Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy

S. I. Strong

Follow this and additional works at: https://repository.law.umich.edu/mjil

Part of the Commercial Law Commons, Dispute Resolution and Arbitration Commons, International Law Commons, and the Legal Writing and Research Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjil/vol37/iss1/1

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
ARTICLES

REASONED AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION: EMBRACING AND EXCEEDING THE COMMON LAW-CIVIL LAW DICHOTOMY

S.I. Strong*

TABLE OF CONTENTS

INTRODUCTION ................................................. 2

II. WHAT CONSTITUTES A REASONED AWARD IN INTERNATIONAL COMMERCIAL ARBITRATION ........... 10

III. WHY REASONED AWARDS ARE NECESSARY OR USEFUL IN INTERNATIONAL COMMERCIAL ARBITRATION ........ 13

A. Structural Rationales for Reasoned Awards ............ 15

B. Non-Structural Rationales for Reasoned Awards ..... 18

IV. WRITING REASONED AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION ......................... 21

A. Issues Relating to the Process ............................ 21

1. Multi-person tribunals .................................. 21

2. Dissenting and concurring opinions ................. 23

3. Ruling in the alternative or on ancillary points .... 24

4. Independent legal or factual research ............... 25

5. Appellate awards ...................................... 27

B. Issues Relating to the Framework ......................... 30

1. Style .................................................. 30

2. Scope ................................................ 33

i. A taxonomy of arbitral disputes ...................... 33

ii. Distinguishing between factual findings and legal conclusions ...................... 36

3. Structure ................................................ 39

i. Required elements .................................. 39

ii. A classical structural framework ................. 41

a. Orientation (exordium) ........................... 44

* D.Phil., University of Oxford; Ph.D. (law), University of Cambridge; J.D., Duke University; Master in Professional Writing, University of Southern California; B.A., University of California, Davis. The author, who is admitted to practice as an attorney in New York, Illinois and Missouri and as a solicitor in England and Wales, is the Manley O. Hudson Professor of Law at the University of Missouri and Senior Fellow at the Center for the Study of Dispute Resolution. The author thanks Joshua Karton for comments offered on earlier drafts of this Article. Portions of this Article were written while the author served as a U.S. Supreme Court Fellow, although the opinions reflected herein are those of the author alone.
Unlike many types of domestic arbitration where unreasoned awards (often called “standard awards”) are the norm, international commercial arbitration routinely requires arbitrators to produce fully reasoned awards. However, very little information exists as to what constitutes a reasoned award in the international commercial context or how to write such an award. This lacuna is extremely problematic given the ever-increasing number of international commercial arbitrations that arise every year and the significant individual and societal costs that can result from a


3. A few materials are available, although most are relatively short and provide only general advice. See generally George A. Bermann, Writing the Award – An Arbitrator’s Perspective, in INTERNATIONAL ARBITRATION CHECKLISTS 171 (Grant Hanessian & Lawrence W. Newman eds., 2009); Thomas Bingham, Reasons and Reasons for Reasons, 4 Arb. Int’l L. 141 (1988); Thomas J. Brener et al., Awards and Substantive Interlocutory Arbitral Decisions, in COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 225, 237-39 (James M. Gaitis et al. eds., 2014); Daniel L. FitzMaurice & Maureen O’Connor, Preparing a Reasoned Award, 14 ARIAS U.S. Q. (2007); Marcel Fontaine, Drafting the Award – A Perspective from a Civil Law Jurist, 5 ICC Court Bull. 30 (1994); Humphrey Lloyd, Writing Awards – A Common Lawyer’s Perspective, 5 ICC Court Bull. 38 (1994); Humphrey Lloyd et al., Drafting Awards in ICC Arbitrations, 16 ICC Court Bull. 19 (2005); William W. Park, Arbitrators and Accuracy, 1 J. Int’l Disp. Settlement 25 (2010); Jose Maria Alonso Puig, Deliberation and Drafting Awards in International Arbitration, in LEBER AMICORUM BERNARDO CREMADES 131, 144-58 (Miguel Ángel Fernández-Ballesteros & David Arias eds. 2010); Nicholas C. Ulmer, Language, Truth, and Arbitral Accuracy, 28 J. Int’l Arb. 295 (2011).

4. International commercial arbitration is the preferred means of resolving cross-border business disputes. See Born, supra note 2, at 73; see also S.I. Strong, Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration, 2012 J. Disp. Resol. 1, 2-3, 5-6 [hereinafter Strong, Border Skirmishes] (noting an increase in arbitral proceedings over the last fifty years). More generalists are entering the world of arbitration as
badly written award.\textsuperscript{5} Indeed, much of the current debate about the need for appellate arbitration stems from controversies generated by awards that fail to provide reasoning that is sufficiently persuasive to the losing party.\textsuperscript{6}

Helping arbitrators write awards that are clear, concise and coherent is vitally important if international commercial arbitration is to retain its place as the preferred means of resolving cross-border business disputes.\textsuperscript{7} However, that task is not as easy as it sounds.

First, the relative scarcity of published awards means that novice arbitrators have very little to look at in the way of models.\textsuperscript{8} Furthermore, 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.\textsuperscript{9} While arbitrators could seek guidance from other types of advocates and arbitrators, which may affect the quality and nature of international award writing. \textit{See id. at 4}.

5. Badly written awards (which in this context means those that provide insufficient reasoning as opposed to those that reach the “wrong” conclusion) can not only diminish parties’ and society’s faith in the legitimacy of the arbitral process, they can also increase the time and cost associated with final resolution of a dispute, both by taking a long time to write and by increasing the chance for a successful challenge to the award. \textit{See BORN, supra note 2, at 304; see also Herbert L. Marx Jr., Who Are Labor Arbitration Awards Written For? And Other Musings About Award Writing, 58 DISP. RESOL. J. 22, 23 (May-July 2003). Rising costs and delays have jeopardized the future of international commercial arbitration, and parties are now considering the viability of other dispute resolution alternatives, such as international commercial mediation. \textit{See S.I. Strong, Beyond International Commercial Arbitration? The Promise of International Commercial Mediation, 45 WASH. U. J. L & POL’Y 11, 12 (2014); S.I. Strong, Reasoned Rationality: An Empirical Assessment of International Commercial Mediation, (forthcoming 2016).}


7. \textit{See BORN, supra note 2, at 73.}

8. \textit{See Albert Jan van den Berg, Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 821, 821 n.4 (Mahmoush Arsanjani et al. eds. 2010) (“[It] is uncommon to publish international commercial awards. . . .”). Although a number of arbitral institutions have been publishing denatured (anonymized) awards for decades, those materials are not widely available, since they are found only in specialized reporting series that are difficult and expensive to find. See S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES 44-45, 83-85 (2009) [hereinafter STRONG, RESEARCH] (listing sources for arbitral awards and noting that databases offered by generalist providers such as Westlaw and LexisNexis generally do not include the necessary information).}

9. \textit{See Lloyd et al., supra note 3, at 20; see also James M. Gaitis, International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards, 15 AM. REV. INT’L ARB. 9, 17 (2004) (discussing why reasoned awards can vary widely). There are no groups responsible for identifying those arbitral awards that are particularly noteworthy from a structural or linguistic perspec-
reasoned rulings that are more widely available (such as awards generated
in investment arbitration\(^{10}\) or reasoned decisions from national courts\(^{11}\)),
not all of those procedures are truly analogous to international com-
mercial arbitration.\(^{12}\)

tive, although a brief review of recently published awards demonstrates a
number of examples of good writing. See Contractor v. Producer (Zam. v. Zam.),
International Chamber of Commerce Case No. 16484, Final Award (2011),
XXXIX Y.B. COMM. ARR. 216 (2014); Consortium Member v. Consortium Leader (It. v.
Neth.), International Chamber of Commerce Case No. 14630, Final Award,
XXXVII Y.B. COMM. ARR. 90 (2012). The situation is quite
different in the judicial realm, where exemplary judicial writing is identified regularly. See Exemplary Legal Writing, THE GREEN BAG ALMANAC & READER,
5, 2016) (listing the best judicial opinions in the United States each year); see also

10. Numerous investment awards are now publicly available as a result
of the move toward increased transparency. See Award – ICISD Convention
Arbitration, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES (ICSID), https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Award-Convention-Arbitration.aspx (last visited Feb. 6, 2016) (noting the presump-
tion toward full or partial publication of investment awards); see also Gary
Born, A New Generation of International Adjudication, 61 DUKE L.J. 775,
841-42 (2012); Susan D. Franck, The Legitimacy Crisis in Investment Treaty
Arbitration: Privatizing Public International Law Through Inconsistent

11. Reasoned judicial decisions exist in both civil law and common
law courts, although there are some differences between the types of judicial opinions generated by
common law courts and civil law courts. See Allen Shoenberger, Change in the
European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent Into the Civil
Law System, 55 LOY. L. REV. 5, 5 (2009); see also infra notes 58-61, 221-222 and accompanying
text. For example, judges in civil law countries often do not undertake the same type of
factual analysis as judges in common law countries because of the civil law’s emphasis on
deductive rather than inductive reasoning. See S.I. STRONG ET AL., COMPARATIVE LAW FOR
BILINGUAL LAWYERS: WORKING ACROSS THE ENGLISH-SPANISH DIVIDE / DERECHO COM-
PARADO PARA ABOGADOS HISPANO Y ANGLOPARLANTES ch. 3 (forthcoming 2016) (noting
that whereas “the civil law . . . uses deductive reasoning to move from general principles of
law to particular outcomes in specific cases, the common law uses analogical or inductive
reasoning to generate general principles of law as a result of legal conclusions generated in
large numbers of individual disputes”); Julie Bédard, Transsystemic Teaching of Law at Mc-

12. See Strong, Writing, supra note 6, at 101-06 (discussing purposes of judicial op-
inions and decisions); see also infra notes 67-84 and accompanying text (concerning differences
between arbitration and litigation). For example, the public-private nature of investment arbitra-
tion and the strong influence of international law means that investment awards often
resemble opinions generated by the International Court of Justice (ICJ). See Born, supra
note 10, at 780-81; Thomas Buergenthal, Lawmaking by the ICJ and Other International
Courts, 103 AM. SOC’Y INT’L L. PROC. 403, 405 (2009) (noting investment awards often rely on
decisions from the ICJ); see also Ernest A. Young, Supranational Rulings as Judgments and Prece-
cedents, 18 DUKE J. COMP. & INT’L L. 477, 491-96 (2008) (suggesting that interna-
tional arbitral awards are enforced more readily than judgments of international tribunals);
compare Application of the Convention on the Prevention and Punishment of the Crime of
18422.pdf, with Ambiente Ufficio S.p.A. v. Argentine Republic (Arg. v. It.), Decision on
Jurisdiction and Admissibility, ICSID Case No. ARB/08/9 (Feb. 8, 2013), http://
Second, new arbitrators typically come to their duties with very little in the way of formal training. Indeed, the underlying assumption is that anyone appointed to an *ad hoc* tribunal or to an arbitral roster is already competent to serve as an arbitrator as a result of that person’s extensive experience as counsel. Interestingly, this reliance on selection procedures rather than on training is similar to the educational model adopted by the judicial systems of many common law countries. In those jurisdictions, judges are selected from a pool of experienced lawyers and placed on the bench with very little specialized training, based on the assumption that anyone who has become a top litigator is naturally competent to take on the role of a judge. However, research into judicial education and performance has demonstrated that the skills associated with serving as an adjudicator are significantly different than those associated with acting as an advocate. The transition to the bench is particularly difficult with respect to the task of writing fully reasoned rulings, with many new judges finding the “move from advocacy to decision, from marshalling and presenting evidence to fact-finding and synthesizing,” to be extremely challenging. As a result, it appears inaccurate to claim, as some authori-

13. A number of universities have attempted to provide advanced training in arbitration, but most of those courses focus on preparing advocates rather than arbitrators. See, e.g., [American University, Washington College of Law, Center on International Commercial Arbitration](https://www.wcl.american.edu/arbitration/) (last visited Feb. 5, 2016); [Columbia Law School, Center for International Commercial & Investment Arbitration, Related Curriculum at Columbia Law School](http://web.law.columbia.edu/center-for-international-arbitration/curriculum) (last visited Feb. 5, 2016); [MIDS-Geneva L.L.M. in International Dispute Resolution, Curriculum](http://www.mids.ch/the-program/curriculum/general-courses/first-general-course.html) (last visited Feb. 5, 2016); [Queen Mary, University of London, School of International Arbitration, Specialist Programmes](http://www.arbitration.qmul.ac.uk/courses/index.html) (last visited Feb. 5, 2016) [hereinafter QMUL]; [University of Miami, L.L.M. in International Arbitration, Program Requirements](http://www.law.miami.edu/academics/international-arbitration-institute/lectures-courses) (last visited Feb. 5, 2016). In the one case where a course on award writing is offered, it is limited to a single session. See QMUL, *supra* (describing one-day short course on award writing in international arbitration).

14. See [Strong, Guide, *supra* note 1, at 7-9](#) (discussing institutional arbitration and *ad hoc* arbitration). Although most arbitral institutions require some training when a new arbitrator joins their roster, those programs focus heavily on administrative issues relating to that particular institution. Some substantive elements may be offered, but not in any detail.


18. Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future From the Roberts Court to Learned Hand – Context and Congruence*, 12 BARRY L. REV. 53, 55 (2009) [hereinafter Van Detta 1]. Indeed, U.S. Supreme Court Justice Hugo Black, one of the most influential writers to ever grace the bench, once said that “the
ties have, that international arbitrators can gain the necessary skillset simply through “observation, exposure, participation and experience.”

This is not to say that arbitrators are entirely without resources, since new and experienced arbitrators can seek out courses in award writing from any one of a variety of institutions specializing in international commercial arbitration. However, the current approach is problematic in several ways.

First, it is not clear how many new or experienced arbitrators capitalize on the opportunity to study award writing. Although some organizations require their members to undertake continuing education in arbitration, that requirement is usually minimal (one one-hour course per year may suffice) and does not mandate instruction in any particular subject. Given the various pressures facing both new and experienced arbitrators, it is perhaps understandable that arbitrators overlook courses in writing, particularly since many arbitrators may feel that after decades of work as practicing lawyers, they are already competent writers. However, many people do not appreciate the extent to which award writing differs from other forms of communication.

most difficult thing about coming on to the Court was learning to write.” DOMNARSKI, supra note 9, at 36 (citation omitted).


21. Commentators have suggested that the field of international commercial arbitration is under-regulated in a variety of ways. See Catherine A. Rogers, The Vocation of the International Arbitrator, 20 AM. U. INT’L L. REV. 957, 970 n.40 (2005) [hereinafter Rogers, Vocation].

22. Although a number of organizations (such as the AAA and CIArb) require mandatory training on award writing, that requirement is usually limited to a single course upon joining the organization or its roster.

23. See Jones, supra note 19, at 288; Rogers, Vocation, supra note 21, at 978. This system is again remarkably similar to judicial education in common law countries, although that approach has been criticized in a number of ways. See S.I. Strong, Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?, 2015 J. DISP. RESOL. 1, 2-5 [hereinafter Strong, Judicial Education]; Strong, Writing, supra note 6, at 95-97.

24. Many arbitrators must not only juggle very busy dockets but must also learn a variety of new skills, ranging from the ability to manage difficult counsel and witnesses to issues relating to the type of evidence to allow or disallow. See Jones, supra note 19, at 281; AAA, COURSE CALENDAR, https://www.adreducation.org/courses (last visited Feb. 5, 2016) (demonstrating the scope of courses available to arbitrators).

25. Of course, it is possible that new arbitrators suffer from the Lake Wobegone Effect with respect to their writing skills. See Garrison Keillor, The Lake Wobegone Effect, A PRAIRIE HOME COMPANION (Apr. 1, 2013), http://prairihome.org/2013/04/the_lake_wobegon_effect/ (noting that all the children in Lake Wobegone are above average).

