[2002] 1 MLJ - ARBITRATION AWARDS

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Introduction

The step that the arbitrator must take after he has closed the proceedings at the reference is to prepare his award in which he will embody his decision. He must decide on the issues canvassed before him. He has contracted to do so and he does so in his award.

The arbitration award informs the parties of the arbitrator's decision and the reasons for his decision. It enables enforcement under the Arbitration Act 1952 ('the Act') and under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1985 ('the Convention Act 1985').

The word 'award' is not defined in the Arbitration Act 1952. The court in Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd [1998] 6 MLJ 545 at p 551 adopted the definition in Black's Law Dictionary (1990, 6th Ed, West Publication Co) as:

> The decision or determination rendered by arbitrators or commissioners, or other private or extra-judicial deciders, upon a controversy submitted to them; also the writing or document embodying such decision.

Thus, an award is a decision/judgment made by an arbitrator on a controversy submitted to him. It informs the parties of his decision, and the reasons for it. In order for an award to be enforceable under s 27 of the Act, it must be in conformity with the Act, legal principles and that of fairness (natural justice or due process).

The court in David Taylor and Son Ltd v Barnett Trading Co[1953] 1 WLR 562 at p 568 stated the general rule as:

> The duty of an arbitrator is to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under all the circumstances.

The decision must be one that decides on all the issues involved in the controversy. The award is the final product of a great deal of work both by the arbitrator and by the parties and their legal teams.

The arbitrator is under a duty to proceed with due diligence and reasonable dispatch in making his award. But unless there is an express intention in the arbitration agreement, an award may be made at any time: see s 14(1) of the Act. An arbitrator who fails to use all

reasonable dispatch in entering on and proceeding with the reference and making an award may be removed by the court: see s 14(3)(a).

Types of awards

There are different types of awards by reference to the Act:

Interim Award

Section 15 of the Act provides for interim awards. Interim awards are sometimes known as partial awards. They are often used:

(i) where disputes can conveniently be divided into stages;
(ii) where the determination of preliminary issues may save the time and cost of a prolonged reference;
(iii) where the arbitrator's award of costs is dealt with separately from the substantive issues.

An example where an interim award may be suitable arises when there is a question of whether or not a claim is time-barred under the Limitation Act 1953. If the claim is time-barred, there is then no need to proceed further. Similarly, an interim award may obviate the need for a further pursuit of the claim if a dispute as to the validity in principle of a claim is dealt with as a preliminary issue.

While the interim award does not determine all the matters in dispute between the parties, all matters referred to in an interim award are determined finally therein. The word 'interim' does not imply that those matters decided in the interim award are subject to review. For example, an interim award where liability is decided in respect of certain items of the claim but not other items provides a final determination of those issues of liability. Only quantum issues on those items are to be decided in another award.

On the other hand, a provisional award may order a part of a claim or claims to be paid 'on account', subject to a final decision later. This power is usually only available if the parties agree to confer it.

Performance award

While it is usual for the arbitrator to make his award in monetary terms, there is a provision under s 16 of the 1952 Act for an arbitrator to order specific performance. A party can be ordered to perform certain specified work or hand over goods or rights, other than the matters related to land or to any interest in land. For example, a contractor may be required to carry out remedial works in the building to ensure uniformity of the finished work and/or to ensure no question arises as to responsibility for future defects. However, the arbitrator should not make a performance award where a monetary award would resolve the dispute in a satisfactory way, the danger being that the manner the work is performed under an order for specific performance may lead to a further dispute.

Final award

Section 17 of the Act provides that unless otherwise stated, an award is deemed to be final, and it concludes the reference. As soon as the arbitrator has completed his award, his work as an arbitrator and his power and duty cease. He becomes functus officio, meaning that he has discharged his duty: see Lloyd & Others v Wright and Dawson v Wright [1983] QB 1065. It follows that thereafter he has no jurisdiction to deal with any question or difficulty that may arise from his award.

