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REASONING IN ARBITRAL AWARDS

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Abstract

The author's analysis focuses on the standard of reasoning in international arbitration. In his view, the awards are unsatisfactorily reasoned whenever they leave unclear whether procedural legitimacy has been respected by the tribunal in the conduct of the proceedings or whenever the award does not allow the readers, especially the losing party and the court empowered to enforce or annul it, to check whether the tribunal has complied with the observance of due process and the crucial duties to not exceed its powers and to apply the proper law. The author underlines that, pursuant to the parties' expectations, the arbitrators owe to them a specific duty to provide understandable and convincing reasoning; indeed, they are appointed and remunerated by the parties to make a thorough, informed, and enforceable decision. The decision being final and not subject to appeal, the arbitrators' obligation to motivate is even sharper than the corresponding duty of domestic courts. After analysing the case law in both commercial and investment arbitration, the author concludes that the international arbitration community should improve the reasoning standards, if it wishes to maintain the privilege of being selected by users as their "premier choice".

I. Introductive remarks

In the history of arbitration,[1] be it domestic or international, the total absence of reasoning in an award is either unknown or extremely rare. Most national arbitration laws and all institutional rules in force worldwide require a *reasoned* award. Only a few legal orders allow the parties to dispense the arbitrators with the duty to give reasons, if the parties so agree at the outset of the proceedings. However, this practice is criticised and, indeed, considerably decreasing over the years, especially because the parties tend to refrain, and rightly so, from granting the arbitrators the power to render awards without reasons.[2]

A further exception is represented by an "*award by consent*" due to its peculiar nature. In this case, the arbitral tribunal does not, and does not need to, provide its own reasoning for the decision, which is only meant to incorporate the terms of the settlement agreed by the parties, which are

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1 For the purpose of this contribution, consideration was given to the practice during the last decades.

2 Significantly, the Paris Appeal Court has recently reversed the past French judicial approach, pursuant to which a foreign award, which was rendered under a law that allows the parties to waive the duty to state reasons, was not contrary to international public policy and could be enforced in France. On April 2, 2019, the Paris Court of Appeal took the opposite view, holding that "[t]he need for reasoning in making justice decisions is an element of the right to an equitable process. Arbitrators who fail to state reasons for their decisions disregard the scope of their mission and the recognition of an award devoid of reasoning goes against the French conception of International Public Policy". *See* Cour d'appel [CA] [regional court of appeal] Paris, Apr. 2, 2019, ARB (AF)/11/3, at 304.

endorsed by the tribunal. The task of the tribunal is limited to vesting the settlement with the form of an award enforceable in law in case one of the parties fails to comply with the agreed settlement.

Apart from these rare exceptions, the debate concerning the reasoning in arbitration takes for granted that – in whatever form it might be expressed – the reasoning is a constant feature in all awards and that a genuine failure to state reasons constitutes a ground for setting aside the award pursuant to most legal orders. The discussion on this matter is rather focused on establishing whether the reasoning is adequate or inadequate in the way it is expressed. In other words, what is lively debated is the standard of reasoning that the arbitral tribunals should satisfy to preserve the validity and enforceability of their decision, not their obligation to state the reasons in the award.

The practice shows that an award does not meet the acceptable standards where the reasoning is incomplete, or inadequate, or inconsistent, or unintelligible. Some examples may be useful, although the list cannot be exhaustive:

i. the award does not allow to understand the logical trajectory followed by the tribunal i.e. how the tribunal has proceeded from point A to point B, and eventually, to its conclusions;[3]

ii. the award does not allow to infer whether the tribunal has considered both parties' case on points of fact or law, including the determination of the applicable law, when this is a disputed matter;

iii. the award does not permit to verify whether the tribunal has exclusively relied on the evidence provided by the parties, or was influenced by information known to the arbitrators but unknown to the parties, or never pleaded during the proceedings;[4]

iv. the award leaves unknown whether the tribunal has applied the agreed governing law, or what law it has applied, if any;

v. it is impossible to infer from the award whether the tribunal has exceeded its mandate by either omitting to decide a relevant issue (*infra petita*) or deciding an issue never referred to it by the parties (*extra petita*);

vi. the award simply refers to certain contract clauses, but fails to examine the interpretation offered by the parties, or even fails to provide the tribunal's interpretation;

vii. the reasoning does not show internal consistency and does not appear congruent with the deliberation process recorded in the award;

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[3] For a comparative analysis of domestic courts' approach when reviewing arbitral awards, *see* T. H. Webster, *Review of Substantive Reasoning in International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication*, 22(3) ARB. INT'L 431 (2006); F. Madsen & P. Eriksson, *Deliberations of the Arbitral Tribunal – Analysis of Reasoned Awards from Swedish Perspective*, STOCKHOLM INT'L ARB. REV. 1, 17 (2006).

[4] Failure to refer to evidence in the file may be a decisive omission leading to annulment. On January 8, 2018, the Tribunal Superior de Justicia de Madrid set aside an award dated April 6, 2017 for "lack of motivation" on the ground that the arbitrator made no reference to the evidence he had relied on to establish the dispositive section of the award: *see* R. Irra, F. Fortùn & C. Cachat, *The Obligation to Motivate an Award: An Open Door to the Substantive Review of an Award?*, 4 ICC DISP. RESOL. BULL. 27 (2018).

viii. even more importantly, the award raises concerns as to whether the decision is exclusively based on the legal arguments openly debated by the parties (as it should), or whether it is influenced by a legal solution adopted *ex officio* by the tribunal in its internal deliberations and never pleaded by the parties before the tribunal.

The above examples have a feature in common: they are generally affected by breach of due process, or breach of the right to be heard, or excess of powers. Each such flaw may constitute an independent ground for either annulling or refusing enforcement of the award. However, they are also frequently merged into one single complaint, where the ground for challenging the award is the failure to state reasons, which may well embrace all related deficiencies as sub-categories of the main complaint. The procedural breach may be more or less flagrant, but it seems unquestionable that in all above cases, the arbitral tribunal is departing from or disregarding certain non-waivable requirements aimed at safeguarding the legitimacy of the arbitral process.[5]

Accordingly, at this introductory stage, it is reasonable to conclude that an award is unacceptably reasoned whenever it does not permit the readers, and especially the court which will be approached for either enforcing or annulling it, to make a proper control on the respect of due process at all stages of the proceedings. This is so because the reasoning is the only means available to the judge to check whether the tribunal has proceeded legitimately or has decided the dispute on its own arbitrary discretion.

