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

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

*S.I. Strong\**

## **ABSTRACT**

Over the last few decades, international commercial arbitration has become the preferred means of resolving cross-border business disputes. The popularity of this particular device is due to a number of uniquely attractive features ranging from the mechanism's sophisticated blend of common law and civil law procedures to the routine use of reasoned awards. As a result, international commercial arbitration does not resemble domestic arbitration so much as it does complex commercial litigation.

Although international commercial arbitration is considered a highly mature form of dispute resolution, very little information exists as to what constitutes a reasoned award in the international commercial context or how to write such an award. This situation is becoming increasingly problematic given the rising number of international commercial arbitrations that arise every year, the expansion and diversification of the pool of potential arbitrators, and the significant individual and societal costs that can result from badly written awards.

This Article provides the first-ever in-depth analysis of the reasoned award requirement in international commercial arbitration. In so doing, the discussion draws heavily on the large body of material involving reasoned rulings in both common law and civil law courts and considers whether and to what extent those criteria apply in the arbitral context. As a result, this Article not only provides useful information to those seeking to better their understanding of the reasoning requirement in international commercial arbitration, it also provides key comparative insights into the judicial process in both common law and civil law legal systems.

Much of the analysis focuses on theoretical concerns relating to reasoned decision-making in judicial and arbitral settings. However, the discussion also incorporates a strong practical element. As a result, this Article is relevant not only to specialists in international commercial arbitration but also to judges involved in enforcing reasoned awards domestically or internationally, scholars studying arbitral and judicial decision-making, and domestic arbitrators seeking to understand the parameters of a reasoned award under national law.

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## I. INTRODUCTION

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.<sup>1</sup> However, very little information exists as to what constitutes a reasoned award in the international commercial context<sup>2</sup> or how to write such an award.<sup>3</sup> This lacuna is extremely problematic given the ever-increasing number of international commercial arbitrations that arise every year<sup>4</sup> and the significant individual and societal costs that can result

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<sup>1</sup> See *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 473-74 (5<sup>th</sup> Cir. 2012) (distinguishing a standard award from a reasoned award); *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844-46 (11<sup>th</sup> Cir. 2011) (same); see also S.I. STRONG, *INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES* 22 (2012) (comparing international commercial arbitration to other forms of arbitration), available at <http://www.fjc.gov> [hereinafter STRONG, GUIDE].

<sup>2</sup> See *Rain CII Carbon*, 674 F.3d at 473-74; *Cat Charter*, 646 F.3d at 844-46; GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 3037-45 (2014). The debate about what constitutes a reasoned award extends to investment arbitration as well. See Tai-Heng Cheng & Robert Trisotto, *Reasons and Reasoning in Investment Treaty Arbitration*, 32 SUFFOLK TRANSNAT’L L. REV. 409, 409 (2009); Jason Webb Yackee, Book Review, *The Reasons Requirement in International Investment Arbitration: Critical Case Studies*, 103 AM. J. INT’L L. 629, 630 (2009).

<sup>3</sup> A few materials are available, although most are relatively short and provide only general advice. See George A. Bermann, *Writing the Award – An Arbitrator’s Perspective*, in *INTERNATIONAL ARBITRATION CHECKLISTS* 171 (Grant Hanessian & Lawrence W. Newman eds., 2009); 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), available at [http://www.daypitney.com/news/docs/dp\\_1987.pdf](http://www.daypitney.com/news/docs/dp_1987.pdf); Marcel Fontaine, *Drafting the Award – A Perspective from a Civil Law Jurist*, 5 ICC BULL. 30 (1994); Humphrey Lloyd, *Writing Awards – A Common Lawyer’s Perspective*, 5 ICC BULL. 38 (1994); Humphrey Lloyd et al., *Drafting Awards in ICC Arbitrations*, 16 ICC BULL. 19 (2005); Jose Maria Alonso Puig, *Deliberation and Drafting Awards in International Arbitration*, in *LIBER AMICORUM BERNARDO CREMADES* 131, 144-58 (Miguel Ángel Fernández-Ballesteros & David Arias eds. 2010).

<sup>4</sup> 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 increase in arbitral proceedings over the last fifty years). More generalists are entering the world of arbitration as advocates and arbitrators, which may affect the quality and nature of international award writing. See *id.* at 4.

from a badly written award.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> While arbitrators could seek guidance from other types of

<sup>5</sup> 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. *See* BORN, *supra* note 2, at 3044; 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. *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, *Use and Perception of International Commercial Mediation and Conciliation: An Empirical Study*, 21 HARV. NEGOT. L. REV. \_\_ (forthcoming 2015).

<sup>6</sup> *See* Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT’L L. & POL’Y 1109, 1111 (2012) (noting that the primary impetus for arbitral appeals in international commercial arbitration is error correction). Badly written awards, like badly written judicial decisions and opinions, fail to persuade the reader that the outcome is correct and therefore generate the desire for an appeal. *See* S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced and Foreign Judges*, 2015 J. DISP. RESOL. \_\_, \_\_ [hereinafter Strong, *Writing*].

<sup>7</sup> *See* BORN, *supra* note 2, at 73.

<sup>8</sup> *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 (Mahnoush Arsanjani et al. eds. 2010) (“[I]t 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).

<sup>9</sup> *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 perspective, although a brief review of recently published awards demonstrates a number of examples of good writing. *See* Contractor (Zambia) v. Producer (Zambia), Final Award, ICC Case No. 16484, 2011, XXXIX Y.B. COMM. ARB. 216 (2014); Consortium member (Italy) v. Consortium leader (Netherlands), Final Award, ICC Case No. 14630 XXXVII Y.B.

reasoned rulings that are more widely available (such as awards generated in investment arbitration<sup>10</sup> or reasoned decisions from national courts<sup>11</sup>), not all of those procedures are truly analogous to international commercial arbitration.<sup>12</sup>

Second, new arbitrators typically come to their duties with very little in the way of formal training.<sup>13</sup> Indeed, the underlying assumption is that anyone appointed to an *ad hoc*

COMM. ARB. 90 (2012). The situation is quite different in the judicial realm, where exemplary judicial writing is identified regularly. *See* The Green Bag Almanac & Reader, Exemplary Legal Writing, [http://www.greenbag.org/green\\_bag\\_press/almanacs/almanacs.html](http://www.greenbag.org/green_bag_press/almanacs/almanacs.html) (listing the best judicial opinions in the United States each year); *see also* WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 97-98 (1997).

<sup>10</sup> Numerous investment awards are now publicly available as a result of the move toward increased transparency. *See* International Centre for Settlement of Investment Disputes (ICSID), Award – ICISD Convention Arbitration, <https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Award-Convention-Arbitration.aspx> (noting the presumption 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 Decisions*, 73 FORDHAM L. REV. 1621, 1611-12 (2005).

<sup>11</sup> Reasoned judicial decisions exist in both civil law and common law countries, although there are some differences between the type 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, 222-23 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 COMPARADO PARA ABOGADOS HISPANO Y ANGLOPARLANTES ch. 3 (anticipated 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 McGill: “Radical Changes, Old and New Hats,”* 27 QUEEN'S L. J. 237, 269-70 (2001).

<sup>12</sup> *See* Strong, *Writing*, *supra* note 6, at \_\_\_ (discussing purposes of judicial opinions and decisions); *see also infra* notes 67-85 and accompanying text (concerning differences between arbitration and litigation). For example, the quasi-public nature of investment arbitration 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; 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 Precedents*, 18 DUKE J. COMP. & INT'L L. 477, 491-96 (2008) (suggesting that international 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 Genocide (Croatia v. Serbia), Judgment of Feb. 3, 2015, <http://www.icj-cij.org/docket/files/118/18422.pdf>, with *Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013), <http://www.italaw.com/sites/default/files/case-documents/italaw1276.pdf>.

<sup>13</sup> 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* American University, Washington College of Law, Center on International Commercial Arbitration, <https://www.wcl.american.edu/arbitration/>; Columbia Law School, Center for International Commercial



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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> As a result, it appears inaccurate to claim, as some authorities have, that international arbitrators can gain the necessary skillset simply through "observation, exposure, participation and experience."<sup>19</sup>

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

& Investment Arbitration, Related Curriculum at Columbia Law School, <http://web.law.columbia.edu/center-for-international-arbitration/curriculum>; MIDS-Geneva LL.M. in International Dispute Resolution, Curriculum, <http://www.mids.ch/the-program/curriculum.html>; Queen Mary, University of London, School of International Arbitration, Specialist Programmes, <http://www.arbitration.qmul.ac.uk/courses/index.html> [hereinafter QMUL]; University of Miami, LL.M. in International Arbitration, Program Requirements, <http://www.law.miami.edu/international-graduate-law-programs/international-arbitration/program-requirements.php?op=3>. 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).

<sup>14</sup> 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.

<sup>15</sup> See Emily Kadens, *The Puzzle of Judicial Education: The Case of Chief Justice William de Grey*, 75 BROOK. L. REV. 143, 143-45 (2009); Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 143 (2004). The situation in civil law countries is very different. There, judges are given instruction in judicial writing from the very beginning of their legal careers. See Kadens, *supra*, at 143-45; Koch, *supra*, at 143.

<sup>16</sup> See Kadens, *supra* note 15, at 143-45; Koch, *supra* note 15, at 143.

<sup>17</sup> See Kadens, *supra* note 15, at 143.

<sup>18</sup> Jeffrey A. Van Datta, *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 Datta 1]. Indeed, U.S. Supreme Court Justice Hugo Black, one of the most influential writers to ever grace the bench, once said that "the most difficult thing about coming on to the Court was learning to write." DOMNARSKI, *supra* note 9, at 36 (citation omitted).

<sup>19</sup> See Doug Jones, *Acquisition of Skills and Accreditation in International Arbitration*, 22 ARB. INT'L 275, 281 (2006).

institutions specializing in international commercial arbitration.<sup>20</sup> However, the current approach is problematic in several ways.<sup>21</sup>

First, it is not clear how many new or experienced arbitrators capitalize on the opportunity to study award writing.<sup>22</sup> 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.<sup>23</sup> Given the various pressures facing both new and experienced arbitrators,<sup>24</sup> 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.<sup>25</sup> However, many people do not appreciate the extent to which award writing differs from other forms of communication.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup>

<sup>20</sup> See, e.g., Chartered Institute of Arbitrators (CI Arb), <https://www.ciarb.org/> (offering courses in award writing), last visited June 14, 2015; American Arbitration Association (AAA), Course Calendar, <https://www.aaau.org/courses> (same), last visited June 14, 2015.

<sup>21</sup> 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*].

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

<sup>23</sup> 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. \_\_, \_\_ [hereinafter Strong, *Judicial Education*]; Strong, *Writing*, *supra* note 6, at \_\_.

<sup>24</sup> 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.adrededucation.org/courses> (demonstrating the scope of courses available to arbitrators).

<sup>25</sup> Of course, it is possible that new arbitrators suffer from the Lake Wobegone Effect with respect to their writing skills. See A Prairie Home Companion, *The Lake Wobegone Effect* (noting that all the children in Lake Wobegone are above average), [http://prairiehome.org/2013/04/the\\_lake\\_wobegone\\_effect/](http://prairiehome.org/2013/04/the_lake_wobegone_effect/), last visited Jan. 19, 2015.

<sup>26</sup> See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 503-06 (2013); Van Dett 1, *supra* note 18, at 55.

<sup>27</sup> See Bryan A. Garner, *Why Lawyers Can't Write*, ABA J. (Mar. 1, 2013), available at [http://www.abajournal.com/magazine/article/why\\_lawyers\\_cant\\_write](http://www.abajournal.com/magazine/article/why_lawyers_cant_write) (discussing problems of judicial overconfidence); Strong, *Judicial Education*, *supra* note 23, at \_\_ (same).

<sup>28</sup> See *infra* notes 67-85 and accompanying text. Furthermore, it cannot be assumed that every judge writes well. See Mark Painter, *No Mercy for Poorly Written Opinions*, WISC. L.J. (Sept. 10, 2010), available at <http://wislawjournal.com/2010/09/10/no-mercy-for-poorly-written-opinions/>.