There are some exceptions to this:

(i) where the award is merely an interim award and the arbitrator will have to deal with other matters left to a final award.
(ii) where the award is remitted to the arbitrator by the court for reconsideration under s 23 or the arbitrator has had to state a case for the court under s 22 of the Act.
(iii) where the arbitrator corrects in an award 'any clerical mistake or error arising from any accidental slip or omission' under s 18 of the Act.
(iv) where no provision has been made in the award with respect to costs of the reference, s 19(4) of the Act provides that any party to the reference may, within 14 days of the publication of the award, or such time as the High Court may direct, apply to the arbitrator for an order directing by and to whom such costs shall be paid. Thereafter, the arbitrator having heard any party who wishes to be heard on the matter, is empowered to amend his award by adding thereto any directions he may think proper with respect to the payment of costs of the reference.

Consent award

The consent or agreed award incorporates the terms of a settlement which the parties have negotiated before it reaches a hearing or an award. The purpose of so doing is to clearly define the matters that have been so settled and to define responsibility for costs. It then enables one party to take enforcement proceedings when the other party fails to comply with the terms of the settlement. The consent award formally brings the arbitration to a conclusion.

Form of the award

Before the award can be drafted, the arbitrator has to decide on what may be the number of important issues, namely, the issues in the reference. He will make his decisions with care, based on what he has learned from the parties and on the application of the law that has been canvassed by the parties. Legally, there is no set form for an award unless the arbitration agreement requires it to be in specific form. The award is a legal document and it must contain enough information to enable the court, if called upon, to enforce it without the need for further inquiry. An award must be prepared with the greatest care, and as a matter of practice, there are some basic requirements.

Formal requirements of an award

There are no particular requirements for the form of an award. However, there are a number of matters that could be termed as 'formal'. Generally, the arbitration legislation almost always requires an award to be written and signed by the arbitrator, to be reasoned, dated and with the seat of the arbitration noted.

The award should state who are the parties, identifying them precisely. This is normally done at the beginning of the award in the recitals. This would list the mainly uncontroversial background and details of the dispute to set the scene for the award.

The arbitrator must sign, date and locate the award. It is also common sense, though maybe not a legal necessity, to have each arbitrator's signature independently witnessed in case it needs to be proved, for example, if an arbitrator were to pass away.

Dating the award is particularly important for many reasons, mostly because of the time available for appeal under law and also, with regard to the payment of interest on a monetary sum. The location is also important in case the award is to be enforced in another jurisdiction under the New York Convention of 1958 or under some treaty.

Publication of an award is a term meaning both completion of the award and notification to the parties that this has been done. It is immaterial whether or not the parties are acquainted with the contents of the award or have received copies of it. Notification is a term usually used in place of publication. Notification may also be important with regard to any time limitation affecting the dispute, being relevant to the date when time starts running again, having been suspended during the arbitration.

Once the arbitrator has signed his award, he is said to be functus officio, that is, having performed his duty. It is his last act and this ends the arbitration.

Three copies of the award are usually made, two of which are signed by the arbitrator. One is delivered to the party taking it up. The other copy will be sent to the other party on request. It is usual for the arbitrator to retain the award under a lien. Either party can take up the award upon payment of the arbitrator's fees.

Substantive requirements

According to Mustill MJ and Boyd SC in The Law and Practice of Commercial Arbitration in England (2nd Ed at p 384), the court will not enforce an award unless it is:

(a) Cogent;
(b) Complete;
(c) Certain;
(d) Final; and
(e) Enforceable.

The meaning of the abovementioned terms are self-evident. Therefore, the terms of an award must be unconditional, non-contradictory, unambiguous and unimpeachable. The arbitrator must be very precise in his adjudication. So, always examine your draft to check that it meets all those requirements.

Cogency

The award must be convincing, persuasive and of consistent reasoning. It is not necessary for the arbitrator to use technical expressions and legalese. However, it is essential that the award sets out the arbitrator's decision unambiguously. It must not be some expression of hope, expectation or opinion. Plain simple language should be the rule, not the exception. Jargon is to be avoided. Short sentences are invariably better than long sentences. Short words are better than long ones. It should be possible for an outsider to the case to understand the award and how the arbitrator reached his decision. A good award has much in common with a good report.