As Professor Jarrosson rightly affirmed:

> "*Human justice must rely on reason, on the law, and cannot be subject to arbitrariness. Setting out the tribunal's reasoning is, by far, the preferred way of showing that the solution is not arbitrary, and that justice has been rendered: indeed, justice must not only be done, it must also be seen to be done.*"[6]

A recent event shows how sensitively this matter is perceived in the international arbitration community. The topic for the 39th Annual Conference of the International Chamber of Commerce Institute of World Business Law ["**ICC Institute**"], held in Paris on December 17, 2019, was defined as follows: *Explaining Why You Lost – Reasoning in Arbitration.* Prominent speakers from civil and common law jurisdictions discussed the various facets of the reasoning in arbitral awards and the risks incurred by the parties when the quality of reasoning is below the required standards.[7]

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5 *See* Tribunal fédérale [TF] May 16, 2011, 4A_46/2011 (Switz.). The Federal Tribunal annulled an arbitral award on the ground that the tribunal had omitted to deal with and decide an issue raised by one party, which was relevant to the disposal of the dispute and, if considered, might have reversed the outcome of the case. The annulment was based on the breach of the "right to be heard" in the meaning of Loi fedrale sur le droit international privi [LDIP], Bundesgesetz uiber das Internationale Privatrecht [IPRG] [Federal Statute on Private International Law] Dec. 18, 1987, SR 291, RS 291, art. 190(2)(d) (Switz.). The decision is published in ASA Bulletin, September 2011, with an interesting comment by François Perret, "Quelques considérations à propos de la motivation des sentences arbitrales en matière d'arbitrage international à la lumière d'une jurisprudence récente du Tribunal Fédéral." Professor Perret quite rightly observed that the most serious defect in the annulled award was the insufficient reasoning, a defect that may lead to annulment of the award, when it becomes apparent that the tribunal has left untouched a question on which the tribunal had been requested to take determination.

6 C. JARROSSON, *Reasoning in Arbitration*, *in* EXPLAINING WHY YOU LOST – REASONING IN ARBITRATION 16 (A. Crivellaro & M. N. Hodgson eds., 2020).

7 *See id.* The Dossier is published since July 2020.

Almost simultaneously, on December 18, 2019, the Supreme Court of India issued an important judgment to sanction an unreasoned award.[8] Obviously, there was no connection between the two events. However, the coincidence in time confirms that the matter is viewed as lively relevant and topical in different regions of the world.

II. According to Supreme Court the award must be *intelligible*

The above-mentioned decision of the Supreme Court of India goes straight to the point discussed here. The question put before the Court revolved around the requirement of a reasoned award and the need for parties and arbitrators "*to have a clear award, rather than to have an award which is muddled in form and implied in its content*" (emphasis added).[9] The Court underlined that this deficiency "*inevitably leads to wastage of time and resources of the parties to get clarity, and in some cases, frustrates the very reason for going to arbitration*" (emphasis added).[10]

The dispute before the arbitral tribunal had arisen from a contract for the construction of ponds, channels, drains, and associated works. The contractor had requested compensation for "*premature termination*" of the contract by the employer, claiming for the loss resulting from the unproductive use of machineries and workforce and loss of profit. The tribunal granted the first claim and disallowed the second.

The award was first challenged by the employer under Section 34 of the Arbitration and Conciliation Act, 1996, before the Single Judge of the High Court at Madras, for alleged failure by the arbitrators to explain the reasons underlying the grant of compensation. However, according to the Single Judge, the arbitrators had provided "*a specific finding*" that the amount claimed was payable to compensate a loss of productivity incurred by the contractor.[11] This decision was appealed before the Division Bench of the High Court, which reversed the Single Judge's conclusion because the award "*does not contain sufficient reasons*" and the relevant paragraph in the award "*does not provide any reasons, discussions or conclusions*". The High Court explained why the challenged award was unreasoned, with the following language:[12]

> "*It is of course true that an Arbitrator cannot be expected to write a detailed judgment as in a law Court. However, the present Act contemplates that the award of the Arbitrator should be supported by reason. The decision relied upon by the counsel for the respondent, rendered on the basis of the Arbitration Act, 1940, cannot be pressed into service keeping in view the specific provision contained in the Act. Moreover, even assuming that the ratio of the said decision is applicable, we cannot cull out any underlying reason in the award for directing payment of compensation. The basis for the right of the claimant and the basis of the liability of the present appellant have not been indicated anywhere within four corners of the award and in spite of the best effort it is not possible to discover even any latent reason in the award.*
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> *It was also contended that the discussion in para 3.1(g) of the award contains the basis and reason given by the Tribunal.*

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8 M/S Dyna Technologies Pvt. Ltd. v. M/S Crompton Greaves Ltd., (2020) 1 Arb. L.R. 1 (India) [*hereinafter* "Dyna Technologies"].

9 Dyna Technologies, (2020) 1 Arb. L.R. 1, ¶ 1 (India).

10 *Id.*

11 *Id.* ¶ 13.

12 *Id.* ¶ 14.

> *We have carefully gone through such paragraph as well as the proceeding and subsequent paragraphs. In our considered opinion, the statements recited in para 3.1 including para 3.1(g) are only substance of the submissions/claim made by the claimant and para 3.1(g) cannot be construed as a conclusion or even the reasoning given by the Tribunal.*" (emphasis added)

Before the Supreme Court, the contractor claimed that it was not open for the High Court to reassess the evidence produced before the arbitrators, nor substitute its own views on the merits to the conclusions reached by the arbitral tribunal. However, the Supreme Court disagreed, and imparted a lesson of law on the meaning of reasoned award, which is worth quoting:[13]

> "*The mandate under Section 31(3) of the Arbitration Act is to have reasoning, which is intelligible and adequate and, which can in appropriate cases be even implied by the Courts from a fair reading of the award and documents referred to thereunder, if the need be. [….]*
>
> *When we consider the requirement of a reasoned order three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasons in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity [….] would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusion reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.*" (emphasis added)

The Court concluded that the arbitral tribunal, after failing to address the claims distinctly and reproducing them confusedly and after quoting the factual narrative and legal arguments put forward by the parties in a muddled and non-intelligible fashion, abruptly jumped to the conclusion that a certain compensation was due to the contractor, without setting out its own independent reasons. The Court found the award unintelligible and vacated it for lack of reasoning.

