

Chapter 6

Reasoning in Arbitral Awards: Why? How?

Control and Sanction under Swiss Law

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I.

INTRODUCTION

The 2013 Swiss Arbitration Association (ASA) Annual Conference was entitled “Ius Comparatum Inside the Black Box: How Arbitral Tribunals operate and Reach their Decisions”. Dr Bernhard Berger, a renowned expert in the field, introduced the theme as follows:

(..) from the parties' perspective, you know the arguments and motions put forward in the proceedings, that is the input; you can see the result in the form of the dispositive section of the award, that is the output; and you can try to understand the reasons given for the decision in the award, that will be the transfer element. All the rest that may have happened in the deliberations remains undisclosed and undiscovered: for example, is there a relatively mild decision on the quantum of damages as a bargaining chip for the unanimous affirmation of liability?¹

This question raises that of the reasoning of the award: how extensive and/or complete must it be for the process to be fully comprehensible and thus legitimate to the parties and in particular to the losing party?

The requirement that, unless otherwise agreed by the parties, the award ‘shall state the reasons upon which it is based’ is a widely recognized principle in international arbitration. It is expressly formulated in the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law)² and in the vast majority of national laws, be they Model Law inspired³ or not⁴. The principle is likewise expressed in almost all international arbitration rules⁵.

The first question that arises in this respect is straightforward: ‘why’ is this requirement deemed to be so important as to be expressed everywhere (*infra*, section II)?

In the absence of any legal or regulatory directions as to the content of the legal or regulatory duty to provide reasons for the award, the second question that inevitably arises is clearly ‘how’ can the requirement be met in a way that satisfies the principles which form the basis of the requirement and thus the user (*infra*, section III)?

The last question that requires our attention is the court’s approach which, in certain cases, may sanction to an unsatisfactory reasoning. This question will be addressed later, regarding in particular the Swiss Supreme Court’s jurisprudence (*infra*, section IV).

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II.

REASONING IN ARBITRATION: WHY?**II.A. As Source of Legitimacy of the Decision⁶**

Immanuel Kant (Germany, 1724-1804), one of the greatest philosophers of all times, was the first to apply to philosophy the idea of astronomer Nicolas Copernic that the Earth was not the centre of the universe (as believed in those times), but rather that the sun was at the centre while the Earth moved around it. This concept entirely changed the way of thinking⁷: the centre of the human world was no longer the egocentric 'I' but rather my relation to 'You' so as "*Ius Comparatum* to treat humanity, whether in thine own person or in that of any other, in every case as an end, never as means only."⁸ For Kant, we treat people as an end whenever our actions towards them reflect their inherent value⁹.

The concept is mirrored in the conclusion reached at the outcome of the Alexandrine Day dedicated to Philippe Fouchard on 28 April 2005: the economic and the business world cannot survive without ethics and the survival of capitalism and liberalism is subject to the condition that the human being is not forgotten.

Jürgen Habermas, another renowned philosopher (Germany, 1929-), follows Kant's way of thinking in putting forward the principle of publicity, namely the requirement of a critical and public use of the reason. This principle comes within the broader frame of the deliberative democracy. For the German philosopher, a decision is legitimate only insofar as it results from a legitimate process called "deliberative process" consisting in the manner in which the problems have been formulated and the way the solutions have been evaluated being made public. This principle is said by Kant to be a source of lawfulness against despotism. It stands up against the decision-maker model put forward by Jean-Jacques Rousseau that states that the source of the decision is sufficient for guaranteeing its legitimacy.¹⁰

The concept was precisely addressed by the Swedish Supreme Court in a decision from 2009:

[a] description of sufficient reasoning in an arbitration award constitutes a guarantee of legal certainty, since it forces the arbitral tribunal to analyse the legal issues and the evidence.¹¹

As a result, I would dare to reformulate the question put to this panel in wondering *what are the users entitled to?*

II.B. Reasoning as evidence of comprehension

As suggested above, the first objective for the decision maker would be the entities/individuals concerned—the parties—to be considered and seen to be considered as an end so that to reflect their inherent value. Such an objective is inherent to the process of evaluation the addressee of the decision is legitimately entitled to and entitled to have knowledge of.

