Kluwer Arbitration Blog

The Case for Synopses in Arbitral Awards

Lucas Bento (Quinn Emanuel Urquhart & Sullivan, LLP) · Thursday, November 21st, 2013

This article argues for the inclusion of synopses in arbitral awards, particularly ICSID awards which tend to be widely publicized and often exceed 100 pages in length, and in some cases, 300 pages. As international investment disputes continue to "mushroom" (UNCTAD, 2012), it is important for the arbitration community to think of ways to maximize efficiency and reduce costs.

The practice of providing case summaries is not new. Indeed, the inclusion of prefatory syllabi[1)] in US Supreme Court decisions dates back to 1798.[2)] In essence, the syllabus operates as an executive summary or abstract of the opinion, outlining the key facts of the case, procedural posture of the proceedings and a summary of the court's holdings. As the Supreme Court held in *United States v. Detroit Timber & Lumber Company*, 200 U.S. 321 (1906), the syllabus is not part of the official opinion of the court. In fact, every Supreme Court decision explicitly discloses that "[t]he syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader."

The practice of providing the synopsis of a decision is not exclusive to the US Supreme Court, nor is it typical of courts per se. Indeed, synopses are usually prepared by someone that was not involved in writing the decision. Law reporting publishers, for example, offer synopses for most reported cases. In the U.S., legal databases like Westlaw and Lexis typically include a short summary of the facts, procedural history, and holdings of a reported case. See also Westlaw UK's 'Case Analysis' feature (providing a summary of the case).

International arbitration awards are not systematically published though some publications offer case summaries and commentary. The case for including a synopsis in arbitration awards is particularly relevant in the case of ICSID awards, given their length and complexity. As ICSID awards not only impinge on the commercial interests of the parties to the arbitration but also affect a broader audience (civic society, political constituencies etc), it would be useful to outline the tribunal's decision in a way that facilitates both location and consumption.

A synopsis of an arbitral award would consist of a paragraph-long summary of the facts, procedural posture, and the main holding of the award. There appears to be no legal or institutional barriers to adopting this practice. The New York Convention does not generally impose form requirements on awards. Indeed, the Convention implies that the award will be written, but beyond that, there are no form requirements. Article 31 UNCITRAL provides that an award 1) "shall be made in writing", 2) "shall be signed by the arbitrator or arbitrators", 3) "shall state its date and the place of arbitration," and 4) "shall state the reasons upon which it is based, unless the parties have

agreed that no reasons have to be given or the award is an award on agreed terms." Similarly, national laws[3] and arbitration rules will often impose comparable form requirements. For example, Article 47 of the ICSID Arbitration Rules states that an award shall conform to a number of requirements, including a summary of the proceeding. This summary, however, only provides a procedural posture (or history) of the case *up to the delivery of the award*. It does not mean a synopsis of the award.

Who are the winners of this proposal? In legal practice, the client is queen. The client will benefit from the systematic inclusion of synopses since lawyers will be able to locate decisions more efficiently, and pass on time savings to clients. Arbitrators will also benefit as they will be able to locate persuasive precedent more swiftly (which in turn may minimize the amount of time taken to prepare an award – another win for the parties). Business executives who do not have the time to navigate a 300 page award will also appreciate this development. Scholars and students, too, will be able to better organize their research and locate relevant sources. The international investment system should also benefit, since added efficiencies would improve general satisfaction with the system, as well as help tribunals develop a more consistent and harmonious jurisprudence. Although "arbitral tribunals consistently acknowledge that in international law there is no doctrine of binding precedent"[4], in practice, however, tribunals take serious note of prior case law, noting that "everything counts."[5] As the tribunal noted in *Noble v Ecuador*, ICSID tribunals "should seek to foster the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."[6]

So where do we go from here? There are a number of ways to foster the gradual adoption of synopses in arbitral awards. At the *decision-making level*, arbitrators could adopt this practice as long as the parties, national legislation or institutional rules do not prohibit it. (My review of the rules and domestic legislation thus far has not revealed any such prohibition). At the *institutional-level*, arbitral institutions could, in future rules, oblige or recommend that arbitrators include a synopsis of the award. Finally, at the *contractual-level*, the arbitration agreement could also require that the tribunal or arbitrator provide a summary of the award.