The judgment certainly contributes to the progressive formation of the Indian arbitration law. However, it also amounts to an illustrative precedent from an international standpoint.

III. The duty to provide reasons is primarily owed to the parties

The ruling of the Indian Supreme Court has a further merit: it clearly recalls to all concerned that the first beneficiaries of the arbitrators' duty to give reasons are the parties to the individual case, and – I would add – the arbitration community at large.

[13] *Id.* ¶¶ 35–36.

The Court's reminder reflects a common understanding in international arbitration practice. Parties who opt to resort to arbitration for settling their disputes waive, on the one hand, any judicial review of the award on the merits, but, on the other hand, expect and wish to have, in exchange, a well-crafted and thorough decision rendered by esteemed and experienced arbitrators. This implies that, although there is almost no court control on the substance of the arbitrators' reasons, the arbitrators have a responsibility towards the parties to provide accurate and comprehensive reasons for their awards, and to deliver decisions that are enforceable at law.[14]

It may thus be stated that the mandate to the arbitrators does, *inter alia*, make them responsible towards the parties for the legitimacy and enforceability of the resulting decision.

As Lord Justice Bingham rightly observed more than 20 years ago, arbitral reasoning should be viewed distinctly from judicial reasoning.[15] Indeed, a badly or wrongly reasoned judgment remains subject to appeal and will be reviewed on both facts and law. It is because of this circumstance that the quality of the judicial reasoning may be relatively lower without causing irreparable harm to the parties. However, the appeal is not a remedy available to review or rectify an award, which remains "*final*", although potentially unsatisfactory or deficient on facts or law. It is this essential distinction that makes the arbitrators' task, when drafting the reasoning, significantly more burdensome and sensitive than the equivalent task of a State lower court.

The difference between arbitral and judicial reasoning is no surprise, for various reasons.

First, arbitral disputes often involve significant amounts and are – factually, or technically, or legally – more complex than in court litigation. The parties' preference to defer this kind of disputes to arbitrators rather than domestic courts, comes exactly from the expectation that the arbitrators will make a conscious effort to show they have considered every issue and every argument. This explains why the reasons in the awards are generally more detailed than in a court judgment.[16]

Second, the court is a State organ committed to render justice in accordance with the legal order of that State. It is obviously accountable to the public for improprieties or wrongdoings in administering justice, including for the violation of its duty to provide reasons of the judgment according to the standards established in the internal legal order. However, the arbitrators' duty to frame reasons is more intense, it being specifically owed to the parties in the individual case, from which the arbitrators received an ad hoc mandate. Differently from the court, the arbitrator is a "*private judge*" owing to the parties a duty to fulfil the mandate with diligence and care, which includes the duty to provide reasons understandable to the parties, by which he/she is remunerated. His/her principal duty is to render a decision that, in conformity with the parties' expectations, shall be exhaustively responsive to their claims, arguments, and defences. In simpler terms, the arbitrator's responsibility is greater, but so is his/her paycheck.[17]

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[14] *See*, *e.g.*, International Chamber of Commerce (ICC), Rules of Arbitration 2012, art. 41, pursuant to which "the arbitral tribunal shall make every effort to make sure that the award is enforceable at law".

[15] *See* Lord Justice Bingham, *Reasons and Reasons for Reasons: Differences between a Court Judgment and an Arbitration Award*, 4(2) ARB. INT'L 141 (1997).

[16] JARROSSON, *supra* note 6, at 20.

[17] *See* A. Crivellaro, How well Reasoned Must an Award Be to Satisfy Non-waivable Legitimacy Requirements, Introductory Presentation at the 39th Annual Conference of the International Chamber of Commerce Institute of

The parties are aware, and accept without reservation, that the drafting of the award will have a significant impact on the duration of the arbitral proceedings. Both in ad hoc and in institutional arbitrations, the parties agree that, after closure of the evidentiary phase, the arbitrators be provided with a considerable amount of time to draft their deliberations, and agree to extend the original time limit, if needed. By acknowledging that the drafting of an award is a time-consuming exercise, the parties show they are really interested in knowing the reasons upon which the award is based. Would it not be so, they would be satisfied with a much more rapid, but unreasoned, award.

IV. On the adequacy standard

In the search for an adequacy standard, the most convincing definition of "adequate" reasoning is, in my view, the one given by two International Centre for Settlement of Investment Disputes ["**ICSID**"] ad hoc committees in *Hussein Nuaman Soufraki* v. *United Arab Emirates* ["**Soufraki**"] and *Maritime International Nominees Establishment* v. *Republic of Guinea* ["**M.I.N.E.**"], respectively.

According to the Soufraki annulment committee, the expression of reasons in the award is the only way by which "*compliance with the fundamental prohibition of manifest excess of powers and with the critical duty to apply the proper law may be observed*".[18] Thus, quoting again from this Committee, "*the more lucid and explicit the reasons set out by a tribunal, the easier it should be to observe what a tribunal is in fact doing by way of compliance*".[19]

The above definition, therefore, calls for reasons which allow readers and controllers to check whether the tribunal has complied with fundamental duties of due process.

Following a slightly different approach, however reaching similar conclusions, the ad hoc committee in *M.I.N.E.* concluded that the requirement to state reasons is satisfied and the award stands as long as the logical itinerary followed by the tribunal is intelligible, or "*the award enables the reader to follow how the Tribunal proceeded from point A to point B and eventually to its conclusions*".[20]

I share the view expressed in both the above definitions. A reasoning showing manifest gaps on points of facts or law makes it impossible to understand how the tribunal arrived at certain conclusions rather than others. An obscure reasoning prevents one from verifying whether the tribunal was guided by self-made considerations, thus manifestly exceeding its powers. It cannot be denied that a laconic, or opaque, or puzzling reasoning sheds serious doubts as to whether the tribunal's findings are based on objective and rational grounds, in full safeguard of the procedural legitimacy, or whether they are the product of arbitrariness.