26. See Lawrence B. Solum, Communicative Content and Legal Content, 89 NOTRE DAME L. REV. 479, 503-06 (2013); Van Detta 1, supra note 18, at 55.
Arbitrators who have worked previously as judges may be particularly disinclined to take courses in award writing, based on the belief that they already know how to write reasoned decisions.27 However, arbitral awards are in many ways different than judicial opinions, and skills learned in the judicial context may not translate into the arbitral setting.28

Current practice regarding continuing education on award writing suffers from other problems as well. For example, most arbitral institutions only ask established arbitrators to act as faculty, presumably based on the belief that arbitrators are the only ones who have the skills and insights necessary to teach other arbitrators.29 Not only can this practice create a number of self-reinforcing behaviors within the field as faculty members emphasize issues that they consider to be important with little input from external or empirical sources,30 but most arbitrators are not especially qualified to teach writing, despite their practical experience in arbitration.31 As a result, many award writing seminars end up focusing on personal anecdotes, basic writing techniques or logistical concerns that do not address the deeper challenge of producing fully reasoned awards.32

Many of these educational practices mirror those traditionally seen in common law forms of judicial education.33 Although those similarities might lead some observers to conclude that the existing approach to arbitrator education is sufficient, commentators have sharply criticized the


29. Many common law countries use a similar approach to judicial education, although that approach has been criticized. See Strong, Judicial Education, supra note 23, at 2-5.


31. The same issues exist in many forms of judicial education. See Strong, Judicial Education, supra note 23, at 1. Many people cling to the belief that good writing cannot be taught, either because writing is an innate skill or because the range of opinions about what constitutes good writing is too diverse to support a single standardized treatment. See S.I. Strong, HOW TO WRITE LAW EXAMS AND ESSAYS 1-2 (4th ed. 2014) [hereinafter Strong, How To Write]. While it is certainly true that good writing can vary a great deal in terms of form, tone and style, that does not mean that it is impossible to identify certain common features that exist in all good legal decisions and opinions. See generally Louise Mailhot & James D. Carnwath, DECISIONS, DECISIONS . . . A HANDBOOK FOR JUDICIAL WRITING 100 (1998) (discussing judicial writing); Domnarski, supra note 9, at 55-74, 90-115.

32. See, e.g., Marx, supra note 5, at 22-23. This type of approach is also evident in materials relating to judicial writing. See Strong, Writing, supra note 6, at 95-97.

33. See Strong, Writing, supra note 6, at 95-97; see also supra notes 15-32 and accompanying text.
common law judicial education model. 34 This phenomenon, when combined with the various concerns enunciated within the arbitral community about the qualifications of international commercial arbitrators, suggests that the existing approach to arbitrator education needs to be changed, particularly with respect to the issue of award writing. 35

Indeed, these issues suggest there is a critical need for more rigorous analysis regarding the reasoned award requirement in international commercial arbitration. 36 This Article attempts to meet that need by scrutinizing the elements of a reasoned award in international commercial arbitration and providing both experienced and novice arbitrators with a structured and content-based approach to writing such awards. 37 Methodologically, the discussion draws heavily on the large body of material involving the use and drafting of reasoned judicial rulings in both common law and civil law jurisdictions. 38 However, the analysis only draws those

---


35. See Jones, supra note 19, at 275. The decreased emphasis on arbitrator education has led many parties to equate experience as an international arbitrator with competence as an international arbitrator, thereby making it difficult for new arbitrators to enter the field. See Wendy Miles, International Arbitrator Appointment: One vs. Three, Lawyer vs. Nonlawyer, 57 DISP. RESOL. J. 36, 37 (Aug.-Oct. 2002) (quoting Redfern & Hunter, Law and Practice of International Commercial Arbitration 205 (3rd. ed. 2004)); Rogers, Vocation, supra note 21, at 967.

36. This is a subject that appears particularly suitable for a written guide, since this form allows arbitrators to review the material at their own speed and in the manner that is most useful to them. For example, arbitrators, like judges, “are generally autonomous [as learners], entirely self-directed, and exhibit an intensely short-term problem-orientation in their preferred learning practices.” Armytage, supra note 34, at 149.

37. This Article focuses on matters relating to final awards on the merits and does not consider the special issues relating to the writing of a procedural order, an award arising out of an arbitral challenge, a consent award or an interim or partial award, although some commentators have discussed such matters. See, e.g., Int’l. Council for Commercial Arbitration (ICCA), Report No. 2: The ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders (2015); Lloyd et al., supra note 3, at 38-40; Margaret Mosse, Reasoned Decisions in Arbitrator Challenges, III Y.B. Int’l Arb. 199 (2013); Rolf Trittmann, When Should Arbitrators Issue Interim or Partial Awards and/or Procedural Orders, 20 J. Int’l Arb. 255 (2003). This Article also does not address the special nature of investment arbitration, which carries its own unique concerns as a result of its quasi-public nature. See Cheng & Trisotto, supra note 2, at 409. However, a number of the issues discussed herein apply to these other sorts of writings to the same extent as to final awards in international commercial arbitration. See Fontaine, supra note 3, at 30.

analogies that are appropriate, since arbitration and litigation are not identical.39

Although this Article is aimed primarily at specialists in international commercial arbitration, the material is also useful to numerous other individuals. For example, the information contained herein can be used to assist judges involved in enforcing reasoned awards domestically or internationally,40 scholars studying arbitral decision-making,41 arbitrators and tribunal secretaries involved in the drafting of individual awards,42 and domestic arbitrators seeking to understand what a reasoned award is under national law.43

39. See infra notes 56-57 and accompanying text.

40. See Born, supra note 2, at 3037-48.

41. Scholarship concerning international commercial arbitration is expanding at a phenomenal rate. See Strong, Research, supra note 8, at 88-137.

42. Discussion about the role of a tribunal secretary has become heated in recent years, particularly with respect to the question of whether and to what extent a tribunal secretary may assist in the drafting of an award. See ICCA, ICCA REPORT NO. 1: YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES (2015); Joint Report of the Int’l Commercial Disputes Comm. and the Comm. on Arbitration of the N.Y.C. Bar Ass’n, Secretaries to International Arbitral Tribunals, 17 AM. REV. INT’L ARR. 575, 576 (2006); Lloyd et al., supra note 3, at 21; Emilia Onyema, The Role of the International Arbitral Tribunal Secretary, 9 VINDOBONA J. INT’L COMM. L. & ARR. 99, 100 (2005); see also Michael Polkinghorne, Different Strokes for Different Folks? The Role of the Tribunal Secretary, KLUWER ARBITRATION BLOG (May 17, 2014), http://kuwerarbitrationblog.com/blog/2014/05/17/different-strokes-for-different-folks-the-role-of-the-tribunal-secretary-2/. This Article takes no position on that issue but simply notes that it is possible that such a role may evolve over time, just as the role of judicial clerks has evolved to include assisting judges with drafting judicial opinions and decisions. See Federal Judicial Center, LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 10, 86, 94-98 (Sylvan A. Sobel ed., 2nd ed. 2007), http://www.fjc.gov (discussing the role of U.S. law clerks in drafting judicial decisions and opinions); Joint Report, supra, at 576; Onyema, supra, at 100 (analogizing tribunal secretaries to judicial law clerks).

43. Some countries require reasoned awards in all sorts of arbitration, including domestic proceedings, while other countries permit the parties to choose whether to obtain a reasoned award. See Born, supra note 2, at 3037-48. In either case, domestic arbitrators would benefit from an increased appreciation of what constitutes a reasoned award and how such an award may be written, since the situation regarding the continuing education of arbitrators is often as dire domestically as it is internationally. See supra notes 22-32 and accompanying text. However, domestic awards differ from international awards in a number of key regards, so arbitrators should tailor their writing appropriately. See infra note 243-46 and accompanying text.
The primary focus of this Article is to analyze various process-oriented and structural issues relating to reasoned awards in international commercial arbitration so as to improve the practical and theoretical understanding of international awards. That discussion, which is found in Section IV, considers various factors from both the common law and civil law perspectives so as to take into account the blended nature of international commercial arbitration.\(^4\)

Of course, to be fully comprehensible, the detailed analysis in Section IV must first be put into context. Therefore, Section II describes the difficulties associated with defining a reasoned award in international commercial arbitration while Section III considers why such awards are necessary or useful as a functional matter.\(^5\)

Before beginning, it is helpful to note two basic points. First, reasoned awards can vary a great deal in terms of form, tone and style.\(^6\) As a result, this Article does not suggest a single, formulaic model that should be followed in all cases but instead provides an analytical framework that can be adapted to the particular needs of the dispute at hand. Second, when discussing how international commercial arbitrators should approach the drafting of a reasoned award, this Article does not address basic rules of good writing. Although these issues can be quite important,\(^7\) they are covered in detail elsewhere and need not be discussed herein.\(^8\)

II. WHAT CONSTITUTES A REASONED AWARD IN INTERNATIONAL COMMERCIAL ARBITRATION

The first matter to consider involves the question of what constitutes a reasoned award in international commercial arbitration. Most institutional rules applicable to international commercial arbitration\(^9\) simply indicate

---

\(^4\) See Born, supra note 2, at 2207-10; Strong, Guide, supra note 1, at 6.

\(^5\) Experts in adult education have found that adult learners do best when they understand why certain information is being presented. See Malcolm S. Knowles, The Modern Practice Of Adult Education: From Pedagogy to Andragogy 45-49 (1980). These principles have been successfully applied in the context of judicial education and can be extended to arbitral education. See Armitage, supra note 34, at 106-11, 127-30.

\(^6\) See Lloyd et al., supra note 3, at 20.

\(^7\) Matters that initially appear to be questions of style can have substantive effects on the law. For example, legal decisions have been known to turn on the precise placement of a comma. See Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 (3d Cir. 2003) (construing the New York Convention).


\(^9\) Most international commercial arbitrations are governed by various procedural rules chosen by the parties, although it is possible to proceed in the absence of such provi-
that an award should include “reasons,” at least as a default position, without any further explanation as to what is entailed by that term.\textsuperscript{50}

\textsuperscript{50}See \textit{International Centre for Dispute Resolution (ICDR) International Arbitration Rules}, art. 30(1) (amended in 2014), \url{https://www.icdr.org/icdr/ShowProperty?id=WL65TGlzh2IK16QdzhHPG1ZblvL2tB2V1J5Mm8HxvPq0wpGgp2Ph!102604678?nodeId=UCM/ADRSTAG/vE2020868&revision=LatestReleased} (“The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given.”); \textit{International Chamber of Commerce (ICC) Arbitration Rules}, art. 31(2), \url{http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration/} (“The award shall state the reasons upon which it is based.”) \textsuperscript{[hereinafter ICC Arbitration Rules]}; \textit{London Court of International Arbitration (LCIA) Arbitration Rules}, art. 26.2, \url{http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx} (“The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based.”); \textit{Stockholm Chamber of Commerce (SCC) Arbitration Rules}, art. 36(1), \url{http://www.sccinstitute.com/media/56030/2007_arbitration_rules_eng.pdf} (“The Arbitral Tribunal shall make its award in writing and, unless otherwise agreed by the parties, shall state the reasons upon which the award is based.”); United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, art. 34(3), G.A. Res. 65/22, art. 34(3) (Jan. 10, 2011), \url{http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf} (“The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.”). However, in practice, many standard procedural orders used by arbitrators contain phrases such as “The award shall contain the reasoning of the Arbitrator, applicable precedent and findings of fact and conclusions of law.”

Although the Chinese International Economic and Trade Commission (CIETAC) adopts an approach similar to that of other arbitral institutions, CIETAC’s language is a bit more comprehensive and indicates that:

The arbitral tribunal shall state in the award the claims, the facts of the dispute, the reasons on which the award is based, the result of the award, the allocation of the arbitration costs, and the date on which and the place at which the award is made. The facts of the dispute and the reasons on which the award is based may not be stated in the award if the parties have so agreed, or if the award is made in accordance with the terms of a settlement agreement between the parties.

\textit{China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules}, art. 49(3), \url{http://www.cietac.org/index/rules.cms}. Other relevant portions of the CIETAC rules state that

1. The arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices.

2. . . .

3. . . . The arbitral tribunal has the power to fix in the award the specific time period for the parties to perform the award and the liabilities for failure to do so within the specified time period.

4. . . .

5. Where a case is examined by an arbitral tribunal composed of three arbitrators, the award shall be rendered by all three arbitrators or a majority of the arbitrators.
To some extent, the lack of detail regarding the shape and content of a reasoned award may be the result of the difficulties inherent in describing a reasoned award in the abstract. Indeed, it is often easier to identify specific examples of fully reasoned decisions than to provide a categorical definition of what constitutes adequate legal reasoning. Nonetheless, various authorities have attempted to provide a more detailed explanation of what constitutes a reasoned award. Thus, a reasoned ruling may be described as one that includes “findings of fact and conclusions of law based upon the evidence as a whole . . . [and that] clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached.”

A written dissenting opinion shall be kept with the file and may be appended to the award. Such dissenting opinion shall not form a part of the award.

6. Where the arbitral tribunal cannot reach a majority opinion, the arbitral award shall be rendered in accordance with the presiding arbitrator’s opinion. The written opinions of the other arbitrators shall be kept with the file and may be appended to the award. Such written opinions shall not form a part of the award.

---

51. No such analyses have been conducted in the international realm, although some attempts have been made in judicial and other arbitral contexts. See Marilyn Blumberg Cane & Ilya Torchinsky, Explaining “Explained Decisions”: NASD’s Proposal for Written Explanations in Arbitration Awards, 16 U. MIAMI BUS. L. REV. 23 (2007); see also Hart v. Massanari, 266 F.3d 1155, 1176-77 (9th Cir. 2001) (discussing and reflecting on the qualities of a reasoned ruling); THE GREEN BAG ALMANAC & READER, supra note 9 (listing well-written judicial rulings on an annual basis). One particularly detailed study has come in the world of investment arbitration, where commentators have claimed that annulment tribunals “have adopted no less than three different thresholds to meet the reasons requirement.” Cheng & Trisotto, supra note 2, at 424. However, these tribunals appear to have achieved unanimity on one important conceptual point: the reasons requirement is in fact a reasoning standard. Disagreements among committees about whether the standard should be high or low are . . . fundamentally about what methods of reasoning are acceptable. The high standard countenances only reasoning that is correct on the law and facts and the rational derivation of outcomes therefrom; the low standard tolerates reasoning that is incorrect due to mistakes in the law or facts, so long as the reasoning is internally consistent; and the intermediate standard requires coherence and permits errors of law and fact, so long as these errors are reasonable errors.

52. See Born, supra note 2, at 3040-41, 3043-44.

As useful as this definition may seem, it only goes so far, since finding “the appropriate methodology for distinguishing questions of fact from questions of law [is], to say the least, elusive.”54 Indeed, “the practical truth [is] that the decision to label an issue a ‘question of law,’ a ‘question of fact,’ or a ‘mixed question of law and fact’ is sometimes as much a matter of allocation as it is of analysis.”55

These kinds of practical difficulties suggest that the best way to define a reasoned award may be through a functional analysis.56 That sort of approach is particularly useful in this setting because a functional inquiry not only overcomes various differences that exist between common law and civil law legal reasoning (an important feature given that international commercial arbitration consciously blends elements from both the common law and civil law legal traditions),57 it also takes into account the various ways that arbitral awards differ from reasoned rulings generated by a court.

In this context, a functional analysis requires two separate steps. The first considers why reasoned awards might be necessary or useful in international commercial arbitration. This issue is taken up in Section III. The second looks into how the structure of reasoned awards might vary, depending on the particular type of dispute at issue. Those concerns are addressed in Section IV.

### III. Why Reasoned Awards Are Necessary or Useful in International Commercial Arbitration

Some people appear to believe that reasoned rulings are an exclusive feature of the common law legal tradition.58 However, civil law countries have long considered reasoned legal opinions to be essential to procedural justice, even though the shape of a civil law judicial opinion can differ significantly from what is standard in common law jurisdictions.59 For example, reasoned decisions in France are usually quite short and “formulated in a single sentence, including several ‘whereas-es’ (attendus).”60

---

55. Id. (citation omitted).
57. See Born, supra note 2, at 2207-10; Strong, Guide, supra note 1, at 6.
58. See Michael L. Wells, “Sociological Legitimacy” in Supreme Court Opinion, 64 Wash. & Lee L. Rev. 1011, 1029 (2007) (suggesting that “French practice belies the notion that well-reasoned [apparently meaning fully reasoned] opinions are in some sense necessary”).
59. See Fontaine, supra note 3, at 33; Shoenberger, supra note 11, at 5.
60. Jeffrey L. Friesen, When Common Law Courts Interpret Civil Codes, 15 Wisc. Int’l L.J. 1, 8 (1996) (“The succinctness of French decisions is consistent with—and probably produced by—the primacy of text, conceptualism, and deduction, as well as the post-revolutionary caution on the part of judges not to exceed their limited powers.”); see also Kai Schadbach, The Benefits of Comparative Law: A Continental European View, 16 B. U. Int’l L.J. 331, 343 n.63 (1998) (citing Erhard Blankenburg, Patterns of Legal Culture: The Nether-
However, other civil law jurisdictions, most notably Germany, often generate reasoned opinions that are remarkable for their “length and thoroughness.”