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.<sup>29</sup> 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,<sup>30</sup> but most arbitrators are not especially qualified to teach writing, despite their practical experience in arbitration.<sup>31</sup> 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.<sup>32</sup>

Many of these educational practices mirror those traditionally seen in common law forms of judicial education.<sup>33</sup> Although those similarities might lead some observers to conclude that the existing approach to arbitrator education is sufficient, commentators have sharply criticized the common law judicial education model.<sup>34</sup> This phenomenon, when combined with the various concerns enunciated within the arbitral community about the qualifications of international commercial arbitrators, suggest that the existing approach to arbitrator education needs to be changed, particularly with respect to the issue of award writing.<sup>35</sup>

<sup>29</sup> 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 \_\_\_\_.

<sup>30</sup> *See* Oona A. Hathaway, *Path Dependence in the Law; The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 628-29 (2001); Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 383 (2007) (noting the risk that international commercial arbitration may become autopoietic) [hereinafter Rogers, *Have-Nots*].

<sup>31</sup> The same issues exist in many forms of judicial education. *See* Strong, *Judicial Education*, *supra* note 23, at \_\_\_\_\_. 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* LOUISE MAILHOT & JAMES D. CARNWATH, *DECISIONS, DECISIONS . . . A HANDBOOK FOR JUDICIAL WRITING 100* (1998) (discussing judicial writing); *see also* DOMNARSKI, *supra* note 9, at 55-74, 90-115.

<sup>32</sup> *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 \_\_\_\_.

<sup>33</sup> *See* Strong, *Writing*, *supra* note 6, at \_\_\_\_; *see also supra* notes 15-32 and accompanying text.

<sup>34</sup> *See* LIVINGSTON ARMYTAGE, *EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING* (1996); Strong, *Judicial Education*, *supra* note 23, at \_\_\_\_.

<sup>35</sup> *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, 36 (Aug.-Oct. 2002) (citing Redfern & Hunter); Rogers, *Vocation*, *supra* note 21, at 967.

Indeed, these issues suggest there is a critical need for more rigorous analysis regarding the reasoned award requirement in international commercial arbitration.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> However, the analysis only draws those analogies that are appropriate, since arbitration and litigation are not identical.<sup>39</sup>

<sup>36</sup> 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.

<sup>37</sup> 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 International 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 Moses, *Reasoned Decisions in Arbitrator Challenges*, III Y.B. INT’L ARB. 199 (2013); Rolf Trittman, *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.

<sup>38</sup> See Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography*, 17 LEGAL WRITING 197, 204-31 (2011) (listing authorities); see also A.B.A., Appellate Judges Conference, Judicial Administration Division, JUDICIAL OPINION WRITING MANUAL (1991), available at [http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/\\$file/judicial-writing-manual-2d-fjc-2013.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/$file/judicial-writing-manual-2d-fjc-2013.pdf); LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993); Samuel A. Alito, Jr. et al., Panel Remarks, *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33 (2009); Richard B. Cappalli, *Improving Appellate Opinions*, 83 JUDICATURE 286 (May/June 2000); Elizabeth Ahlgren Francis, *The Elements of Ordered Opinion Writing*, 38 JUDGES J. 8 (Spring 1999); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Joseph Kimble, *First Things First: The Lost Art of Summarizing*, 38 CT. REV. 30 (Summer 2001); Douglas K. Norman, *An Outline for Appellate Opinion Writing*, 39 JUDGES J. 26 (Summer 2000); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995); Strong, *Writing*, *supra* note 6, at \_\_; Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 JUDGES J. 4 (Spring 1999); Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writing*, 62 U. CHI. L. REV. 1371 (1995); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47 (2002); James Boyd White, *What’s an Opinion for?* 62 U. CHI. L. REV. 1363 (1995); Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals of the Eleventh Circuit*, 32 STETSON L. REV. 247 (2003); *infra* notes 193-366 (listing sources).

<sup>39</sup> See *infra* notes 56-57 and accompanying text.

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,<sup>40</sup> scholars studying arbitral decision-making,<sup>41</sup> arbitrators and tribunal secretaries involved in the drafting of individual awards<sup>42</sup> and domestic arbitrators seeking to understand what a reasoned award is under national law.<sup>43</sup>

The primary focus of this Article is on analyzing 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.<sup>44</sup>

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.<sup>45</sup>

<sup>40</sup> See BORN, *supra* note 2, at 3037-48.

<sup>41</sup> Scholarship concerning international commercial arbitration is expanding at a phenomenal rate. See STRONG, RESEARCH, *supra* note 8, at 88-137.

<sup>42</sup> 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 REPORT NO. 1, YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES (2015); Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 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. & ARB. 99, 100 (2005); see also Michael Polkinghorne, *Different Strokes for Different Folks? The Role of the Tribunal Secretary*, [kluwerarbitrationblog.com](http://kluwerarbitrationblog.com) (May 17, 2014), <http://kluwerarbitrationblog.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 LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 10, 86, 94-98 (2007), available at <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).

<sup>43</sup> 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 245 and accompanying text.

<sup>44</sup> See BORN, *supra* note 2, at 2207-10; STRONG, GUIDE, *supra* note 1, at 6.

<sup>45</sup> 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

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.<sup>46</sup> 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,<sup>47</sup> they are covered in detail elsewhere and need not be discussed herein.<sup>48</sup>

## 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<sup>49</sup> simply indicate that an award should include “reasons,” at least as a default position, without any further explanation as to what is entailed by that term.<sup>50</sup>

applied in the context of judicial education and can be extended to arbitral education. *See* ARMYTAGE, *supra* note 34, at 106-11, 127-30.

<sup>46</sup> *See* Lloyd et al., *supra* note 3, at 20.

<sup>47</sup> Matters that initially appear to be questions of style can have substantive effect in 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).

<sup>48</sup> Some good manuals concerning general principles of standard and legal writing include THE CHICAGO MANUAL OF STYLE (2010); ALASTAIR FOWLER, HOW TO WRITE (2007); BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2002); BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES (2013); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE (2006); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008); STRONG, HOW TO WRITE, *supra* note 31; S.I. STRONG & BRAD DESNOYER, HOW TO WRITE LAW EXAMS: IRAC PERFECTED ch. 8 (2015); WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE (1999).

<sup>49</sup> 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 provisions. *See* STRONG, GUIDE, *supra* note 1, at 7-9 (discussing institutional arbitration and *ad hoc* arbitration).

<sup>50</sup> *See* International Centre for Dispute Resolution (ICDR) International Arbitration Rules, art. 27(2) (“The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given.”), *available at* [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_002037](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037); International Chamber of Commerce (ICC) Arbitration Rules, art. 31(2) (“The award shall state the reasons upon which it is based.”), *available at* <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration/>; London Court of International Arbitration (LCIA) Arbitration Rules, art. 26.2 (“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.”), *available at* [http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx); Stockholm Chamber of Commerce (SCC) Arbitration Rules, art. 36(1) (“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.”), *available at* [http://www.sccinstitute.com/media/56030/2007\\_arbitration\\_rules\\_eng.pdf](http://www.sccinstitute.com/media/56030/2007_arbitration_rules_eng.pdf); United Nations Commission



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.<sup>51</sup> Nevertheless,

on International Trade Law (UNCITRAL) Arbitration Rules, art. 34(3), G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011) (“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.”), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>. 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 fulsome 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.

CIETAC Arbitration Rules, art. 49(3), *available at* <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. 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.
- . . . .

*Id.* art. 49.

<sup>51</sup> 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 the qualities of a reasoned ruling); The Green Bag Almanac & Reader, *supra* note 9



various authorities have attempted to provide a more fulsome explanation of what constitutes a reasoned award.<sup>52</sup> 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.”<sup>53</sup>

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.”<sup>54</sup> 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.”<sup>55</sup>

These kinds of practical difficulties suggest that the best way to define a reasoned award may be through a functional analysis.<sup>56</sup> 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),<sup>57</sup> it also takes into account the various ways that arbitral awards differ from reasoned rulings generated by a court.

(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.

*Id.* The highest level of scrutiny identified in investment disputes appears to contradict the standard applicable in the international commercial context. *See* BORN, *supra* note 2, at 3044 (“The requirement for a reasoned award is also not a requirement for a well-reasoned award: bad or unpersuasive reasons are still reasons, and satisfy statutory requirements for reasoned awards.”).

<sup>52</sup> *See* BORN, *supra* note 2, at 3040-41, 3043-44.

<sup>53</sup> 77 Pa. Stat. Ann. § 834 (West 2013). Although this definition arises in the context of the statutory duties of a workers’ compensation board, the principles appear to apply equally in other situations, including arbitration. *See* Jennifer Kirby, *What Is An Award, Anyway?* 31 J. INT’L ARB. 475, 476 (2014).

<sup>54</sup> *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) (citations omitted).

<sup>55</sup> *Id.* (citation omitted).

<sup>56</sup> *See* Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 342, 357 (Mathias Reiman & Reinhard Zimmerman eds., 2006).

<sup>57</sup> *See* BORN, *supra* note 2, at 2207-10; STRONG, GUIDE, *supra* note 1, at 6.

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.<sup>58</sup> 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.<sup>59</sup> For example, reasoned decisions in France are usually quite short and “formulated in a single sentence, including several ‘whereas-es’ (*attendus*).”<sup>60</sup> However, other civil law jurisdictions, most notably Germany, often generate reasoned opinions that are remarkable for their “length and thoroughness.”<sup>61</sup>

Although French courts consider very brief, highly deductive opinions to be sufficiently reasoned as a matter of procedural fairness,<sup>62</sup> this particular structural approach does not appear to have been routinely adopted in international commercial arbitration.<sup>63</sup> Instead, the concept of

<sup>58</sup> 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”).

<sup>59</sup> See Fontaine, *supra* note 3, at 33; Shoenberger, *supra* note 11, at 5.

<sup>60</sup> 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 Netherlands 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 . . . ”)).

<sup>61</sup> Schadbach, *supra* note 60, at 343 n.63 (citing ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM, AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 1140 (2d ed. 1977); Blankenburg, *supra* note 60, at 40; Louis Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A.*, 24 AM. J. COMP. L. 43, 45 (1976)).

<sup>62</sup> See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 533 n.286 (2015).

<sup>63</sup> 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* Interim Award in ICC Case No. 4131, IX Y.B. COM. ARB. 131, 135 (1984) (using

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.<sup>64</sup> Thus, most awards in international commercial arbitration currently run dozens of pages in length.<sup>65</sup>

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 divide, it also helps identify rationales that are exclusively associated with judicial rulings and that are therefore inapplicable in the arbitral context.<sup>66</sup>

### *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.”<sup>67</sup> 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*.”<sup>68</sup> Because the principle of *stare decisis* does not technically apply in international

*attendu* clauses, although the decision was translated from French and comes from an earlier era in international commercial arbitration).

<sup>64</sup> See, e.g., *Contractor (Zambia) v. Producer (Zambia)*, Final Award, ICC Case No. 16484, 2011, XXXIX Y.B. COMM. ARB. 216 (2014); Fontaine, *supra* note 3, at 36; see also XXXIX Y.B. COMM. ARB. 30-305 (2014) (publishing a variety of recent awards); Schadbach, *supra* note 60, at 343 n.63 (comparing German and Dutch legal decisions).

<sup>65</sup> See, e.g., *Contractor (Zambia)*, XXXIX Y.B. COMM. 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 XXXIX Y.B. COMM. 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 (Italy) v. Consortium leader (Netherlands)*, Final Award, ICC Case No. 14630 XXXVII Y.B. COMM. ARB. 90 (2012). Notably, some commentators have suggested that “in some instances, longer is not better.” BORN, *supra* note 2, at 3041-42.

<sup>66</sup> 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 \_\_\_\_.

<sup>67</sup> *National Aeronautics and Space Admin. v. Nelson*, 131 S. Ct. 746, 766 (2011) (citation omitted). Interestingly, it was not until the late nineteenth century that common law courts began to impose upon themselves a strict duty to follow previous case law. See KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 260 (Tony Weir trans., 3d ed. 1998).

