Reasoned Awards in International Commercial Arbitration

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Most arbitration agreements in the international realm require arbitrators to produce a "reasoned" or "fully reasoned" award. However, relatively little has been written on why such awards are necessary and what constitutes a reasoned award in a legal regime that includes elements of both the common and civil law.

On one level, the question of why a reasoned award (sometimes described as "findings of fact and conclusions of law") is necessary can be answered in very simple terms: reasoned awards are required if and when the arbitration agreement or arbitral rules chosen by the parties require such an award. However, the inquiry cannot stop there. Why do parties routinely request such awards, particularly given the amount of time and money that is usually required to generate those types of rulings?

Some answers might be found through an analogy to litigation, particularly litigation in common law courts. Common law systems typically require reasoned decisions and opinions to assist in the development of the common law and aid appellate judges in determining whether and to what extent the lower court decision should be affirmed or overturned. However, not every matter heard in a common law court results in a fully reasoned decision or opinion. Furthermore, many civil law systems also require courts to provide reasoned determinations even though those countries do not adhere to the principle of precedent in the same way that common law jurisdictions do. Therefore, reasoned rulings cannot be linked solely to the special requirements of the common law.

Reasoned awards could be deemed necessary or useful in situations where judicial appeals of arbitral awards may be made as a matter of law (such as in England under section 69 of the Arbitration Act 1996) or in cases where an arbitral appeal (i.e., an appeal to another arbitral tribunal) may be brought. In those situations, the reviewing court or tribunal would benefit greatly from a fully reasoned award at first instance. However, a very small proportion of international commercial awards currently fall within either of these two scenarios.

The preceding paragraphs suggest that there is something more than functional or structural concerns involved in the reasoning requirement in international commercial arbitration. Instead, parties' desire for reasoned awards may be explained by reference to one or more non-functional rationales. For example, it has been said that:

• reasoned awards provide key assurances regarding the nature and quality of justice that is being dispensed by the arbitrator;

• use of reasoned awards improves the quality of the decision-making process and consequently of the decision itself;
• reasoned awards provide parties with a more comprehensive and satisfactory explanation of why the arbitrator decided as he or she did and may therefore increase the likelihood of voluntary compliance, since the losing party will feel fully "heard"; and
• reasoned awards enhance the legitimacy of the arbitral process in the eyes of the arbitrators, the parties and the public, including national courts that may be asked to enforce an award, even if there is no ability to review the merits of the award, by demonstrating the seriousness and integrity of the arbitral endeavor.

Not all of these rationales may be equally attractive to all parties. However, these principles do provide some explanation of why parties continue to require reasoned awards even though many jurisdictions do not incorporate a legal requirement for such awards.

Of course, some jurisdictions may require a fully reasoned award as a matter of law, and most parties require such an award as a matter of contract. As a result, the question of why a reasoned award is needed is perhaps less important than what constitutes a reasoned award.

Again, the first way to respond to this question might be through an analogy to litigation. However, judicial practice with respect to written rulings varies widely both within and between jurisdictions. Thus, for example, a French judgment, with its multiple "whereas" clauses (*attendus*), looks very different than a U.S. judgment, although both are considered reasoned ruling. While some people may simply attribute those distinctions to the differences between the common law and civil law, significant variety also exists within each of those legal traditions. Thus, a German judgment is very different than a French judgment and even a Dutch judgment. Similar distinctions appear in common law jurisdictions, as reflected in the disparities between U.S. judgments and English judgments.

Differences within a single jurisdiction are harder to see, but are nevertheless evident. For example, U.S. Supreme Court Justice Benjamin Cardozo created and discussed a taxonomy of judicial rulings in his book, *The Nature of the Judicial Process* (1949). In that book, he identified three different types of disputes that can result in a judicial ruling and demonstrated how the shape and content of a reasoned ruling can and should be adapted to take those underlying differences into account. That methodology can be adapted for use in international commercial arbitration, thereby increasing efficiencies of time and money and resulting in more appropriately tailored awards.

For example, Justice Cardozo suggested that some disputes arise when "[t]he law and its application alike are plain" (Cardozo, pp. 164-65). Such matters can only be decided in one way and therefore merit a very short written ruling. Another set of disputes arise when "the rule of law is certain, and the application alone doubtful" (id.). These matters can be handled by a short description of how the court or arbitral tribunal arrived at its decision, even though the ruling does not include a detailed discussion of the facts or a comprehensive explanation of the legal rationales underlying the decision. The final set of disputes involves situations that "will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law" and therefore require a fully reasoned decision or opinion (id.). While arbitrators do not act like common law courts, they nevertheless resolve a variety of issues that can be characterized as ground-breaking and that therefore merit a comprehensive written ruling. By distinguishing between the various types of disputes, Justice Cardozo provides a principled manner of limiting judicial and arbitral writings, thereby increasing the efficiency of the dispute resolution process while avoiding any detrimental effect on the parties or to the concept of a reasoned award.

Justice Cardozo and other experts in judicial writing have also identified how the classical principles of Greco-Roman rhetoric can be adapted for use in judicial rulings. This structure, which includes an

orientation paragraph (*exordium*), a summary of legal issues (*divisio*), a statement of facts (*narratio*), an analysis of legal issues (*confirmatio a. confutatio*) and a conclusion indicating the holding or disposition (*peroratio*), can also be adapted for use in international commercial arbitration.

As useful as these suggestions are, they do not provide arbitrators with detailed guidance on how to write a reasoned award. This lacuna is somewhat problematic, given that the shift from advocate to decision-maker is much more difficult than it initially appears to be, as many judges have noted. Though some observers have suggested that international arbitrators can learn their new profession through observation and experience, that approach – which is based on the common law model of judicial education, which has been criticized from both within and without – would seem untenable, particularly given statements from many esteemed judges, including U.S. Supreme Court Justice Hugo Black, who once said that one of the hardest things about coming to the Court was learning to write.

The preceding discussion suggests that a great deal more thought must go into the concept of a reasoned award in international commercial arbitration, both as to the motivations for such awards and the shape that such awards can or should take. While it is in no way desirable that a single model award should be adopted, it would doubtless be helpful if the arbitral community had a better understanding of what constituted a reasoned award in the international commercial context, particularly since novice (and experienced) arbitrators have very little to look at in the way of models. Not only are published awards relatively scarce, but many of the materials that are publicly available are typically offered only in excerpted, digested or translated form and may not be suitable for use as prototypes. While arbitrators could seek guidance from other types of reasoned rulings (such as awards generated in investment arbitration or reasoned decisions from national courts), not all of those procedures are truly analogous to international commercial arbitration.

This is just an introduction to the many issues that arise with respect to reasoned awards. Many of the themes introduced in this post are discussed in more detail in my forthcoming article in the *Michigan Journal of International Law*. However, the concept of reasoned awards is something that can and should be subject to robust debate and discussion within the arbitral community as a whole. It is therefore hoped that this post will inspire more scholarship and thought on matters relating to reasoned awards in international commercial arbitration