A non-lawyer arbitrator should, however, be wary about being too ready to use legal terms and maxims. He is likely to get the principles correct, but can so easily use inappropriate legalese. Obviously, if the lawyers have argued a legal construction before the arbitrator, he is likely to be compelled to use the terms they have used. However, the non-lawyer arbitrator is well advised to resist the temptation to import such terms of his own volition.

For example, say a contract requires notice of the matters complained of to be given in writing at the registered office of the other party. Notice was given orally to a senior site manager. The recipient company acted on that notice in the same manner as they would have done had it been given in strict accord with the contract terms. Without here making any point as to the validity of such decision, if the non-lawyer arbitrator of his own volition used terms such as constructive notice or estoppel, he might well have got it wrong. Such a pitfall would be more likely to be avoided if that arbitrator said, for instance, the respondent company, having acted in a manner which implied to the claimant that strict compliance with the notice requirements was not necessary, cannot now seek to rely on the need for such strict compliance. I stress that in using this example, I am not expressing a view on the law, but simply illustrating a drafting point.

Completeness

The award must deal with all matters with which it purports to deal — all matters in issue, no more than those. A final award must give the arbitrator's decision on all the matters in dispute submitted to him. If an interim award is being made, it must clearly identify the issues that are being covered and deal with each of them. An arbitrator should, if that is his intention, include in his interim award a statement to the effect that his decisions are final even though the award as a whole is only an interim one. An award is not complete if it does not deal with costs. An arbitrator must make clear what the position is with respect to costs even if he is simply reserving the position.

Certainty

It must not be in any way ambiguous. For example, the award should read 'I determine and award that the respondent shall pay to the claimant…' and not 'I have formed the opinion that the respondent…'. The object is to end up with an award that is not ambiguous. The award must be able to stand alone. It should not require reference to anything else to be sure of its meaning. Certainty also has to be the intention when dealing with costs and interest. The court will not enforce an award that is uncertain.

Finality

The award must not leave opportunity for reopening the issues covered. The arbitrator is required to dispose of all the issues before him. He should not leave some to be decided by a third party. If he wants to reserve some matters for his future decision, he has to deal with it by means of an interim award that makes clear his intentions.

Enforceability

The award must be in a form capable of being enforced. For example, if it is a monetary award, it must be clear as to just what amount is awarded and to be paid. If it is a performance award, it must specify the time by which it is to be performed. If an award relating to a claim for money deals with liability only, there is nothing to enforce. See Mustill MJ and Boyd SC, The Law and Practice of Commercial Arbitration in England(1989, 2nd Ed, at pp 387 and 389).

If the award is cogent, complete, certain and final, it can be enforced. In order to enforce an award by action, it is necessary to prove affirmatively that it is valid, that is to say, that the contract containing the arbitration agreement was made, that a dispute arose which fell within its terms or was otherwise duly submitted to arbitration, and that the arbitrator was validly appointed, that he made the award pleaded, and that such award has not been performed.

Reasons in an award

If one party requires a reasoned award it should be given, in the absence of exceptional circumstances. If both parties ask that there shall not be a reasoned award it should not be given. These decisions together with the reasons for them are set out in the award. In Malaysia, most awards are very brief —generally, three or four pages long. In the past, it was the practice to give 'protected' reasons in a separate document so as to avoid an error of law appearing on the face of the award, for that could result in the remission or setting aside of the award. Thus, it is rife that many awards do little more than identify the parties and their dispute, recite how the arbitrator came to be appointed, and set down terse reasons followed by a bare decision on the substantive matter and costs.

The court in Transcatalana de Commercio SA v INCOBRASA Industrial e Commercial Brazileira SA [1995] 1 Lloyd's Rep 215 explained what can give rise to unsatisfactory awards:

> The present award is imbalanced between recitation on the one hand and findings and reasoning on the other. It sets out, at great length, messages exchanged between the various parties (many of them containing assertions of fact raised as the dispute evolved) as well as the parties' respective submissions to the board on