World Business Law (Dec. 17, 2019), in EXPLAINING WHY YOU LOST – REASONING IN ARBITRATION 9 (A. Crivellaro & M. N. Hodgson eds. 2020).

18 Hussein Nuaman Soufraki v. U.A.E., ICSID Case No. ARB/02/7, Decision on the Application for Annulment, ¶ 127 (June 5, 2007) [*hereinafter* "Soufraki"].

19 *Id.*

20 Maritime International Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision on Annulment, ¶ 5.09 (Dec. 22, 1989), 4 ICSID Rep. 61 (1997).

In brief, prudent parties should be advised that a waiver to a reasoned award would empower an arbitral tribunal to adjudicate "*as it deems fit*", which implies the risk of a decision made in absolute arbitrariness.[21]

A related issue is whether an "*adequate*" reasoning should also be "*exhaustive*" and address all allegations, arguments, or defences raised by the parties. In common practice, parties support their claims or defences on multiple alternative or cumulative grounds. However, a well-reasoned award should primarily address the "*questions*" that have a direct *bearing on the disposal* of the dispute. Indeed, a distinction should be maintained between a relevant or decisive "*question*", on the one hand, and "*arguments*", or "*pleas*", or "*allegations*" raised in connection with that "*question*", on the other hand.

As already stated, the "*question*" is the issue the resolution of which determines the outcome of the case. For instance, the issue whether "*Party A is liable towards Party B for breach of contract*" or whether "*Party A must pay to Party B the sum of XX in reparation of the breach*" are the real "*questions*" that cannot be left undecided. They are indeed material to the outcome of the case, which is determined by the ruling of the tribunal on the merits of the relevant "*question*".[22] Otherwise, the award would be affected by an "*omitted decision*" (*infra petita)*, which, in most legal orders, amounts to breach of the "*right to be heard*" and is, as such, a ground for setting the award aside.[23]

As practice shows, the parties discuss the relevant "*issue*" or "*question*" to be decided by offering multiple arguments or pleas. However, in order to resolve the specific "*question*", a tribunal shall, of course, consider all arguments and counterarguments, but is not bound to decide them all, where it finds that certain arguments prevail over, or absorb, the others.[24]

V. Reasoning in investment arbitration

Article 48(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"] reads as follows: "*The Award shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based*". Failure to state reasons is one of the few grounds for annulment of an ICSID award. Pursuant to Article 52(1), either party may apply for annulment if, *inter alia*: "*(e) the award has failed to state the reasons on which it is based*".[25]

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21 *See* T. Landau, *Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration*, *in* 14 ICCA CONGRESS SERIES 187 (2009) (according to T. Landau, the requirement that the award be adequately reasoned constitutes a "safeguard against arbitrariness or biased judgment, or private judgment, or irrational splitting of the differences between the parties" and is the "litigants' guarantee that […] justice should not only be done, but should manifestly and undoubtedly be seen to be done").

22 This view is commonly shared in literature. For a recent comment, *see* M. S. Abdel Wahab, *Judicial Review and Reasoning of Arbitral Awards*, *in* EXPLAINING WHY YOU LOST – REASONING IN ARBITRATION 30, 30 (A. Crivellaro & M. N. Hodgson eds., 1st ed. 2020).

23 *See* Tribunal fédérale [TF] May 16, 2011, 4A_46/2011 (Switz.).

24 On the adequacy of reasoning in commercial arbitrations, *see* P. Lalive, *On the Reasoning of International Arbitral Awards*, 1(1) J. INT'L DISP. SETTLEMENT 55 (2010). For the suggestion that the reasoning should not be excessively lengthy but focused on the essential points that lead to the decision, *see* R. Dupeyré, *Les limites de l'obligation de motivation: de la concision des sentences arbitrales*, 19(1) REVUE QUBÉCOISE DU DROIT INT'L 44 (2006).

25 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 52(1), Oct. 14, 1966, 575 U.N.T.S. 159 [*hereinafter* "ICSID Convention"].

The drafting history of the ICSID Convention shows that the reasons requirement was initially mitigated by the phrase "*except as parties otherwise agree*".[26] However, the insertion of this derogation raised serious criticism and concerns. The issue was eventually voted upon, and the exception was removed by large majority.[27]

There are several good reasons that make the duty to state reasons in investment arbitration even more rigorous than in commercial arbitration.

First, one of the parties to an investment dispute is, necessarily, a sovereign State. Whereas private parties may renounce to the reason requirement (although, as seen above, they waive it in very rare circumstances), States have a specific entitlement to see whether and how the tribunal has addressed the balance between the State's right to exercise its sovereign powers according to its own legal order, on the one hand, and its duty to comply with international standards applicable to the treatment of foreigners, on the other hand. Investment tribunals must inevitably determine whether, acting as a sovereign, the State has complied, or not, with its obligations under customary international law or treaty provisions. This involves an analysis by the tribunals of the international legitimacy of the actions or omissions of the State organs and agencies, including its executive, legislative or judicial branches, for the conduct of which the State undertakes international responsibility. This requires arbitrators to be particularly careful in assessing the case and in motivating its conclusions.[28]

Second, the tribunals' determinations have a predictable impact on matters of public concerns, for which a State is also accountable to its own institutions and citizens, which have an evident interest in understanding whether the State behaved in accordance with its international duties. This further requires adamant clarity and persuasive reasoning in the award.

Third, well-reasoned awards in investor-to-State disputes contribute to the progressive development of international investment law. All States have an interest in understanding what conducts of the State are held to be illicit under international law by investment tribunals. In addition, investment arbitration usually places a greater reliance on precedents than commercial arbitration. This explains why an illustrative award made in a prior case is taken into consideration by the tribunals called upon to decide subsequent cases in which the same or similar issues are again disputed.[29] In this sense, investment awards unavoidably assume an interest which goes beyond the sphere of the two parties concerned.

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26 Art. 51(3) – First Draft (Doc. 43), *in* 1 THE HISTORY OF THE ICSID CONVENTION 213 (1970); Comments and Observations of Member Governments on the Draft Convention (Nov. 23, 1964), *reprinted in* 2(2) THE HISTORY OF THE ICSID CONVENTION 651, 664 (2006); Summary Proceedings of the Legal Committee meeting, December 8, morning (Dec. 30, 1964), *reprinted in* 2(2) THE HISTORY OF THE ICSID CONVENTION 812, 816 (2006).