Although French courts consider very brief, highly deductive opinions to be sufficiently reasoned as a matter of procedural fairness,62 this particular structural approach does not appear to have been routinely adopted in international commercial arbitration.63 Instead, the concept of a reasoned award in international commercial arbitration appears to more closely resemble the longer, more discursive models seen in the common law and in civil law jurisdictions like Germany.64 Thus, most awards in international commercial arbitration currently run dozens of pages in length.65

When considering why reasoned awards might be useful or necessary in international commercial arbitration, it is helpful to distinguish structural rationales for reasoned rulings from non-structural rationales. This approach not only overcomes matters relating to the common law-civil law

lands Compared to Neighboring Germany, 46 Am. J. Comp. L. 1, 40 (1998) (“Whoever compares the arguments of a decision of a German Landgericht with those of a Dutch rechtbank will be impressed by the length and thoroughness of the German argument on the one hand, the straightforward, paper-saving decision of the Dutch court on the other. In appeal courts and before the highest courts the differences in elaborateness are even more apparent. German legal style is much more differentiated, scholarly worded; the style of Dutch courts is pragmatic . . . .”).


63. See Gaitis, supra note 9, at 17 (describing what is typically included in a reasoned award); Fontaine, supra note 3, at 36 (noting that French-style “whereas” clauses (attendus) are generally not used in international awards, even in those countries where that style of writing is common in the judicial context). But see Dow Chemical (Fr., U.S., Switz. v. Fr.), International Chamber of Commerce Case No. 4131, Interim Award, IX Y.B. Com. Arb. 131, 135 (Sept. 23, 1984) (using attendu clauses, although the decision was translated from French and comes from an earlier era in international commercial arbitration).

64. See, e.g., Contractor v. Producer (Zam. v. Zam.), International Chamber of Commerce Case No. 16484, Final Award, (2011), XXXIX Y.B. Com. Arb. 216 (2014); Fontaine, supra note 3, at 36; see also XXXIX Y.B. Com. Arb. 30-305 (2014) (publishing a variety of recent awards); Schadbach, supra note 60, at 343 n.63 (comparing German and Dutch legal decisions).

65. See, e.g., Contractor (Zam.), XXXIX Y.B. Com. Arb. at 216; Fontaine, supra note 3, at 36; Catherine A. Rogers, Transparency in International Commercial Arbitration, 54 U. Kan. L. Rev. 1301, 1316-17 n.64 (2006) [hereinafter Rogers, Transparency]; see also XXIX Y.B. Com. Arb. at 30-305 (publishing a variety of recent awards); QMUL, supra note 13 (offering a course in award writing and indicating that the mock award produced by students must exceed 5,000 words). A somewhat shorter example can be found at Consortium Member v. Consortium Leader (It. v. Neth.), International Chamber of Commerce Case No. 14630, Final Award, XXXVII Y.B. Com. Arb. 90 (2012). Notably, some commentators have suggested that “in some instances, longer is not better.” Born, supra note 2, at 3041-42.
divide, it also helps identify rationales that are exclusively associated with judicial rulings and that are therefore inapplicable in the arbitral context.66

A. Structural Rationales for Reasoned Awards

Perhaps the most well-known structural rationale supporting the use of reasoned rulings comes from the common law legal tradition, which requires “subsequent courts to adhere to the legal conclusions established in earlier judgments rendered by courts whose decisions are binding upon the ruling court.”67 Reasoned decisions are used in common law jurisdictions to provide “the necessary reasoning (the ‘ratio decidendi’) for courts bound to adhere to precedent under stare decisis.”68 Because the principle of stare decisis does not technically apply in international commercial arbitration, this rationale does not appear applicable to the arbitral forum, strictly speaking.69

However, arbitral awards are considered very important forms of persuasive authority and have been said to reflect a type of “soft precedent” in certain types of international disputes (most notably those involving investment and sports arbitration) and in certain types of matters (most notably those involving arbitral procedure).70 The willingness of international arbitrators to consider and in many cases follow the reasoning reflected in previous awards can be traced directly to the need for

66. See W. Laurence Craig, The Arbitrator’s Mission and the Application of Law in International Commercial Arbitration, 21 AM. REV. INT’L L. 243, 284 (2010) (noting five reasons why Lord Bingham of Cornhill, former Lord Chief Justice of England and Wales, thought reasoned judgments were necessary in court and applying those rationales to arbitration); Jones, supra note 19, at 282-83 (suggesting arbitrators can learn from judges); Strong, Writing, supra note 6, at 101-06.


68. FitzMaurice & O’Connor, supra note 3. Stare decisis has been said to “reflect[ ] a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.” Nat’l Aeronautics & Space Admin, 131 S. Ct. at 766 (suggesting that reliance on precedent is preferable to other mechanisms “because it promotes the evenhanded, predictable, and consistent development of legal principles”).

69. See Strong, Guide, supra note 1, at 21; Strong, Research, supra note 8, at 26-27.

70. Although the concept of “soft precedent” is most widely supported in investment arbitration and sports arbitration, where publication of denatured awards is relatively routine, some commentators believe that arbitral awards have some precedential value even in the international commercial setting. See Strong, Research, supra note 8, at 26-27 (noting the precedential power of previous international awards is highest in matters of arbitral procedure); Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity or Excuse?, 23 ARB. INT’L 357, 361-78 (2007) (discussing investment and sports arbitration); Rogers, Vocation, supra note 21, at 1004 (“In a meaningful sense, international arbitration produces precedents that are public goods.”). Arbitral awards also contribute to the development of substantive legal principles via the lex mercatoria. See Fontaine, supra note 3, at 32.
predictability and consistency in international commercial arbitration. Interestingly, the approach used in international commercial arbitration is similar to that found in many civil law countries, where judges routinely follow the decisions of higher level courts, even if the principle of precedent does not apply, so as to promote predictability and consistency. Thus, reasoned awards may be said to be useful for this first type of structural purpose, even if they are not strictly necessary.

Reasoned rulings serve other structural purposes. For example, reasoned decisions are used in both common law and civil law jurisdictions to give context to lower court decisions and thereby help appellate courts determine whether and to what extent to uphold the judgment below. Initially, this rationale might also appear inapplicable to international commercial arbitration, since most jurisdictions do not allow courts to review the merits of an arbitral award. However, some jurisdictions, most notably England, do allow judicial appeals of international awards, which could be seen as providing arbitrators with a strong incentive to render well-written reasoned awards in arbitrations seated in England.

International awards may also be subject to other types of post-award scrutiny, both inside and outside of England. One type of post-award judicial procedure involves a challenge to enforcement, either at the seat of arbitration or in a foreign jurisdiction. Although these types of actions usually focus on procedural matters, the likelihood of a challenge being brought in the first place may be affected by the quality of the reasoning.

---

71. See Strong, Guide, supra note 1, at 21 (quoting Interim Award in International Chamber of Commerce Case No. 4131, IX Y.B. COM. ARB. 131, 135 (1984), which stated that “[t]he decisions of these [arbitral] tribunals progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.”).

72. See Peter DeCruz, Comparative Law in a Changing World 70 (3d ed. 2007); Strong, Guide, supra note 1, at 17.

73. See J.J. George, Judicial Opinion Writing Handbook 26 (5th ed. 2007). Providing all of the relevant factual data and outlining each step of the legal analysis allows an appellate court to consider the propriety of the decision-making process below in a comprehensive and principled manner. See id.

74. See Born, supra note 2, at 83.


76. Although parties in international commercial arbitration usually comply with awards on a voluntary basis, the number and type of post-award challenges may be increasing. See Born, supra note 2, at 3410 (claiming “[i]n practice, the overwhelming majority of international awards are complied with voluntarily”); Strong, Border Skirmishes, supra note 4, at 8 (discussing rising number of challenges).

77. Public policy objections, which could be seen as a substantive in nature, are a possible ground for non-enforcement at the seat of arbitration and elsewhere. See, e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 10, 1958,
found in the underlying award.\textsuperscript{78} For example, a well-written and fully reasoned award may persuade the losing party that a decision is well-supported, even if the outcome is negative.\textsuperscript{79} Alternatively, a fully reasoned award may diminish the likelihood of a judicial challenge by eliminating certain grounds for non-enforcement, as might be the case in situations where an international arbitral tribunal explicitly takes European competition or U.S. antitrust law into account, thereby dissuading the losing party from challenging an award in European or U.S. courts on certain public policy grounds.\textsuperscript{80}

Another type of post-award procedure involves collateral proceedings.\textsuperscript{81} These types of actions may be on the rise, given the increasing incidence of parallel proceedings in international commercial disputes.\textsuperscript{82} Although the law concerning preclusion and collateral estoppel are not as well developed in arbitration as in litigation,\textsuperscript{83} a court may find itself unable to give preclusive effect to a ruling or award that is unreasoned, since the court cannot determine whether a particular issue was fully and fairly argued in the earlier action.\textsuperscript{84}

The final type of post-award procedure involves “arbitral appeals,” which are an entirely private, contractually created means of appealing the substance of an arbitral award.\textsuperscript{85} Over the last few years, several arbitral

\textsuperscript{78} See Born, supra note 2, at 83. At one time, arbitrators were advised not to be too discursive in their awards lest they create grounds for vacatur or non-enforcement. See Fontaine, supra note 3, at 33. However, arbitrators are now advised to “protect the award” through judicious drafting, which may include a more detailed description of the reasons for the award. See AAA, Writing Arbitration Awards: A Guide for Arbitrators (April 23, 2014), https://www.aaau.org/media/20549/writing%20arbitration%20awards%20materials.pdf; Edna Sussman, Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them, XI Revista Brasileira de Arbitragem 76, 83 (2014) (Braz.).

\textsuperscript{79} See Fontaine, supra note 3, at 34; Marx, supra note 5, at 23 (quoting a party who stated, “We weren’t at all happy with your award, but I can’t complain because you explained it so well”).


\textsuperscript{81} See Born, supra note 2, at 3732.

\textsuperscript{82} See Nadja Erik-Kabat, Parallel Proceedings in International Arbitration: A European Perspective 1 (2014); Strong, Guide, supra note 1, 85-87.

\textsuperscript{83} See Born, supra note 2, at 3733; Strong, Guide, supra note 1, 85-87.

\textsuperscript{84} See Born, supra note 2, at 3757.

organizations have established formal procedures for appellate arbitration. The evolution of this particular procedure has important ramifications for the award writing process, both at first instance and on appeal. For example, arbitrators hearing a dispute as an initial matter may need to be increasingly aware of the quality of their awards both to avoid creating an appealable issue and to provide an appellate tribunal with a solid understanding of how and why the initial decision was made. Questions will also arise as to whether and to what extent an appellate award can or should differ from an award at first instance as a matter of form or content.

B. Non-Structural Rationales for Reasoned Awards

As the preceding discussion suggests, there are a number of structural rationales supporting the use of reasoned awards in international commercial arbitration. These structural reasons apply despite the various functional differences between litigation and arbitration. However, there are also several non-structural reasons why reasoned awards are useful or necessary in international commercial arbitration.


87. Some authorities have suggested that, in cases involving two tiers of arbitration, the first decision does not constitute an “award” per se. See Born, supra note 2, at 2926 (citing a French decision). However, the initial decision will be referred to as an “award” for purposes of the current discussion.

88. The notion of what constitutes an appealable issue is by no means entirely clear. See Marrow, supra note 85, at 14-15. At this point, parties must rely largely on the language reflected in the relevant rules. See infra notes 165-70 and accompanying text (discussing the standard and scope of appellate review).

89. See Kass, supra note 85, at 35.

90. See infra notes 156-70 and accompanying text (regarding drafting of appellate awards).
First and perhaps most importantly, reasoned awards provide key assurances regarding the nature and quality of justice that is being dispensed by the arbitrator. Commentators have noted that both common law and civil law jurisdictions have recognized a “procedural trinity” that is necessary to establish the rule of law.91 The three constituent elements include:

1. the audiatur principle (audiatur et altera pars), which in England and America forms part of natural justice and due process of law;
2. explicit reasons and fact finding; [and]
3. the right to appeal.92

While parties in arbitration are allowed to waive the right to an appeal as well as the right to explicit reasons and fact finding, such waivers are not a required feature of arbitration.93 To the contrary, as the recent debate about arbitral appeals has shown, parties can enforce these procedural rights to the extent consistent with the arbitral setting.94 Thus, while it remains to be seen how the reasons requirement in international commercial arbitration compares to similar standards applicable in litigation, it is clear that arbitrators must provide some minimal level of reasoning once the parties have requested a reasoned award.95 In fact, the length and detail associated with reasoned awards in international commercial arbitration suggests that international arbitrators are far exceeding any minimum requirements.96

Second, use of reasoned awards improves the quality of the decision-making process and consequently of the decision itself.97 As U.S. Circuit

---

91. Gunnar Bergholtz, Ratio et Auctoritas: A Comparative Study of the Significance of Reasoned Decisions with Special Reference to Civil Cases, 33 SCANDINAVIAN STUDIES IN LAW 11, 44 (1989); see also Rogers, Vocation, supra note 21, at 985 n.97 (claiming “the product of international arbitral decision-making is justice”).
92. Bergholtz, supra note 91, at 44.
93. There has never been any claim that parties in arbitration can waive the audiatur principle. See S.I. Strong, Limits of Procedural Choice of Law, 39 BROOK. J. INT’L L. 1027, 1100-01 (2014) [hereinafter Strong, Procedural Limits]. Furthermore, some jurisdictions do not allow parties to waive the reasoning requirement. See Duarte Gorjão Henriques, Motivation of Arbitral Awards: A Few Notes, 10 Y OUNG A RB. R EV. 34, 34-35 (2013) (noting that arbitration awards must be reasoned under Portuguese law).
94. Thus, for example, parties may require arbitral appeals but not judicial appeals. See supra note 85 and accompanying text.
95. See Lloyd et al., supra note 3, at 27; see also infra note 246 and accompanying text. For example, some commentators have suggested that arbitral awards do not necessarily need to have the same degree and depth of legal reasoning as judicial decisions and opinions. See, e.g., Born, supra note 2, at 3044.
96. See supra note 65 and accompanying text; see also infra notes 165-302 and accompanying text. Critics of arbitration often claim that arbitration results in “second-class justice.” See Hiro N. Aragaki, Arbitration’s Suspect Status, 159 U. PA. L. REV. 1233, 1263 (2011) (tracing history of hostility to arbitration, primarily in the domestic U.S. context).
97. See GEORGE, supra note 73, at 27; see also Fontaine, supra note 3, at 34; Chad M. Oldfather, Writing, Cognition, and the Nature of the Judicial Function, 96 GEO. L.J. 1283, 1302 (2008).
Judge Richard Posner has noted, “[r]easoning that seemed sound when ‘in the head’ may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he [or she] has written will be wondering how an audience would react.”98 By encouraging arbitrators to articulate their reasons for following a particular course of action, reasoned awards help increase the rationality of the process, minimize the likelihood of arbitrary decisions, prevent the introduction of irrelevant issues into the analysis, decrease the possibility of reliance on unreliable evidence and promote justice while simultaneously showing society that these aims are being met.99

Third, reasoned awards can be said to enhance the legitimacy of the arbitral process in the eyes of the arbitrators, the parties and the public by demonstrating the seriousness and integrity of the arbitral endeavor.100 Reputational concerns may be particularly important as international arbitration comes under increased attack for matters ranging from the lack of transparency to the supposedly preferential treatment of large, multinational firms.101

Fourth, reasoned awards provide parties with a more detailed and satisfactory explanation of why the arbitrator decided as he or she did.102 This feature can be quite important, since parties – including parties to commercial disputes – are often motivated as much by emotion as by logic, and a party who believes that he or she has not been fully “heard” during the arbitration (a phenomenon that could be directly affected by the quality or content of the award) might mount a challenge, even if the chance of prevailing seems relatively low.103 Indeed, empirical studies have shown that “the perceived fairness of arbitration hearings significantly predicts litigant decisions to accept an arbitration decision,” which suggests that fully reasoned awards are beneficial to international commercial arbitration at both an individual and systemic level.104

99. FitzMaurice & O’Connor, supra note 3, at n.19.
100. See id.; Alan Scott Rau, Integrity in Private Judging, 38 S. Tex. L. Rev. 485, 532 (1997) (quoting Thomas Carbonneau for the proposition that “reasoned awards ‘could serve as a means of assessing the arbitrators’ ability to assure the parties of a principled decisional basis’ ” (citation omitted)); see also George, supra note 73, at 26.
101. See Born, supra note 10, at 821 n.202; Rogers, Transparency, supra note 65, at 1325.
102. See Craig, supra note 66, at 284 (noting the importance of satisfying the parties’ curiosity as to why the case has been decided as it has); Yackee, supra note 2, at 629.
IV. WRITING REASONED AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION

The preceding section discussed various reasons why reasoned awards are either necessary or useful in international commercial arbitration. However, the frequency with which parties require reasoned awards suggests that few people need to be convinced of the benefits of reasoned awards in cross-border business proceedings. Instead, the primary concern is with the execution of such awards.

