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 with 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
Thank you