27 *Id.*

28 According to certain authors, the reasoning functions as an intrinsic control mechanism to safeguard procedural correctness and, therefore, acquires a greater importance in international investment arbitration. *See* G. A. ALVAREZ and M. REISMAN, *How Well Are Investment Awards Reasoned?*, *in* THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION - CRITICAL CASE STUDIES 1-32 (2008).

29 In this line, *see* a concurring comment by JARROSSON, *supra* note 6, at 19.

Fourth, given the public domain in which the investor-State disputes are resolved, awards are open to broad review in the arbitration community and the arbitrators are particularly mindful of producing adequate reasoning to maintain their reputation.[30]

Fifth, while in commercial arbitration the reasoning should generally satisfy the parties' expectations originated from their respective pleadings, which are obviously known to the parties, in investment arbitration, public interest may require a *broader* reasoning to cover legitimacy or accountability issues implied by the involvement of a sovereign. As case law shows, a decision may be rendered in a critical political climate, for instance, in cases where it emerges that State organs were corrupted by the foreign investor and the tribunal must determine the consequences of corruption upon the legality of the investment and the related State contracts. The tribunal's reasoning may have to be, in such cases, particularly instructive to the investors and, especially, to the States, in improving future compliance with principles of international public policy.

Investment tribunals had to deal with corruption in several cases during the last decade,[31] and the reading of their reasoning is rather enlightening for the detail and sophisticated motivational effort undertaken by the arbitrators. I draw here the reader's attention to two specific cases, namely *Metal-Tech.* v. *Uzbekistan* and *Spentex* v. *Uzbekistan.*

In the first case, after finding numerous "*red flags*" pointing to the existence of corruption in the acquisition of the investment contract, for the first time, the State was ordered to bear a relevant part of the arbitration costs, although it had prevailed on the invalidation of the contract and consequent flat rejection of all investor's claims. Indeed, the Tribunal observed that the State's victory on the substance "*does not mean that the State has not participated in creating the situation that leads to the dismissal of the claims*".[32] In other words, the State was deemed to be an accomplice of the

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30 As a commentator observed, "[t]he quality of the reasoning is as a rule (though not automatically) much higher in investment awards expected to become public as the members of the tribunal will want to seek to safe guard their reputation not just before the appointing counsel, annulment committees and enforcement courts, but also before their peers and the professional and academic community". *See* T. W. Wälde, *Improving The Mechanisms For Treaty Negotiation And Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy*, *in* 1 YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009 505, 553 (2009).

31 The most important decisions were the following: World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 126 (Oct. 4, 2006); African Holding Co. of Am., Inc. & Société Africaine de Constr. au Congo S.A.R.L. v. La République démocratique du Congo, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, ¶¶ 48–56 (July 29, 2008); Azpetrol Int'l Holdings B.V., Azpetrol Group B.V. & Azpetrol Oil Servs. Group B.V. v. Republic of Azer., ICSID Case No. ARB/06/15, Award, ¶¶ 6–8, 84–89, 105 (Sept. 2, 2009); EDF (Servs.) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award (Oct. 8, 2009); Siemens A.G. v. Arg. Republic, ICSID Case No. ARB/02/8, Award, ¶¶ 221–37 (Oct. 6, 2007); Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶ 293 (Oct. 4, 2013) [*hereinafter* "Metal-Tech Ltd."]; Spentex Neth., B.V. v. Republic of Uzb., ICSID Case No. ARB/13/26, Award (Dec. 27, 2016) (the award is not public; however, it is known to the Author and a detailed report is available on IA – Investment Arbitration Reporter), *see* Spentex v. Uzbekistan, IAREPORTER, *available at* https://www.iareporter.com/arbitration-cases/spentex-v-uzbekistan/[*hereinafter* "Spentex"]; Vladislav Kim & Ors. v. Republic of Uzb., ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 543 (Mar. 8, 2017); Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/13/1, Award, ¶ 390 (Aug. 22, 2017); Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pak., ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons), ¶¶ 284–319 (Nov. 10, 2017).

32 Metal-Tech Ltd., ICSID Case No. ARB/10/3, Award, ¶ 422 (Oct. 4, 2013).

investor in carrying out the corruption, a circumstance that the arbitrators found to be "*implicit in the very nature of corruption*".[33]

In the second case, the conclusion on the substance was similar and all investor's claims were dismissed "*because the investment was procured by corruption and thus is contrary to core values of the international 'ordre public'*".[34] However, the innovative part of this decision concerned, once again, the cost allocation. Exercising the discretion conferred to tribunals under Article 61(2) of the ICSID Convention, and with the explicit intent to contribute to the fight against corruption and discourage States from implementing corrupted schemes, the Tribunal invited Uzbekistan to donate the amount of USD 8 million to two United Nations agencies combatting corruption and keep at its own charge all its legal costs, failing which the State was ordered to refund Spentex for almost the entirety of its legal fees and costs.

This was a typical decision in which the reasoning was to play an essential role. Indeed, the "*sanction*" by which the Tribunal wished to stigmatise the State conduct was ordered by the Tribunal *sua sponte* (none of the parties had suggested it). Therefore, the Tribunal felt the duty to support its unprecedented approach on lengthily elaborated reasons. Basically, they are a reflection of its conviction that, having to resolve the dispute in accordance with international law, the Tribunal could not "*close the eyes*" before the serious breach of international public order committed by the State by taking part in the corruption plan devised by the investor.

The standard of adequacy for the reasoning in investment arbitration is not dissimilar from the standard analysed above for commercial arbitration. Concerning exhaustiveness of the award, the accepted rule is that (a) a tribunal must provide a reasoned decision in respect of each question that has a bearing on the overall resolution of the case and (b) the requirement "*to deal with every question submitted to the Tribunal*" (Article 48(3) of ICSID Convention) does not bind the tribunals to address every plea or contention underlying the relevant question. A good example is a State's objection that the investor's activity does not qualify as a protected investment under international law. This objection raises the question of whether the tribunal has or lacks jurisdiction and, as such, is directly material to the disposal of the case. The objection may be articulated through multiple arguments, for instance, lack of sufficient duration of the economic operation, absence of substantive risks, lack of capital contributions, failure to contribute to the host country economy, the investment was made in bad faith or in breach of the domestic laws of the recipient State, and so forth. If the tribunal finds in favour of the State based on the first and third argument and considers them decisive on the point, Article 48(3) does not require it to also address the outstanding arguments, since a response to them would in fact leave the tribunal's conclusion unaltered.[35]

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[33] *Id.* ¶¶ 414–22. This decision was applauded by commentators. *See*, inter alia, Y. Fortier, *Arbitrators, corruption, and the poetic experience: When power corrupts, poetry cleanses*, 31(3) ARB. INT'L 367 (2015); M. Hwang & K. Lim, *Corruption in Arbitration – Law and Reality*, 8 ASIAN INT'L ARB. J. 1 (2012).