> numerous issues of fact and law. But its reasoning and finding on liability are limited to one issue and are of the utmost brevity.
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> More particularly, the award extends over some 41 pages, divided into sections headed 'The Contracts', 'The Facts', 'Appellant Sellers' Submissions', 'Respondents Buyers' Submissions' and 'Submissions as the Law and GAFTA Provisions applicable' and concluding with a section on the findings and the award. 'The Facts' extend over 18 pages consisting mainly of verbatim recitation of messages passed between the parties. The sections on submissions comprise 15 pages recounting arguments and submissions on facts. By contrast, the essential findings and reasoning on liability extend to 12 lines. The equivalent reasons in Cefetra [Cefetra BV v Alfred C Toepfer International GmbH [1994] 1 Lloyd's Rep 93] were, it appears, only five lines long.
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> The approach to the preparation of reasoned awards almost inevitably leads to uncertainty and argument about what, if anything, the arbitrators have accepted by way of evidence or decided on important issues of fact or law. The function of a reasoned award is not simply to identify and determine a point that the arbitrators have ultimately considered to be decisive. It is to enable the parties and the court (a) to understand the facts and general reasoning which led the arbitrators to conclude that this was the decisive point and (b) to understand the facts, and so consider the position with respect to appeal, on any other issues which arose before the arbitrators. Where distinct issues have been argued, the award should thus indicate the nature of the findings and reasoning on each, including those that the arbitrators may not themselves have thought to be determinative. Further, it serves no useful purpose, and can be positively unhelpful, to recite at great length messages exchanged or submissions made containing assertions of fact or law; the arbitrators' findings and brief reasoning upon them are what matters.

In other words, there is an increasing expectation by parties and professionals involved in arbitration that the arbitrator in making his award must give detailed reasons. This would enable the parties to launch an appeal to the court and prevent their future conduct from getting into the same position again. Drafting reasons for an award is not a formidable task.

However, it is not incumbent on an arbitrator in stating reasons (and again, probably not desirable) to give an assessment of the witnesses and a detailed statement of his grounds for preferring the evidence of Y to Z or the expert of A to that of B. The arbitrator may say as much or as little as he thinks necessary for the enlightenment of the parties. It is sometimes helpful to state that the evidence of a particular witness or witnesses was not accepted.

An arbitrator is not called upon to make any detailed analysis of the legal principles canvassed before him or to review the legal authorities cited. He should briefly summarize the arguments put to him and express his legal conclusion in a way that makes it intelligible. Referring to the case of Universal Petroleum v Handel Transportgesellschaft [1987] 2 All ER 737, an arbitrator's primary findings of fact are final and intended to be immune from review by the courts in the absence of misconduct, such as breaches of natural justice.

It is the arbitrator's duty to determine matters of both fact and law. Having determined both the relevant facts and the law to be applied to those facts, he must decide on the validity of the claims, counterclaims, on the remedies to which either or both parties are entitled and in awarding costs.

Structure of a reasoned award

It must be stated that format is an individual matter as long as the substantive requirements of an award are met. The useful approach is to think of the award as being the only document before a foreign court in an application for its enforcement.

It should be a complete document, giving a sufficient history of the dispute and the arbitration that makes it fully and unambiguously understood. All important documentary and oral evidence including the points accepted or rejected should be logically discussed leading to a clear summary decision on everything in dispute.

The contents of the award should ideally cover the contract, arbitration clause, the type of dispute or difference, the appointment of arbitration, dispute details, proceeding details, reasoning, decision and summary.

It is likely, though not essential, that the dispute arises under a contract between the parties. The contract should be identified in the award as should its arbitration clause or agreement. An arbitration clause in a separate document, for example, in standard conditions, needs to be clearly identified both in the contract and in the award.

As the arbitration clause is the source of the arbitrator's authority and as it probably refers to the 'dispute' or 'difference', it should be noted that either or both of these must have arisen, otherwise there may not be the necessary jurisdiction to make an award. If the arbitration agreement is not in a contract (for example, arbitration is agreed on by the parties after the dispute has arisen) then that agreement to arbitrate should be identified.