In that regard, and as put by the renowned contemporary French Philosopher Edgar Morin, "*Ius Comparatum* information does not provide understanding". When we really attempt to understand each other, again always according to Morin, there are three types of comprehension:

- (i) The 'objective comprehension', namely the understanding of the explanation provided. This type of comprehension assembles data and objective information concerning a person, a behaviour or a situation;
- (ii) The 'subjective comprehension', "Ius Comparatum that is from subject to subject, from person to person". This comprehension is more emotional, enabling us to understand another person's motivations and feelings;
- (iii) The 'complex comprehension', which includes both objective and subjective comprehension. This complex comprehension tends to avoid reducing a person to one single trait or see him/her, or if it is a group, in only one light. It tends to encompass the various dimensions of the person or entity and the multiplicity of his/her/its various roles.¹²

Morin's approach can easily be transposed into the international business arena in general and the resolution of international disputes in particular as a practical tool to prevent parties' dissatisfaction with the way decisions are drafted and communicated.

Inspiration can be drawn in this respect from the contents of judgments issued by different judicial bodies. For example, the Swiss Federal Tribunal generally sets out in the first place the reasons why the recourse must fail or succeed. The Federal Tribunal thereafter addresses all the other defences addressed by the parties in explaining how and why such defences cannot alter the decision made. This is precisely the methodology suggested by Morin in that it includes a proper and independent reasoning on (all) the arguments a party has considered as relevant for its case despite the fact that these very same arguments were not held as such for the decision maker.

II.C. Reasoning as Evidence of the Abeyance to the Parties Fundamental Right to Due Process

As put by the then deputy president of the UK Supreme Court, Lord Hope of Craighead, in an (unpublished) lecture on legal reasoning:¹³

Clear reasoning and analysis are basic requirements in judicial decisions and an important aspect of the article 6 [of the European Convention on Human Rights] right to a fair trial.

The reader, whoever he or she is, should be able to understand what led us to the conclusions that we have reached.

[The judgment] has to satisfy the rule of law that says that the litigant has a right to know why he has won or lost his case.

The key is to think of your audience and to imagine yourself having to justify your reasoning to it face to face. Although you are setting out your conclusions on paper, the techniques are those that you might want to use if you were having to debate the issue orally. There is no need to go on at length if the point can be made quite simply. But there are some borderline cases where it is worth making the effort to reason the arguments out point by point.

II.D. Reasoning as a Tool Necessary for Court Scrutiny

Last but not least, reasoning is generally the only means a court disposes of to verify the award compliance with the basic principles of validity and enforceability under the UNCITRAL Model Law¹⁴ and the 1958 Convention

on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)¹⁵, in particular of the parties' right to be heard and the non-violation of public policy principles.

III.

REASONING IN ARBITRATION: HOW?

Following the principle of publicity set forth by the German philosopher Habermas, what may have happened in the deliberations should be made known to the parties. This is precisely what the reasoning should serve to do, namely, to communicate to the parties the manner in which the problems have been formulated and the way the solutions have been evaluated by the tribunal.

Put differently, it is the author's view that the award can be held as legitimate by the parties to the extent that they can be satisfied that the tribunal has addressed all the problems they hold as relevant to the decision to make, and this, in a full and comprehensive way.

This approach puts the focus on the deliberation process and the way it could be made visible to, or even shared with, the parties.

The parties' views with respect thereto can constitute a very efficient tool, for instance in response to the Arbitral Tribunal identifying as soon as possible in the proceedings both the key questions to be decided and the methodology by which the decisions must be arrived at.¹⁶ Such a consultation process can permit the parties to make sure their concerns are being considered and to comment as the case may be on the methodology that will be followed to resolve them.

Another component of the decision-making process that can constitute an important indication on the tribunal's approach to the issues at stake consists in the document production process, or more broadly put, the issue of the burden and weighing of the evidence. More often than not, this issue is simply referred to in the terms of reference or in the first procedural order by reference to existing rules, such as the so-called IBA Rules¹⁷ or the Prague Rules,¹⁸ without further ado. Here again, a real debate at the outset of the proceedings can considerably enhance the transparency of the way the evidence will be considered and weighed by the tribunal, possibly leading to a general agreement between the protagonists. Such a debate would also present the advantage of having the rules of the game clearly established, which, as practice shows, is not so obvious (e.g. obligation, or lack of obligation, to produce documents adverse to one's position).

To sum up, I believe that a decision will be deemed legitimate to the parties concerned, if the reasoning is the express outcome of deliberations led with as much transparency as possible. In the paragraphs above I have suggested some tools to that end; there surely exist others.

