Kluwer Arbitration Blog

Challenging Arbitral Awards before the Singapore Courts for a Tribunal's Failure to Give Reasons (Part 2 of 2)

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Professor Stacie Strong has noted on this blog that "*[c]ritics of international arbitration often express concerns about the quality of legal reasoning in arbitration, even though conventional wisdom…suggests that international arbitral awards reflect relatively robust reasoning that is often on a par with that of decisions rendered by commercial courts*" .

However, adopting a more close-up view, it is the users of arbitration themselves who are often most directly affected by the quality of an arbitral tribunal's reasoning in its award. Take the example where, at the end of a lengthy and complex arbitration, the tribunal issues an award that summarises the evidence and submissions of both parties, and concludes with a single paragraph that states, "For the reasons given by the Claimant, which are accepted by this Tribunal, the claim is allowed in full." Can an award of this nature be set-aside for lack of reasons?

In the first of this two-part series, we examined the arbitrator's duty to give reasons. This second part of this series examines the remedies parties may seek in cases where this duty has been breached, in particular with respect to the following two issues.

1. Is a party seeking to set-aside an award for lack of reasons obliged to first apply for an additional award?

2. What is the appropriate remedy where an award lacks reasons?

It concludes with a number of key practical tips for arbitrators and users of international arbitration.

Obligation to First Apply for an Additional Award?

Under Singapore law, pursuant to Article 33 of the Model Law and section 43 of the Arbitration Act (for awards emanating from international arbitration and awards emanating from domestic arbitration, respectively), a party to an arbitration is entitled to request the arbitral tribunal to make an additional award. This position is similar to that under the laws of other leading jurisdictions for arbitration, e.g. England and Wales (cf. s57 of the English Arbitration Act 1996) and Hong Kong (cf. s69 of the Hong Kong Arbitration Ordinance (Cap. 609).

One may therefore attempt to argue that a party should be obliged to *first* apply for an additional award, before applying to challenge an arbitral award for lack of reasons – and that if a party has not first applied for an additional award within the statutory timeframe, it should be barred from challenging an award for lack of reasons.

However, it is clear that a failure to first apply for an additional award is no bar to an application to set aside an award for an arbitral tribunal's failure to give reasons.

1. In *BLB v BLC* [2014] 4 SLR 79, the Singapore Court of Appeal in considering Articles 33 and Articles 34 of the Model Law, recognised that requesting an additional award was optional – something a party "may" seek.

2. The Court also observed at [116] that the risks of failing to first apply for an additional award are as follows:

   …whilst a party is not obliged to invoke Art 33(3) [i.e. to request an additional award], **he takes the risk that the court would not, in a setting-aside application, exercise its discretion to set aside any part of the award** or invoke the powers of remission under Art 34(4) of the Model Law… [emphasis added].

3. Where the Arbitration Act is concerned, the legislative drafters have expressly made the exhaustion of recourse under section 43 (including requests for additional awards) a prerequisite to a section 49 *appeal* (see s50 titled "Supplementary provisions to appeal under s 49" at s50(1)(2)(b)). The legislative drafters *did not* make this a requirement for a section 48 setting aside application. The *expressio unius est exclusio alterius* maxim applies to prevent the Court from judicially 'legislating' the equivalent of section 50 for section 48.

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Appropriate Remedy

If an applicant is able to establish that a breach of the duty to provide adequate reasons warrants setting aside the award or a part of it under section 48(1)(a)(v) of the Act, or if the inadequacy of reasons forms the applicant's primary complaint about the award, what is the appropriate remedy?

The key question is whether the Court should set aside the award, or remit it back to the tribunal, as it is empowered to do under Article 34(4) of the Model Law and section 48(3) of the Arbitration Act.

There are a number of competing considerations.

In favour of setting aside the award is the overarching point that if the courts resort to remission too readily, this practice may undermine key principles of arbitration: party autonomy, minimal curial intervention, and arbitrator discipline.

1. **Party autonomy**: When a party succeeds in establishing that an arbitrator has breached his duty to give adequate reasons, that party's dispute-resolution bargain has been breached. Arguably, the party is therefore entitled to have the dispute resolved in accordance with its bargain, by having the award set aside.

2. **Minimal curial intervention**: Remittance is a classic case of curial intervention with the arbitral process, in particular the tribunal's decision-making process.

3. **Arbitrator discipline**: Regular remittance may reduce the motivation for arbitrators to be thorough and diligent in setting out their reasons, since they know that the court will likely give them a second bite of the cherry should they fail to do so.

However, in favour of remission is the fundamental benefit of self-correction. Remission of an award enables the arbitral process to correct itself before the severe stage of setting aside is reached. Indeed, a case of inadequate reasons can be said to be the paradigm case for remission.

1. **Assistance to the Court.** Remission may allow the supervisory court to better determine whether

an award should ultimately be set aside. This is because inadequacy of reasons in an award directly affects the court's ability to determine whether any other grounds for setting aside the award are well?founded (e.g. whether there has been a breach of natural justice, failure to give a party the opportunity to be heard).

2. **Finality unaffected.** Remission typically does not require the re-opening of proceedings which have closed, e.g. for additional disclosure, evidence or submissions. Remission also cannot result in any change of outcome on the merits, and there is therefore no direct impact on the finality of the award.

3. **Time and costs.** Generally, the cost and delay of going back to the tribunal on a remission for it to provide additional reasons is likely to be less than the cost and delay of starting fresh proceedings in respect of the matters covered by the award if the award is set aside.

It may therefore be preferable to remit an award as the first resort, in a case where the only or primary ground for setting aside which has been established is inadequate reasons, rather than require the parties to re-arbitrate their dispute.

This conclusion is supported by the judgment of Lord Phillips of Worth Matravers MR for the English Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at [24]-[25], albeit given in the context of litigation:

Where the judge who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the judge has not included in his judgment adequate reasons for his decision. … If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course…

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Conclusion

As stated in the first of this two-part series, arbitrators should be conscious of their duty to render adequately reasoned awards. They should not regard the appointment of experts as exculpatory of the arbitrator's duty, and, in giving reasons, should go beyond mere regurgitation of evidence / submissions.

Ultimately, arbitrators can expect the analysis set out in their awards – and in particular, any lack thereof – to be closely scrutinised by the parties, and potentially, the courts. The courts can, and will in the appropriate circumstance, remit awards back to arbitrators, to provide supplemental reasons for their decisions within a stipulated timeframe.

On the other hand, parties should be made aware that if they are unsuccessful in an arbitration, they should carefully scrutinise not only the arbitral procedure, but also the tribunal's reasoning in its award. They should also properly consider the remedies that may be available – and in particular, whether they can request the remittance of the award back to the arbitral tribunal.

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