The arbitrator's appointment should be noted, listing the correspondences involved which may include further agreements between the parties as the arbitrator's powers or restrictions as arbitrator (such as to decide the dispute according to 'equitable principles'). The details of the dispute need to be listed, from contentions of the parties in their submissions, followed by the details of the proceedings, interlocutory matters and any hearings of evidence including the names of the parties' representatives and the witnesses they called, divided in witnesses of fact and expert witnesses.

The arbitrator then takes note of all the evidence and submissions, 'finds' the facts, 'holds' his opinion as to the application of the law to those facts, considers liability and quantum and finally, makes his decision on each and every point put to him. He then summarizes all these decisions.

Example of a reasoned award

Berstein R and Wood D, in their Handbook of Arbitration Practice (Sweet & Maxwell, 1993 at pp 178–179) have suggested the following structure for a reasoned award:

(a) The arbitration agreement: date and parties (usually the parties to the arbitration).
(b) Date and method of appointment of the arbitrator(s).
(c) The procedure adopted (documents only; or if hearing, give the dates).
(d) The issues.

(e) First issue of fact: I find as a fact that… because the evidence of Mr X was more closely supported by the contemporaneous documents than that of Mr Y or I preferred the evidence of Mr Z to that of Mr A or as appropriate.

(f) First issue of law:
Argument for Claimant…
Argument for Respondent…
I prefer the case for the… because
(1) …
(2) …
I therefore find for the… on this issue.

(g) Second Issue: (continue as first)

(h) I therefore find for the… on this issue.

(h) I therefore determine and award… with interest at… percent from… to [the date of this award or as the case may be].

(i) (1) This award is final as to all matters except costs.

(2) If either party wishes to make any representations to me as to costs, it should send them to me, and to the other party, by noon on… If either party wishes to make any representations in answer to the other party's representations, it should send them to me and to the other party by noon on… Thereafter I will make my final award.

Alternatively

(j) I AWARD AND DETERMINE that the… shall pay to the costs of this arbitration to be taxed (if not agreed) [by me] OR [in the High Court].

Date:
Signature:
Another broad pattern of a reasoned award is something as follows:

1 Heading
IN THE MATTER OF THE ARBITRATION ACT 1952
AND
IN THE MATTER OF AN ARBITRATION
BETWEEN
(the name of the party who is the Claimant)
AND
(the name of the party who is the Respondent)

2. Type of award
INTERIM, FINAL OR CONSENT AWARD

3 Identify the parties;

4 Describe how they came to be in this arbitration;

5 Describe how you came to be the arbitrator;

6 Outline the nature of the dispute;

7 Briefly outline the procedures;

8 Summarize the contentions;

9 Find the relevant facts and apply the relevant law to those facts;

10 Reach a conclusion
HAVING TAKEN CAREFUL CONSIDERATION OF THE PLEADINGS AND SUBMISSIONS OF THE PARTIES, THE EVIDENCE ADDUCED, BOTH ORAL AND DOCUMENTARY, I NOW FIND AND HOLD AS FOLLOWS:

11 Consider and decide upon the matters of interest and liability for costs;

12 Unequivocally set down your decision, requiring such compliance as is appropriate.
ACCORDINGLY I AWARD AND DIRECT IN FULL AND FINAL SETTLEMENT OF THE ISSUES IN DISPUTE BEFORE ME THAT:

13 Complete the award by signing it, preferably with a witness to the signature, the date and location.

Enforcement of an award
The objective of arbitration is to produce an award that is just, final and enforceable. If the arbitrator has observed the requirement of conclusiveness and completeness, he should have provided the parties with a determination that either of them could use, defensively to fend off further claims against or positively for enforcement of, his rights acquired under the award.

Where the losing party refuses or fails to honor an award, the other party can apply under s 27 of the Act to the High Court for judgment in the terms of the award. Therefore, enforcement of arbitral awards in Malaysia itself is by registration in the High Court. The normal procedure is a letter of demand to the unsuccessful party; and an application to the court, supported by an affidavit annexing the submission, the award and the letter of demand. If it is a valid award, judgment will normally be given. Otherwise, the award will not be one enforceable in the court.

The means of enforcement is similar to that of any other judgment of the High Court. Similarly, for an award issued under the rules of the Kuala Lumpur Regional Center for Arbitration, assistance can be obtained from the High Court under s 34 of the Act only as to enforcement.