Experts agree that writing a reasoned award is an extremely challenging endeavor requiring both time and diligence. However, the task can be greatly facilitated if the arbitrator has a solid grasp of the fundamental principles underlying reasoned awards. The following discussion therefore considers a number of process- and structure-oriented issues relating to reasoned awards in international commercial arbitration so as to improve the understanding of these types of awards and to assist new and experienced arbitrators who are called upon to draft such documents.

A. Issues Relating to the Process

Although some people may view the mechanics of writing an award to be a purely logistical issue, process-related concerns can affect not only the method used to write an award but also its content and structure. The following subsections therefore consider those features that appear to have the most significant effect on the reasoning and form of an arbitral award. The list includes matters involving multi-person tribunals, dissenting and concurring opinions, ruling in the alternative or on ancillary points, conducting independent legal or factual research, and appellate awards.

1. Multi-person tribunals

Not surprisingly, the process of writing an award differs depending on how many arbitrators are involved. As a rule, sole arbitrators have more flexibility in drafting a reasoned award than members of an arbitral tribunal, since sole arbitrators have only their own consciences to con-
sider.\textsuperscript{109} In cases involving multiple arbitrators, the drafting process often includes a certain amount of compromise and negotiation.\textsuperscript{110}

Every tribunal approaches the process of writing judgments differently.\textsuperscript{111} Usually the chair takes responsibility for putting together the initial draft, although that approach can be changed in any way that suits the arbitrators, such as by giving different panel members different sections to write.\textsuperscript{112} Regardless of who has the responsibility for writing a particular section of an award, that person “does not have the luxury of writing independently, but should approach the . . . task so that it will reflect the collective mind of the collegial body that makes up the panel.”\textsuperscript{113}

Once the first draft is written and circulated, the panel considers the precise language of the proposed award.\textsuperscript{114} Ideally, arbitrators who disagree with particular elements should not only identify the substantive grounds of concern but should also offer alternative language for the drafter to consider.\textsuperscript{115} This process is critically important because the award must reflect the views of a majority of the tribunal.\textsuperscript{116} If the arbitrators can reach only a narrow consensus, then the resulting award will have to be equally narrow.\textsuperscript{117}

As the process of deliberation and drafting continues, it may become apparent that consensus cannot be reached on certain points.\textsuperscript{118} In those cases, the majority may be able to overcome the need for a separate opinion by taking the dissenting arbitrator’s views into account in the award itself or by going forward with an award that is signed by only two members of the tribunal.\textsuperscript{119} However, in some cases, a dissenting panelist may insist on submitting an individual opinion.\textsuperscript{120} In those situations, the tribu-

\begin{itemize}
\item \textsuperscript{110} See id. (discussing how the deliberation process affects how an opinion is written); Tom Cobb & Sarah Kaltsounis, \textit{Real Collaborative Context: Opinion Writing and the Appellate Process}, 5 \textit{J. Ass’n Legal Writing Directors} 156, 158-63 (2008); Lloyd et al., supra note 3, at 25-26.
\item \textsuperscript{112} See Lloyd, supra note 3, at 38-39; Lloyd et al., supra note 3, at 25-26.
\item \textsuperscript{113} \textit{George}, supra note 73, at 279.
\item \textsuperscript{114} See Aldisert et al., supra note 109, at 12-14; Lloyd et al., supra note 3, at 25-26.
\item \textsuperscript{115} See \textit{George}, supra note 73, at 281; \textit{see also} Lloyd et al., supra note 3, at 26. Criticism should also be limited to matters of substance rather than style. See \textit{George}, supra note 73, at 282.
\item \textsuperscript{116} See Aldisert et al., supra note 109, at 14; Lloyd et al., supra note 3, at 26.
\item \textsuperscript{117} See Aldisert et al., supra note 109, at 14; Lloyd et al., supra note 3, at 26.
\item \textsuperscript{118} See Lloyd et al., supra note 3, at 26.
\item \textsuperscript{120} See Arroyo, supra note 119, at 459-64.
\end{itemize}
nal will need to refer to the arbitral rules governing the dispute to determine the availability and treatment of separate opinions.  

2. Dissenting and concurring opinions

The debate about individual opinions in international commercial arbitration has become increasingly heated in recent years. Although most rule sets permit (or at least do not explicitly disallow) dissents and concurrences in situations where an arbitrator feels he or she cannot join the majority opinion as a matter of conscience, the strong cultural preference in international commercial arbitration is for a single majority award, since a separate opinion is both expensive to draft and largely unnecessary, given that most awards in international commercial arbitration are not published.

Much of the push for dissenting opinions seems to have come from the investment realm, where there is more of an incentive for arbitrators to write separate opinions. For example, a large percentage of investment awards are published in whole or in part, and an arbitrator may wish to write separately so as to help develop the type of “soft precedent” that is said to exist in treaty-based arbitration. Alternatively, an arbitrator may want to set the record straight as to his or her views on a particular matter so as to increase the likelihood of winning future appointments.

Although most of the commentary in international arbitration focuses on dissenting opinions, it is also possible for an arbitrator to write a concurring opinion. Concurrences are seen even less frequently than dissenting opinions.

---

121. See C. Mark Baker & Lucy Greenwood, Dissent – But Only If You Really Feel You Must: Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances, 7 DISP. RESOL. INT’L 31, 34 (May 2013). For example, the CIETAC Arbitration Rules indicate that dissenting opinions may be written but will not form part of the award. See CIETAC Arbitration Rules, supra note 50, art. 49. The CAS Arbitration Rules adopt a similar approach. See CAS Arbitration Rules, supra note 85, art. 46.


123. See Arroyo, supra note 119, at 458; Baker & Greenwood, supra note 121, at 34; Redfern, supra note 122, at 379-92 (suggesting the current approach is too lenient toward allowing dissents); van den Berg, supra note 8, at 821 n.4; see also George, supra note 73, at 282, 326-30.


125. See Kaufmann-Kohler, supra note 70, at 361-78.

126. See Martinez-Fraga & Samra, supra note 122, at 470; van den Berg, supra note 8, at 821, 830-31.

127. Concurrences arise when the decision-maker agrees with the outcome reached by the majority but arrives at that result through different analytical means. See van den Berg,
sents in the international commercial context, since there is little need for such awards in a private, non-precedential system of justice. However, arbitrators in investment proceedings occasionally write concurring opinions for reasons similar to those applicable to dissenting opinions.128

Some people oppose the use of individual opinions in international commercial arbitration because such opinions are said to threaten the legitimacy of arbitration by demonstrating a lack of unanimity among the members of the arbitral panel.129 However, other people believe that a well-written dissent or concurrence can be a positive feature, since such opinions can be seen as advancing the legal debate, so long as the individual opinion is written in a respectful manner.130 Thus, sarcasm and *ad hominem* attacks should play no role in a dissent, just as they should not in a majority award.131

3. Ruling in the alternative or on ancillary points

Another issue that occasionally arises involves the question of whether an arbitrator can or should rule in the alternative or on ancillary points.132 On the one hand, providing alternative grounds for a decision can be confusing and hence inefficient to the extent that parties who read the award are not able to discern the precise basis on which the holding is founded.133 On the other hand, reasoning in the alternative can increase efficiency by allowing an appellate tribunal or enforcing court to uphold the decision on the alternative rationale, thereby avoiding the possibility of non-enforcement.134 Providing multiple reasons why a particular party prevails can also provide additional persuasive power in cases where a sin-

*supra* note 8, at 837; *see also* *Supreme Court of Ohio, Writing Manual: A Guide to Citations, Style and Judicial Opinion Writing* 153-54 (2013) (noting various types of concurrences).


131. *See* GEORGE, *supra* note 73, at 281; van den Berg, *supra* note 8, at 832. Observers have suggested that the increasing use of sarcasm in the judicial context has been detrimental to the public’s faith in the courts. *See* Debra Cassens Weiss, *Scalia Tops Law Prof’s Sarcasm Index*, ABA L.J. (Jan. 20, 2015).

132. “An alternative ground used to support a decision is not dictum.” GEORGE, *supra* note 73, at 331.


134. Although this rationale is more important in the judicial context, where substantive appeals are common, arbitration also involves various types of post-award review. *See* *supra* notes 67-90 and accompanying text.
gle rationale might appear insufficient or overly legalistic to the losing party.\textsuperscript{135} Arbitrators might also wonder whether and to what extent awards can or should discuss matters that technically do not need to be decided in order to reach a final conclusion.\textsuperscript{136} Normally, such rulings (referred to as \textit{dicta} in common law countries) are unnecessary and unwise in arbitration, since the arbitrator’s jurisdiction only extends to the parties themselves and the normal rationales justifying the use of \textit{dicta} do not apply in arbitration.\textsuperscript{137} However, some experts have suggested that “there may be occasions when an arbitral tribunal will acknowledge that the parties themselves . . . expect to know the views of the arbitral tribunal on a point of law or of fact which, strictly, does not have to be decided.”\textsuperscript{138} In those cases, an advisory ruling might be appropriate, so long as that discussion “cannot be used to undermine the central reasoning” of the award.\textsuperscript{139}

4. Independent legal or factual research

Another process-oriented question that is often raised involves the extent to which arbitrators may conduct independent research into legal or factual issues.\textsuperscript{140} The issue of independent legal research has been addressed extensively in the judicial context, where various authorities have suggested that

[a] competent judge is not so naive to believe that briefs will always summarize the relevant facts and the applicable law in an accurate fashion. A competent judge uses the briefs as a starting line and not the finish line for his or her own independent research. Not only does a good judge confirm that the authorities cited actually support the legal propositions in the briefs, a good judge also makes sure that the authorities continue to represent a correct statement of the law. A member of the bench who fails to

\textsuperscript{135} For example, an arbitrator might find it helpful to indicate that a party who has lost because the claim is inadmissible for some reason (such as the running of the relevant statute of limitations) would also have lost on the merits. See Lloyd et al., \textit{supra} note 3, at 33.

\textsuperscript{136} \textit{See id.} at 28.

\textsuperscript{137} The primary use of \textit{dicta} is to suggest how a court would rule in the future on certain facts not presently at issue. \textit{See} Michael Abramowicz & Maxwell Stearns, \textit{Defining Dicta}, 57 STAN. L. REV. 953, 958 (2005). Courts use \textit{dicta} to guide the future behavior of the parties and those who are similarly situated, thereby reducing the amount of future litigation and increasing judicial efficiency. \textit{See id.} at 1000. Although \textit{dicta} may be useful to the parties in cases where they are in a longstanding relationship that might give rise to future disputes that are somewhat similar to the one in arbitration, none of the other rationales are relevant in the arbitral context.

\textsuperscript{138} Lloyd et al., \textit{supra} note 3, at 28.

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{See} Phillip Landolt, \textit{Arbitrators’ Initiatives to Obtain Factual and Legal Evidence, 28 ARB. INT’L 173, 173 (2012).}
independently develop his or her own legal rationale does so at
his or her own peril and the peril of the litigants.\footnote{141}

Some commentators have gone so far as to say that “[w]hile the briefs
prepared by the parties will be useful, there is no substitute for independent
research.”\footnote{142} However, other observers have criticized independent
judicial research because it denies the parties “the opportunity for cross-
examination, rebuttal, or the introduction of further testimony.”\footnote{143}
Nevertheless, experts agree that “the prerogative of the judge to search the case
law independently and to consult legal treatises is soundly entrenched,
presumably to promote uniformity and accuracy in legal interpretation.”\footnote{144}

The debate about independent legal research also exists in the arbitral
realm, although it is colored by the fact that arbitrators do not have the
same duty that judges do to ensure the proper development of the law.\footnote{145}
The contractual nature of arbitration has also led various commentators to
argue that parties have a heightened right to develop their own cases and
that concerns about “the opportunity for cross-examination, rebuttal, or the introduction of further testimony” should lead arbitrators to avoid undertaking any form of independent legal research.\footnote{146}

After weighing these competing interests, most authorities have con-
cluded that arbitrators have the right to conduct independent research but that they should exercise that right in a limited fashion.\footnote{147} In particular,
arbitrators should ask for supplemental briefing on any question of law
that was not initially raised by the parties in their submissions.\footnote{148} This approach is justified on the grounds that it increases the likelihood that the arbitrator will arrive at the correct conclusion of law while simultaneously

\footnote{141. Camacho v. Trimble Irrevocable Trust, 756 N.W.2d 596, 298-99 (Wisc. Ct. App. 2008); see also Hampton v. Wyant, 296 F.3d 500, 564-65 (7th Cir. 2002).
142. \textit{George}, supra note 73, at 199.
144. \textit{Id.}
146. Cheng, supra note 143, at 1296; Marrow, supra note 85, at 24-30. \textit{But see Gaitis}, supra note 9, at 17 (suggesting that “[t]he reasoning section of reasoned awards . . . , on occasion, contains citations to legal authorities that were not presented to the tribunal by the parties.”).
148. \textit{See ILA Report}, supra note 147; Marrow, supra note 85, at 30; Sheppard, supra note 145, at 144-45.
avoiding surprise and allowing the parties to take the lead in developing their cases. However, concerns about surprise and autonomy are not implicated with respect to legal materials that have been cited by the parties in their submissions. Therefore, an arbitrator may and perhaps should “confirm that the authorities cited actually support the legal propositions in the briefs” and ensure that the authorities “continue to represent a correct statement of the law.”

The situation involving independent factual research is somewhat different. For example, analogies to judicial processes are largely unhelpful, since “the rules governing independent [factual] research are astonishingly unclear” and the bench is sharply divided as to what the best course of action is. To the extent that any sort of consensus exists, it appears to suggest that judges should conduct independent factual research very rarely and only in the interests of justice.

Although the issue has seldom been discussed in the arbitral realm, those authorities that have considered the matter have indicated that independent factual research should be treated in the same way as independent legal research. Thus, an arbitrator who has discovered a factual issue of relevance should ask the parties to provide further evidentiary submissions on that matter so as to avoid the possibility of a subsequent challenge.

5. Appellate awards

Although arbitral appeals are not at this point a frequent occurrence, the amount of commentary and institutional activity currently being dedicated to this issue suggests that such procedures may become relatively

149. See A v. B, Tribunal Fédéral, 1ère Cour de Droit Civil, 4A_554/2014 (Apr. 15, 2015), 33 ASA BULL. 406, 406–15 (2015) (discussing situation where a plaintiff applied to the Supreme Court to annul an arbitration award on the ground that the arbitral tribunal violated due process by relying on an unpredictable application of the law and concluding that tribunals may apply the law pursuant to the principle of iura novit curia, so long as the parties are not taken by surprise). Concerns exist that an arbitrator who has exceeded his or her power to conduct independent research could create a situation where the award would be unenforceable. See Landolt, supra note 140, at 191, 199-214.

150. Camacho v. Trimble Irrevocable Trust, 756 N.W.2d 596, 598-99 (Wisc. Ct. App. 2008); see also Hampton v. Wyant, 296 F.3d 560, 564-65 (7th Cir. 2002).

