

## ■ IX. Awards

# WIPO Mediation and Arbitration Workshop

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# Introduction and definitions

- Scope of presentation
  - Issues relevant to drafting of award
  - Issues after rendering the award
- Definitions
  - Award vs order
  - Final vs interim decision
  - Several awards (Art. 64 WIPO Rules)
  - Consent award (Art. 67 WIPO Rules)

# 1. Drafting of award: decision making

- Drafting responsibility
  - Role of president
  - Possible split (technical/legal issues)
- Unanimous decisions
- Dissenting opinions
- Majority / no majority: Art. 63 WIPO Rules
- Truncated tribunals: Art. 35 WIPO Rules

# 1. Drafting of award: formal requirements

- In writing
- With reasons
- Place, date
- Signed (by the majority / president)

Art. 64 WIPO Rules

Art. 31 UNCITRAL Model Law

*E.g.* Art. 189 Swiss PIL Act

# 1. Drafting of award: role of arbitral institution

- Scrutiny of award
  - Matters of form vs. points of substance
    - Art. 64(e) WIPO Rules vs. Art. 34 ICC Rules
- Timely delivery: 3 months from closing
  - Art. 65 WIPO Rules
  - ICC approach
  - LCIA approach

# 1. Drafting of award: applicable law

## ■ Award must contain decision on substance of dispute in accordance the law:

- Law chosen by the parties
- Law decided by tribunal as appropriate
- Contract / trade usages

Art. 61 WIPO Rules

## ■ Other relevant laws:

- Law of the seat (mandatory law, e.g. arbitrability)
- Law applicable to patent infringement
- Law of place of incorporation of party
- Law of likely place of enforcement

# 1. Drafting of award: remedies (1)

- Award should deal with remedies sought/prayers for relief set out in pleadings
- Amendments possible: Art. 44 WIPO Rules
- Monetary compensation/damages
  - Different measures: reliance (negative), expectation (positive)
  - Different bases (tort, contract, patent law)
  - Punitive damages/penalty
  - Currency: Art. 62(a) WIPO Rules

# 1. Drafting of award: remedies (2)

## ■ Other remedies

- Declaratory relief (e.g. invalidity registration IP rights)
- Specific performance / permanent injunctions
- Contract rectification/gap filling

All depend on applicable law and arbitration agreement

## ■ Interest : rate, period, simple/compound

- Arbitration rules: Art. 62(b) WIPO Rules
- Arbitration law: e.g. s. 49 UK Arbitration Act
- Substantive law applicable & Parties' contract



# 1. Drafting of award: costs (1)

## ■ Costs of the arbitration

- Arbitrators' fees and expenses
- Expert advice required by tribunal
- Other expenses (meeting / hearing facilities)

Art. 73 WIPO Rules

## ■ Parties' reasonable expenses incurred in presentation of their case =, including for legal representatives and witnesses

Art. 74 WIPO Rules

# 1. Drafting of award: costs (2)

## ■ Apportionment of costs: broad discretion

Art. 73-74 WIPO Rules: all circumstances and outcome of arbitration

## ■ Different approaches

- Costs follow the event
- Equal share / costs lie where they fall
- Sealed offer / without prejudice offer save as to costs
- Success fee/ third party funder's costs

## 2. Post award

- Award final and binding: Art. 66(a) WIPO Rules
- Losing party may:
  - Comply with award
  - Challenge award
  - Resist enforcement of award
- Winning party may:
  - Demand payment
  - Apply for recognition / enforcement
- Both: seek correction/interpretation of the award

## 2. Post award: corrections & additional awards

- Tribunal *functus officio*
- But correction / additional award possible within 30 days: Art. 68 WIPO Rules
- Interpretation of award : Art. 36 ICC Rules
- Typical issues:
  - Clerical / typographical / calculation errors
  - Obvious omissions
  - Errors vs additional / new arguments

## 2. Post award: challenge

- Narrow grounds under most arbitration laws :
  - Incapacity / invalidity arbitration agreement
  - Wrongful constitution of arbitral tribunal
  - Wrong decision on jurisdiction
  - Violation of due process
  - *Ultra/infra petita*
  - Lack of arbitrability
  - Violation of public policy
- Waiver: Art. 66(a) WIPO Rules  
*E.g* Art. 190(2) Swiss PIL Act

## 2. Post award: enforcement

- Country of seat of arbitration and countries signatories to the New York Convention
- Different formalities / local procedural mechanisms
- But grounds for resisting enforcement set out in Art. V
  - Similar to grounds for challenge
  - Award not yet binding/set aside
- Convention applied differently by different courts, some discretion

## 2. Post award: contacts with arbitrators

- Broad and ongoing confidentiality

Art. 75-78 WIPO Rules

- Confidentiality of the award: Art. 77 WIPO Rules
- Exception: challenge and enforcement proceedings
- Unwritten rule of secrecy of deliberations



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Thank you