Given the increase of the use of tribunal secretaries or "law secretaries", the preparation of the arbitral synopsis could be a fitting task for what some have characterized as the "fourth arbitrator" or the "fourth musketeer".[7]

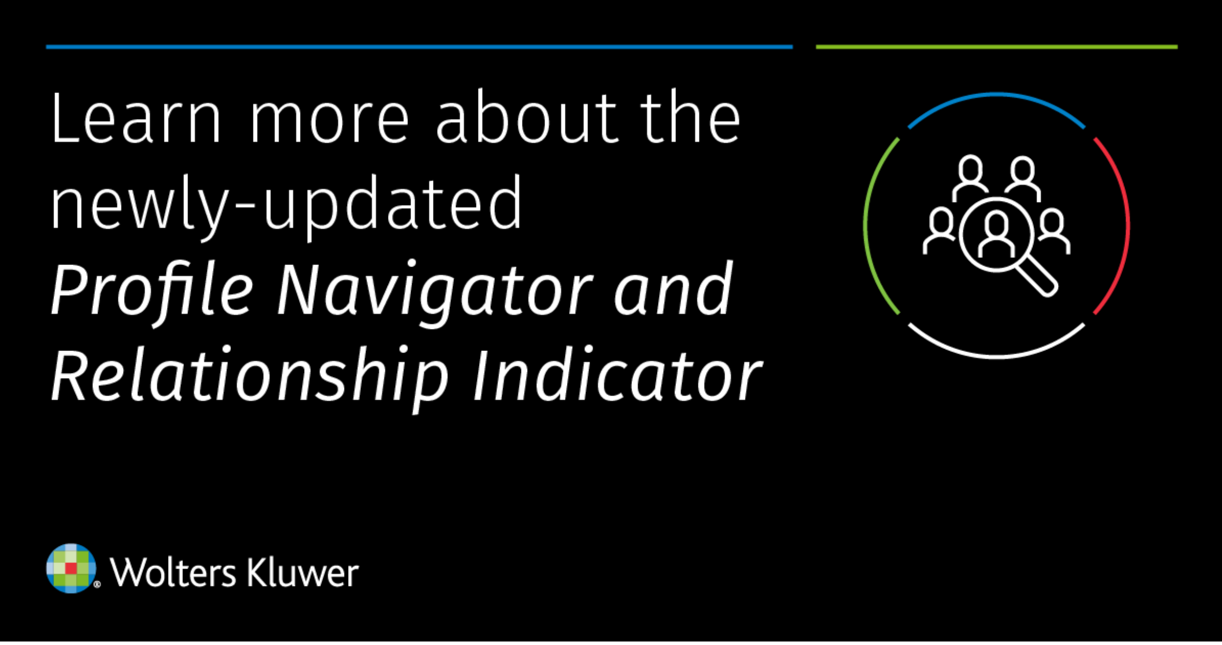
International arbitration is a fascinating microcosm of substance and procedure that is constantly evolving and adapting to changing societal and commercial needs. The future of international investment law in particular has been recently subject to much debate. Although the inclusion of case synopses in arbitral awards is unlikely to effect a paradigmatic shift in the evolution of international arbitration, it is a cost-efficient step to provide some much needed structure and uniformity in this area of law.

Lucas Bento is Chair of the International Arbitration Sub-Committee of the Inter-American Affairs Committee at the New York City Bar Association, and an Associate at Quinn Emanuel Urquhart & Sullivan LLP in New York. The views expressed in this post are the author's personal views, and do not reflect the opinions of Quinn Emanuel or of the New York City Bar Association. *The author would like to thank Matthew Lee and Armand Terrien for their helpful comments.*

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



References

?1 Syllabi that systematically include the holding of the court's opinion. Although earlier Supreme Court decisions contained syllabi, these only summarized the parties' contentions and procedural posture of the case, but did not summarize the Court's holding.

?2 Calder v. Bull, 3 U.S. 386 (1798)(drawing a distinction between criminal and private rights in considering ex post facto laws and holding that while all ex post facto laws are retrospective, all retrospective laws are not necessarily ex post facto).

?3 See e.g. Section 52 of the English Arbitration Act 1996 (providing that, unless agreed otherwise by the parties, the award shall be in writing, reasoned, signed and dated, and shall provide the seat of the arbitration).

?4 Andrés Rigo Sureda, "Precedent In Investment Treaty Arbitration", in Christina Binder et al., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, (Oxford University Press, 2009), 933.

?5 Burlington Resources Inc. v Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, (December 14, 2012), para. 221.

?6 Noble Energy and Machalapower Cia. Ltd. v The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction (March 5, 2008), para. 50 (noting that "The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must give due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it should adopt solutions established in a series of consistent cases.").

?7 In the international commercial arbitration arena, some parties may, however, agree in the terms of reference that tribunal secretaries are not to write any part of the award. Terms of reference could thus explicitly permit tribunal secretaries to prepare the award's synopsis, which in any event does not form part of the award.

This entry was posted on Thursday, November 21st, 2013 at 7:28 am and is filed under Uncategorized You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.