<sup>68</sup> 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.” *National Aeronautics and Space Admin.*, 131 S. Ct. at 766 (suggesting that reliance on precedent is

commercial arbitration, this rationale does not appear applicable to the arbitral forum, strictly speaking.<sup>69</sup>

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).<sup>70</sup> 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 predictability and consistency in international commercial arbitration.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup> However, some jurisdictions, most notably England, do allow judicial appeals of

preferable to other mechanisms “because it promotes the evenhanded, predictable, and consistent development of legal principles”).

<sup>69</sup> See STRONG, GUIDE, *supra* note 1, at 21; STRONG, RESEARCH, *supra* note 8, at 26-27.

<sup>70</sup> 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.

<sup>71</sup> See STRONG, GUIDE, *supra* note 1, at 21 (quoting Interim Award in ICC Case No. 4131, IX Y.B. COM. ARB. 131, 135 (1984), which stated that “[t]he decisions of these [arbitral] tribunals progressively create caselaw 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”).

<sup>72</sup> See PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 70 (3d edn. 2007); STRONG, GUIDE, *supra* note 1, at 17.

<sup>73</sup> 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.*

<sup>74</sup> See BORN, *supra* note 2, at 83.

international awards, which could be seen as providing arbitrators with a strong incentive to render well-written reasoned awards in arbitrations seated in England.<sup>75</sup>

International awards may also be subject to other types of post-award scrutiny, both inside and outside of England.<sup>76</sup> One type of post-award judicial procedure involves a challenge to enforcement, either at the seat of arbitration or in a foreign jurisdiction.<sup>77</sup> Although these types of actions usually focus on procedural matters,<sup>78</sup> the likelihood of a challenge being brought in the first place may be affected by the quality of the reasoning found in the underlying award.<sup>79</sup> 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.<sup>80</sup> Alternatively, a fully reasoned award may diminish the likelihood of a judicial challenge by eliminating certain grounds for non-enforcement.<sup>81</sup>

Another type of post-award procedure involves collateral proceedings.<sup>82</sup> These types of actions may be on the rise, given the increasing incidence of parallel proceedings in

<sup>75</sup> The right to appeal an arbitral award is found in section 69 of the Arbitration Act 1996, although parties may opt out of this provision. See Arbitration Act 1996, § 69; Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 30 J. INT'L ARB. 531, 534-43 (2013). Notably, England is one of the top jurisdictions in the world for international commercial arbitration. See Jan Paulsson, *Arbitration Friendliness: Promises of Principle and Realities of Practice*, 23 ARB. INT'L 477, 477 (2007).

<sup>76</sup> 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).

<sup>77</sup> See Strong, *Border Skirmishes*, *supra* note 4, at 2-6.

<sup>78</sup> 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, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; 9 U.S.C. §§ 10, 208 (2015); Arbitration Act 1996 §§ 68, 103.

<sup>79</sup> See BORN, *supra* note 2, at 83. At one time, arbitrators were advised not to be too fulsome 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%20-%20materials.pdf> (last visited Jan. 23, 2015); Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, XI REVISTA BRASILEIRA DE ARBITRAGEM 76, 83 (2014).

<sup>80</sup> 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”).

<sup>81</sup> For example, an international arbitral tribunal that explicitly takes European competition or U.S. antitrust law into account may dissuade a losing party from challenging an award in European or U.S. courts on certain public policy grounds. See BORN, *supra* note 2, at 3688-70 (discussing the “second look” doctrine); see also *Eco Swiss China Time Ltd v. Benetton Int’l NV*, [1999] E.C.R. I-3055; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 638 (1985).

<sup>82</sup> See BORN, *supra* note 2, at 3732.



international commercial disputes.<sup>83</sup> Although the law concerning preclusion and collateral estoppel are not as well developed in arbitration as in litigation,<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup> Over the last few years, several arbitral organizations have established formal procedures for appellate arbitration.<sup>87</sup> The evolution of this particular procedure has important ramifications for the award writing process, both at first instance and on appeal.<sup>88</sup> 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<sup>89</sup> and to provide an appellate tribunal with a solid

<sup>83</sup> See NADJA ERK-KABAT, *PARALLEL PROCEEDINGS IN INTERNATIONAL ARBITRATION: A EUROPEAN PERSPECTIVE* 1 (2014); STRONG, GUIDE, *supra* note 1, 85-87.

<sup>84</sup> See BORN, *supra* note 2, at 3733; STRONG, GUIDE, *supra* note 1, 85-87.

<sup>85</sup> See BORN, *supra* note 2, at 3757.

<sup>86</sup> See Judge Rudolph Kass, *A Private Path to Appellate Arbitration*, 50 BOSTON B.J. 35, 35 (Jan./Feb. 2006); Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 10, 14-15 (Aug.-Oct. 2005). Because this process does not require any form of judicial review, it does not run afoul of the U.S. Supreme Court’s prohibition on contractual expansions of judicial jurisdiction. See *Hall St. Assocs. v. Mattel, Inc.*, 550 U.S. 968 (2007); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1150-51 (2009). Arbitral appeals are somewhat different than the kind of annulment proceedings used in certain investment arbitrations. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), Mar. 18, 1965, Rules of Procedure for Arbitration, Rules 50-55, [1966] 17 U.S.T. 1291, T.I.A.S. No. 6090. Arbitral appeals also differ from the types of appellate procedures contemplated by the Court of Arbitration for Sport (CAS). See CAS, Procedural Rules 47-59, <http://www.tas-cas.org/en/arbitration/code-procedural-rules.html> [hereinafter CAS Arbitration Rules] (discussing arbitral appeals from rulings generated by a federation or national sports body); Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & The Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63, 64-65.

<sup>87</sup> See AAA, Optional Appellate Arbitration Rules (Nov. 1, 2013), <http://go.adr.org/AppellateRules> [hereinafter AAA Appellate Rules]; International Institute for Conflict Prevention and Resolution (CPR) Arbitration Appeal Procedure and Commentary, <https://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Arbitration%20Appeal%20Procedure.pdf> [hereinafter CPR Appellate Rules]; JAMS, Optional Arbitration Appeal Procedure, <http://www.jamsadr.com/appeal/> [hereinafter JAMS Appellate Rules]. Such procedures are not limited to the United States. See Arbitrators’ and Mediators’ Institute of New Zealand (AMINZ), Arbitration Appeals Tribunal, [http://www.aminz.org.nz/Category?Action=View&Category\\_id=172](http://www.aminz.org.nz/Category?Action=View&Category_id=172). Furthermore, parties do not have to adopt an appellate rule set but can instead simply establish arbitral appeal by contract. See STRONG, GUIDE, *supra* note 1, at 7-9; Marrow, *supra* note 86, at 13.

<sup>88</sup> 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.

<sup>89</sup> The notion of what constitutes an appealable issue is by no means entirely clear. See Marrow, *supra* note 86, at 14-15. At this point, parties must rely largely on the language reflected in the relevant rules. See *infra* notes 166-71 and accompanying text (discussing the standard and scope of appellate review).

understanding of how and why the initial decision was made.<sup>90</sup> 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.<sup>91</sup>

### *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.

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.<sup>92</sup> 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.<sup>93</sup>

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.<sup>94</sup> 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.<sup>95</sup> 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

<sup>90</sup> See Kass, *supra* note 86, at 35.

<sup>91</sup> See *infra* notes 157-71 and accompanying text (regarding drafting of appellate awards).

<sup>92</sup> 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”).

<sup>93</sup> Bergholtz, *supra* note 92, at 44.

<sup>94</sup> 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 YOUNG ARB. REV. 34, 34-35 (2013) (noting that arbitration awards must be reasoned under Portuguese law).

<sup>95</sup> Thus, for example, parties may require arbitral appeals but not judicial appeals. See *supra* note 86 and accompanying text.

reasoning once the parties have requested a reasoned award.<sup>96</sup> In fact, the length and detail associated with reasoned awards in international commercial arbitration suggests that international arbitrators are far exceeding any minimum requirements.<sup>97</sup>

Second, use of reasoned awards improves the quality of the decision-making process and consequently of the decision itself.<sup>98</sup> As U.S. Circuit 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.”<sup>99</sup> By encouraging arbitrators to articulate their reasons for following a particular course of action, reasoned awards help “rationalize the . . . process,” “safeguard against arbitrary decisions,” “prevent consideration of improper and irrelevant factors,” “minimize the risk of reliance upon inaccurate information,” and “attain[] . . . institutional objective[s] of dispensing equal and impartial justice” while simultaneously “demonstrat[ing] to society that these goals are being met.”<sup>100</sup>

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.<sup>101</sup> 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.<sup>102</sup>

Fourth, reasoned awards provide parties with a more fulsome and satisfactory explanation of why the arbitrator decided as he or she did.<sup>103</sup> 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

<sup>96</sup> See Lloyd et al., *supra* note 3, at 27; see also *infra* note 249 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 BORN, *supra* note 2, at 3044.

<sup>97</sup> See *supra* note 65 and accompanying text; see also *infra* notes 166-306 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).

<sup>98</sup> See GEORGE, *supra* note 73, at 27; 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).

<sup>99</sup> Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447-48 (1995).

<sup>100</sup> FitzMaurice & O’Connor, *supra* note 3, at n.19.

<sup>101</sup> 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.

<sup>102</sup> See BORN, *supra* note 10, at 821 n.202; Rogers, *Transparency*, *supra* note 65, at 1325.

<sup>103</sup> 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.

the award) might mount a challenge, even if the chance of prevailing seems relatively low.<sup>104</sup> 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.<sup>105</sup>

#### 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.<sup>106</sup> Instead, the primary concern is with the execution of such awards.<sup>107</sup>

Experts agree that writing a reasoned award is an extremely challenging endeavor requiring both time and diligence.<sup>108</sup> 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

<sup>104</sup> See Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 126 (2009); Don Peters, *It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers' Resistance to Mediating Commercial Disputes*, 9 RICH. J. GLOBAL L. & BUS. 381, 398 n.124 (2010).

<sup>105</sup> See Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 177 (2005). The quality of international awards may be one reason why parties traditionally complied with the final decision of the arbitrators. See BORN, *supra* note 2, at 3410 (noting most awards are complied with voluntarily). But see Strong, *Border Skirmishes*, *supra* note 4, at 2-3, 5-6 (noting increase in judicial procedures regarding arbitration).

<sup>106</sup> See STRONG, GUIDE, *supra* note 1, at 22.

<sup>107</sup> See *supra* note 5 and accompanying text.

<sup>108</sup> See *Hart v. Massanari*, 266 F.3d 1155, 1176-77 (9th Cir. 2001); DOMNARSKI, *supra* note 9, at 36; Henry G. Stewart, *Trials of a Neophyte Neutral: The Transition From Full-Time Advocate*, 58 DISP. RESOL. J. 39 (Nov. 2003-Jan.2004) (“[D]eciding cases and writing opinions take much longer than I ever anticipated.”); Van Detta 1, *supra* note 18, at 55.

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.<sup>109</sup> 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 consider.<sup>110</sup> In cases involving multiple arbitrators, the drafting process often includes a certain amount of compromise and negotiation.<sup>111</sup>

Every tribunal approaches the process of writing judgments differently.<sup>112</sup> 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.<sup>113</sup> 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.”<sup>114</sup>

Once the first draft is written and circulated, the panel considers the precise language of the proposed award.<sup>115</sup> 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.<sup>116</sup> This process is critically important because the award must reflect the views of a majority of the tribunal.<sup>117</sup> If the arbitrators can reach only a narrow consensus, then the resulting award will have to be equally narrow.<sup>118</sup>

As the process of deliberation and drafting continues, it may become apparent that consensus cannot be reached on certain points.<sup>119</sup> In those cases, the majority may be able to

<sup>109</sup> See Lloyd et al., *supra* note 3, at 25-26.

<sup>110</sup> See Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 12-14 (2009).

<sup>111</sup> See *id.* (discussing how the deliberation process affects how an opinion is written); Tom Cobb & Sarah Kaltsounis, *Real Collaborative Context: Opinion Writing and the Appellate Process*, 5 J. ASS’N LEGAL WRITING DIRECTORS 156, 158-63 (2008); Lloyd et al., *supra* note 3, at 25-26.