IV.

CONTROL AND SANCTION OF THE TRIBUNAL'S REASONING

IV.A.

Introduction

The generally recognized legal duty to provide reasons for the award finds support in particular in the control exercised by the courts of the validity of the award and/or of its recognition and enforcement.

The chapter that follows will specifically concentrate on the control exercised by the Swiss Supreme Court as an illustration of one of the modern legislations and approaches to the security of a valid and enforceable award.

IV.B. The Requirement of Reasons

The requirement for awards to be supported by reasoning is expressed in Article 189.2 of the Swiss Private International Law Act (PILA) that reads as follows:

The arbitral award shall be rendered in conformity with the rules of procedure and in the form agreed upon by the parties.

In the absence of such an agreement, the arbitral award shall be made by a majority, or, in the absence of a majority, by the chairman alone. The award shall be in writing, supported by reasons, dated and signed. The signature of the chairman is sufficient.¹⁹

This legal provision calls for three major considerations:

- (i) First, the obligation to provide reasons—as it is the case for state courts—is restricted to allowing a party to understand the main reasons supporting the decision and to assess the possibilities of appeal.²⁰
- (ii) Secondly, the obligation only applies to awards, namely decisions which, for procedural or substantive reasons, end the arbitral proceedings in respect of all (final awards) or part (partial awards) of the claims and are subject to annulment proceedings.²¹ The qualification of a decision as an award depends on its content rather than on its formal designation by the arbitral tribunal. Therefore, a ‘procedural order’ which rules on substantive issues needs to be motivated as per Article 189 PILA;²² similarly, an ‘order’ that closes the proceedings has to be considered as an award with the legal requirement of an explicit motivation.²³ By contrast, orders on provisional measures which can be lifted or modified at any time during the proceedings do not fall under the scope of application of the legal provision mentioned and therefore would not be subject as a matter of principle to the requirement of reasoning.²⁴
- (iii) Thirdly, the parties are entitled to waive the requirement of the reasoning in the award any time during the proceedings and after the notification of the dispositive part of an award.²⁵ The waiver may also occur by conclusive acts.²⁶

Moreover, it has to be stressed that the waiver to the reasoning does not amount to a waiver of the possibility to apply for the setting aside of the award,²⁷ even though such a waiver impairs significantly the chances for a party to have an award annulled.²⁸ Similarly, a waiver does not impair the parties’ right to have the award enforced.²⁹

IV.C. The Control

IV.C.1. The Grounds for Annulment under Swiss Law

Article 190.2 PILA sets forth the list of the grounds for annulment of international awards as follows:

The award may only be annulled:

- a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
- b) if the arbitral tribunal wrongly accepted or declined jurisdiction;
- c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
- d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
- e) if the award is incompatible with public policy.

The Supreme Court's jurisprudence has constantly affirmed in the first place that given the lack of, or insufficient reasoning not being included in the exhaustive list of grounds under Article 190.2 PILA, it cannot therefore *per se* constitute a ground for annulment of the award.³⁰

The Supreme Court has also constantly held that the lack of reasoning is not 'in and of itself' incompatible with public policy³¹ including in the context of recognition and enforcement of awards.³² Even an intrinsic inconsistency in the reasons of the award or a contradiction between the reasons and the dispositive is not covered by the concept of public policy under Article 190.2 PILA.³³

The lack of reasoning has however been found to be relevant in the context of the parties' right to be heard under Article 190.2(d) PILA which requires in particular that the arbitral tribunal, while under no obligation to provide an express and reasoned decision on a given request,³⁴ is under a minimum duty to examine and dispose of the issues that are both material and relevant to the outcome of the case. This duty is violated when, by oversight or misunderstanding, the arbitral tribunal fails to consider factual allegations, arguments, evidence and offers of evidence presented by a party and which are important for the decision to be rendered.³⁵

The lack of reasoning can, however, be overcome by the tribunal itself which—under Swiss law—is entitled to submit a determination in response to the recourse, by either explaining that the issue was considered as not decisive or that the argument was implicitly dismissed.³⁶

Finally, as rightly emphasised by the Swiss Supreme Court, lack of (or by extension insufficient) reasoning is susceptible to "Ius Comparatum considerably reduce the chances of success of a recourse".³⁷

V.