[34] *See* Spentex, ICSID Case No. ARB/13/26, Award (Oct. 4, 2013).

[35] It is within the tribunal's discretion whether to extend its scrutiny to all outstanding allegations. Sometimes, this may be induced by the fact that the parties have pleaded all arguments in depth and expect a tribunal's response in respect of each of them. Alternatively, the same approach may be inspired by the legitimate desire to clarify an intricate topic by inserting in the award an *obiter* by which the tribunal may wish to add its own contribution to the doctrinal or jurisprudential debate. In some other cases, the tribunal may instead wish to give prevalence to procedural economy,

According to Professor Schreuer, the reasons need not deal with all arguments raised by the parties and are complete if they address the arguments that were accepted by the tribunal as necessary or relevant for the decision.[36] In any case, the reasons must address the parties' arguments that were rejected by the tribunal and which, had they been accepted, would have changed the outcome of the case.[37]

A similar approach had been recommended in 1973 by the International Court of Justice ["**ICJ**"] to international courts and treaty-based tribunals when drafting the statement of reasons in their decisions: [38]

> "*This statement must indicate in a general way the reasoning upon which the judgment is based; but it need not enter meticulously into every claim and contention on either side. While a judicial organ is obliged to pass upon all the formal submissions made by a party, it is not obliged, in framing its judgment, to develop its reasoning in the form of a detailed examination of each of the various heads of claim submitted. Nor are there any obligatory forms or techniques for drawing up judgments: a tribunal may employ direct or indirect reasoning, and state specific or merely implied conclusions, provided that the reasons on which the judgment is based are apparent. The question whether a judgment is so deficient in reasoning as to amount to a denial of the right to a fair hearing and a failure of justice, is therefore one which necessarily has to be appreciated in the light both of the particular case and of the judgment as a whole.*" (emphasis added)

Several ICSID tribunals and ad hoc committees refer to the standards recommended by the ICJ when stating or reviewing the reasoning of awards rendered in investment arbitrations, particularly the requirement that the reasons "*be apparent*".

VI. The control of reasoning by ICSID ad hoc committees

The failure to state reasons has been frequently invoked by losing parties as a ground for the annulment of awards under Article 52 of the ICSID Convention, which envisaged a mere and internal (through ad hoc committees appointed by ICSID itself) control of the procedural regularity, not an appeal on the merits.

From the very first annulment, dated 1985,[39] the ad hoc committees frequently fluctuated between two opposite tendencies: on the one hand, an interventionist approach that induced some committees to cross the boundaries between annulment for procedural deficiencies and appeal on the merits; on the other hand, the restriction of the committee's role to that of a guardian of no more than possible irregularities in the conduct of the proceedings, not errors in the substantive decision.[40]

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thus avoiding redundancies: *see* A. Crivellaro, *The Failure to State Reasons in ICSID Awards*, 4 LES CAHIERS DE L'ARBITRAGE [PARIS J. INT'L ARB.] 865 (2012).

36 C. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 824 (2d ed. 2009).

37 *Id.*

38 Application for Review of Judgement No. 158 of the United Nations Admin. Tribunal, Advisory Opinion, 1973 I.C.J. Rep. 166, 210–11 (July 12, 1973).

39 Klöckner Industrie-Anlagen GmbH & Ors. v. United Republic of Cameroon & Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Decision on Annulment (May 3, 1985), 2 ICSID Rep. 9, 135 (1994) [*hereinafter* "Klöckner"].

40 This is a very ancient distinction. Roman law already distinguished the *errores in decidendo* from the *errores in procedendo*.

After a period of excessive intrusion by the committees into the merits of the arbitral award,[41] in 2002, the committees' decisions in *Compania de Aguas del Aconquija S.A. and Vivendi and Wena Universal S.A.* v. *Argentine Republic* ["**Vivendi**"] and *Wena Hotels Limited* v. *Arab Republic of Egypt* ["**Wena**"] made it clear that the annulment power should be exclusively exercised where the alleged irregularity (for example, a failure to state reasons, or a manifest excess of power, or a serious departure from a fundamental rule of procedure) leads the tribunal to a result that, absent the irregularity, would be replaced by a different result. Both Committees established with persuading clarity that annulment is unnecessary, and even inconvenient, when a tribunal's misdeed is incapable "*of making a difference to the result*" and remains uninfluential on the disposition of the parties' rights.[42] This is what occurs in cases where, despite a possible procedural wrongdoing, the tribunal's overall reasoning show that the outcome would remain unchanged had the wrongdoing not materialised.

In particular, the *Vivendi* committee specified the standard for annulment based on lack of reasoning that should be correctly adopted, a standard which was then followed by the subsequent decisions made on applications for annulment. The relevant section reads as follows:[43]

> "*[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons ... Provided that the reasons given by a Tribunal can be followed and relate to the issues that were before the Tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning. ... In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the Tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, Tribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a Tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.*" (emphasis added)

Several ad hoc committees appointed in subsequent cases referred to the two above decisions as an important turning point and an inspiring guideline.[44] In two such cases – *MDT Equity Sdn. Bhd.*

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41 *See*, *e.g.*, Klöckner, ICSID Case No. ARB/81/2, Decision on Annulment (May 3, 1985), 2 ICSID Rep. 9, 135 (1994); Amco Asia Corp. & Ors. v. Republic of Indon., ICSID Case No. ARB/81/1, Decision on Annulment (May 16, 1986), 1 ICSID Rep. 413 (1993); Amco Asia Corp. & Ors. v. Republic of Indon. ICSID Case No. ARB/81/1, Resubmission, Decision rejecting the parties' applications for annulment of the award and annulling the decision on supplemental decisions and rectification (Dec. 17, 1992), 1 ICSID Rep. 569 (1993).