151. See Cheng, supra note 143, at 1297; Landolt, supra note 140, at 173-74.


154. See Landolt, supra note 140, at 176, 220-21; see also Sheppard, supra note 145, at 144-45.

155. See Landolt, supra note 140, at 176; see also Bernardo M. Cremades, Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration, 14 A R B. INT’L 157, the text accompanying nn.17-26 (1998).
routine in the future.156 If that should indeed happen, the question then arises as to whether an appellate award should be written differently than an award at first instance.157 Unfortunately, there is no real analysis of this issue from the arbitral perspective. Indeed, most of the appellate rules that are currently in place do not discuss the form of the appellate award at all.158

Fortunately, a functional analysis provides some useful insights into this particular concern.159 For example, if an appellate tribunal is seen as functionally equivalent to an appellate court, then an appellate award might need to be written slightly differently than an award at first instance, just as an appellate opinion is written slightly differently than a trial court decision.160

Appellate opinions differ from decisions at first instance in a number of ways, at least in the judicial context.161 Many of these differences arise because appellate judges typically have an obligation to achieve an outcome that is not only appropriate in the dispute at bar (justice in personam) but also in any similar cases that may arise in the future (justice in


157. See supra note 87 (discussing nomenclature regarding arbitral decisions below).

158. See AAA Appellate Rules, supra note 86; CPR Appellate Rules, supra note 86; see also Platt, supra note 75, at 547-52 (discussing arbitral appeals under the Spanish Arbitration Act, the Rules of the Spanish Court of Arbitration, the Rules of the European Court of Arbitration and the International Arbitration Chamber of Paris (Chambre Arbitrale de Paris)). The one organization that does refer to the form of the appellate award does so only at a very general level, simply stating that “[t]he Panel’s decision will consist of a concise written explanation, unless all Parties agree otherwise.” JAMS Appellate Rules, supra note 86, Rule D.

159. See Michaels, supra note 56, at 342, 357 (describing functionalism).

160. See George, supra note 73, at 257 (considering appellate opinions in court).

161. See Strong, Writing, supra note 6, at 101-10.
However, this feature does not appear to translate to the arbitral realm, since the duty to provide justice in rem is directly related to the role that appellate opinions play in developing the rule of law and arbitral awards do not generate precedent in the same way that judicial opinions do.\textsuperscript{163}

Appellate judges also have a heightened duty to include a detailed description of the procedural history of the dispute so as to establish the standard, scope and propriety of appellate review.\textsuperscript{164} This feature could also be necessary in arbitration. However, a number of questions exist regarding the standard and scope of appellate review in arbitration.

Matters of scope are addressed, at least in some degree, by most appellate rule sets. Thus, for example, the American Arbitration Association (AAA) indicates in its rules on appellate arbitration that “[a] party may appeal on the grounds that the Underlying Award is based upon: (1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous.”\textsuperscript{165} Other arbitral organizations focus on similar criteria.\textsuperscript{166} However, these provisions could be difficult to implement

\begin{footnotes}
\item[162.] See George, supra note 73, at 275; Aldisert et al., supra note 109, at 14.
\item[163.] See Strong, Writing, supra note 6, at 108-10; see also supra notes 68-69 and accompanying text. Although civil law jurisdictions do not adhere to precedent in quite the same way that common law countries do, civil law countries still recognize the need to develop consistent interpretations of the law. See De Cruz, supra note 72, at 70.
\item[164.] See Strong, Writing, supra note 6, at 116-17.
\item[165.] AAA Appellate Rules, supra note 86, Rule A-10. The AAA further indicates that:
\begin{quote}
(a) Within thirty (30) days of service of the last brief, the appeal tribunal shall take one of the following actions:
1. adopt the Underlying Award as its own, or,
2. substitute its own award for the Underlying Award (incorporating those aspects of the Underlying Award that are not vacated or modified), or,
3. request additional information and notify the parties of the tribunal’s exercise of an option to extend the time to render a decision, not to exceed thirty (30) days.

The appeal tribunal may not order a new arbitration hearing or send the case back to the original arbitrator(s) for corrections or further review.
\end{quote}

\textit{Id.} Rule A-19.
\item[166.] Thus, the CPR rules on appellate procedure state that:

\begin{itemize}
\item [8.2] If the Tribunal hears the Appeal, it may issue an Appellate Award modifying or setting aside the Original Award, but only on the following grounds:
  \begin{itemize}
  \item [a.] That the Original Award (i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record; or
  \item [b.] That the Original Award is subject to one or more of the grounds set forth in Section 10 of the Federal Arbitration Act for vacating an award. The Tribunal does not have the power to remand the award.
  \end{itemize}
\item [8.3] If the Tribunal does not modify or set aside the Original Award pursuant to Rule 8.2 above, it shall issue an Appellate Award approving the Original Award and the Original Award shall be final as provided in Rule 8.6 below.
\end{itemize}

\textit{CPR Appellate Rules}, supra note 86, Rule 8.
\end{footnotes}
in practice, given the problems associated with distinguishing between findings of fact and conclusions of law.\textsuperscript{167}

The situation is even more challenging with respect to questions relating to the standard of review, since only one arbitral organization – JAMS – addresses the standard of review in its appellate rules.\textsuperscript{168} As a result, it is by no means clear in most cases whether and to what extent appellate arbitrators should defer to arbitrators at first instance as opposed to simply considering the matter \textit{de novo}. In judicial appeals in the United States, the appropriate standard is usually determined by reference to the matter under review, with the three most frequently used standards – clear error, abuse of discretion and plenary (\textit{de novo}) review – typically relating to evidentiary, discretionary and legal matters, respectively.\textsuperscript{169} However, recent decisions from the U.S. Supreme Court have made that standard increasingly difficult to apply.\textsuperscript{170} Other national laws could be similarly problematic.

\textbf{B. Issues Relating to the Framework}

As important as process-oriented issues are, perhaps the most challenging issue in this area of law involves the framework for reasoned awards. The following sub-sections therefore discuss various aspects of a fully reasoned award, including core considerations relating to scope, structure, and, to a lesser extent, style.

\textbf{1. Style}

Although this Article does not address issues relating to diction, sentence structure, punctuation, and the like, some so-called elements of style

\begin{itemize}
  \item \textsuperscript{167} See Miller v. Fenton, 474 U.S. 104, 113-14 (1985); \textit{see also supra} notes 54-55 and accompanying text.
  \item \textsuperscript{168} The JAMS rules on appellate procedures state

  The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision. The Appeal Panel will respect the evidentiary standard set forth in Rule 22(d) of the JAMS Comprehensive Arbitration Rules. The Panel may affirm, reverse or modify an Award. The Panel may not remand to the original arbitrator(s), but may re-open the record in order to review evidence that had been improperly excluded by the Arbitrator(s) or evidence that is now necessary in light of the Panel’s interpretation of the relevant substantive law. . . . The Panel’s decision will consist of a concise written explanation, unless all Parties agree otherwise.

  JAMS Appellate Rules, \textit{supra} note 86, Rule D. However, JAMS does not address the scope or trigger for review. \textit{See id.}
  \item \textsuperscript{169} \textit{See Aldisert et al., \textit{supra} note 109, at 30. Notably, the standard of review differs from the scope of review. \textit{See George}, \textit{supra} note 73, at 297.
  \item \textsuperscript{170} Recent decisions from the U.S. Supreme Court have permitted, if not required, \textit{de novo} analysis of certain mixed questions of law and fact. \textit{See Russell M. Coombs, A Third Parallel Primrose Path: The Supreme Court’s Repeated, Unexplained, and Still Growing Regulation of State Courts’ Criminal Appeals}, 2005 \textsc{Mich. St. L. Rev.} 541, 547-48. However, distinguishing questions of law from questions of fact is quite challenging. \textit{See Miller}, 474 U.S. at 113-14; \textit{see also supra} notes 54-55 and accompanying text.
\end{itemize}
have a significant effect on the substance of an award, since they affect not just the mode of an author’s communication but the ability to communicate effectively.\textsuperscript{171} Since the first duty of an arbitrator is to produce a clear, internationally enforceable award, it is necessary to consider a few stylistic concerns.\textsuperscript{172}

The first point involves the audience for arbitral awards.\textsuperscript{173} Because the parties “have an all-pervasive interest” in the outcome of the dispute,\textsuperscript{174} conventional wisdom suggests that arbitrators should direct their statements primarily if not exclusively to the litigants.\textsuperscript{175}

This conclusion has significant repercussions for the style that an arbitrator adopts when writing an award, since parties who have taken the trouble and expense of contracting for a reasoned award want to know not only who won, but why.\textsuperscript{176} Most parties do not have extensive training in the law, which means that arbitrators need to write awards that are “clear, logical, unambiguous, and free of” legal jargon.\textsuperscript{177} Indeed, many experts have recognized that “[i]t the mark of a well-written opinion is that it is comprehensible to an intelligent layperson.”\textsuperscript{178} Furthermore, awards “should not . . . be turned into briefs or vehicles for advocacy.”\textsuperscript{179}

Although arbitral awards are directed primarily to the parties, arbitrators need to keep other potential audience members in mind. For example, an award may need to be read by a national court judge as part of a collateral or enforcement proceeding.\textsuperscript{180} Not all judges are as knowledgeable about the arbitral process as they could be, which suggests that an arbitrator may need to explain the nuances of the governing law and arbitral procedure so as to avoid any judicial misunderstandings.\textsuperscript{181} The possibility

\begin{thebibliography}{99}
\bibitem{172} See Lloyd et al., supra note 3, at 20-21.
\bibitem{173} Knowing one’s audience is one of the fundamental rules of good writing, regardless of context. See Jeffrey A. Van Detta, The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future From the Roberts Court to Learned Hand – Segmentation, Audience, and the Opportunity of Justice Sotomayor, 13 BARRY L. REV. 29, 34 (2009) [hereinafter Van Detta 2].
\bibitem{174} Aldisert et al., supra note 109, at 17.
\bibitem{175} See Marx, supra note 5, at 23 (expanding the audience slightly); see generally Aldisert et al., supra note 109, at 17 (discussing judicial opinions).
\bibitem{176} See Lloyd, supra note 3, at 40.
\bibitem{177} Aldisert et al., supra note 109, at 18. Those who are writing an award in a second language often must take additional steps to make sure that they are using foreign legal terms properly and adhering to party expectations regarding the form and content of the award. See Strong et al., supra note 11, ch. 1; see also Lloyd, supra note 3, at 39.
\bibitem{179} Id. at 5.
\bibitem{180} See Lloyd et al., supra note 3, at 28.
\bibitem{181} Judges are often confused about the special nature of international commercial arbitration. See Strong, GUIDE, supra note 1, at 1. Numerous national and international organizations are taking steps to address this issue. See S.I. Strong, Improving Judicial Performance in Matters Involving International Arbitration, in Defining Issues in International Commercial Arbitration (Julio César Betancourt ed.) (forthcoming 2016).
\end{thebibliography}
of judicial confusion may be heightened in cases where the award is being enforced across the common law/civil law divide. In those situations, the arbitrator may wish to be particularly careful about making sure that the award includes various elements that will be familiar to the enforcing judge.\textsuperscript{182}

An award may also be read by various private parties.\textsuperscript{183} For example, an insurer may need to read an award to determine whether and to what extent any damages granted by the arbitrator fall within the terms of a business insurance policy.\textsuperscript{184} In these sorts of cases, an arbitrator may want to be particularly clear about the nature of the underlying financial calculations, including issues relating to taxes, interest and costs.\textsuperscript{185}

The second stylistic issue to consider involves consistency and coherence in relation to the citation of legal authorities.\textsuperscript{186} Advocates are often advised to take their audience into account when drafting written submissions in international commercial arbitration and, in particular, to make sure that the presentation and discussion of legal materials take into account the various differences between the civil and common law.\textsuperscript{187} The diversity of potential audience members for international commercial awards suggests that arbitrators should follow this general rule as well, since there is no way for the author of an international award to anticipate all future uses of an award or the legal background of all potential audience members.\textsuperscript{188} As a result, international arbitrators must be very familiar with the role that different legal authorities play in arbitration and the various ways in which common law and civil law courts approach the citation, interpretation and application of legal materials.\textsuperscript{189}

The third and final stylistic issue to mention involves the use of headers. Commentators have noted that the length of international awards makes it useful for arbitrators to make generous use of headings, subheadings and other types of subdivisions so as to increase the reader’s understanding of the structure of the award.\textsuperscript{190} It is also often “convenient to

\begin{itemize}
\item \textsuperscript{182} See Lloyd et al., supra note 3, at 31; see also infra notes 186-89 and accompanying text.
\item \textsuperscript{183} See Lloyd, supra note 3, at 41.
\item \textsuperscript{184} See Lloyd et al., supra note 3, at 29.
\item \textsuperscript{185} See id. at 33-34.
\item \textsuperscript{186} See Aldisert et al., supra note 109, at 18.
\item \textsuperscript{187} See Strong, Research, supra note 8, at 9-37 (discussing role of legal authority in international commercial arbitration); S.I. Strong, Research in International Commercial Arbitration: Special Skills, Special Sources, 20 Am. Rev. Int’l Arb. 119, 130-45 (2009) [hereinafter Strong, Sources] (discussing the role of legal authority in international commercial arbitration).
\item \textsuperscript{188} See supra notes 76-84 and accompanying text.
\item \textsuperscript{189} Strong, Research, supra note 8, at 9-37 (discussing role of legal authority in international commercial arbitration); Karton, supra note 153, at n.6; see also Strong, Sources, supra note 187, at 130-45 (same); Strong et al., supra note 11, at chs. 4-6 (discussing the interpretation and use of legal authority in common law and civil law jurisdictions, particularly in Spanish- and English-speaking countries).
\item \textsuperscript{190} See Fontaine, supra note 3, at 36; see also supra note 65 and accompanying text.
\end{itemize}
number the paragraphs or groups of paragraphs to facilitate cross-referencing within the award.”

2. Scope

One of the first things that an arbitrator must do when sitting down to draft an award is decide the scope of the analysis. Conventional wisdom suggests that a reasoned award should include a full discussion of “the nature of the case, the issues, the facts, the law applicable to the facts, and the legal reasoning applied to resolve the controversy.” This type of content is necessary because the award “is the authoritative answer to the questions raised by the [arbitration] . . . [and] should explain the reasons upon which the [award] is to rest.”

Although this description may be useful as a starting point, it fails to provide sufficiently specific advice to arbitrators faced with drafting a reasoned award. In particular, this type of general guidance fails to recognize how an award can and should be adapted in response to different types of disputes.

i. A taxonomy of arbitral disputes

When drafting awards, arbitrators from both common law and civil law jurisdictions would be well-advised to consider reviewing The Nature of the Judicial Process, one of the seminal guides on judicial opinion-writing. In that book, U.S. Supreme Court Justice Benjamin Cardozo suggests that there are three different types of disputes that can result in a judicial ruling and demonstrates how a reasoned ruling can and should be adapted to take those underlying differences into account.

“The first category . . . is comprised of those cases where ‘[t]he law and its application alike are plain.’ Such cases ‘could not, with semblance of reason, be decided in any way but one.’ ” Cardozo’s suggestion in these sorts of situations is for the adjudicator to avoid drafting a lengthy written opinion because such a ruling would contribute nothing to the jurisprudence in the field.

Of course, an arbitrator who is contractually bound to render a reasoned award does not have the luxury of refusing to write a reasoned award simply because the outcome of the dispute appears clear on its
face. However, Cardozo’s analysis provides a useful way for arbitrators to save costs by suggesting that an award addressing this type of dispute need not be very long or very detailed to be considered “reasoned.” Indeed, judges addressing matters falling within this first category of cases usually render a summary judgment order that runs no more than a single page in length. While an international award would need to be longer than that due to a number of logistical requirements that arise out of the special nature of international commercial arbitration, an arbitrator could nevertheless be quite succinct in the analytical section and still produce an award that could be considered fully reasoned under the circumstances.

The second category of cases described by Cardozo involves situations where “the rule of law is certain, and the application alone doubtful.” In such cases, a complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. Often these cases provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome.

In these situations, Cardozo suggests rendering a non-precedential judicial opinion. On one level, this sort of advice may not seem helpful to arbitrators, since arbitral awards are already considered non-precedential. However, closer examination of the nature of a non-precedential judicial opinion provides useful lessons for international arbitrators.

Judges faced with this second category of cases typically issue a memorandum opinion. These documents are slightly more discursive than the summary orders used in Cardozo’s first category of cases and provide a short description of how the court arrived at its decision, even though they

199. See Cardozo, supra note 195, at 164.
200. Writing an award can be a time-consuming task and an extremely expensive one in situations where arbitrators are paid by the hour. See Stewart, supra note 107, at 39 (noting the length of time it takes to write an award).
201. See Cardozo, supra note 195, at 164; Aldisert et al., supra note 109, at 8; see also FJC Manual, supra note 178, app. B (suggesting that these types of orders include a brief statement of the findings of fact and conclusions of law, but without a detailed explanation of why the court reached the outcome that it did).
202. See Lloyd et al., supra note 3, at 29-31 (describing various logistical requirements and basic data needs in international commercial awards); see also infra notes 253-54 and accompanying text.
203. Aldisert et al., supra note 109, at 8-9 (quoting Cardozo, supra note 195, at 164-65).
204. See Cardozo, supra note 195, at 164-65; Aldisert et al., supra note 109, at 8-9.
205. See supra notes 68-69 and accompanying text.
206. See Cardozo, supra note 195, at 164; see also Aldisert et al., supra note 109, at 8, 11.
do not include a detailed discussion of the facts or a comprehensive explanation of the legal rationales underlying the decision. Although arbitrators are again bound by their contractual duty to provide a fully reasoned award, Cardozo’s taxonomy suggests that analyses in this second category of cases can and should focus on those elements that are most in contention (that is, the facts) while spending less time on those matters that are not really debatable (that is, the law). By focusing on what is truly at issue and avoiding the notion that a reasoned award in international commercial arbitration requires exhaustive analysis of every nuance of the dispute, arbitrators can operate in an efficient, timely and cost-effective manner without jeopardizing the enforceability of the award or the parties’ interest in understanding how and why the result was obtained. Indeed, a number of civil law legal systems have shown that length has little to do with whether a legal ruling can be considered reasoned.