<sup>112</sup> See DOMNARSKI, *supra* note 9, at 32-34; Daniel J. Bussell, *Opinions First – Argument Afterward*, 61 UCLA L. REV. 1194, 1196-97 (2014); Goodwin Liu, *How the California Supreme Court Really Works: A Reply to Professor Bussell*, 61 UCLA L. REV. 1246, 1250-58 (2014); Lloyd et al., *supra* note 3, at 25-26.

<sup>113</sup> See Lloyd, *supra* note 3, at 38-39; Lloyd et al., *supra* note 3, at 25-26.

<sup>114</sup> GEORGE, *supra* note 73, at 279.

<sup>115</sup> See Aldisert et al., *supra* note 110, at 12-14; Lloyd et al., *supra* note 3, at 25-26.

<sup>116</sup> GEORGE, *supra* note 73, at 281; see also Lloyd et al., *supra* note 3, at 26. Criticism should also be limited to matters of substance rather than style. See GEORGE, *supra* note 73, at 282.

<sup>117</sup> See Aldisert et al., *supra* note 110, at 14; Lloyd et al., *supra* note 3, at 26.

<sup>118</sup> See Aldisert et al., *supra* note 110, at 14; Lloyd et al., *supra* note 3, at 26.

<sup>119</sup> See Lloyd et al., *supra* note 3, at 26.



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.<sup>120</sup> However, in some cases, a dissenting panelist may insist on submitting an individual opinion.<sup>121</sup> In those situations, the tribunal will need to refer to the arbitral rules governing the dispute to determine the availability and treatment of separate opinions.<sup>122</sup>

## 2. Dissenting and concurring opinions

The debate about individual opinions in international commercial arbitration has become increasingly heated in recent years.<sup>123</sup> 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.<sup>124</sup>

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.<sup>125</sup> 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.<sup>126</sup> Alternatively, an arbitrator may want to set the record

<sup>120</sup> See Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, 25 ASA BULL. 437, 459-64 (2008); Lloyd et al., *supra* note 3, at 26.

<sup>121</sup> See Arroyo, *supra* note 120, at 459-64.

<sup>122</sup> 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 86, art. 46.

<sup>123</sup> See Arroyo, *supra* note 120, at 437; Baker & Greenwood, *supra* note 122, at 31-40; Ilhyung Lee, *Introducing International Commercial Arbitration and Its Lawlessness, by Way of the Dissenting Opinion*, 4 CONTEMP. ASIA ARB. J. 19 (2011); Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, in ARBITRATION INSIGHTS: TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION 367, 373-76 (Loukas Mistelis & Julian D.M. Lew eds., 2007); Jacques Werner, *Dissenting Opinions: Beyond Fears*, 9 J. INT'L ARB. 23, 24-25 (1992); see also Pedro J. Martinez-Fraga & Harout Jack Samra, *A Defense of Dissents in Investment Arbitration*, 43 U. MIAMI INTER-AM. L. REV. 445, 450-63 (2012).

<sup>124</sup> See Arroyo, *supra* note 120, at 458; Baker & Greenwood, *supra* note 122, at 31-40; Redfern, *supra* note 123, 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.

<sup>125</sup> See Baker & Greenwood, *supra* note 122, at 39-40.

<sup>126</sup> See Kaufmann-Kohler, *supra* note 70, at 361-78; van den Berg, *supra* note 8, at 823.

straight as to his or her views on a particular matter so as to increase the likelihood of winning future appointments.<sup>127</sup>

Although most of the commentary in international arbitration focuses on dissenting opinions, it is also possible for an arbitrator to write a concurring opinion.<sup>128</sup> Concurrences are seen even less frequently than dissents 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.<sup>129</sup>

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.<sup>130</sup> 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.<sup>131</sup> Thus, sarcasm and *ad hominem* attacks should play no role in a dissent, just as they should not in a majority award.<sup>132</sup>

### 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.<sup>133</sup> 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.<sup>134</sup> 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

<sup>127</sup> See Martinez-Fraga & Samra, *supra* note 123, at 467-70; van den Berg, *supra* note 8, at 821, 830-31.

<sup>128</sup> 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, *supra* note 8, at 837; see also SUPREME COURT OF OHIO, WRITING MANUAL: A GUIDE TO CITATIONS, STYLE AND JUDICIAL OPINION WRITING 153-54 (2012) (noting various types of concurrences), available at <http://www.supremecourt.ohio.gov/ROD/manual.pdf>.

<sup>129</sup> See *Alemanni v. Argentine Republic*, ICSID Case No. ARB/07/8, Concurring Opinion of Mr. J. Christopher Thomas, Q.C., Nov. 17, 2014, available at <http://www.italaw.com/sites/default/files/case-documents/italaw4064.pdf>; van den Berg, *supra* note 8, at 833.

<sup>130</sup> See GEORGE, *supra* note 73, at 329; van den Berg, *supra* note 8, at 833.

<sup>131</sup> See GEORGE, *supra* note 73, at 281; van den Berg, *supra* note 8, at 825.

<sup>132</sup> 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).

<sup>133</sup> "An alternative ground used to support a decision is not dictum." GEORGE, *supra* note 73, at 331.

<sup>134</sup> Avoidance of confusion is another reason why judges and arbitrators do not always outline the entire basis for their decision. See Konrad Schiermann, *A Response to the Judge As Comparativist*, 80 TULANE L. REV. 281, 287-90 (2005).

possibility of non-enforcement.<sup>135</sup> Providing multiple reasons why a particular party prevails can also provide additional persuasive power in cases where a single rationale might appear insufficient or overly legalistic to the losing party.<sup>136</sup>

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.<sup>137</sup> Normally, such rulings (referred to as *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 *dicta* do not apply in arbitration.<sup>138</sup> 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."<sup>139</sup> 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.<sup>140</sup>

#### 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.<sup>141</sup> 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

<sup>135</sup> 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 67-91 and accompanying text.

<sup>136</sup> 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., *supra* note 3, at 33.

<sup>137</sup> See *id.* at 28.

<sup>138</sup> The primary use of *dicta* is to suggest how a court would rule in the future on certain facts not presently at issue. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 958 (2005). Courts use *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. See *id.* at 1000. Although *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.

<sup>139</sup> Lloyd et al., *supra* note 3, at 28.

<sup>140</sup> *Id.*

<sup>141</sup> See Phillip Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence*, 28 ARB. INT'L 173, 173 (2012).

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 independently develop his or her own legal rationale does so at his or her own peril and the peril of the litigants.<sup>142</sup>

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.”<sup>143</sup> However, other observers have criticized independent judicial research because it denies the parties of “the opportunity for cross-examination, rebuttal, or the introduction of further testimony.”<sup>144</sup> 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.”<sup>145</sup>

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.<sup>146</sup> 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.<sup>147</sup>

After weighing these competing interests, most authorities have concluded that arbitrators have the right to conduct independent research but that they should exercise that right in a limited fashion.<sup>148</sup> In particular, arbitrators should ask for supplemental briefing on any question of law that was not initially raised by the parties in their submissions.<sup>149</sup> This approach

<sup>142</sup> *Camacho v. Trimble Irrevocable Trust*, 756 N.W.2d 596, 298-99 (Wisc. Ct. App. 2008); *see also* *Hampton v. Wyant*, 296 F.3d 560, 564-65 (7th Cir. 2002).

<sup>143</sup> GEORGE, *supra* note 73, at 199.

<sup>144</sup> Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1296 (2007) (noting that “[a] few judges and commentators have advocated against” independent legal research).

<sup>145</sup> *Id.*

<sup>146</sup> *See* GEORGE, *supra* note 73, at 275; Aldisert et al., *supra* note 110, at 14; Audley Sheppard, *Mandatory Rules in International Commercial Arbitration – An English Perspective*, 18 AM. REV. INT’L ARB. 121, 144 (2007) (discussing the concept of *jura novit curia* (*iura novit curia*) in international commercial arbitration).

<sup>147</sup> Cheng, *supra* note 144, at 1296; Marrow, *supra* note 86, at 24-30. *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”).

<sup>148</sup> *See* International Law Association, International Commercial Arbitration Committee, *Final Report – Ascertaining the Contents of the Applicable Law in International Commercial Arbitration* (2008) [hereinafter ILA Report]; Gaitis, *supra* note 9, at 17; Landolt, *supra* note 141, at nn.4-6, 39; Marrow, *supra* note 86, at 30; Sheppard, *supra* note 146, at 144-45.

<sup>149</sup> *See* ILA Report, *supra* note 148; Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 ARB. INT’L 157, n.5 (1998); Gaitis, *supra* note 9, at 17; Landolt, *supra* note 141, at nn.4-6, 39; Marrow, *supra* note 86, at 30; Sheppard, *supra* note 146, at 144-45.

is justified on the grounds that it increases the likelihood that the arbitrator will arrive at the correct conclusion of law while simultaneously avoiding surprise and allowing the parties to take the lead in developing their cases.<sup>150</sup> 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.”<sup>151</sup>

The situation involving independent factual research is somewhat different.<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup>

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.<sup>155</sup> 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.<sup>156</sup>

### 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 routine in the future.<sup>157</sup> If that should indeed happen, the question then

<sup>150</sup> 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 “plaintiff applied to the Supreme Court to have an arbitral award annulled, alleging that the arbitral tribunal had violated due process by relying in its award on an unpredictable application of the law” and concluding “that arbitral tribunals are free to apply the law (*iura novit curia*), subject only to a prohibition on taking the parties 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 141, at nn.39, 64–85.

<sup>151</sup> *Camacho v. Trimble Irrevocable Trust*, 756 N.W.2d 596, 298–99 (Wisc. Ct. App. 2008); see also *Hampton v. Wyant*, 296 F.3d 560, 564–65 (7th Cir. 2002).

<sup>152</sup> See Cheng, *supra* note 144, at 1297; Landolt, *supra* note 141, at nn.1–2.

<sup>153</sup> Cheng, *supra* note 144, at 1267; see also *Hernandez v. State*, 116 S.W.3d 26, 32 (Tx. Ct. Crim. App. 2003) (Keller, P.J., concurring); GEORGE, *supra* note 73, at 276.

<sup>154</sup> See GEORGE, *supra* note 73, at 276. In fact, empirical research suggests this is indeed what happens. See Joshua Karton, *The Arbitral Role in Contractual Interpretation*, 6 J. INT’L DISP. SETTLEMENT 4, nn.37–38 (2015).

<sup>155</sup> See Landolt, *supra* note 141, at nn.7–8, 91–94; see also Sheppard, *supra* note 146, at 144–45.

<sup>156</sup> See Landolt, *supra* note 141, at nn.7–8; see also Cremades, *supra* note 149, nn.17–26.

<sup>157</sup> See M. Scott Donahey, *A Proposal for an Appellate Panel for the Uniform Domain Name Dispute Resolution Policy*, 18 J. INT’L ARB. 131, 131–34 (2001); Christian A. Garza & Christopher D. Kratovil, *Contracting for Private Appellate Review of Arbitration Awards*, 19 APP. ADVOCATE 17 (2007)



arises as to whether an appellate award should be written differently than an award at first instance.<sup>158</sup> 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.<sup>159</sup>

Fortunately, a functional analysis provides some useful insights into this particular concern.<sup>160</sup> 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.<sup>161</sup>

Appellate opinions differ from decisions at first instance in a number of ways, at least in the judicial context.<sup>162</sup> 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 rem*).<sup>163</sup> However, this feature does not appear to translate to the arbitral realm, since the duty to provide justice *in*

(discussing various rule sets); Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid Of?* 7 PEPP. DISP. RESOL. L.J. 269, 286-87 (2007); Roger B. Jacobs, *Compared and Contrasted: Skepticism and Promise in the Major Providers' Appellate Arbitration Procedures*, 33 ALT. TO HIGH COST LITIG. 19 (Feb. 2015); Margie-Lys Jamie, *An Appellate Body in Treaty-Based Investment Arbitration: Redefining the Investor-State Dispute Settlement Mechanism*, 21 SPAIN ARB. REV. / REVISTA DEL CLUB ESPAÑOL DEL ARBITRAJE 93, 94-97 (2014); Platt, *supra* note 75, at 547-52; Mauro Rubino-Sammartano, *An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings*, 6 J. INT'L ARB. 181, 181-88 (1989); Hon. David B. Saxe, *An Appellate Mechanism in Arbitration*, 86 N.Y. ST. B.J. 44, 45 (Nov./Dec. 2013) (supporting arbitral appeals in some cases); Ten Cate, *supra* note 6, at 1111. The debate has been particularly pitched in the context of investment arbitration, which raises somewhat different questions due to the quasi-public nature of investor-state disputes. See Barry Appleton, *The Song is Over: Why It's Time to Stop Talking About an International Investment Arbitration Appellate Body*, 107 AM. SOC'Y INT'L L. PROC. 23, 23 (Apr. 3-6, 2013) (discussing an arbitral appellate procedure created by international treaty); David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39 (2006); Ian Laird & Rebecca Askew, *Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System?* 7 J. APP. PRAC. & PROCESSES 283, 286-87 (2005).