42 Compania de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Arg. Republic, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 86 (July 3, 2002), 6 ICSID Rep. 340 (2006) [*hereinafter* "Vivendi"]; *see also* Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on the application for annulment, ¶ 58 (Feb. 5, 2002), 6 ICSID Rep. 129 (2006).

43 Vivendi, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 64 (July 3, 2002), 6 ICSID Rep. 340 (2006).

44 The relevant cases were the following: MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on the application for annulment (Mar. 21, 2007) [*hereinafter* "MDT Equity"]; Soufraki, ICSID Case No. ARB/02/7, Decision on the application for annulment (June 5, 2007); Industria Nacional de Alimentos, S.A. & Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. & Lucchetti Perú, S.A.) v. Republic of Peru, ICSID Case No. ARB/03/4, Decision on the application for annulment (Sept. 5, 2007); CMS Gas Transmission Co.

and MTD Chile S.A. v. *Republic of Chile* ["**MTD**"] and *CMS Gas Transmission Company* v. *Argentine Republic* ["**CMS**"] – the annulment had been applied for alleged failure to state reasons, so they deserve to be briefly summarised.

In *MTD*, the Committee admitted that in some parts of the award, the reasoning was "*extremely succinct*",[45] however, it concluded that the lack of reasoning must be viewed "*in terms of absence rather than inadequacy or brevity of reasoning*".[46] The failure to state "*correct or convincing*" reasons would thus be insufficient because what is needed is a "*failure to state any reason*" or some "*outright or unexplained contradictions*".[47]

In *CMS*, the Committee annulled one section of the award that it found to be affected by a lacuna which made it impossible to follow the reasoning on a particular point: [48]

> "*In the end it is quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN. It could have done so by the above interpretation of Article II(2)(c), but in that case one would have expected a discussion of the issues of interpretation referred to above. Or it could have decided that CMS had an Argentine law right to compliance with the obligations, yet CMS claims no such right; and Argentine law appears not to recognise it.*
>
> *In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point. It is not the case that answers to the question raised 'can be reasonably inferred from the terms used in the decision'; they cannot. Accordingly, the Tribunal's finding on Article II(2)(c) must be annulled for failure to state reasons.*"

However, the partial annulment did not affect the award as a whole: the outstanding parts of the award were not annulled, which was enough to find Argentina liable for damages.

A clear exemplification of the different forms that a failure to state reason may assume in the meaning of Article 52(1)(e) of the ICSID Convention was given by the *Soufraki* committee:[49]

> "*In quick summary, the ad hoc Committee considers that there may be a ground for annulment on the case of:*
>
> *i. a total absence of reasons for the award, including the giving of merely frivolous reasons;*
>
> *ii. a total failure to state reasons for a particular point, which is material for the solution;*
>
> *iii. contradictory reasons; and,*
>
> *iv. insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal.*"

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v. Arg. Republic, ICSID Case No. ARB/01/8, Decision on the application for annulment (Sept. 25, 2007) [*hereinafter* "CMS Gas"].

45 MTD Equity, ICSID Case No. ARB/01/7, Decision on the application for annulment, ¶ 106 (Mar. 21, 2007).

46 *Id.* ¶ 78.

47 *Id.*

48 CMS Gas, ICSID Case No. ARB/01/8, Decision on the application for annulment, ¶¶ 96–97 (Sept. 25, 2007).

49 Soufraki, ICSID Case No. ARB/02/7, Decision on the application for annulment, ¶ 126 (June 5, 2007).

Based on the decisions just commented upon, the ad hoc committees seemed to have restored a balanced definition of their correct mission under the ICSID Convention. However, their invasive approach suddenly resurfaced in 2010 in the cases *Sempra Energy International* v. *Argentine Republic* ["**Sempra**"] and *Enron Corporation and Ponderosa Assets, L.P.* v. *Argentine Republic* ["**Enron**"], in a particularly aggressive manner.

In *Sempra*, the disputed issue was whether the arbitral tribunal had applied Article XI of the United States of America-Argentina Bilateral Investment Treaty ["**U.S.-Argentina BIT**"], a treaty provision that exempts the State from liability for breach of its international obligations to the extent that its measures affecting foreigners are dictated by a situation of "emergency and necessity". Notwithstanding the Tribunal had amply addressed Article XI as well as all Argentina's defences on necessity, the Committee concluded that the arbitral tribunal had "*failed to apply*" this provision.[50] The surprising conclusion was caused by the Committee's disagreement on the way the Tribunal had interpreted the same provision in the light of international customary law on necessity as a limitation of States' responsibility, which amounted to an abusive interference on the merits of the award and an arbitrary conversion of the Committee into a Court of Appeal, which is expressly vetoed by Articles 52, 53, and 54 of the ICSID Convention.

Sure enough, the award was annulled just because the Committee impermissibly substituted its own views on the law and its own appreciation of the facts for those of the arbitral tribunal.[51] This was a clear excess of powers.

A similar amazing abuse was committed in the *Enron* annulment proceedings, which were again focused on the application of Article XI of the U.S.-Argentina BIT. The arbitral tribunal had found Argentina liable for damages holding that its "*Emergency Law*", that had substantially expropriated the investments of several foreign companies, was not, in the meaning of international customary law, "*the only way*" for Argentina to safeguard its essential interest against a grave and imminent peril.

The Tribunal had lengthily motivated its conclusion,[52] based also on the analysis made by a financial expert, but the Committee was of the opposite view and concluded that Argentina had no other option available for addressing its crisis. As a result, the Committee blamed the Tribunal for failing to state sufficient reasons for its decision.[53]

This conclusion was evidently false: the Tribunal had indeed devoted tens of pages to explain why, in the particular case, Argentina was not entitled under international law to invoke a state of emergency or necessity, given that Argentina could and should have circumvented the crisis through various other governmental or legislative measures. Rightly or wrongly, the Tribunal

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50 Sempra Energy Int'l v. Arg. Republic, ICSID Case No. ARB/02/16, Decision on application for annulment, ¶ 207 (June 29, 2010) [*hereinafter* "Sempra"].