Cardozo then goes on to discuss his “third and final category” of cases, which is the only one he believes should generate a fully reasoned ruling. This category is comprised of cases “where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. . . .” From such cases, each modestly articulating a narrow rule, emerge the principles that form the backbone of a court’s jurisprudence and warrant full-length, signed published opinions.

Some aspects of Cardozo’s analysis (for example, statements about “the development of the law”) do not apply to arbitration. However, Cardozo’s description of this third category of cases is nevertheless useful because it helps arbitrators identify those types of disputes that merit a detailed analysis of both the facts and the law. As a result, awards falling into this category will probably be somewhat longer than those in the

207. See George, supra note 73, at 325-26; Aldisert et al., supra note 109, at 11; see also FJC Manual, supra note 178, app. A.

208. See Cardozo, supra note 195, at 164; see also Aldisert et al., supra note 109, at 8, 11.


210. See supra notes 60-63 and accompanying text; see also Born, supra note 2, at 3041-42 (noting that “in some instances, longer is not better”).

211. Aldisert et al., supra note 109, at 8-9 (quoting Cardozo, supra note 195, at 164-65).

212. Aldisert et al., supra note 109, at 8-9 (quoting Cardozo, supra note 195, at 164-65); see also George, supra note 73, at 32-34 (discussing types of judicial writings).

213. See supra notes 68-69 and accompanying text.

previous two categories, since the legal and factual issues are both more complicated.\footnote{15}

Although Cardozo’s taxonomy is useful in distinguishing different types of disputes, it does not address a number of more detailed issues, such as how a judge or arbitrator is to distinguish between a factual finding and a legal conclusion.\footnote{16} That particular analysis is extremely challenging even for experienced decision-makers, since “the appropriate methodology . . . has been, to say the least, elusive.”\footnote{17} This matter is discussed in more detail in the following subsection.

ii. Distinguishing between factual findings and legal conclusions

When considered in the abstract, distinguishing between factual findings and legal conclusions appears relatively easy. For example, “[f]indings of fact may be defined as those facts which are deduced from the evidence and which are found by the . . . [arbitrator] to be essential to the judgment rendered in the case.”\footnote{18} Conclusions of law, on the other hand, “are drawn by the . . . [arbitrator] through the exercise of his [or her] legal judgment from those facts he [or she] has found previously as the trier of fact . . . ”\footnote{19}

As straightforward as these definitions appear, they can be quite challenging to apply in practice.\footnote{20} The situation is further exacerbated in the international context by virtue of certain differences between common law and civil law analyses. For example, it has been said that

[a] civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, “What should we do this time?” and the second asking aloud in the same situation, “What did we do last time?” . . . The instinct of a civilian is to systematize. The working rule of the common lawyer is solvitur ambulando.\footnote{21}

\footnote{15. See supra notes 197-210 and accompanying text.}
\footnote{16. See Cardozo, supra note 195, at 164-65.}
\footnote{17. Miller v. Fenton, 474 U.S. 104, 113-14 (1985) (citations omitted); see also George, supra note 73, at 235-38 (including examples).}
\footnote{18. George, supra note 73, at 188 (noting findings of fact are “a form of judicial inquiry”).}
\footnote{19. Id. at 189 (noting “[w]hen the judge considers the facts and draws the legal conclusion . . . [the statement] becomes a conclusion of law.”).}
\footnote{20. See Miller, 474 U.S. at 113-14.}
\footnote{21. Thomas Mackay Cooper, The Common and the Civil Law – A Scot’s View, 63 Harv. L. Rev. 468, 470-71 (1950).}
Another way of describing the differences between the two legal systems is by recognizing that the common law places its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals. It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally . . . . It is the . . . habit of dealing with things as they arise instead of anticipating them by abstract universal formulas [as is the case with the civil law].

Differences in the nature of common law and civil law analysis can have a significant effect on how an arbitrator writes an award. Indeed, both the form and the content of an arbitral award will likely be influenced by the legal system with which an arbitrator is most familiar, at least to some extent. For example, arbitrators from common law jurisdictions often spend a significant amount of time discussing the underlying facts and analyzing legal precedents while arbitrators from civil law jurisdictions focus more heavily on categorizing the type of legal issues at stake during the initial stages of the analysis.

This is not to say that an arbitrator cannot or should not adopt a more blended perspective in appropriate circumstances. In fact, the most successful international arbitrators in the world are renowned for precisely that ability. However, it can be difficult for novice arbitrators to overcome their early training and learn how to reflect an appropriately international perspective in their awards.

---

223. See Lloyd et al., supra note 3, at 20.
224. See id.; see also Bergholtz, supra note 91, at 42 (discussing the issue in the context of judicial proceedings).
225. This approach cannot only be useful in communicating the arbitrator’s rationale to the parties, it can be helpful in smoothing the path to enforcement. See Lloyd et al., supra note 3, at 31 (“If a national court has ever to examine an award, for example for the purposes of recognition or setting aside, it will naturally be less likely to be critical if the reasoning adopts a pattern with which it is familiar.”).
227. See Helena Whalen-Bridge, The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills, 58 J. LEGAL EDUC. 364, 368-69 (2008). While an arbitrator should never pretend to be an expert in foreign law, that person cannot ignore the governing law simply because he or she is not qualified in that jurisdiction. However, each arbitrator was intentionally selected so as to be able to bring his or her unique technical or legal skills to bear on the problem at hand, resulting in a more blended analysis of the law and the facts at issue. See Born, supra note 2, at 1638; Cremades, supra note 155, at 169-70; Miles, supra note 35, at 39-41. Arbitrators in international commercial arbitration may not only be qualified in a jurisdiction different than the one whose law controls the dispute, they may be qualified as lawyers in no jurisdiction what-
Perhaps the best way to explain how this type of comparative methodology can be applied in international commercial arbitration is through an example involving a situation where an arbitrator has been asked to apply the substantive law of a country that not only differs from the law with which the arbitrator is most familiar but that falls on the other side of the common law-civil law divide. In these types of cases, the arbitrator needs to adopt certain comparative legal skills to be sure that he or she is ascertaining, interpreting and applying the appropriate legal standard.228

Thus, for instance, a French-qualified arbitrator who is faced with a dispute governed by U.S. law might want to adopt more of a common law methodology when seeking to ascertain the governing legal principles.229 In so doing, the arbitrator would likely give considerable weight to case law in his or her deliberations and drafting and might also place a stronger emphasis on factual considerations than he or she would normally do.230 Finally, the arbitrator might consider discussing how the facts in the case generated the legal principles chosen to govern the dispute.231

Similarly, a U.S.-qualified arbitrator faced with a dispute governed by French law might want to approach the dispute from more of a civil law perspective.232 In so doing, the arbitrator would likely rely heavily on scholarly commentary when interpreting and applying various statutes and would avoid focusing exclusively on case law as a guide to interpretation.233 Similarly, the arbitrator might interpret legislation from more of a purposive or teleological perspective rather than rely on the four-corners or plain meaning doctrine,234 and would perhaps aim to derive the appli-

---

228. See Strong, Sources, supra note 187, at 145-48. Interestingly, parties have been known to require arbitrators to apply common law and civil law principles simultaneously. See Rusty Park, Michael Mustill: A Reminiscence (July 20, 2015), http://dx.doi.org/10.1093/arbint/aiv044 363-365 (discussing the Channel Tunnel Case, Channel Group v. Balfour Beatty Ltd. [1993] Adj. L. R. 01/21, which involved a contract requiring application of common principles of English and French law); see also Karton, supra note 153, at nn.45-46 (discussing the ICC awards in the Channel Tunnel Case, referred to in this example as the Eurotunnel cases).

229. See Strong, Sources, supra note 187, at 145-48; see also Karton, supra note 153, at 38-39.

230. See id.; see generally Friesen, supra note 60, at 7-11. One commentator has suggested that “a civil law perspective on contractual interpretation predominates” in international commercial arbitration. See Karton, supra note 153, at 16.

231. See id.

232. See id.; see generally Friesen, supra note 60, at 7-11. One commentator has suggested that “a civil law perspective on contractual interpretation predominates” in international commercial arbitration. See Karton, supra note 153, at 16.

233. See Strong, Sources, supra note 187, at 145.

cable legal standard primarily by reference to various legal principles rather than through factual analogies.\footnote{235} Although this approach may seem complicated and perhaps somewhat confusing to those who have not undertaken such analyses, all of the underlying interpretive techniques are used in both common law and civil law jurisdictions, even if conventional wisdom tends to associate particular methodologies more closely with one or the other of the two legal traditions.\footnote{236} Therefore, this approach does not require arbitrators to abandon their longstanding professional expertise but instead encourages them to supplement their analysis by incorporating techniques and authorities that are used and valued in the legal system whose law controls.\footnote{237} Notably, arbitrators cannot hope to hide their evaluative approach, since any and all influences on the arbitrator’s analytical methodology will necessarily affect the manner in which the final award is written, both as a matter of style and content.\footnote{238} Indeed, commentators have long recognized that the substance of a legal ruling influences the form, as well as the reverse.\footnote{239}

3. Structure

i. Required elements

As important as questions of style and scope may be, the real challenge for those charged with writing an arbitral award involves structure.

\footnote{235}{See Strong, Sources, supra note 187, at 145. This is not to say that different interpretive techniques may not lead to different outcomes, since that is obviously the case. See Karton, supra note 153, at 25-27.}

\footnote{236}{See Strong, Sources, supra note 187, at 145-50.}

\footnote{237}{The technique is explained thusly by Bernardo Cremades, a highly esteemed international arbitrator: \[A\]rbitrators display their real expertise and professionalism at the time of making their decision, placing aside their individual cultural background. Thus, the truly international arbitrator is one who is immediately able to distinguish what is purely local from that which is outside his own national frontiers and within a globalized economy. His professionalism leads his decision to be independent from the “bag and baggage” of the system or national systems from which he originates: \textit{da mihi factum et tibi dabo ius}. In the final decision, he is not conditioned either by his geographical origin or by education, race, religion or even personal sympathies. Here lies the true professionalism of the international arbitrator who knows how to face the expectations of the parties, who have chosen him for his impartiality and neutrality. Cremades, supra note 155, at 170 (citation omitted).}

\footnote{238}{Bergholtz, supra note 91, at 42 (noting that “[i]n the grounds of legal decisions form and substance, procedural form and substantive law, meet”); see also Carl Baudenbacher, Some Remarks on the Method of Civil Law, 34 Tex. Int’l L.J. 333, 348-49 (1999); Cremades, supra note 155, at 161; Friesen, supra note 60, at 7-11. Although some commentators have suggested that arbitrators do not explicitly describe their interpretive approach, that does not mean that the interpretive methodology cannot be gleaned from the structure, style and content of the opinion. See Karton, supra note 153, at 7-10.}

\footnote{239}{See Bergholtz, supra note 91, at 42.}
Without a good structural framework, an arbitrator cannot hope to persuade or even inform his or her readers.\textsuperscript{240} Some structural concerns have already been resolved by the international arbitral community.\textsuperscript{241} Thus, as noted previously, reasoned awards in international commercial arbitration are usually quite lengthy and tend to adopt an approach reminiscent of judicial opinions generated by common law and certain civil law courts.\textsuperscript{242} As a result, international awards are often longer and more formal than arbitral awards rendered in domestic proceedings, even in cases that feature legal and factual issues that are as complicated as those arising in the cross-border context.\textsuperscript{243} The length of international awards can be somewhat problematic, given that arbitration is supposed to reduce the time and costs associated with resolving legal disputes and writing a fully reasoned award is often both expensive and time-consuming.\textsuperscript{244} Indeed, Gary Born, one of the leading commentators in the field, has recognized that “in some instances, longer is not better.”\textsuperscript{245} However, the detailed analysis reflected in many international awards can be defended on several grounds. For example, an arbitrator may perceive a heightened need to explain international commercial arbitration’s uniquely blended procedural approach to those who may be unfamiliar with the process.\textsuperscript{246} Alternatively, an arbitrator may wish to demonstrate

\textsuperscript{240} See Strong & Desnoyer, supra note 48, ch. 1.

\textsuperscript{241} See supra notes 60-64 and accompanying text.

\textsuperscript{242} See Lloyd et al., supra note 3, at 29-31; see supra notes 62-64 and accompanying text.


\textsuperscript{244} See Stewart, supra note 107, at 39 (noting the length of time it takes to write an award). Notably, some arbitrators in international commercial arbitration are not paid by the hour. See ICC Arbitration Rules, supra note 50, Appx. III, art. IV (basing arbitrator’s fees on amount in dispute).

\textsuperscript{245} Born, supra note 2, at 3041-42.

\textsuperscript{246} Enforcing courts often need to assess the fairness of the arbitral procedure, which will be reflected in certain aspects of the award. Thus, it has been said that

[n]ational courts throughout the world also expect or require certain fundamental principles to be followed by arbitral tribunals, such as the right of a party to know and to be able to deal with the case against it. The award must make it clear that these principles have been observed by the arbitral tribunal and how the tribunal did so.

Lloyd et al., supra note 3, at 24-25; see also New York Convention, supra note 77, art. V.
his or her faithfulness to the contractual obligation to produce a reasoned award.247

These are both reasonable justifications for longer and more detailed awards. However, the real reason for the length of most international awards may lie in the nature of a reasoned award itself. For example, experts have suggested that an award in international commercial arbitration should inform the reader that the arbitral tribunal has acted in a judicial manner, not just in the way in which it heard the dispute but in the manner in which the dispute was decided, i.e., the reasoning must be both thorough and self-sufficient. The award must therefore be – and be seen to be – the product of compliance by the arbitral tribunal with the fundamental principles of the processes by which civil disputes are to be resolved (insofar as they apply to arbitration). Thus the arbitral tribunal must allow each party the opportunity to answer the case against it and also any pertinent point raised by the arbitral tribunal on its own initiative, as well as to deal with any fact or allegation brought to the attention of the tribunal.248

These requirements have significant ramifications with respect to the structure of the award, as discussed in the next sub-section.

ii. A classical structural framework

As mentioned previously, arbitrators do not need to adhere to any pre-established structural norms when drafting international awards.249 Instead, arbitrators simply need to fulfill various functional requirements250 that may be imposed privately, institutionally251 or as a result of the special nature of arbitration.252

247. See Lloyd et al., supra note 3, at 27 (“The arbitral tribunal ought to facilitate voluntary compliance [with an award] by producing an award which explains clearly and persuasively how and why it has arrived at its conclusions.”); see also Bergholtz, supra note 91, at 45, 48 (noting that judges also need to demonstrate their faithfulness with legal authority so as to avoid being perceived as arbitrary). These obligations include the duty to comply with necessary procedural rules as well as the duty to comply with the substantive law chosen explicitly or implicitly by the parties. See Born, supra note 2, at 1963-64; Strong, Procedural Limits, supra note 93, at 1089-1109 (noting the limits on procedural and substantive autonomy in international commercial arbitration).

248. Lloyd et al., supra note 3, at 21.

249. See id. at 20.

250. See Born, supra note 2, at 3037-45.

251. For example, the ICC has a number of form requirements that may not apply in other types of proceedings. See Lloyd et al., supra note 3, at 23; see also Born, supra note 2, at 3030-37.