<sup>158</sup> See *supra* note 88 (discussing nomenclature regarding arbitral decisions below).

<sup>159</sup> See AAA Appellate Rules, *supra* note 87; CPR Appellate Rules, *supra* note 87; 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." See JAMS Appellate Rules, *supra* note 87, Rule D.

<sup>160</sup> See Michaels, *supra* note 56, at 342, 357; see also *supra* note 56 and accompanying text.

<sup>161</sup> See GEORGE, *supra* note 73, at 257 (considering appellate opinions in court).

<sup>162</sup> See Strong, *Writing*, *supra* note 6, at \_\_\_\_.

<sup>163</sup> See GEORGE, *supra* note 73, at 275; Aldisert et al., *supra* note 110, at 14.

*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.<sup>164</sup>

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.<sup>165</sup> 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.”<sup>166</sup> Other arbitral organizations focus on similar criteria.<sup>167</sup> However,

<sup>164</sup> See Strong, *Writing*, *supra* note 6, at \_\_\_; 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.

<sup>165</sup> See Strong, *Writing*, *supra* note 6, at \_\_\_.

<sup>166</sup> AAA Appellate Rules, *supra* note 87, Rule A-10. The AAA further indicates that

(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.

*Id.* Rule A-19.

<sup>167</sup> Thus, the CPR rules on appellate procedure state that

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:

- 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
- 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.

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.

CPR Appellate Rules, *supra* note 87, Rule 8.

these provisions could be difficult to implement in practice, given the problems associated with distinguishing between findings of fact and conclusions of law.<sup>168</sup>

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.<sup>169</sup> 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 *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 (*de novo*) review – typically relating to evidentiary, discretionary and legal matters, respectively.<sup>170</sup> However, recent decisions from the U.S. Supreme Court have made that standard increasingly difficult to apply.<sup>171</sup> Other national laws could be similarly problematic.

### *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.

<sup>168</sup> See *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985); see also *supra* notes 54-55 and accompanying text.

<sup>169</sup> 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, *supra* note 87, Rule D. However, JAMS does not address the scope or trigger for review. See *id.*

<sup>170</sup> See *Aldisert et al.*, *supra* note 110, at 30. Notably, the standard of review differs from the scope of review. See *GEORGE*, *supra* note 73, at 297.

<sup>171</sup> Recent decisions from the U.S. Supreme Court have permitted, if not required, *de novo* analysis of certain mixed questions of law and fact. 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 MICH. ST. L. REV. 541, 547-48. However, distinguishing questions of law from questions of fact is quite challenging. See *Miller*, 474 U.S. at 113-14; see also *supra* notes 54-55 and accompanying text.

### I. Style

Although this Article does not address issues relating to diction, sentence structure, punctuation and the like, some so-called elements of style 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.<sup>172</sup> Since the first duty of an arbitrator is to produce a clear, internationally enforceable award, it is necessary to consider a few stylistic concerns.<sup>173</sup>

The first point involves the audience for arbitral awards.<sup>174</sup> Because the parties "have an all-pervasive interest" in the outcome of the dispute,<sup>175</sup> conventional wisdom suggests that arbitrators should direct their statements primarily if not exclusively to the litigants.<sup>176</sup>

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.<sup>177</sup> 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.<sup>178</sup> Indeed, many experts have recognized that "[t]he mark of a well-written opinion is that it is comprehensible to an intelligent layperson."<sup>179</sup> Furthermore, awards "should not . . . be turned into briefs or vehicles for advocacy."<sup>180</sup>

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.<sup>181</sup> 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.<sup>182</sup> The possibility of judicial confusion may be heightened in cases

<sup>172</sup> See *supra* note 47 and accompanying text.

<sup>173</sup> See Lloyd et al., *supra* note 3, at 20-21.

<sup>174</sup> 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].

<sup>175</sup> Aldisert et al., *supra* note 110, at 17.

<sup>176</sup> See Marx, *supra* note 5, at 23 (expanding the audience slightly); see also Aldisert et al., *supra* note 110, at 17 (discussing judicial opinions).

<sup>177</sup> See Lloyd, *supra* note 3, at 40.

<sup>178</sup> Aldisert et al., *supra* note 110, 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; Lloyd, *supra* note 3, at 39.

<sup>179</sup> FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 6 (2d edn, 2013) [hereinafter FJC MANUAL], available at [www.fjc.gov](http://www.fjc.gov).

<sup>180</sup> *Id.* at 5.

<sup>181</sup> See Lloyd et al., *supra* note 3, at 28.

<sup>182</sup> 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*

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.<sup>183</sup>

An award may also be read by various private parties.<sup>184</sup> 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.<sup>185</sup> 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.<sup>186</sup>

The second stylistic issue to consider involves consistency and coherence in relation to the citation of legal authorities.<sup>187</sup> 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.<sup>188</sup> 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.<sup>189</sup> 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.<sup>190</sup>

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, sub-headings and other types of subdivisions so as to increase the reader's understanding of the structure of the award.<sup>191</sup> It is also often "convenient to number the paragraphs or groups of paragraphs to facilitate cross-referencing within the award."<sup>192</sup>

*Arbitration*, in SELECTED TOPICS IN INTERNATIONAL ARBITRATION: LIBER AMICORUM \_\_ (Julio César Betancourt ed., forthcoming 2015).

<sup>183</sup> See Lloyd et al., *supra* note 3, at 31; see also *infra* notes 187-90 and accompanying text.

<sup>184</sup> See Lloyd, *supra* note 3, at 41.

<sup>185</sup> See Lloyd et al., *supra* note 3, at 29.

<sup>186</sup> See *id.* at 33-34.

<sup>187</sup> See Aldisert et al., *supra* note 110, at 18.

<sup>188</sup> 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*] (same).

<sup>189</sup> See *supra* notes 76-85 and accompanying text.

<sup>190</sup> STRONG, RESEARCH, *supra* note 8, at 9-37 (discussing role of legal authority in international commercial arbitration); Karton, *supra* note 154, at n.6; see also Strong, *Sources*, *supra* note 188, 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).

<sup>191</sup> See Fontaine, *supra* note 3, at 36; see also *supra* note 65 and accompanying text.

<sup>192</sup> Fontaine, *supra* note 3, at 36.



## 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.<sup>193</sup> 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.”<sup>194</sup> 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.”<sup>195</sup>

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.<sup>196</sup> 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.<sup>197</sup>

“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.’”<sup>198</sup> 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.<sup>199</sup>

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.<sup>200</sup> 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.”<sup>201</sup> Indeed, judges addressing matters falling within

<sup>193</sup> See FJC MANUAL, *supra* note 179, at 3-7 (discussing scope in the context of judicial opinions).

<sup>194</sup> GEORGE, *supra* note 73, at 32-33.

<sup>195</sup> *Id.* at 32-33.

<sup>196</sup> See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1949).

<sup>197</sup> See CARDOZO, *supra* note 196, at 164-65; Aldisert et al., *supra* note 110, at 8.

<sup>198</sup> Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65).

<sup>199</sup> See CARDOZO, *supra* note 196, at 164-65; Aldisert et al., *supra* note 110, at 8-9.

<sup>200</sup> CARDOZO, *supra* note 196, at 164.

<sup>201</sup> 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 108, at 39 (noting the length of time it takes to write an award).

this first category of cases usually render a summary judgment order that runs no more than a single page in length.<sup>202</sup> 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 in the circumstances.<sup>203</sup>

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.<sup>204</sup>

In these sorts of situations, Cardozo suggests rendering a non-precedential judicial opinion.<sup>205</sup> On one level, this sort of advice may not seem helpful to arbitrators, since arbitral awards are already considered non-precedential.<sup>206</sup> 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.<sup>207</sup> These documents are slightly more fulsome 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 do not include a detailed discussion of the facts or a comprehensive explanation of the legal rationales underlying the decision.<sup>208</sup> 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 (i.e., the facts) while spending less time on those matters that are not

<sup>202</sup> See CARDOZO, *supra* note 196, at 164; Aldisert et al., *supra* note 110, at 10-11; *see also* FJC MANUAL, *supra* note 179, 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).

<sup>203</sup> 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 255-56 and accompanying text.

<sup>204</sup> Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65).

<sup>205</sup> See CARDOZO, *supra* note 196, at 164-65; Aldisert et al., *supra* note 110, at 8-9.

<sup>206</sup> See *supra* notes 68-69 and accompanying text.

<sup>207</sup> See CARDOZO, *supra* note 196, at 164; *see also* Aldisert et al., *supra* note 110, at 8, 11.

<sup>208</sup> See GEORGE, *supra* note 73, at 325-26; Aldisert et al., *supra* note 110, at 11; *see also* FJC MANUAL, *supra* note 179, app. A.

really debatable (i.e., the law).<sup>209</sup> 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.<sup>210</sup> 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.<sup>211</sup>

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.<sup>212</sup> 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.<sup>213</sup>

Some aspects of Cardozo's analysis (for example, statements about "the development of the law") do not apply to arbitration.<sup>214</sup> 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.<sup>215</sup> As a result, awards falling into this category will probably be somewhat longer than those in the previous two categories, since the legal and factual issues are both more complicated.<sup>216</sup>

Although Cardozo's taxonomy is useful in distinguishing between 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.<sup>217</sup> That particular analysis is extremely challenging even for experienced decision-makers, since "the appropriate

<sup>209</sup> See CARDOZO, *supra* note 196, at 164; *see also* Aldisert et al., *supra* note 110, at 8, 11.

<sup>210</sup> See Fontaine, *supra* note 3, at 34. The international legal and business communities have expressed concern about the time it takes many arbitrators to generate their awards. See Berwin Leighton Paisner, International Arbitration: Research Based Report on Perceived Delay in the Arbitration Process 15-19 (2012), available at [https://www.blplaw.com/media/pdfs/Reports/BLP\\_International\\_Arbitration\\_Survey\\_Delay\\_in\\_the\\_Arbitration\\_Process\\_July\\_2012.pdf](https://www.blplaw.com/media/pdfs/Reports/BLP_International_Arbitration_Survey_Delay_in_the_Arbitration_Process_July_2012.pdf).

<sup>211</sup> 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").

<sup>212</sup> Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65).

<sup>213</sup> Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65); *see also* GEORGE, *supra* note 73, at 32-34 (discussing types of judicial writings).

<sup>214</sup> See *supra* notes 68-69 and accompanying text.

<sup>215</sup> See CARDOZO, *supra* note 196, at 164-65.

<sup>216</sup> See *supra* notes 198-211 and accompanying text.

<sup>217</sup> See CARDOZO, *supra* note 196, at 164-65.

methodology . . . has been, to say the least, elusive.”<sup>218</sup> 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.”<sup>219</sup> Conclusions of law, on the other hand, “are drawn by the . . . [arbitrator] through the exercise of her [or her] legal judgment from those facts he [or she] has found previously as the trier of fact.”<sup>220</sup>

As straightforward as these definitions appear, they can be quite challenging to apply in practice.<sup>221</sup> 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*.<sup>222</sup>

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

<sup>218</sup> *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) (citations omitted); *see also* GEORGE, *supra* note 73, at 235-38 (including examples).