51 Sempra, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); Sempra, ICSID Case No. ARB/02/16, Decision on application for annulment (June 29, 2010).

52 Enron Creditors Recovery Corp. (formerly Enron Corp.) & Ponderosa Assets, L.P. v. Arg. Republic, ICSID Case No. ARB/01/3, Award, ¶¶ 322–42 (May 22, 2007) [*hereinafter* "Enron"].

53 Enron, ICSID Case No. ARB/01/3, Decision on Annulment, ¶¶ 374–95 (July 30, 2010).

concluded that, in the circumstances of the case, Argentina was not exempted from liability under the treaty provision in Article XI and, instead, bound to indemnify the investors.

Accordingly, the abusive interference by this Committee, namely its impermissible revision of the decision on the merits of the dispute, was a further case in which an ad hoc committee was not unsatisfied with the award for a genuine lack of reasoning. It was rather unsatisfied with the substance of the reasoning.

Both *Sempra* and *Enron* decisions were severely criticised, and, to my knowledge, their excessively intruding approach was not followed in the subsequent jurisprudence of the ad hoc committees.[54]

VII. The "*cultural*" functions of the reasons

The legal reasoning provided in support of a decision fulfils various functions.

First, articulating the reasons in writing assists the arbitrator in identifying the correct solution of the case. The need for reasoning compels him to give a logical written form to the intellectual process he is following. This is the process which leads the arbitrator from the evidence in the file and the legal arguments of the parties to the solution of the dispute that he deems to be just and correct. A person who must decide might have an intuitive idea of who is right and who is wrong well before writing the reasons of the decision. However, it is during the drafting exercise that the decision-maker is enabled to check the soundness of his earlier instinctive perceptions or assumptions. In non-rare cases, he must revise his previous views, to reach a more thoughtful and robust conclusion.

Second, a credible reasoning may provide a valuable guide not only to the disputing parties, but also to other interested parties involved in future similar disputes. As a matter of the fact, the reasoning may allow them to "*learn from the forensic experience of others*",[55] thus assuming an educative role.[56]

Third, at a time when the arbitration community was still discussing whether to favour reasoned or unreasoned awards, important scholars stated, quite rightly in my view, that reasoning in the awards contributes to form "*a better basis for the elaboration of a common law of international transactions than national court decisions*".[57] As known in our community, academic researches which are devoted to the study of international public law, international trade law, law of international contracts, and international arbitration law, find their principal source in the analysis of the reasoning in published arbitral awards. In my view, this part of the legal research is more extensive and even more relevant than the analysis of the pertinent law provisions as written down in domestic legislations or international conventions.

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54 For an overall analysis of the annulment decisions under ICSID Convention from 1985 to 2010, including a more detailed analysis of the aberrant conclusions in *Sempra* and *Enron*, see my following contribution: A. CRIVELLARO, *Annulment of ICSID Awards: Back to the "First Generation"?*, *in* LIBER AMICORUM, EN L'HONNEUR DE SERGE LAZAREFF 145 (1st ed. 2011).

55 Landau, *supra* note 21, at 188.

56 On the continuing professional education of judges and arbitrators on how to write reasoned decisions, *see* S.I. Strong, *Legal Reasoning in International Commercial Disputes - Empirically Testing the Common Law-Civil Law Divide*, *in* EXPLAINING WHY YOU LOST- REASONING IN ARBITRATION 53, 53 (A. Crivellaro & M. N. Hodgson eds., 2020).

57 T. E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 578, 597 (1985).

In the sphere of international commerce, the progressive formation of the relevant rules of law is indeed a creative process, which combines both written law and, more importantly, its interpretation and application by international tribunals when resolving real disputes.

Fourth, the reasons underlying an award have an important function in respect of the credibility of arbitration as an efficient settling-dispute mechanism. An unreasoned, or inadequately reasoned, award offers no bases to determine whether the decision was sound or arbitrary. In the long run, this creates the risk that arbitration be perceived as less effective than it should be. Awards that fail to observe the most basic notions of an adjudicatory process may cause progressive erosion of the trust in the arbitration system.[58]

Fifth, a convincing reasoning may avoid future challenges against the award. Both parties, particularly the losing party, have the right to know how the arbitrator arrived at a certain conclusion. When the losing party finds the reasons to be persuasive, it may prefer spontaneous compliance with the award rather than embarking in costly and risky challenges. In other words, the reasoning is the section in the award that should be drafted having in mind the need to try to persuade the losing party.

VIII. Conclusions

It is common knowledge that international arbitration, as a system, has the ambition to retain the rank of "*premier choice*" and a standing of consolidated legitimacy for the resolution of disputes arising from international trade.

I see nothing wrong with this aspiration. However, the condition for the arbitration community to continue to enjoy the users' confidence is the acceptable quality of the awards, which must be able to show that the arbitrators made their best efforts to produce an intelligible, plausible, and solid reasoning.

Arbitrators should never forget that their awards are first and foremost written for two addressees: the losing party and the court which may be requested to revise the award. The more solidly the reasons are expressed, the more likely the losing party will not be tempted to refuse enforcement of or try to set aside the award, and the more likely the judicial control will leave the award untouched.

Arbitrators should especially keep in mind that, when drafting the award, they are "*speaking to*" the judge who will review it. Setting out adequate and clear reasons is a guarantee of a proper judicial review of the award. Whereas court decisions are normally reviewed on both facts and law, arbitral awards are not reviewed on the substance. Under most legal orders, the reviewing judge cannot re-examine the evidence or reinterpret the law, a function that the arbitral tribunal has already accomplished. On the contrary, the judge is bound to respect the "*finality*" of the award and assign to it the effects of *res judicata*.

[58] This conclusion has been emphasised by G. Cordero-Moss, *Reasoning in Arbitration: What Do Users Want or Need?*, *in* EXPLAINING WHY YOU LOST - REASONING IN ARBITRATION 97 (A. Crivellaro & M. N. Hodgson eds., 2020).

What a reviewing judge is rather interested in, and has the legal authority to do, is checking whether the award is the product of a legitimate process, and it is important to recall that the essential basis on which the judge may perform such a review is, precisely, the reasoning in the decision.

This explains why the reasoning has a so vital relevance for the future survival of the award and, more generally, for the correct administration of justice after that the arbitrators have completed their mandate.