Preparing Reasoned Awards in Arbitration

By Kate Krause

Gene Fowler, a playwright and novelist, once said, “Writing is easy; all you do is sit staring at a blank sheet of paper until drops of blood start to form on your forehead.”1 Although no one would compare drafting a reasoned award to writing the great American novel, that blank sheet of paper can still be intimidating. Starting with an adaptable structure for the award, along with suggestions for fleshing out that structure into an effective and enforceable award (which is the key responsibility of an arbitrator), may relieve some of the pressure.

There is no accepted definition for what constitutes a “reasoned” award. In general, a reasoned award summarizes the facts and the law applicable to the issues presented, and provides the arbitrator’s analysis and verdict. It presents a reasoned application of the relevant legal principles to the facts, resulting in the material decisions and orders that dispose of each claim.

Similarly, there are no specific requirements for what must be included in a reasoned award, other than the almost universal requirement that the award be in writing. Bearing in mind the standards for enforceability of an award provides some guidance on what to include in (and exclude from) the award. For instance, if you rule on matters not properly submitted to arbitration by the parties, your award will likely be subject to vacatur.2

It is also helpful to consider the interests and concerns of your audience. Your first and most important audience is the parties themselves. The award must clearly and concisely explain, in plain English, the facts and law you considered and the reasoning you applied to arrive at your decisions. The parties should be satisfied that their contentions were understood, that you addressed all issues presented, and that you treated each party fairly in your deliberations.

Start preparing sections of the award well in advance of the hearing, as it will help you focus on the key evidence presented during the hearing. It is particularly useful to prepare a list of issues early in the proceedings and update it as needed. The parties can then confirm at the hearing or in post-hearing briefs that you are addressing all the issues (and that no issues have been included that were not presented to arbitration by the parties).

In preparing to write the award, look at your list of issues, review the parties’ submissions, and cross-reference each issue to where it is discussed. Follow the same process with the transcript or your notes of the hearing. This will provide a handy reference when you are preparing your findings, reasons, and conclusions.

A proper structure for the award will assist in ensuring not only that the award properly presents your reasoning, but also that the reasoning you applied was logical and supportable. The following outline presents the various sections that should be included in a reasoned award. The order in which these sections should be presented is discussed separately, as there is considerable flexibility to allow the structure to be adapted to virtually any arbitration proceeding.

Contents of the Award

A. Introduction. State the names of parties, counsel, and the arbitrator; the nature of the dispute; governing law and arbitration rules (state correct version of rules); and the procedural
background, including the basis of the arbitrator’s jurisdiction (reciting the arbitration clause),
appointment of the arbitrator, any challenges to the arbitrator or to jurisdiction, any procedural
and interim orders, notice to the parties, dates of the hearing and closing of the proceedings, and
type of award (Interim or Final – see paragraphs I.G and I.H, below).

B. Summary of Claims and Defenses. Include the specific requests for relief, and summarize
the issues to be decided. Providing a summary of the claims and defenses before presenting the
facts and law is particularly helpful in lengthy or complex awards, as it gives the reader a context
in which to understand the material that follows.

C. Factual Background. The undisputed facts should be listed, usually in chronological
order. The disputed facts and your findings regarding those facts should be discussed in the
sections on the claims for relief. In the alternative, some arbitrators provide a factual summary
that includes the disputed facts, and present their findings regarding those facts in this section.

D. Claimant’s Claims for Relief. Provide a separate section for each claim for relief.

1. Claimant’s and Respondent’s Contentions. Summarize the claimant’s contentions,
followed by the respondent’s defenses. For example: “Claimant contends that Respondent failed
to complete the contract work within the time required under the contract. Respondent contends
that the contract time for completion was modified and extended by the parties, and that
Respondent met the extended time for completion.”

2. Issues Presented. The issues can often be most effectively stated as a question; e.g.,
“Was the contractual completion date modified by the parties in writing as required by the
contract?”