<sup>219</sup> GEORGE, *supra* note 73, at 188 (noting findings of fact are “a form of judicial inquiry”).

<sup>220</sup> *Id.* at 189 (noting “[w]hen the judge considers the facts and draws the legal conclusion . . . [the statement] becomes a conclusion of law”).

<sup>221</sup> *See Miller*, 474 U.S. at 113-14.

<sup>222</sup> Lord Cooper, *The Common Law and the Civil Law – A Scot’s View*, 63 HARV. L. REV. 468, 470 (1950), *as quoted in* ZWEIGERT & KÖTZ, *supra* note 67, at 259.

instead of anticipating them by abstract universal formulas [as is the case with the civil law].<sup>223</sup>

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.<sup>224</sup>

This is not to say that an arbitrator cannot or should not adopt a more blended perspective in appropriate circumstances.<sup>225</sup> In fact, the most successful international arbitrators in the world are renowned for precisely that ability.<sup>226</sup> 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.<sup>227</sup>

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.<sup>228</sup> 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.<sup>229</sup>

<sup>223</sup> Roscoe Pound, *What Is the Common Law*, in *THE FUTURE OF THE COMMON LAW* 3, 18 (1937), as quoted in ZWEIGERT & KÖTZ, *supra* note 67, at 259.

<sup>224</sup> See Lloyd et al., *supra* note 3, at 20. 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. See *id.*; see also Bergholtz, *supra* note 92, at 42.

<sup>225</sup> This approach can not 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.")

<sup>226</sup> See Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L 1, 8 (2015) (listing most popular international arbitrators in the world).

<sup>227</sup> 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 Cremades, *supra* note 149, at 172; 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 whatsoever. See *id.*; see also BORN, *supra* note 2, at 1679, 1745 (noting that only some jurisdictions require arbitrators to be legally qualified).

<sup>228</sup> See Friesen, *supra* note 60, at 3.

<sup>229</sup> See Strong, *Sources*, *supra* note 188, at 145-50. Interestingly, parties have been known to require arbitrators to apply common law and civil law principles simultaneously. See William W. Park, *Michael Mustill: A Reminiscence*, 31 ARB. INT'L \_\_\_\_ (forthcoming 2015) (discussing the *Channel Tunnel Case*,



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.<sup>230</sup> In so doing, the arbitrator would likely give considerable weight to case law in his or her deliberations and drafting<sup>231</sup> and might also place a stronger emphasis on factual considerations than he or she would normally do.<sup>232</sup> Finally, the arbitrator might consider discussing how the facts in the case generated the legal principles chosen to govern the dispute.<sup>233</sup>

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.<sup>234</sup> 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.<sup>235</sup> 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<sup>236</sup> would perhaps aim to derive the applicable legal standard primarily by reference to various legal principles rather than through factual analogies.<sup>237</sup>

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.<sup>238</sup> 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.<sup>239</sup>

*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 154, at nn.45-46 (discussing the ICC awards in the *Channel Tunnel Case*, referred to in this example as the *Eurotunnel* cases).

<sup>230</sup> See Strong, *Sources*, *supra* note 188, at 145-50; see also Karton, *supra* note 154, at nn.185-89.

<sup>231</sup> See ZWEIGERT & KÖTZ, *supra* note 67, at 259.

<sup>232</sup> See *id.*

<sup>233</sup> See *id.*

<sup>234</sup> See *id.*; Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT'L L.J. 333, 348-49 (1999) (discussing the hermeneutical nature of contemporary civil law analysis); Friesen, *supra* note 60, at 7-11. One commentator has suggested that that "a civil law perspective on contractual interpretation predominates" in international commercial arbitration. See Karton, *supra* note 154, at n.53.

<sup>235</sup> See Strong, *Sources*, *supra* note 188, at 145-50; see also Karton, *supra* note 154, at nn.185-89.

<sup>236</sup> See S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 571 (2013).

<sup>237</sup> See Strong, *Sources*, *supra* note 188, at 145-50. 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 154, at nn.111-22.

<sup>238</sup> See Strong, *Sources*, *supra* note 188, at 145-50.

<sup>239</sup> The technique is explained thusly by Bernardo Cremades, a highly esteemed international arbitrator:

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.<sup>240</sup> Indeed, commentators have long recognized that the substance of a legal ruling influences the form, as well as the reverse.<sup>241</sup>

### 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. Without a good structural framework, an arbitrator cannot hope to persuade or even inform his or her readers.<sup>242</sup>

Some structural concerns have already been resolved by the international arbitral community.<sup>243</sup> 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.<sup>244</sup> 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 those arising in the cross-border context.<sup>245</sup>

[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: *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 149, n.27 (citation omitted).

<sup>240</sup> Bergholtz, *supra* note 92, at 42 (noting that "[i]n the grounds of legal decisions form and substance, procedural form and substantive law, meet"); *see also* STRONG, RESEARCH, *supra* note 8, at 3-7; Baudenbacher, *supra* note 234, at 348-49; Cremades, *supra* note 149, 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 154, at nn.13-29.

<sup>241</sup> *See* Bergholtz, *supra* note 92, at 42.

<sup>242</sup> *See* STRONG & DESNOYER, *supra* note 48, ch. 1.

<sup>243</sup> *See supra* notes 60-63 and accompanying text.

<sup>244</sup> *See* Lloyd et al., *supra* note 3, at 29-31; *see supra* notes 60-61 and accompanying text.

<sup>245</sup> *See* STRONG, GUIDE, *supra* note 1, at 3-6. For example, class arbitrations are often as complex as international commercial arbitrations, with similar amounts in dispute. *See* S.I. Strong, *Does Class*

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.<sup>246</sup> Indeed, Gary Born, one of the leading commentators in the field, has recognized that “in some instances, longer is not better.”<sup>247</sup>

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.<sup>248</sup> Alternatively, an arbitrator may wish to demonstrate his or her faithfulness to the contractual obligation to produce a reasoned award.<sup>249</sup>

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

*Arbitration “Change the Nature” of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 262-66 (2012). However, class awards often adopt a different structure and tone than international awards. *Compare* Contractor (Zambia) v. Producer (Zambia), Final Award, ICC Case No. 16484, 2011, XXXIX Y.B. COMM. ARB. 216 (2014) (reflecting an international award) *with* Hausner v. United – Clause Construction Award, AAA Class Arbitration Docket, [www.adr.org](http://www.adr.org).

<sup>246</sup> See Stewart, *supra* note 108, 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).

<sup>247</sup> BORN, *supra* note 2, at 3041-42.

<sup>248</sup> Enforcing courts often need to assess the fairness of the arbitral procedure, which will be reflected in certain aspects of the award. See Lloyd et al., *supra* note 3, at 24-25 (“National 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.”); *see also* New York Convention, *supra* note 78, art. V.

<sup>249</sup> 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 92, 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 94, at 1089-1109 (noting the limits on procedural and substantive autonomy in international commercial arbitration).

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.<sup>250</sup>

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.<sup>251</sup> Instead, arbitrators simply need to fulfill various functional requirements<sup>252</sup> that may be imposed privately, institutionally<sup>253</sup> or as a result of the special nature of arbitration.<sup>254</sup>

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;

<sup>250</sup> Lloyd et al., *supra* note 3, at 21.

<sup>251</sup> *See id.* at 20.

<sup>252</sup> *See BORN, supra* note 2, at 3037-45.

<sup>253</sup> 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.

<sup>254</sup> 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 78; 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.

- 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.<sup>255</sup>

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.<sup>256</sup> 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.<sup>257</sup>

Although very little material exists on how arbitrators should draft the reasoning section of an international award,<sup>258</sup> extensive commentary exists regarding judicial reasoning.<sup>259</sup> 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.<sup>260</sup> In so doing, it will of course be necessary to take into account the various functional differences between arbitral awards and judicial rulings.<sup>261</sup>

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.<sup>262</sup> However, one popular

<sup>255</sup> 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.*

<sup>256</sup> *See id.*

<sup>257</sup> *See id.* at 31-37.

<sup>258</sup> *See id.* at 29-31; *see also supra* notes 8-13 and accompanying text.

<sup>259</sup> *See supra* note 38 (listing authorities); *see also infra* note 262.

<sup>260</sup> *See BORN, supra* note 2, at 3044.

<sup>261</sup> *See Michaels, supra* note 56, at 342, 357; *see also supra* notes 56-57 and accompanying text.

<sup>262</sup> *See FJC MANUAL, supra* note 179 (United States); CHERYL THOMAS, REVIEW OF JUDICIAL TRAINING IN OTHER JURISDICTIONS 8, 16 (May 2006) (discussing judicial writing programs around the world and noting the United States, Canada and Spain are leaders in judicial education, offering numerous courses in "judge craft," which includes judicial writing), [http://www.ucl.ac.uk/laws/judicial-institute/files/Judicial\\_Training\\_and\\_Education\\_in\\_other\\_Jurisdictions.pdf](http://www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Training_and_Education_in_other_Jurisdictions.pdf); *see also* European Commission, European Judicial Training, Good Training Practices (noting courses on decision writing from Estonia and the Netherlands), [https://e-justice.europa.eu/content\\_good\\_training\\_practices-311-en.do?clang=en#n03](https://e-justice.europa.eu/content_good_training_practices-311-en.do?clang=en#n03); National Judicial Institute – Institut Nacional de la Magistrature, Judicial Education Course Calendar, <https://www.nji-inm.ca/index.cfm/publications/> (offering advanced courses in opinion-writing); Susan Glazebrook, *Restoring Image and Trust Through Judicial Training on Communication*, 2 JUD. EDUC. & TRAINING: J. INT'L ORG. JUD. TRAINING 50, 55-56 (2014) (discussing judicial writing in New Zealand); Plan Docente de Formación Inicial 66a Promoción de la Carrera Judicial, Curso 2014-2016 Escuela Judicial 22 (2014) (noting the need to provide training in writing



multicultural model is based on the classical principles of Greco-Roman rhetoric.<sup>263</sup> 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 seeking to rationalize drafting techniques in international commercial arbitration.<sup>264</sup> Indeed, close examination of existing awards suggests that this approach is already quite common in the international realm.<sup>265</sup>

This model includes five different sections, including:

- 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*).<sup>266</sup>

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

reasoned judicial rulings during the initial training (formación inicial) at the Spanish judicial training institute (La Escuela Judicial, part of the Consejo General de Poder Judicial), *available at* [http://www.poderjudicial.es/stfls/CGPJ/ESCUELA%20JUDICIAL/FORMACIÓN%20INICIAL/PLANES%20DE%20FORMACIÓN/FICHERO/20141222%20Plan%20Docente%2066PCateg%20justicia%20nou%20\(negro\).swf](http://www.poderjudicial.es/stfls/CGPJ/ESCUELA%20JUDICIAL/FORMACIÓN%20INICIAL/PLANES%20DE%20FORMACIÓN/FICHERO/20141222%20Plan%20Docente%2066PCateg%20justicia%20nou%20(negro).swf).

<sup>263</sup> See RUGGERO J. ALDISERT, *OPINION WRITING* 77-82 (2d ed. 2009); FJC MANUAL, *supra* note 179, 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), *available at* <http://www.fjc.gov>; SUPREME COURT OF OHIO, *supra* note 128 (providing an outline of a judgment); Aldisert et al., *supra* note 110, 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*, Australasian Institute of Judicial Administration (2002) (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), *available at* <http://www.aija.org.au/Mag02/Roslyn%20Atkinson.pdf>.

<sup>264</sup> See Aldisert et al., *supra* note 110, at 24; Van Detta 2, *supra* note 174, at 32.

<sup>265</sup> 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).

