Thou Shalt Avoid Perversity in Reasoning! A Philosophical Account of (Un)reasoned Arbitral Award

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What were the triggers?

1. funny designation – “arbitration (un)friendly” decision/court/jurisdiction
2. awkward provision of Article 31(2) of the UNCITRAL Model law – parties may agree “that no reasons are to be given” in the award
3. intriguing formulation of the Indian Supreme Court - “perversity in reasoning”

Starting intuitions

1. indication of how the professional community of arbitration lawyers portrays its field of expertise – as a branch of law that has to be kept as autonomous as possible from the controlling influences of the state (public) law.
2. does a waiver of the right to a reasoned award somehow imply a waiver of parties' expectation that the arbitrator settles the dispute in a reasonable fashion?
3. if the intuitive response is – NO –then, what would serve as a standard for 'perversity in reasoning' in arbitration law?

Genealogy of Arbitration Decision-Making

- By asking ‘why do we have this or that institution?’, genealogy is in the service of the functional analysis of the studied phenomenon
- The undertaken genealogy was supposed to reveal whether the autonomous status of arbitration decision-making affects in any way the presumed standards of its reasonableness.
- If “to appeal to a judge is to appeal to what is just” (Aristotle), was there ever any different expectation when appealing to an arbitrator?

Initial findings

- While autonomous nature of arbitration stemmed from the virtues of expeditious, informal and less costly procedure, reasons for resorting to arbitration and separating it from the rest of the legal system were never such as to diminish, let alone completely eliminate, parties' legitimate expectation of a fair and reasonable dispute-settlement.
- In short, *agreeing to a reason-less arbitral award is by no means the license to an unreasonable one.*
- Standards of reasonableness apply, *a fortiori,* to cases in which parties do opt for a reasoned award.

On reasonableness (C. McMahon)

1. In the *concession* sense (to be reasonable = to make a concession)
2. In the *competence* sense (to be reasonable = to competently reason)

- "A person is reasoning *competently* in a particular case when his drawing of a conclusion, or generating a *cognitive product* of some other kind, manifests the *proper functioning* of the *relevant mental capacities*."

Reasonable *v.* True conclusion

- Calling one conclusion "reasonable" implies "expressing an unwillingness to move to [its] final acceptance." In doing so, "we are affirming the *prima facie* plausibility of the conclusion in light of the *available evidence (reasons)*."
- In case of certainty that no overturning evidence (reasons) is possible, we would call one conclusion true (correct)!

Two implications:

1. certain threshold level of strength is required (hence, *reasonableness can be graded*)
2. "reasonable" serves as "an epistemic term that marks a certain context-sensitive *justificatory* status."

Reasoning in a legal context

- As for the reasoner's competence, the "relevant capacity" is defined by an additional set of formal requirements (e.g. law degree, bar-exam, status of a judge, solicitor, arbitrator, etc.)
- Legal context is determined by "artificiality" of legal reasoning, which is substantively and institutionally constrained. Substantive constraint implies that legal conclusion can be properly justified only with the help of some valid legal reasons (arguments). Legal decision (e.g. judgment, arbitral award) is the end-result of the process of interpretation and application of valid legal provision(s) in the given institutional setting.
- General epistemic formula: *the provided valid legal reasons (arguments), which justify the decision of the adjudicator (be it judge or arbitrator), must attain a certain threshold level of strength in order for a competent legal reasoner to affirm sufficient reasonableness of the given "cognitive product".*

Towards standards of (un)reasonableness

- Point of departure: Lord Justice Bingham, 'Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award' (1988)
- The private law element in arbitration affects the role of arbitrator and the scope of her concomitant duty of providing reasons:

1. institutional constraint of the finality of arbitral award;
2. substantive constraints of narrow legal grounds for challenging the finality of arbitral award – two forms of review: a) natural-justice-based and b) merits-based.

- Even a cursory comparative overview of global judicial practice demonstrates that, overall, courts act in the arbitration-friendly manner, thereby reaffirming autonomy of arbitration law
- However, some fairly recent court decisions (Spain [2015], Austria [2016], Australia [2010, 2011]) seem to "have set the standard of sufficiency of reasoning higher", thereby prompting some commentators to speak "of a broader trend pursuant to which arbitration has come to increasingly mimic litigation."

Avoiding the trap of 'perversity of reasoning': guidelines

- Point of departure: Sir John Donaldson's definition of a "reasoned award" as "one which states the reasons for the award *in sufficient detail* for the court" to review it.

1. merely putting a heading that indicates that the arbitrator is providing reasoning shall not suffice (e.g. if 'reasoning' boils down to '*inhaltsleere Floskeln'* [Austrian SC]);
2. arbitrator's discretion in interpreting and implementing the applicable law is not absolute (e.g. US doctrine of "manifest disregard for law");
3. in complex international arbitrations, the sufficiency threshold for a reasoned arbitral award shall be deemed at the level closer to the court's judgment (e.g. the threshold "will generally depend upon the nature of the dispute and particular circumstances of the case" [*Westport Insurance Corporation v Gordian Runoff Ltd*, 2011, HCA)