as detailed as an award with findings of fact and conclusions of law. One court has attempted to define it as follows:

> [A] reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties.[4]

Consequently, as the above definition foretells, there is a wide variation in work-product that might satisfy the contours of a reasoned award. The many considerations a tribunal should undertake in drafting a reasoned award are beyond the scope of this column, but would include the following:

- Whether the tribunal has adhered to the award provisions contained in the parties' arbitration agreement and the applicable ADR provider's ruleset;
- Whether the tribunal has adhered to the applicable arbitral procedural law, particularly as it relates to any specific requirements for an enforceable award;
- Whether the type and format of the award is appropriate;
- Whether the tribunal has addressed all the claims, counterclaims, defenses, and issues that have been presented by the parties;
- Whether the tribunal has addressed any and all outstanding applications interposed or raised by the parties;
- Whether the award is clear, coherent, logical, consistent, and concise;
- Whether the tribunal, in making any credibility determinations, has explained why it found something credible (or not), avoiding the use of conclusory words like "lied" or falsified";
- Whether the tribunal has ensured that it has demonstrated through the writing that it has considered all sides presented; and
- Whether the tribunal has chosen language in the award that will help ensure that the award will be able to sustain a challenge to its vacatur and contribute to its enforceability.

In the end, it bears noting that the ultimate objective in award-writing is to ensure that the work product comprises an enforceable award, thereby allowing the parties to gain the benefit of having bargained for an arbitration proceeding to resolve their dispute. In doing so, the tribunal needs to meet out justice and follow the law, while, within certain constraints, develop its own unique writing style.[5]

Incidentally, the closing of the hearing by the tribunal is a milestone event in the arbitration proceeding.[6] Thereafter, the parties are not permitted to submit any further evidence or argument to the tribunal, subject to an application to reopen the hearing.[7] Under some ADR provider rulesets, the

closing of the hearing also starts the applicable time period for the tribunal to render the award.[8]

Notably, missing a mandated deadline for rendering the award – whether it is established by a rule or by the parties' agreement – can subject the tribunal to becoming *functus officio*. *Functus officio* is a Latin term meaning "having performed one's duty" or "having fulfilled one's office." It is a legal doctrine that signifies when an official (like the tribunal), after completing its assigned task, no longer has authority or power to act further in that matter. Said differently, once that purpose has been fulfilled, the official is *"functus officio."*

In the arbitration context, "[t]he *functus officio* doctrine dictates that, once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, their authority over those questions is ended, and the arbitrators have no further authority, absent agreement by the parties, to redetermine those issues."[9] Thus, if the deadline for rendering the award expires and the tribunal has not yet rendered that award, it will become powerless and without further authority to do so, absent an agreement of the parties to restore that authority to the tribunal.

This has been a breakdown of the types and forms of awards that parties can expect to see in the arbitral forum. In form, they are essentially very much like opinions issued by a judge after a bench trial. Yet in substance, they are not judgments or orders of a court, although they can be reduced to a judgment – and have the same force and effect like any other court judgment – if a party seeks confirmation of the award in court. That is a subject, perhaps, for another column.

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## Endnotes

1. *See, e.g.*, 9 U.S.C. § 10 (setting forth grounds for vacating an arbitration award under the Federal Arbitration Act); C.P.L.R. 7511 (setting forth grounds for vacating an arbitration award under the New York state arbitration procedural statute).
2. *See, e.g.*, AAA Commercial Arbitration Rules (Sept. 1, 2022) at Rule 48(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."); AAA Consumer Arbitration Rules (Sept. 1, 2014) at Rule 43(b) ("The award shall provide the concise written reasons for the decision unless the parties all agree otherwise."); CPR Administered Rules (Mar. 1, 2019) at Rule 15.2 ("All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise.") JAMS Comprehensive Arbitration Rules & Procedures (June 1, 2021) at Rule 24(h) ("Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.").
3. *See* Theodore K. Cheng, "Maintaining Confidentiality in Arbitration," NYSBA Entm't, Arts & Sports L. J., Vol. 28, No. 2, at 25 (2017).
4. *Leeward Constr. Co. v. Am. Univ. of Antigua–Coll. of Med.*, 826 F.3d 634, 640 (2d Cir. 2016).
5. For more on reasoned awards, *see generally* John Burritt McArthur, "The Reasoned Arbitration Award in the United States: Its Promise, Problems, Preparation, and Preservation" (JurisNet, LLC 2022).
6. *See, e.g.*, AAA Commercial Arbitration Rules (Sept. 1, 2022) at Rule R-40(a) ("The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed."); JAMS Comprehensive Arbitration Rules & Procedures (June 1, 2021) at Rule 22(h) ("When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial Awards have been issued, the Arbitrator shall declare the Hearing closed."); Resolute Systems Commercial Arbitration Rules (Sept. 1993) at Rule 17 ("The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard in accordance with the Arbitration Agreement. The arbitrator shall declare the hearing closed upon determination that there are no further presentations.").
7. *See, e.g.*, AAA Commercial Arbitration Rules (Sept. 1, 2022) at Rule R-41 ("The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made."); JAMS Comprehensive Arbitration Rules & Procedures (June 1, 2021) at Rule 22(i) ("At any time before the Award is rendered, the Arbitrator may, *sua sponte* or on application of a Party for good cause shown, reopen the Hearing.").
8. *See, e.g.*, AAA Commercial Arbitration Rules (Sept. 1, 2022) at Rule R-47 ("The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing . . . ."); JAMS Comprehensive Arbitration Rules & Procedures (June 1, 2021) at Rule 24(a) ("The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing . . . ."); Resolute Systems Commercial Arbitration Rules (Sept. 1993) at Rule 19 ("The arbitrator shall render the award promptly and, unless otherwise agreed by the parties or specified by law, no later than fourteen days from the date of closing the hearing, or, if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.").
9. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 342 (2d Cir. 2010).