252. For example, an arbitrator must be aware of any requirements imposed as a result of the national law of the seat or by the New York Convention. See New York Convention, supra note 77; Lloyd, supra note 3, at 41. Authorities also suggest that an arbitrator should be aware of any requirements imposed at the place where the award is likely to be enforced. See Fontaine, supra note 3, at 31-32.
A number of these elements are relatively straightforward. For example, an international award should include:

- the names of the arbitrator(s);
- the manner in which the tribunal came to be appointed;
- the names and addresses of the parties (including any company or commercial registration number) and of their legal or other representatives;
- how the dispute arose (and thus why an arbitral award is required);
- the terms of the arbitration agreement (and any variations) – these are best set out in full as they establish the basis for the jurisdiction of the arbitral tribunal; . . .
- the place of the arbitration together with how it came to be chosen;
- the law or rules applicable to the merits of the dispute and whether they were agreed by the parties or decided by the arbitral tribunal (in the latter case, the reasons considered to be appropriate by the arbitral tribunal must be given at some point in the award); . . .
- the procedural rules agreed [by the parties] . . . or determined by the arbitral tribunal;
- the language or languages of the arbitration (and any departures therefrom and the reason for any such deviation);
- the principal chronology both of the dispute and of the proceedings . . . ;
- the steps that the arbitral tribunal took, in accordance with the procedural rules, to ascertain the facts of the case;
- the dates of any evidentiary hearings and previous awards; [and]
- the date when the proceedings were closed.253

This material, which usually appears at the beginning of the arbitral award, is relatively easy to draft, which obviates the need for further discussion herein.254 Instead, this Article will focus on issues relating to the arbitrator’s legal reasoning and factual analysis, since those are the elements that are the most challenging for both new and experienced arbitrators.255

253. Lloyd et al., supra note 3, at 29-30 (footnotes omitted). Other logistical information, such as that relating to the appointment of a tribunal expert, can be included in this section if necessary. See id. at 30. This material is necessary in case the award ever needs to be enforced internationally and therefore should be presented in a strictly informational and non-controversial manner. See id.
254. See id. at 29.
255. See id. at 31-37.
Although very little material exists on how arbitrators should draft the reasoning section of an international award, extensive commentary exists regarding judicial reasoning. While arbitral awards do not necessarily have to reflect the same degree and depth of analysis as judicial decisions and opinions, it nevertheless appears useful to consider the various recommendations made to judges in case the advice is transferrable to arbitration. In so doing, it will of course be necessary to take into account the various functional differences between arbitral awards and judicial rulings.

It is impossible to provide a comprehensive analysis of every type of reasoned analysis, since every nation takes its own particular approach to judicial writing. However, one popular multicultural model is based on the classical principles of Greco-Roman rhetoric. The long-standing appeal of this particular approach, combined with its proven effectiveness in a variety of countries and contexts, could prove very useful for those seek-

256. See id.; see also supra notes 8-13 and accompanying text.

257. See supra note 38 (listing authorities).

258. See Born, supra note 2, at 3044.

259. See Michaels, supra note 56, at 342, 357; see also supra note 57 and accompanying text.


261. See Ruggiero J. Aldisert, Opinion Writing 77-82 (2d ed. 2009); FJC Manual, supra note 178, at 13; George, supra note 73, at 291-304; Mailhot & Carnwath, supra note 31, at 37-38; Edward D. Re, Appellate Opinion Writing 11 (1975), http://www.fjc.gov; Supreme Court of Ohio, supra note 127, at 129-30 (providing an outline of a judgment); Aldisert et al., supra note 109, at 24; George Rose Smith, A Primer of Opinion Writing, for Four New Judges, 21 Ark. L. Rev. 197, 204 (1967); see also Justice Roslyn Atkinson, Judicial Writing, Austl. Inst. of Jud. Admin. (2002), http://www.aija.org.au/Mag02/Roslyn%20Atkinson.pdf (Australia; citing Greco-Roman principles and citing the FLAC (facts-law-application-conclusion) system, which is similar to analytical techniques used in the United States and England).
ing to rationalize drafting techniques in international commercial arbitration.262

Indeed, close examination of existing awards suggests that this approach is already quite common in the international realm.263

This model includes five different sections:

• an opening paragraph or orientation (exordium);
• a summary of the issues to be discussed (divisio);
• a recitation of material adjudicative facts (narratio);
• an analysis of the legal issues (confirmatio a. confutatio); and
• a conclusion indicating the holding or disposition (peroratio).264

Each section is considered in more detail below.

a. Orientation (exordium)

The classical principles of rhetoric suggest that every reasoned award should begin with an opening or orientation section that puts the legal and factual discussion into context and lets the reader know what is to come.265 This sort of roadmap or executive summary should include all of the critical information about the case and attempt to “pique the opinion reader’s interest with its language.”266

Experts suggest that a well-written orientation section should provide answers to six key questions known to every journalist: who, what, when, where, why and how.267 “Who” is perhaps the easiest of the questions to answer, since it simply requires the arbitrator to identify the parties and their counsel.268 If the matter is being heard on arbitral appeal, then the orientation section should also indicate who prevailed in the first proceeding.269

262. See Aldisert et al., supra note 109, at 11-14 (noting that five parts are necessary for an opinion); Van Dett 2, supra note 173, at 32.

263. See Fontaine, supra note 3, at 34-35 (writing from a civil law perspective); Lloyd, supra note 3, at 41-45 (writing from a common law perspective); Lloyd et al., supra note 3, at 29-37 (writing from a mixed common law-civil law perspective).

264. See Aldisert et al., supra note 109, at 24; see also Aldisert, supra note 261, at 77-78; FJC Manual, supra note 178, at 13; George, supra note 73, at 291-304; Mailhot & Carnwath, supra note 31, at 37-38; Re, supra note 261, at 11; Supreme Court of Ohio, supra note 127, at 129-30; Smith, supra note 261, at 204.

265. See Aldisert et al., supra note 109, at 24-25 (noting that five parts are necessary for an opinion). Some commentators refer to this section as “the nature of the action.” George, supra note 73, at 162.

266. Aldisert et al., supra note 109, at 26. For examples of both good and bad orientation paragraphs, see Smith, supra note 261, at 205 (citing Johnson v. Smith, 219 S.W. 2d 926 (Ark. 1949); McClure Ins. Agency v. Hudson, 377 S.W. 2d 814 (Ark. 1964); Garner v. Amsler, 377 S.W. 2d 872 (Ark. 1964); and Dercuiseaux v. Bell, 378 S.W. 2d 208 (Ark. 1964)).

267. See George, supra note 73, at 12; Smith, supra note 261, at 204.

268. See Aldisert et al., supra note 109, at 26.

269. See id.
The concept of “what” is also relatively straightforward and simply requires the arbitrator to identify the major factual and legal issues that are at stake.270 Thus, for example, an arbitrator might indicate that the case involved a claim in negligence and that the primary issue in contention involved whether the respondent owed a legal duty to the claimant.271 This section should also outline any remedies or relief sought by the parties in their claims or counterclaims.272

“When” refers to the time of the legal injury so as to establish whether the dispute has been brought in a timely manner.273 Timing may also be important to the calculation of damages or interest274 or to the issue of whether an arbitral appeal has been brought within the proper period of time.275

“Where” can be considered a jurisdictional question. For example, it is critical in an international proceeding that the arbitrator identifies the arbitral seat.276 Appellate arbitrators may wish to establish the provenance of the dispute so as to demonstrate that appellate jurisdiction exists.277

The next question relates to “why” the matter has been brought to the arbitrator’s attention. Sometimes this issue will have already been answered as a result of the “who,” “what,” “when” or “where” analyses.278 If the motivation for the suit has not already been addressed, the arbitrator should discuss the matter independently, since the question of “why is this matter being brought before this arbitrator at this time” is fundamental to every proceeding.279

“How” can be interpreted in two ways. First, “how” can refer to the manner in which the issue reached the arbitrator.280 Because arbitration is a creature of contract, it is important for an arbitrator to demonstrate that all the necessary requirements have been met before taking jurisdiction over the dispute.281

270. See id.
271. The tort of negligence typically requires the plaintiff to establish the existence of a legal duty, breach of that duty, legal causation, factual causation and damages, at least in the United States. See Detraz v. Lee, 950 So. 2d 557, 562 (La. 2007). Only some of these issues will be in doubt in any particular case. See STRONG, HOW TO WRITE, supra note 31, at 39.
272. See Lloyd et al., supra note 3, at 31.
273. See GEORGE, supra note 73, at 12.
274. See id.
275. Parties typically have between fourteen and thirty days from the date the underlying award is issued or finalized to file an appeal. See AAA Appellate Rules, supra note 86, Rule A-3 (providing for thirty days); CPR Appellate Rules, supra note 86, Rule 2.1 (providing for thirty days); JAMS Appellate Rules, supra note 86, Procedure B(i) (providing for fourteen days).
276. See Lloyd et al., supra note 3, at 29-30.
277. See Aldisert et al., supra note 109, at 26.
278. See GEORGE, supra note 73, at 12; Smith, supra note 261, at 204.
279. See GEORGE, supra note 73, at 12; Smith, supra note 261, at 204.
280. See GEORGE, supra note 73, at 12; Smith, supra note 261, at 204.
281. See Lloyd et al., supra note 3, at 29-30.
Second, “how” can refer to the manner in which the arbitrator has decided to rule. While some arbitrators believe that withholding the result until the end of the award increases the reader’s anticipation, there is little to be gained by not indicating the outcome of the dispute in the orientation paragraph, since most readers who do not find the outcome at the beginning of the award will simply turn to the dispositive section at the end of the document. As a result, most authorities suggest that the orientation paragraph should include a reference to the holding or disposition “as a guide to [the] intelligent reading” of the award.

When announcing the outcome of the dispute, either in the orientation paragraph or the dispositive section, arbitrators should avoid using the passive tense or other indirect language (such as “I believe”), since such phrases “dilute the vigour which should characterize the result.” A clear reference to the outcome of the case may be particularly important in “splintered” awards in which a claim is denied in part and granted in part. Disputes with multiple opinions offer similar opportunities for confusion, which suggests a heightened need for a well-written orientation paragraph.

Although the orientation section is comprehensive in scope, it should be very brief. Learning to write a good orientation takes practice, and even experienced arbitrators spend considerable time getting the wording just right. However, the benefits of a clear, concise opening justify the time spent.

b. Summary of legal issues (divisio)

The second section of a reasoned award involves a summary of the various legal issues that will be discussed in the body of the document. This section focuses exclusively on legal issues, since factual issues are considered separately.

282. See George, supra note 73, at 301; Mailhot & Carnwath, supra note 31, at 53.
283. See id.
284. See id. at 26.
285. See id. at 28.
286. An issue can be defined as “a point in dispute between two or more parties.” Black’s Law Dictionary (2009). Strictly separating the legal and factual analysis is a skill that is first taught in law school, at least in the United States and the United Kingdom. See Strong, How to Write, supra note 31, at 53-97 (discussing legal education in England and
Some common law arbitrators may worry about discussing legal issues outside their factual context, thinking that such an analysis is too academic and treatise-like. However, the goal in this subsection is not to discuss the law in a vacuum but rather to provide a clear analysis of the legal dispute that will ultimately be informed by the material adjudicative facts. This technique not only brings the discussion of legal concerns down to a manageable size, it helps the reader understand the materiality of the facts that are presented later in the decision or opinion. As one expert notes, “[t]he effect is like reading a review of a movie before seeing it, so that one knows what to look for in the theater.” Arbitrators from civil law systems are less likely to be troubled by this particular element of the award, since they have a great deal of experience in categorizing legal disputes as an initial matter.

Some disputes present more than one legal issue. In those cases, an arbitrator can either present all of the potential issues in a single summary paragraph or split up the various issues and introduce them in separate paragraphs under topic sentences introducing individual sub-issues. Either approach is fine, so long as the structure is clear to the reader. The arbitrator should also note if any changes have been made to the claims or counterclaims and how those changes came about (for example, through a party amendment to the pleadings or as a result of a decision by the arbitrator).

When discussing legal issues, it is usually not necessary to address everything raised by counsel in detail, since not every point will be equally contentious. While it is important to address any claim, defense, error or objection that has been properly raised, some concerns do not merit lengthy analysis and can be handled in a relatively succinct manner. Furthermore, it is important to separate the arguments of the parties from the legal conclusions identified by the arbitrators.
Awards generated by appellate arbitration need to include one additional item, namely a brief description of the appropriate standard of review. Debates involving the standard of review will likely increase in the coming years, since existing rules on arbitral appeals provide little guidance as to what either the scope or the standard of review should be in arbitration.

c. Statement of facts (narratio)

All reasoned rulings, be they judicial or arbitral, must include a statement of the relevant facts. This is an area where common law and civil law arbitrators may differ in their approach, since common law lawyers often see a wider range and number of facts as relevant to the dispute at hand. However, lawyers trained in civil law jurisdictions have long recognized the importance that factual issues play in legal reasoning, even if civil law methodology differs from that of the common law.

A well-written factual analysis “requires an identification of resemblances, which we may call positive analogies, and differences, which we may call negative analogies.” Although an arbitrator must include all the relevant facts, he or she must avoid introducing any unnecessary facts, since additional elements not only slow the reader down but may cause confusion about the scope of the legal principle enunciated in the award. As a result, “[o]nly material, adjudicative facts” should be reflected in the award.

To determine what facts are material, an arbitrator must look to the substantive law controlling that issue. Only “facts that might affect the outcome of the suit under the governing law” can be considered material. Focusing on facts “that are truly essential as opposed to those that

302. See Aldisert et al., supra note 109, at 30.
303. See supra notes 165-70 and accompanying text.
304. See Aldisert et al., supra note 109, at 24; Lloyd et al., supra note 3, at 32.
305. See Fontaine, supra note 3, at 34 (“The summary of the facts will be confined to the essential points (even though arbitrators from common law countries tend to lend particular weight to this part of the award), taking a stand on any disputed points.”).
306. See Baudenbacher, supra note 238, at 348-49 (discussing the hermeneutical nature of contemporary civil law analysis); see also supra notes 220-21 and accompanying text.
308. See Aldisert et al., supra note 109, at 31.
309. Id.
are decorative and adventitious” allows the “conclusion . . . to follow so
naturally and inevitably as almost to prove itself.”

When summarizing the facts, arbitrators must ensure the accuracy of
each individual element. “While the author may interpret the law liber-
ally or strictly, he [or she] must not take this kind of liberty with the
facts.” As a result, arbitrators should avoid adopting any proposed find-
ings of facts submitted by the parties, both to minimize error and to pre-
vent claims that the arbitrator did not exercise independent judgment
when reviewing the facts.

When describing the material facts, an arbitrator needs to do more
than simply recount the evidence. Instead, the award must “set out ex-
press findings of fact showing how the . . . [arbitrator] reasoned from the
evidentiary facts to the ultimate fact” that decides a particular legal is-

sue. While experts often suggest a chronological approach to the factual
analysis, some disputes lend themselves to another type of organizational
structure.

If witnesses testified at the hearing, the arbitrator should address is-

sues of credibility. However, the award does not need to list all of the
witnesses who have appeared. Instead, it is sufficient to “identify the
undisputed facts and make findings of those in dispute, all within the ru-
bric of pertinence. It is important to make findings of credibility when
establishing the probative force of a witness’ testimony, and to give
reasons.”

(Mich. 1981); Aldisert, supra note 261, at 137. For examples from both U.S. and English
tax, Aldisert, supra note 261, at 139-40 (discussing Rylands v. Fletcher, (1868) L.R. 3 H.L.
330 (HL), and Brown v. Board of Education, 347 U.S. 483 (1954)).

312. Aldisert et al., supra note 109, at 31-32 (quoting Benjamin N. Cardozo, Law and
Literature, 14 YALE L.J. 705 (1925)); see also Aldisert, supra note 261, at 138-40. In some
ways, the task of deciding what constitutes a material versus non-material fact is not as diffi-
cult as it seems, since an arbitrator has been considering those issues throughout the proceed-
ings. See George, supra note 73, at 232 (noting the “definition of what is and is not [legally]
at issue . . . determines the evidence to be presented and limits what will be heard” at trial.).

313. See Aldisert et al., supra note 109, at 33.

314. George, supra note 73, at 164.

315. See United States v. El Paso 376 U.S. 651, 656-57 (1964); United States v. Crescent
Amusement Co., 323 U.S. 173, 184-85 (1944); Bright v. Westmoreland Cty, 380 F.3d 729, 731-
32 (3d Cir. 2004); George, supra note 73, at 187. Commentators have cautioned against
“judicial plagiarism,” which occurs when a judge does not give proper credit for a particular
statement or proposition. Id. at 707-27. Arbitrators could be subject to a similar charge if
they copy parties’ proposals too closely.

316. See George, supra note 73, at 194-95.

317. Id. at 195 (discussing an example). The arbitrator “must formulate the ultimate or
conclusionary fact by scrutinizing the evidentiary facts.” Id. (discussing judicial practices).