CONCLUSION

It is this author's conviction that what the parties need (the winner also wants to understand the reasons for its victory that can have an important impact on the business at stake) is what Dr Berger mentioned at the outset of the ASA Conference: information on the deliberations, more precisely on the manner in which the problems and the solutions have been identified and evaluated.

The only practical response to this concern is, in my view, in the deliberative process being made public as set forth by Habermas, precisely having the parties participate as much as feasibly possible in the setting up of the mechanism itself and the way it will be run. Put differently, the parties should be involved in identifying, on the one hand, the issues that must be

considered to ensure both objective and subjective comprehension and, on the other hand, the methodology (including on the weighing of evidence) that will be followed by the tribunal.

The reasoning of the award would then just mirror the results reached by applying a methodology shared with, or at least known to, the parties beforehand.

This is what in my opinion the users are entitled to.

NOTES

1. Berger, Bernhard, "The Legal Framework: Rights and Obligations of the Arbitrators in the Deliberations", in *Berger, Bernhard and Schneider, Michael E. (eds.), "Inside the Black Box; How Arbitral Tribunals Operate and Reach their Decisions", ASA Special Series No. 42 (2014), p. 7.*
2. UNCITRAL Model Law, Article 31.2.
3. e.g., in Switzerland, Swiss Private International Law Act, Article 189.2.
4. e.g., in China, Arbitration Law of the People's Republic of China, Article 54.
5. e.g., ICC Rules, Article 32.2; LCIA Rules, Article 26.2.
6. The chapter that follows is partly inspired from the author's speech delivered at the Annual Meeting of the American Arbitration Association's Board of Directors in Montreal on 5 May 2011, published as Giovannini, Teresa, "Philosophy Can Help Tribunals Draft Awards that Parties Will Accept as Legitimate", *International Arbitration*, May/July 2011, p. 78 et seq.
7. *13 Encyclopaedia Universalis*, p. 260.
8. *id.*, p. 265.
9. Internet Encyclopedia of Philosophy, Ethics, available at: <https://www.iep.utm.edu/ethics/>.
10. Wikipedia, Jürgen Habermas, available at: https://fr.wikipedia.org/wiki/J%C3%BCrgen_Habermas.
11. Swedish Supreme Court, *Soyak v. Hochtief*, NJA 2009, p. 128, 31 March 2009, cited in Hope, James and Rosengren, Mattias, "A call for Reason", 16 August 2013, Commercial Dispute Resolution, available at: <https://www.cdr-news.com/categories/arbitration-and-adr/a-call-for-reason>.
12. Address by Edgar Morin, *Round Table: Dialogue Among Civilizations*, United Nations, New York, 5 September 2000, Provisional verbatim transcription, available at: www.unesco.org/dialogue/en/morin2.hm.
13. Lord Hope of Craighead, unpublished lecture on legal reasoning, delivered to the Judicial Studies Committee Seminar on 14 November 2011, quoted Hope, James and Rosengren, Mattias, *op. cit. supra*, footnote 12.
14. See UNCITRAL Model Law, Articles 34 and 36.
15. New York Convention, Article V.
16. Bunni, Nael G., "Personal Views on How Arbitral Tribunals Operate and Reach Their Decisions", in *Berger, Bernhard and Schneider, Michael E. (eds.), op. cit. supra*, footnote 2, p. 123.
17. IBA Rules on the Taking of Evidence in International Arbitration, Adopted by a resolution of the IBA Council on 29 May 2010.
18. Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018).
19. PILA, Article 189.
20. Poudret, Jean-François and Besson, Sébastien, "Comparative Law of International Arbitration" (2007), para. 749.
21. See Molina, Martin, "Commentary on Chapter 12 PILA, Article 189", in Arroyo, Manuel (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (2018), p. 243, para. 4, with reference to Lalive, Pierre, Poudret, Jean-François and Reymond, Claude, "Le droit de l'arbitrage interne et international en Suisse" (1989), paras 1-2 at Art. 189, and paras 3-4 at Art. 188; Heini, Anton, in Girsberger, Daniel et al. (eds.), *Zürcher Kommentar zum IPRG* (2004), paras 3-4 at Art. 189; and Wirth, Markus, in Honsell, Heinrich et al. (eds.), *Basler Kommentar Internationales Privatrecht* (2013), paras 2-4 at Art. 189.
22. Molina, Martin, *op. cit. supra*, footnote 22, p. 244, para. 8.
23. SFT 4A_600/2008 of 20 February 2009, E. 2.3:

“(..) pour juger de la recevabilité du recours, ce qui est déterminant n’est pas la dénomination du prononcé entrepris, mais le contenu de celui-ci. De ce point de vue, il n’est pas douteux que, dans sa décision, le TAS ne s’est pas borné à fixer la suite de la procédure. Il y constate que l’avance de frais requise n’a pas été faite dans le délai fixé à cet effet et en tire la conséquence que prévoit l’art. R64.2 du Code, c’est-à-dire la fiction irréfragable du retrait de l’appel. Son prononcé s’apparente à une décision d’irrecevabilité qui clôt l’affaire pour un motif tiré des règles de la procédure.”

In free translation: “(..) in order to assess the admissibility of the appeal, what is decisive is not the name of the pronouncement, but its content. From this point of view, there is no doubt that in its decision the CAS did not limit itself to fixing the rest of the proceedings. It finds that the advance of costs was not paid within the time fixed for this purpose and draws the consequence provided for in art. R64.2 of the Code, that is, the irrevocable withdrawal of the appeal. Its pronouncement is similar to a decision of inadmissibility which closes the case for a procedural reason.”

24. Molina, Martin, *op. cit. supra*, footnote 22, p. 243, para. 7.
25. Berger, Bernhard and Kellerhals, Franz, “International and Domestic Arbitration in Switzerland” (2015), para. 1543 and fn 8.
26. SFT 5P.315/2003 BGE 130 III 125 of 9 December 2009, E. 2.2.
27. A possibility that is expressly contemplated by Article 190(1) PILA as follows:

[I]f none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).
28. SFT 4A_198/2012 of 14 December 2012 E.2.2.
29. *id.*
30. Molina, Martin, *op. cit. supra*, footnote 22, p. 772, para. 20. See SFT 5P.315/2003 BGE 130 III 125 of 9 December 2009, E. 2.2.; and SFT 4P.26/2005 of 23 March 2005, E.3.2.
31. Berger, Bernhard and Kellerhals, Franz, *op. cit. supra*, footnote 26, para. 1745, with reference to 4P.17/1990 BGE 116 II 373 of 21 August 1990, E.7b.
32. Berger, Bernhard and Kellerhals, Franz, *op. cit. supra*, footnote 26, para. 1745 with reference to BGE 101 IA 521 of 12 December 1975, E.4.
33. See Berger, Bernhard and Kellerhals, Franz, *op. cit. supra*, footnote 26, para. 1788, with reference to SFT 4P.282/2001 BGE 128 III 191 of 3 April 2002, E.6b; SFT 4A_612/2009 of 10 February 2010 E.6.2.2.; SFT 4A_464/2009 of 15 February 2010, E.5.1, holding that the objection based on intrinsic inconsistency of the reasons of an award does not fall under the definition of substantive public policy in the meaning of Article 190.2(e); and 4_A 386/2010 of 3 January 2011, E.8.3.1
34. See, e.g., SFT 4P.26/2005 of 23 March 2005, E.3.2: “une autorité ne viole pas le droit d’être entendu si elle n’examine pas des questions qu’elle n’estime pas décisives, à bon droit, pour la solution du cas”, in free translation: “an authority does not violate the right to be heard if it does not consider issues that it does not deem decisive, rightly, for the solution of the case”; and SFT 4A_468/2007 BGE 134 III 186 of 22 January 2008 E.6., 6.1. and 6.2.
35. See SFT 4A_46/2011 of 16 May 2011, E.4.3.1: annulment of the award as a consequence of an arbitral tribunal’s failure to address the statute of limitation as argued by the aggrieved party for the first time in the post-hearing brief; and SFT 4.A 460/2013 of 4 February 2014, E.3.3: annulment of the award as a consequence of an arbitral tribunal’s failure to consider the contractual exclusion of liability for certain damages, which was expressly invoked in the arbitration. See Berger, Bernhard and Kellerhals, Franz, *op. cit. supra*, footnote 26, para. 1748.
36. See Molina, Martin, *op. cit. supra*, footnote 22, p. 772, para. 21, with reference to SFT 4A_46/2011 of 16 May 2011, E.4.3.1 and others.
37. SFT 4A_198/2012 of 14 December 2012, E.2.2, free translation from French original.