Remission and setting aside an award

As stated, the courts have the supervisory powers of revoking the very submission to arbitration and causing a case to be stated under s 22 of the Act. Also, the court may set aside the award for the arbitrator's misconduct or, if the award is improperly procured, it may remit any matters referred to the arbitrator back to him for reconsideration.

Matters that may constitute misconduct justifying the setting aside of an award are those capable of causing a substantial miscarriage of justice. Another major area relates to an argument that there is a defect in the award, that is, on it. The arbitrator, in such cases, is alleged to have made an error of law that is on the face of the award, or that the error is incorporated into the award from other material. Compared to upsetting an award based on natural justice complaints, this complaint is on a more limited basis as it pertains to the arbitrator's technical misconduct. Defective aspects of a case having less than such an effect are more appropriate for remission.

Thus, under ss 23 and 24 of the Act, the circumstances leading to an arbitrator's award being remitted or set aside by the court arise basically from two avenues, namely:

1 The conduct of the reference, for example the denial of natural justice to the parties; and
2 The award, for example, where an error of law is alleged on the face of the award, either expressly or being incorporated in the award.

Remission must be sought within six weeks after the award has been made and published to the parties (see Rules of the High Court, O 69 rr 2(1)(a) and 4(1)(a), while the application to set aside an award must be made within six weeks after the award has been made and published to the parties (see Rules of the High Court, O 69 r 4(1)(b)).

In either case, the court's power is discretionary and is not exercised lightly. The Appellate Court will not interfere with the court's discretionary power unless it has been obviously misused. An award may be good in part if the bad part is clearly severable from the rest of the award. The remitter for reconsideration may be confined to the letter: see Anthony Walton QC, Russell on Arbitration (1970, 18th Ed, Steven & Sons Ltd, at pp 399–401). It is provided in s 23(2) of the Act that where an award is remitted, unless the order is otherwise, the arbitrator must make the rectified award within three months after the date of the order.

Enforcement of Convention awards

Malaysia has ratified the New York Convention of 1958 and has enacted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('the Convention Act 1985') to facilitate the enforcement of Convention awards. A Convention award is any award made pursuant to an arbitration agreement in the territory of a state (other than Malaysia) that is a party to the New York Convention.

A party can enforce a Convention award either by obtaining leave and thereby the right to enter judgment, or by an action. Enforcement may only be refused in specified cases if the party against whom the award invoked proves:

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity (see s 5(1)(a) of the Convention Act 1985); or
(b) that the arbitration agreement was not valid under the law to which the parties subjected it, or failing any indication thereon, under the law of the country where the award is made (see s 5(1)(b) of the Convention Act 1985); or
(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case (see s 5(1)(c) of the Convention Act 1985); or
(d) that the award deals with a difference not contemplated by, or not falling within, the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (see s 5(1)(d) of the Convention Act 1985); or
(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place (see s 5(1)(e) of the Convention Act 1985); or
(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made (see s 5(1)(f) of the Convention Act 1985); or
(g) that the award is in respect of a matter not capable of settlement by arbitration (see s 5(2) of the Convention Act 1985); or
(h) that it would be contrary to public policy to enforce the award (see s 5(2) of the Convention Act 1985; see also Harris Adacom Corp v Perkom Sdn Bhd[1994] 3 MLJ 504).

A party seeking to enforce a Convention award must produce a duly authenticated original award or a duly certified one, and the original arbitration agreement or a duly certified one. If the award or agreement is in a language other than Bahasa Malaysia or English, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent (see s 4 of the Convention Act 1985) must be produced.

Conclusion

The arbitrator, in making his award, has to ensure that it meets both the formal and substantive requirements. It has to clearly define what and when the parties are to do to resolve the matters in dispute between them. His award should be cogent, complete, certain, final and enforceable. The Act provides for the enforcement of valid awards. On the other hand, there are reasons why this objective of a valid award is not always achieved. The arbitrator may make accidental errors or omissions in the award. It may be procured improperly. It may contain errors of law. Again, the law provides for the means by which erroneous awards may be rectified or nullified.