<sup>266</sup> See Aldisert et al., *supra* note 110, at 24; *see also* ALDISERT, *supra* note 263, at 77-82; FJC MANUAL, *supra* note 179, at 13; GEORGE, *supra* note 73, at 291-304; MAILHOT & CARNWATH, *supra* note 31, at 37-38; RE, *supra* note 263, at 11; SUPREME COURT OF OHIO, *supra* note 128, at 129-30; Smith, *supra* note 263, at 204.

reader know what is to come.<sup>267</sup> This sort of roadmap or executive summary<sup>268</sup> should include all of the critical information about the case and attempt to “pique the opinion reader’s interest with its language.”<sup>269</sup>

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.<sup>270</sup> “Who” is perhaps the easiest of the questions to answer, since it simply requires the arbitrator to identify the parties and their counsel.<sup>271</sup> If the matter is being heard on arbitral appeal, then the orientation section should also indicate who prevailed in the first proceeding.<sup>272</sup>

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.<sup>273</sup> 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.<sup>274</sup> This section should also outline any remedies or relief sought by the parties in their claims or counterclaims.<sup>275</sup>

“When” refers to the time of the legal injury so as to establish whether the dispute has been brought in a timely manner.<sup>276</sup> Timing may also be important to the calculation of damages or interest<sup>277</sup> or to the issue of whether an arbitral appeal has been brought within the proper period of time.<sup>278</sup>

“Where” can be considered a jurisdictional question. For example, it is critical in an international proceeding that the arbitrator identify the arbitral seat.<sup>279</sup> Appellate arbitrators may

<sup>267</sup> See Aldisert et al., *supra* note 110, at 24-25. Some commentators refer to this section as “the nature of the action.” GEORGE, *supra* note 73, at 162.

<sup>268</sup> See Lloyd et al., *supra* note 3, at 32 (discussing “points on order”); *see also* STRONG, HOW TO WRITE, *supra* note 31, at 180-81.

<sup>269</sup> Aldisert et al., *supra* note 110, at 27. For examples of both good and bad orientation paragraphs, *see* Smith, *supra* note 263, 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 Dereuisseaux v. Bell, 378 S.W.2d 208 (Ark. 1964)).

<sup>270</sup> See GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.

<sup>271</sup> See Aldisert et al., *supra* note 110, at 26.

<sup>272</sup> See *id.*

<sup>273</sup> See *id.*

<sup>274</sup> 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); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §6, cmt. b. Only some of these issues will be in doubt in any particular case. *See* STRONG, HOW TO WRITE, *supra* note 31, at 39.

<sup>275</sup> See Lloyd et al., *supra* note 3, at 31.

<sup>276</sup> See GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.

<sup>277</sup> See GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.

<sup>278</sup> See Aldisert et al., *supra* note 110, at 26. 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 87, Rule A-3 (providing for thirty days); CPR Appellate Rules, *supra* note 87, Rule 2.1 (providing for thirty days); JAMS Appellate Rules, *supra* note 87, Procedure B(i) (providing for fourteen days).

<sup>279</sup> See Lloyd et al., *supra* note 3, at 29-30.

wish to establish the provenance of the dispute so as to demonstrate that appellate jurisdiction exists.<sup>280</sup>

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.<sup>281</sup> 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.<sup>282</sup>

“How” can be interpreted in two ways. First, “how” can refer to the manner in which the issue reached the arbitrator.<sup>283</sup> 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.<sup>284</sup>

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.<sup>285</sup> 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.<sup>286</sup>

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.”<sup>287</sup> 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.<sup>288</sup> Disputes with multiple opinions offer similar opportunities for confusion, which suggests a heightened need for a well-written orientation paragraph.<sup>289</sup>

<sup>280</sup> See Aldisert et al., *supra* note 110, at 26.

<sup>281</sup> See GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.

<sup>282</sup> See GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.

<sup>283</sup> See GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.

<sup>284</sup> See Lloyd et al., *supra* note 3, at 29-30.

<sup>285</sup> See GEORGE, *supra* note 73, at 301; MAILHOT & CARNWATH, *supra* note 31, at 53; Lloyd et al., *supra* note 3, at 35 (“The award must contain, often at the very end, a section containing the dispositive part of the award.”).

<sup>286</sup> Aldisert et al., *supra* note 110, at 27 (quoting B.E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* §57, at 93 (1977)).

<sup>287</sup> MAILHOT & CARNWATH, *supra* note 31, at 54.

<sup>288</sup> See SUPREME COURT OF OHIO, *supra* note 128, at 150 (containing example).

<sup>289</sup> See Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L. J. 1, 7-10 (2011) (discussing the difficulties associated with plurality opinions); Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933, 935-37 (2013) (same).

Although the orientation section is comprehensive in scope, it should be very brief.<sup>290</sup> Learning to write a good orientation takes practice, and even experienced arbitrators spend considerable time getting the wording just right.<sup>291</sup> 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.<sup>292</sup> This section focuses exclusively on legal issues, since factual issues are considered separately.<sup>293</sup>

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.<sup>294</sup> 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.<sup>295</sup> 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.<sup>296</sup> 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.”<sup>297</sup> 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.<sup>298</sup>

Some disputes present more than one legal issue.<sup>299</sup> 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.<sup>300</sup> 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

<sup>290</sup> See Aldisert et al., *supra* note 110, at 26.

<sup>291</sup> See *id.*

<sup>292</sup> See *id.* at 28.

<sup>293</sup> 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 Wales); STRONG & DESNOYER, *supra* note 48, chs. 4-5 (discussing legal education in the United States).

<sup>294</sup> See STRONG, HOW TO WRITE, *supra* note 31, at 69, 81.

<sup>295</sup> See Aldisert et al., *supra* note 110, at 28. Adjudicative facts are those that are adduced through evidence at trial. See, e.g., FED. R. EVID. 201, advisory committee note (a).

<sup>296</sup> See Aldisert et al., *supra* note 110, at 28.

<sup>297</sup> *Id.*

<sup>298</sup> See Cooper, *supra* note 222, at 470 (noting the civil lawyer’s need to “systematize”); see also ZWEIGERT & KÖTZ, *supra* note 67, at 259.

<sup>299</sup> See STRONG, HOW TO WRITE, *supra* note 31, at 42-43 (discussing cases with multiple causes of action and/or multiple party pairings); Aldisert et al., *supra* note 110, at 28.

<sup>300</sup> See Aldisert et al., *supra* note 110, at 28-29.

how those changes came about (for example, through a party amendment to the pleadings or as a result of a decision by the arbitrator).<sup>301</sup>

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.<sup>302</sup> 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.<sup>303</sup> Furthermore, it is important to separate the arguments of the parties from the legal conclusions identified by the arbitrators.<sup>304</sup>

Awards generated by appellate arbitration need to include one additional item, namely a brief description of the appropriate standard of review.<sup>305</sup> 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.<sup>306</sup>

### *c. Statement of facts (narratio)*

All reasoned rulings, be they judicial or arbitral, must include a statement of the relevant facts.<sup>307</sup> 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.<sup>308</sup> 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.<sup>309</sup>

A well-written factual analysis “requires an identification of resemblances, which we may call positive analogies, and differences, which we may call negative analogies.”<sup>310</sup> 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

<sup>301</sup> See Lloyd et al., *supra* note 3, at 31.

<sup>302</sup> See GEORGE, *supra* note 73, at 167; Aldisert et al., *supra* note 110, at 29; see also MAILHOT & CARNWATH, *supra* note 31, at 51 (noting “if the plaintiff is in favour of a proposition the reader can usually infer the defendant is against it”); *supra* notes 197-218 and accompanying text.

<sup>303</sup> See GEORGE, *supra* note 73, at 295; Aldisert et al., *supra* note 110, at 29.

<sup>304</sup> See Lloyd et al., *supra* note 3, at 33.

<sup>305</sup> See Aldisert et al., *supra* note 110, at 30-31.

<sup>306</sup> See *supra* notes 166-71 and accompanying text.

<sup>307</sup> See Aldisert et al., *supra* note 110, at 24; Lloyd et al., *supra* note 3, at 32.

<sup>308</sup> 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.”).

<sup>309</sup> See Baudenbacher, *supra* note 234, at 348-49 (discussing the hermeneutical nature of contemporary civil law analysis); see also *supra* notes 221-23 and accompanying text.

<sup>310</sup> ALDISERT, *supra* note 263, at 136.



confusion about the scope of the legal principle enunciated in the award.<sup>311</sup> As a result, “[o]nly material, adjudicative facts” should be reflected in the award.<sup>312</sup>

To determine what facts are material, an arbitrator must look to the substantive law controlling that issue.<sup>313</sup> Only “facts that might affect the outcome of the suit under the governing law” can be considered material.<sup>314</sup> Focusing on facts “that are truly essential as opposed to those that are decorative and adventitious” allows the “conclusion . . . to follow so naturally and inevitably as almost to prove itself.”<sup>315</sup>

When summarizing the facts, arbitrators must ensure the accuracy of each individual element.<sup>316</sup> “While the author may interpret the law liberally or strictly, he [or she] must not take this kind of liberty with the facts.”<sup>317</sup> As a result, arbitrators should avoid adopting any proposed findings of facts submitted by the parties, both to minimize error and to prevent claims that the arbitrator did not exercise independent judgment when reviewing the facts.<sup>318</sup>

When describing the material facts, an arbitrator needs to do more than simply recount the evidence.<sup>319</sup> Instead, the award must “set out express findings of fact showing how the . . . [arbitrator] reasoned from the evidentiary facts to the ultimate fact” that decides a particular

<sup>311</sup> See Aldisert et al., *supra* note 110, at 31.

<sup>312</sup> *Id.*

<sup>313</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (considering materiality in the context of a motion for summary judgment). Different jurisdictions may adopt different definitions as to the materiality of a certain issue. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), Brief of the International Chamber of Commerce et al. as Amicus Curiae in Support of Respondents, at 24 (noting the different definitions of materiality under U.S. and Swiss law).

<sup>314</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (considering materiality in the context of a motion for summary judgment); see also *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006); *Willis v. Roche Biomedical Lab., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995); *Buirkle v. Hanover Ins. Co.*, 832 F. Supp. 2d. 469, 471-73, 489 (D. Mass. 1993); *People v. White*, 308 N.W.2d 128, 131-32 (Mich. 1981); ALDISERT, *supra* note 263, at 137. For examples from both U.S. and English law, see *id.* 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)).

<sup>315</sup> Aldisert et al., *supra* note 110, at 31-32 (quoting Benjamin N. Cardozo, *Law and Literature*, 14 YALE L.J. 705 (1925)); see also ALDISERT, *supra* note 263, at 138-40. In some ways, the task of deciding what constitutes a material versus non-material fact is not as difficult as it seems, since an arbitrator has been considering those issues throughout the proceedings. 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)

<sup>316</sup> See Aldisert et al., *supra* note 110, at 33.

<sup>317</sup> GEORGE, *supra* note 73, at 164.

<sup>318</sup> See *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 County*, 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. See *id.* at 707-27. Arbitrators could be subject to a similar charge if they copy parties’ proposals too closely.

<sup>319</sup> See GEORGE, *supra* note 73, at 194-95.

legal issue.<sup>320</sup> While experts often suggest a chronological approach to the factual analysis, some disputes lend themselves to another type of organizational structure.<sup>321</sup>

If witnesses testified at the hearing, the arbitrator should address issues of credibility.<sup>322</sup> However, the award does not need to list all of the witnesses who have appeared.<sup>323</sup> Instead, it is sufficient to “identify the undisputed facts and make findings of those in dispute, all within the rubric of pertinence. It is important to make findings of credibility when establishing the probative force of a witness’ testimony, and to give reasons.”<sup>324</sup>

Some authorities believe that the summary of facts should precede the summary of legal issues, although there is no consensus on that point.<sup>325</sup> Ultimately, the order of the various sections is a matter of logic and individual preference.<sup>326</sup> 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.<sup>327</sup> Sections can be rearranged later, during the editing process.<sup>328</sup>

#### *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.<sup>329</sup> 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.<sup>330</sup>

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

<sup>320</sup> *Id.* at 195 (discussing an example). The arbitrator “must formulate the ultimate or conclusionary fact by scrutinizing the evidentiary facts.” *Id.* (discussing judicial practices).

<sup>321</sup> See MAILHOT & CARNWATH, *supra* note 31, at 48.