3. Findings, Reasons, and Conclusions. This is the heart of a “reasoned” award. State
the applicable law, and cite the supporting cases. Describe the evidence presented and your
findings regarding the relevant disputed facts. Cross-reference to the testimony and exhibits that
support your factual findings. Then present your reasoned application of the law to all relevant
facts, and the resulting conclusions. For example: “To establish a breach of contract, Claimant
must prove [state the applicable law]. Claimant’s President testified [summarize testimonial and
documentary evidence from both parties]. I find that the contract was never modified in writing,
and Respondent was therefore required to comply with the original contract terms. I further find
that Respondent failed to meet the contractual time of completion, and thereby materially
breached the contract.”

The amount of damages to be awarded must be specified. It may be appropriate to
include separate subsections on entitlement and damages, particularly where the analysis of
damages is complex or the subject of expert testimony.

Although you generally should not discuss alternative issues, i.e., what your ruling
would be if you were wrong on the primary questions of fact or law, there is at least one
exception. If your ruling would be the same under the alternative issue, you may want to present
your analysis to assure the losing party that the outcome would be the same even if the
conclusions on the primary questions were wrong. For example, if you decided on disputed facts
or unsettled law that the claimant had not established the first element of a claim, you might want
to discuss that the second element of the claim on undisputed facts and settled law had also not
been proven, thereby reducing the likelihood that the claimant would appeal the award.
E. **Respondent’s Counterclaims.** Include this section if the Respondent has asserted any counterclaims, with the same subsections used for Claimant’s claims for relief.

F. **Interest.** State the basis for any award of interest, the interest rate, whether interest is simple or compound, and the date from which and until which interest is payable. Identify any differences in pre-award and post-award interest.

G. **Costs.** The allocation of institution fees and arbitrator fees and expenses should be stated. If other costs are awarded, an itemization of costs requested is usually presented in a post-hearing submission after issuance of an Interim Award identifying which party is awarded costs. The final amount of costs awarded is then included in the Final Award.

H. **Attorneys’ Fees.** The legal basis for any award of attorneys’ fees (e.g., arbitration agreement, state statute) must be provided. The amount of attorneys’ fees requested should be handled in the same manner as costs.

I. **Summary of Decisions.** Some institution rules require a summary of certain types of decisions, such as the AAA’s Construction Arbitration Rule 47(b) which requires a financial breakdown of any monetary awards and a line item disposition of any non-monetary claims. A summary of decisions is often helpful even if not mandated by applicable rules.

J. **Judgment and Final Award.** This is the operative part of the award, setting out the arbitrator’s disposition of the claims. This section is usually prefaced by language such as: “Based on the foregoing findings and conclusions, the Arbitrator renders the following decisions.” The operative language can be in a variety of forms, such as “Claimant’s claim for breach of contract is denied,” “Judgment in favor of Claimant and against Respondent on Claimant’s claim for breach of contract in the amount of $10 million,” “Claimant’s claim for breach of contract is granted, and Respondent shall pay Claimant the sum of $10 million,” or “Claimant is awarded the sum of $10 million in full and final settlement of its claim against Respondent for breach of contract.” Always include a “catch-all” subparagraph at the end, such as: “This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims and counterclaims not expressly granted in this Award are denied.”

K. **Date and Signature(s).** If there are three or more arbitrators, check institution rules on whether all must sign, whether a dissenting arbitrator must sign, and whether an explanation must be provided if an arbitrator does not sign the award.

II. **Order of Presentation.**

The order in which the various sections are presented is not carved in stone. Although most arbitrators write an award following the order suggested above, using “writer-based logic,” you should consider preparing the first draft in that manner and then reorganizing it with “reader-based logic” – the reader wants to know the results first, and then the facts, law, and reasoning that led to those results. There is nothing that prevents you from putting a summary of your decisions first. Be creative in structuring the award to satisfy the unique requirements of each case.

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1 Gene Fowler, playwright and novelist, circa 1940.
2 See., e.g., 9 U.S.C. § 10(a)(4).
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