318. See Mailhot & Carnwath, supra note 31, at 48.

319. See id. at 50.

320. See id.

321. Id.
Some authorities believe that the summary of facts should precede the summary of legal issues, although there is no consensus on that point. Ultimately, the order of the various sections is a matter of logic and individual preference. However, most experts suggest writing the summary of legal issues before writing the summary of facts so as to avoid the introduction of immaterial factual information. Sections can be rearranged later, during the editing process.

d. Analysis of the legal issues (confirmatio a. confutatio)

The fourth section of a classically constructed award involves a detailed analysis of the legal issues and describes why the arbitrator has reached the outcome in question. Some authorities refer to this as the “application” section, since this is the place where the law that has been identified in the legal summary is applied to the facts.

Arbitrators can organize this section in a variety of ways, depending on the nature of the dispute. For example, if one issue can be considered dispositive, then the arbitrator may want to begin by addressing that element. Alternatively, if no single issue controls the outcome, then the arbitrator could adopt the organizational approach used by counsel or begin with either the easiest or the most difficult of the outstanding issues, whichever seems best. Regardless of which technique is used, “[t]here is but one obligation: to correctly describe the arguments in support of each party’s position on each issue, and to give clear reasons justifying the result.”

322. See Aldisert et al., supra note 109, at 24. One expert suggests that “[f]acts should be stated in the past tense” while “[p]ropositions of law should be stated in the present tense,” but that does not appear to be a hard and fast rule. George, supra note 73, at 163.

323. See Aldisert et al., supra note 109, at 28.

324. See Mailhot & Carnwath, supra note 31, at 45-47; Aldisert et al., supra note 109, at 28.

325. See Aldisert et al., supra note 109, at 28, 33. Editing is as important as writing. See Mailhot & Carnwath, supra note 31, at 84 (suggesting judges revise their draft texts somewhere between three and eight times).

326. See Aldisert et al., supra note 109, at 34.

327. See Lloyd et al., supra note 3, at 33. This technique is reminiscent of the legal writing methodology used in the United States, England and Australia. See Strong, How to Write, supra note 31, chs. 3-6 (discussing the IRAC (issue-rule-application-conclusion) system in the United States); Strong & Desnoyer, supra note 48, chs. 3-6 (discussing the CLEO (claim-law-evaluation-outcome) system in England); Atkinson, supra note 261, at 3-5 (discussing FLAC (facts-law-application-conclusion) in Australia).

328. See Mailhot & Carnwath, supra note 31, at 51.

329. Id.

330. Id.; see also George, supra note 73, at 172 (noting each issue discussed requires a separate conclusion); Mailhot & Carnwath, supra note 31, at 52 (noting “reasons are the foundation of the result, a form of justification”).
When drafting an award, an arbitrator needs to be aware of the various ways that reasoned awards differ from written advocacy. For example, reasoned awards resemble a form of justification. . . . [Arbitrators] are not required to convince, but rather to make themselves understood. They must therefore express their reasons in a fashion that will carry with them the support of the majority of the readers. The losing parties may never be convinced their cause was wrong but they are entitled to know why they lost and how the judge reached that result.

Experts suggest that arbitrators adopt a thoughtful and neutral tone so as to give the parties reason to trust in the integrity of the award. Arbitrators also should be careful about adopting any proposed conclusions of law submitted by a party, since that may cause the losing party to have doubts about the independence and impartiality of the arbitrator.

Functionally, arbitrators “must decide all the issues in a case on the basis of general principles that have legal relevance; . . . and the opinion justifying the decision should contain a full statement of those principles.” Although “[t]he legal conclusion should cover each of the legal elements required to decide the case,” the goal is not to “state the law [as] fully and comprehensively . . . as might be expected in writing a law review” or “to resolve unasked questions or legal issues not yet in dispute.” Furthermore, a well-drafted legal analysis “should not be a recitation of the case [or statutory] authorities, but rather their specific application to the precise issues raised by the case.”

331. M AILHOT & C ARNWATH, supra note 31, at 52.
332. Id.; see also A LDISERT, supra note 261, at 157-66 (discussing inductive and deductive reasoning).
333. See A ldisert et al., supra note 109, at 34; F ontaine, supra note 3, at 36-37. Arbitrators may also need to discuss any concurring or dissenting opinions. See A rroyo, supra note 119, at 459-64. While some authors address their colleagues’ concerns in the body of the award (a step that may be necessary if the analysis of the dissent or concurrence is quite long), it is also possible to address these matters in the footnotes.
334. See G EORGE, supra note 73, at 187-88; William W. Park, Arbitrator Integrity: The Transient and the Permanent, 46 SAN DIEGO L. REV. 629, 635-38 (2009); R ogers, Vocation, supra note 21, at 987-88.
335. Kent G reenawalt, The Enduring Significance of Legal Principles, 78 COLUM. L. REV. 982, 990 (1978); see also A ldisert et al., supra note 109, at 36.
336. G EORGE, supra note 73, at 195.
337. Id. at 13. But see supra notes 136-39 and accompanying text. Indeed, it is generally considered “improper for the . . . [arbitrator] to state more in a decision/opinion than is necessary or to resolve or attempt to resolve future problems.” G EORGE, supra note 73, at 13; see also id. at 233-34 (discussing the advantages and disadvantages of so-called “lecturing” decisions).
338. G EORGE, supra note 73, at 195.
When undertaking a legal analysis, an arbitrator faces three possible scenarios.\textsuperscript{340} First, after “identify[ing] the flash point of the conflict,” the arbitrator may find him or herself required to “choose among competing legal precepts to determine which should control.”\textsuperscript{341} Here, the arbitrator needs to identify a controlling principle from a series of cases or statutes.\textsuperscript{342} Once the controlling principle of law is determined, that principle must then be interpreted and applied to the facts of the case.\textsuperscript{343}

In the second scenario, the arbitrator may not have any difficulties identifying which of several competing legal principles controls the issue but may nevertheless need to decide how to interpret that principle.\textsuperscript{344} This type of concern arises most frequently in cases involving statutory construction.\textsuperscript{345} In this situation, the arbitrator does not need to discuss other potential legal principles at length but can focus on the interpretation of the law and the application of that law to the facts.\textsuperscript{346}

The third alternative arises when the dispute is primarily factual in nature. When faced with these kinds of situations, the bulk of the analysis will involve describing and weighing the evidence.\textsuperscript{347} Once that task is complete, the arbitrator can apply the governing law (as chosen and interpreted) to the facts that have been established.\textsuperscript{348}

As the preceding suggests, different types of disputes not only demand different types of analyses but also generate different type of awards.\textsuperscript{349} In deciding how best to draft an award, an international arbitrator must not

\textsuperscript{339} Id. at 234.

\textsuperscript{340} These scenarios are reminiscent of Cardozo’s taxonomy of legal disputes, although the two analyses are not identical. See supra notes 195-217 and accompanying text.

\textsuperscript{341} Aldisert et al., supra note 109, at 35.

\textsuperscript{342} See id. For example, an arbitrator faced with a question governed by the law of a common law jurisdiction must study the various authorities, which each announce “a specific rule of law attached to a detailed set of facts.” Id. Some commentators suggest that this process allows an adjudicator “to ‘find’ or create a broader legal precept attached to a broad set of facts.” Id.; see also George, supra note 73, at 349-68; Deborah B. McGregor & Cynthia M. Adams, The International Lawyer’s Guide to Legal Analysis and Communication in the United States 142-91 (2008). Although this process may appear problematic to lawyers trained in the civil law tradition, Justice Cardozo has explained how the common law method complies with certain notions of natural law and is indeed consistent with certain readings of the civil law approach to statutory interpretation. See Cardozo, supra note 195, at 142-45 (citing François Gény, Méthode d’Interprétation et Sources en Droit Privé Positif, vol. II (1919)).

\textsuperscript{343} See Aldisert et al., supra note 109, at 35.

\textsuperscript{344} See id.

\textsuperscript{345} See id. A number of common law jurisdictions have become increasingly codified. See Guido Calabresi, A Common Law for the Age of Statutes 5-7 (1982) (discussing the United States).

\textsuperscript{346} See Aldisert et al., supra note 109, at 35.

\textsuperscript{347} See id. at 35-36.

\textsuperscript{348} See id. at 36.

\textsuperscript{349} See also supra notes 195-228 and accompanying text.
be afraid of exercising his or her judgment and discretion.\textsuperscript{350} However, arbitrators “must not rely on value judgments to the exclusion of reasoned analysis.”\textsuperscript{351} Furthermore, the award must “not be written as a record of the tribunal’s internal deliberations but for consumption by those for whom it is intended.”\textsuperscript{352}

c. Conclusion indicating the holding or disposition (\textit{peroratio})

The final section of a reasoned award involves the holding or disposition of the dispute.\textsuperscript{353} In judicial opinions, this section usually constitutes “a single paragraph or sentence at the end” of the award.\textsuperscript{354} Arbitral awards usually require a slightly lengthier conclusion, since the issue of fees and costs usually must be addressed in addition to the outcome of the various substantive claims.\textsuperscript{355} Notably, if the issue of fees and costs is at all contentious, it may merit a special subsection following the legal analysis and prior to the conclusion.\textsuperscript{356}

The dispositive section of the award is usually relatively formulaic so as to avoid any possible misunderstandings.\textsuperscript{357} Arbitrators must be sure to address all alleged claims and defenses, since the doctrine of \textit{functus officio} may make it difficult if not impossible to go back and address any gaps that have been left.\textsuperscript{358} As a result, it is often considered a best practice to conclude the award with a provision stating that all matters not explicitly addressed in the award have been considered and determined to be without merit.\textsuperscript{359}

Appellate arbitrators may be required to identify which aspects of the initial award have been affirmed, reversed, vacated, and/or modified, although at this point very little analysis exists regarding the scope of an appellate arbitrator’s powers.\textsuperscript{360} However, existing appellate rules suggest that appellate arbitrators do not have the power to remand a matter to the original tribunal.\textsuperscript{361}

\textsuperscript{350} Arbitrators have long been selected for their ability to exercise appropriate discretion.
\textsuperscript{351} Aldisert et al., supra note 109, at 37.
\textsuperscript{352} Lloyd, supra note 3, at 40.
\textsuperscript{353} See Aldisert et al., supra note 109, at 24.
\textsuperscript{354} GEORGE, supra note 73, at 176.
\textsuperscript{355} See Lloyd et al., supra note 3, at 35-37.
\textsuperscript{356} See id. at 34-35. Fee-related issues in international commercial arbitration can become quite complicated and could require detailed submissions regarding the allocation of costs, interest and attorneys’ fees. See id. In those cases, the discussion of fees and costs can run several pages in length and should be analyzed in a separate section in the award. See id.
\textsuperscript{357} See id. at 34-37 (including model language).
\textsuperscript{358} See Gaitis, supra note 9, at 12.
\textsuperscript{359} See Aldisert et al., supra note 109, at 38.
\textsuperscript{360} See GEORGE, supra note 73, at 302-04; Aldisert et al., supra note 109 at 38.
\textsuperscript{361} See AAA Appellate Rules, supra note 86, at Rule A-19(a) (“The appeal tribunal may not order a new arbitration hearing or send the case back to the original arbitrator(s) for corrections or further review.”); CPR Appellate Rules, supra note 86, at Rule 8.2(b) (“The
The conclusion should also include any formalities that are required as a matter of national or international law. Thus, for example, an award should be signed by all arbitrators (or at least a majority thereof if a dissent exists) and should include both the date and the place of arbitration.

**Conclusion**

As the preceding discussion suggests, writing a reasoned award is one of the most important and challenging tasks that an international arbitrator must undertake. Not only do international awards typically reflect the same degree of analytical complexity as many judicial decisions, they also require a uniquely international perspective that is very difficult to master. Learning to overcome the allure of parochialism and incorporate key elements of both the common law and the civil law legal traditions into one’s legal analysis is something that requires a great deal of skill and training. Unfortunately, the arbitral community has adopted the view that international arbitrators can become competent in award writing simply through “observation, exposure, participation and experience.”

To some extent, this highly deferential approach to arbitral education would appear unassailable, since it strongly resembles the standard means by which many common law jurisdictions have educated their judges. However, experts have expressed a number of concerns about the efficacy of the common law approach to judicial education, thereby raising similar questions about the nature and quality of arbitral education, particularly with respect to award-writing.

The current approach to arbitral education has also been defended on the grounds that market forces will ensure the requisite degree of competence in writing international awards. The hypothesis is that good arbitrators—meaning those that can and do comply with national and international requirements regarding reasoned awards and who reflect an...
appropriately international perspective in their analyses—will be rewarded through repeat appointments, while those arbitrators who do not rise to the task of drafting an adequate award will eventually find themselves without jobs.\textsuperscript{369} However, this argument breaks down in several ways. First, commentators have long recognized that the lack of transparency in international commercial arbitration can allow sub-standard arbitrators to continue to work for a significant period of time.\textsuperscript{370} Second, experts have noted that that “no selection method can guarantee the continued fitness” of an adjudicator.\textsuperscript{371} Indeed, many judges “turn out to be ill-suited for the job,” despite having complied with selection procedures that are ostensibly more rigorous than those facing international arbitrators.\textsuperscript{372}

As it turns out, there are a number of ways to improve the skills of international arbitrators. One is to increase the number and quality of educational opportunities concerning award-writing in international commercial arbitration.\textsuperscript{373} In so doing, the arbitral community can consider some of the recent innovations in judicial education to see what types of improvements are possible on both a procedural and substantive level.\textsuperscript{374} For example, educational providers can combine in-person sessions with written guidebooks so as to take the particular needs and learning style of international arbitrators into account.\textsuperscript{375}

Another possibility is to create more rigorous standards regarding arbitrator education, such as by imposing a mandatory minimum regarding the number or type of courses a new or experienced arbitrator should take.\textsuperscript{376} Similar initiatives have met with significant resistance in the judicial context on the grounds that such measures were somehow “insulting,” and similar types of objections can be anticipated in the arbitral context.\textsuperscript{377} However, mandatory minimums in arbitrator education would be

\textsuperscript{369} See id. at 62 (applying a law and economies approach to arbitrator appointment); Rogers, Transparency, supra note 65, at 1316-17.
\textsuperscript{370} See Susan D. Franck, The Role of International Arbitrators, 12 ILSA J. INT’L & COMP. L. 499, 516-17 & n.75 (2006). One particularly noteworthy effort to overcome lack of transparency in international commercial arbitration involves Arbitrator Intelligence, a new database developed by Professor Catherine Rogers to provide parties in arbitration with accurate information on arbitrators and arbitral awards. See Arbitrator Intelligence, http://www.arbitratorintelligence.org/.
\textsuperscript{372} Fisher, supra note 371, at 164.
\textsuperscript{373} See supra notes 13-36 and accompanying text.
\textsuperscript{374} See supra note 259 and accompanying text.
\textsuperscript{375} See ARMYTAGE, supra note 34, at 149; see also supra note 36 and accompanying text.
consistent with other efforts to improve the quality of international commercial arbitration. Furthermore, mandatory education would help overcome the fact that those individuals who are most in need of additional training are often the least likely to recognize that need.

At this point, international commercial arbitration is considered to be one of the legal world’s most remarkable success stories, and nothing in this Article should be taken as criticizing the excellent work done by the large majority of international arbitrators. Indeed, studies suggest that most observers and participants appear satisfied with decision-making in international commercial arbitration. However, the arbitral community must continue to be vigilant if international commercial arbitration is to retain its position as the preferred method of resolving cross-border business disputes. One of the best ways of ensuring the continued excellence of international commercial arbitration is to ensure the quality of reasoned awards. While it is not recommended that the international arbitral community attempt to adopt a single standard approach to award writing, new and experienced arbitrators would undoubtedly benefit from an improved understanding of what is involved in a reasoned award. Hopefully this Article has proven useful in that regard.

---

378. See Rogers, Have-Not, supra note 30, at 377 ("[T]he international arbitration community is highly sensitive to perceptions of its own legitimacy."). The International Bar Association has been particularly active in this regard. See International Bar Association, Arbitration Committee Publications, http://www.ibanet.org/LPD/Dispute_Resolution_SECTION/Arbitration/Publications.aspx.


380. See Born, supra note 2, at 73.


382. See Born, supra note 2, at 73; see also supra note 5.

383. Indeed, some efforts have already been made in this regard. See QMUL, supra note 13 (offering a short course on award-writing); see also supra notes 20-22 and accompanying text.