<sup>322</sup> See *id.* at 50.

<sup>323</sup> See *id.*

<sup>324</sup> *Id.*

<sup>325</sup> See Aldisert et al., *supra* note 110, 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.

<sup>326</sup> See Aldisert et al., *supra* note 110, at 28, 33.

<sup>327</sup> See MAILHOT & CARNWATH, *supra* note 31, at 45-47; Aldisert et al., *supra* note 110, at 28.

<sup>328</sup> See Aldisert et al., *supra* note 110, 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).

<sup>329</sup> See Aldisert et al., *supra* note 110, at 34.

<sup>330</sup> 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 263, at 3 (discussing FLAC (facts-law-application-conclusion) in Australia).

begin by addressing that element.<sup>331</sup> 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.<sup>332</sup> 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.”<sup>333</sup>

When drafting an award, an arbitrator needs to be aware of the various ways that reasoned awards differ from written advocacy.<sup>334</sup> 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.<sup>335</sup>

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.<sup>336</sup> 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.<sup>337</sup>

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.”<sup>338</sup> Although “[t]he legal conclusion should cover each of the legal elements required to decide the case,”<sup>339</sup> 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.”<sup>340</sup> Furthermore, a well-drafted legal analysis

<sup>331</sup> See MAILHOT & CARNWATH, *supra* note 31, at 51.

<sup>332</sup> See *id.*

<sup>333</sup> *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”); Aldisert et al., *supra* note 110, at 34.

<sup>334</sup> MAILHOT & CARNWATH, *supra* note 31, at 52.

<sup>335</sup> *Id.*; see also ALDISERT, *supra* note 263, at 157-66 (discussing inductive and deductive reasoning).

<sup>336</sup> See Aldisert et al., *supra* note 110, at 34; Fontaine, *supra* note 3, at 36-37. Arbitrators may also need to discuss any concurring or dissenting opinions. See Arroyo, *supra* note 120, 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.

<sup>337</sup> See GEORGE, *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); Rogers, *Vocation*, *supra* note 21, at 987-88.

<sup>338</sup> Kent Greenawalt, *The Enduring Significance of Legal Principles*, 78 COLUM. L. REV. 982, 990 (1978); see also Aldisert et al., *supra* note 110, at 36.

<sup>339</sup> GEORGE, *supra* note 73, at 195.

<sup>340</sup> *Id.* at 13. But see *supra* notes 137-40 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

“should not be a recitation of the case [or statutory] authorities, but rather their specific application to the precise issues raised by the case.”<sup>341</sup> “In drawing a legal conclusion it is important to identify the factual elements necessary to support that conclusion.”<sup>342</sup>

When undertaking a legal analysis, an arbitrator faces three possible scenarios.<sup>343</sup> 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.”<sup>344</sup> Here, the arbitrator needs to identify a controlling principle from a series of cases or statutes.<sup>345</sup> Once the controlling principle of law is determined, that principle must then be interpreted and applied to the facts of the case.<sup>346</sup>

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.<sup>347</sup> This type of concern arises most frequently in cases involving statutory construction.<sup>348</sup> 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.<sup>349</sup>

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.<sup>350</sup> Once that task is complete, the arbitrator can apply the governing law (as chosen and interpreted) to the facts that have been established.<sup>351</sup>

attempt to resolve future problems.” GEORGE, *supra* note 73, at 13; *see also id.* at 233-34 (discussing the advantages and disadvantages of so-called “lecturing” decisions).

<sup>341</sup> GEORGE, *supra* note 73, at 195; *see also* STRONG & DESNOYER, *supra* note 48, ch. 5.

<sup>342</sup> GEORGE, *supra* note 73, at 234.

<sup>343</sup> These scenarios are reminiscent of Cardozo’s taxonomy of legal disputes, although the two analyses are not identical. *See supra* notes 196-218 and accompanying text.

<sup>344</sup> Aldisert et al., *supra* note 110, at 35.

<sup>345</sup> *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 196, at 142-45 (citing FRANÇOIS GÉNY, *MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF*, vol. II (1919)).

<sup>346</sup> *See* Aldisert et al., *supra* note 110, at 35.

<sup>347</sup> *See id.*

<sup>348</sup> *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).

<sup>349</sup> *See* Aldisert et al., *supra* note 110, at 35.

<sup>350</sup> *See id.*

<sup>351</sup> *See id.*

As the preceding suggests, different types of disputes not only demand different types of analyses but also generate different type of awards.<sup>352</sup> In deciding how best to draft an award, an international arbitrator must not be afraid of exercising his or her judgment and discretion.<sup>353</sup> However, arbitrators “must not rely on value judgments to the exclusion of reasoned analysis.”<sup>354</sup> 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.”<sup>355</sup>

*e. Conclusion indicating the holding or disposition (peroratio)*

The final section of a reasoned award involves the holding or disposition of the dispute.<sup>356</sup> In judicial opinions, this section usually constitutes “a single paragraph or sentence at the end” of the award.<sup>357</sup> 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.<sup>358</sup> 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.<sup>359</sup>

The dispositive section of the award is usually relatively formulaic so as to avoid any possible misunderstandings.<sup>360</sup> Arbitrators must be sure to address all alleged claims and defenses, since the doctrine of *functus officio* may make it difficult if not impossible to go back and address any gaps that have been left.<sup>361</sup> 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.<sup>362</sup>

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.<sup>363</sup> However, existing appellate

<sup>352</sup> See also *supra* notes 196-218 and accompanying text.

<sup>353</sup> Arbitrators have long been selected for their ability to exercise appropriate discretion. See William W. Park, *The 2002 Freshfields Lecture – Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT’L 279 nn.2-3 (2003).

<sup>354</sup> Aldisert et al., *supra* note 110, at 37.

<sup>355</sup> Lloyd, *supra* note 3, at 40.

<sup>356</sup> See Aldisert et al., *supra* note 110, at 24.

<sup>357</sup> GEORGE, *supra* note 73, at 176.

<sup>358</sup> See Lloyd et al., *supra* note 3, at 35-37.

<sup>359</sup> 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.*

<sup>360</sup> See *id.* at 34-37 (including model language).

<sup>361</sup> See Gaitis, *supra* note 9, at 12.

<sup>362</sup> See Aldisert et al., *supra* note 110, at 38.

<sup>363</sup> See GEORGE, *supra* note 73, at 302-04; Aldisert et al., *supra* note 110, at 38.



rules suggest that appellate arbitrators do not have the power to remand a matter to the original tribunal.<sup>364</sup>

The conclusion should also include any formalities that are required as a matter of national or international law.<sup>365</sup> 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.<sup>366</sup>

## V. 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.<sup>367</sup> 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.<sup>368</sup> Unfortunately, the arbitral community has adopted the view that international arbitrators can become competent in award writing simply through "observation, exposure, participation and experience."<sup>369</sup>

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.<sup>370</sup> 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.<sup>371</sup>

<sup>364</sup> See AAA Appellate Rules, *supra* note 87, 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 87, Rule 8.2(b) ("The Tribunal does not have the power to remand the award."); JAMS Appellate Rules, *supra* note 87, Procedure D ("The Panel may not remand to the original Arbitrator(s) . . .").

<sup>365</sup> See Lloyd, *supra* note 3, at 41; Lloyd et al., *supra* note 3, at 37.

<sup>366</sup> See Lloyd et al., *supra* note 3, at 37 (suggesting the phrase "Place of Arbitration" should be used to designate the arbitral seat rather than the more archaic "Done at").

<sup>367</sup> See *Hart v. Massanari*, 266 F.3d 1155, 1176-77 (9th Cir. 2001); see *supra* note 38 and accompanying text.

<sup>368</sup> McGill University in Canada is one of the few institutions that teaches law on a transsystemic basis. See Bédard, *supra* note 11, at 239; see also McGill University, Paul-André Crépeau Centre for Private and Comparative Law, <http://www.mcgill.ca/centre-crepeau/transsystemic/>.

<sup>369</sup> See Jones, *supra* note 19, at 281.

<sup>370</sup> See Strong, *Judicial Education*, *supra* note 23, at \_\_; see also Symposium, *Judicial Education and the Art of Judging: From Myth to Methodology*, 2012 J. DISP. RESOL; *supra* note 38 and accompanying text.

<sup>371</sup> See Strong, *Judicial Education*, *supra* note 23, at \_\_; THOMAS, *supra* note 262, at 113.

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.<sup>372</sup> 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.<sup>373</sup> 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.<sup>374</sup> Second, experts have noted that that “no selection method can guarantee the continued fitness” of an adjudicator.<sup>375</sup> 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.<sup>376</sup>

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.<sup>377</sup> 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.<sup>378</sup> 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.<sup>379</sup>

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.<sup>380</sup> Similar initiatives have met with significant resistance in

<sup>372</sup> See Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 62 (2010). However, it is also likely that market forces and concerns about predictability will limit the number of arbitrators who are chosen on a regular basis. See *id.* at 68.

<sup>373</sup> See *id.* at 62 (applying a law and economics approach to arbitrator appointment); Rogers, *Transparency*, *supra* note 65, at 1316-17.

<sup>374</sup> 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/>.

<sup>375</sup> Wayne Doane, Note, *The Membership of Judges in Gender Discriminatory Clubs*, 12 VT. L. REV. 459, 461 (1987); see also Keith R. Fisher, *Education for Judicial Aspirants*, 54 AKRON L. REV. 163, 164 (2010).

<sup>376</sup> Fisher, *supra* note 374, at 164.

<sup>377</sup> See *supra* notes 13-36 and accompanying text.

<sup>378</sup> See *supra* note 262 and accompanying text.

<sup>379</sup> See ARMYTAGE, *supra* note 34, at 149; KNOWLES, *supra* note 45, at 45-49; see also *supra* note 36 and accompanying text.

<sup>380</sup> See David Lord Hacking, *Ethics, Elitism, Eligibility: A Response – What Happens if the Icelandic Arbitrator Falls Through the ICC?* 15 J. INT’L ARB. 73, 77 (1998).

the judicial context on the grounds that such measures were somehow “insulting,” and similar types of objections can be anticipated in the arbitral context.<sup>381</sup> However, mandatory minimums in arbitrator education would be consistent with other efforts to improve the quality of international commercial arbitration.<sup>382</sup> 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.<sup>383</sup>

At this point, international commercial arbitration is considered to be one of the legal world’s most remarkable success stories,<sup>384</sup> 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.<sup>385</sup> 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.<sup>386</sup> 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.<sup>387</sup> Hopefully this Article has proven useful in that regard.

<sup>381</sup> See National Judicial Education Program, Testimony to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct 15 (Apr. 2004), *available at* [http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/Comm\\_Code\\_HechtSchafraan\\_0504ddt.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/Comm_Code_HechtSchafraan_0504ddt.authcheckdam.pdf) (“Mandatory judicial education is a vexed question. Many judges find it insulting and strenuously oppose it.”). Concerns have also been raised about whether and to what extent a mandatory educational regime would infringe on judicial independence, although those questions can easily be answered. See Strong, *Judicial Education*, *supra* note 23, at \_\_\_\_.

<sup>382</sup> See Rogers, *Have-Nots*, *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](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx).

<sup>383</sup> See Stephen V. Burks et al., *Overconfidence and Social Signalling*, 2013 REV. ECON. STUD. 1, 4 (2013); Garner, *supra* note 27 (discussing the problem of judicial overconfidence); Strong, *Judicial Education*, *supra* note 23, at \_\_\_\_ (discussing sociological studies regarding overconfidence and the illusion of competence).

<sup>384</sup> See BORN, *supra* note 2, at 73.

<sup>385</sup> See Hacking, *supra* note 379, at 75; Ten Cate, *supra* note 6, at 1148-49; *see also* Queen Mary, University of London, 2013 International Arbitration Survey, Corporation Choices in International Arbitration: Industry Perspectives 5, 7 (2013), <http://www.arbitration.qmul.ac.uk/docs/123282.pdf>.

<sup>386</sup> See BORN, *supra* note 2, at 73; *see also supra* note 5.

<sup>387</sup> 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.