Kluwer Arbitration Blog

Arbitral Awards: How Long is Long Enough?

Max Bonnell (Henry William Lawyers) · Friday, September 2nd, 2022

There's a story told of Abraham Lincoln who, during his days as a working lawyer, was riding in a stagecoach from one rural courthouse to another. His companions got to discussing human anatomy, and one of them asked Lincoln, a distinctly tall man himself, how long he thought a man's legs should be. Long enough, Lincoln replied, to reach the ground.

In the same vein, there is no one prescriptive answer to the question of how long an arbitral award should be. Long enough, Lincoln may have suggested, to do its job. But not as long, surely, as most awards are today.

Even in relatively routine commercial cases, it has become very rare to encounter a final award on the merits that is briefer than 100 pages. Often, awards in such cases are very significantly longer than that. There is next to no objective data on this point – institutions don't publish information on it, and the various surveys of practitioners and clients that are published from time to time don't discuss it. But my experience of arbitration practice over the last twenty years has been that, over that time, awards have been getting increasingly lengthy, and that the trend shows no signs of abating.

Why are awards so long?

The easy part of the answer is that technology makes it possible. I began practising law in the late 1980s, before the widespread adoption of word processing software. Legal documents were tapped out on a typewriter, and if substantial amendments were required, the entire document usually needed to be re-typed. That constraint imposed the discipline of brevity, and even relatively complex contracts and pleadings were markedly shorter than their equivalents are today. Contemporary technology neither imposes nor encourages that restraint: on the contrary, it enables lengthy documents to be created with minimal thought, allowing for the wholesale dumping of boilerplate clauses or cut-and-pasted extracts.

So the means to create long documents are now freely available. But to what purpose? There are very few mandatory elements to an award: I am aware of no country whose law sets out an exhaustive list of what an award must contain. The UNCITRAL Model Law, for example, requires only that an award be in writing, signed by the arbitrators; that it state the reasons upon which it is based (unless the parties agree otherwise); and that it state the date on which, and place at which, it was made. Contemporary practice (propounded in such guidelines as the IBA's Toolkit for Award

Writing) has established, however, a template for an award that includes minute detail of the procedural history of the case; extensive lists of the parties' representatives and arguments; and synopses of the evidence presented. Tribunals load up their awards with this wealth of detail in order, it appears, to demonstrate that the arbitration was procedurally sound, and that each party was afforded an opportunity to put its case. The motivation, in other words, is to protect the award against the risk of a challenge; as the IBA's Toolkit for Award Writing puts it, all this "*information may be relevant in later recognition and enforcement or set-aside or annulment proceedings*."

As an example, on 18 May 2022, an ICSID Tribunal rendered an award in *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea (ICSID Case No. ARB/14/22) ("**BSG v Guinea**")*. I have chosen this award randomly, because it's public and among the more recent awards published by ICSID. Moreover, the tribunal – Professor Gabrielle Kaufmann-Kohler, Professor Albert Jan van den Berg and Professor Pierre Mayer – possessed unimpeachable credentials, and its work may fairly be taken to represent best current practice. No criticism of that distinguished tribunal is intended. Indeed, by contemporary standards, its award is relatively concise, running to a mere 360 pages and 1132 numbered paragraphs. I also acknowledge that there are good reasons why an award in an investor-State arbitration might be rather longer than an award in a private commercial arbitration: there is a public dimension that justifies a thorough analysis of how the dispute has unfolded, and investment treaty awards (although not binding as precedent) may be treated as sources of guidance on international law.

Nonetheless, the award in *BSG v Guinea* is worth examining precisely because it is of such a high standard: strongly reasoned and clearly written. Around 204 paragraphs, or about 18% of the award, contain a summary of the procedural history of the case. In contrast, the tribunal's admirably succinct summary of the critical facts of the case occupies 67 paragraphs. It has been a long-standing practice of counsel to provide submissions to tribunals in soft copy, as an invitation to cut and paste; the unhappy outcome of that practice is that tribunals now routinely cut and paste *both* sets of submissions: hence, some 220 paragraphs (or nearly 20%) of the *BSG v Guinea* award summarise the positions advanced by the parties.

In my recent experience of commercial arbitration, those percentages are on the low side: it is now commonplace for awards to recite the procedural history of a case, and the positions put by opposing counsel, at enormous length, while devoting only a handful of paragraphs to the reasoning by which the tribunal reached its result. I have often encountered a long succession of paragraphs setting out the parties' detailed contentions on an issue, followed by a single paragraph recording the tribunal's decision on it. My experience is that awards are not only becoming increasingly lengthy, but that they are also cluttered up with information that is incidental, at best, to the tribunal's reasoning.

But does it matter?

I think it does, and for at least three reasons. First, the inclusion of lengthy case histories in awards stokes the widespread belief that large amounts of the initial drafting of awards is now delegated to tribunal secretaries, a practice of which not everyone approves. Secondly, the creation of unnecessarily lengthy documents adds delay to an arbitration, and thirdly, it adds cost. Some institutions, of course, impose time limits on the delivery of awards, but I have never known a

request for additional time to be refused. This may be relatively less important in a treaty case, but commercial arbitration is often promoted as a speedy, cost-efficient means of resolving disputes. 500-page awards cluttered up with records of who attended which hearing are not tools by which speedy, cost-efficient solutions are delivered. Several times now, I have needed to wait for more than 12 months after the final hearing to receive an award in a commercial case. The commercial courts of most countries now deliver their judgments with far greater efficiency than that.

It is worth touching upon an important distinction between court judgments and commercial awards. In the common law jurisdictions, it is necessary for courts to canvass every point put to them, and explain how each is answered, partly because their judgments have the binding force of precedent and partly because their judgments are subject to appeal (and so it is important to explain why unsuccessful arguments were rejected). The fact that neither constraint applies to an award ought to (and used to) give tribunals a far greater licence to deal only very briefly with matters that are not directly relevant to the result.

It is also worth observing that the purported rationale behind many very lengthy awards has an obvious flaw. It is commendable that tribunals strive to deliver enforceable awards, and understandable that they seek to demonstrate that they have followed correct processes and afforded the parties procedural fairness. But, on those issues, an award has limited evidentiary value: it is merely the tribunal's secondary (and potentially self-justifying) account of what occurred, which carries far less weight as evidence than the primary records of those events – transcripts, submissions, correspondence and so on. Most courts, considering the circumstances of an arbitration, are far more likely to look to the primary evidence, which calls into question whether detailed procedural histories add anything much of value to an award. Besides, I refuse to believe that any award, ever, has survived challenge because it troubled to list the paralegals who delivered document trolleys to the second procedural hearing.

On 19 December 1863, Abraham Lincoln attended the dedication of the Soldiers' National Cemetery at Gettysburg. He wasn't invited to deliver the main address on that occasion: that honour fell to a celebrated orator named Edward Everett, a politician and sometime President of Harvard University. Everett spoke for over two hours, delivering more than 13,000 words, not one of which is now remembered by anyone. Lincoln, speaking almost as an afterthought, addressed the assembly in the 271 words of the Gettysburg Address. Sometimes, concise is better.

How long should an award be? Long enough to do its job – but that may be much shorter than you might expect.

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