Miodrag Jovanović*

# Thou Shalt Avoid Perversity in Reasoning!

# A Philosophical Account of (Un)reasoned Arbitral Award

## Intro

A 2019 decision of the Indian Supreme Court recognized three distinctive grounds for setting aside arbitral award under the Section 31(3)(a) of the *Indian Arbitration and Conciliation Act*, 1996, which replicates the formulation from Article 31(2) of the UNCITRAL Model law, according to which, "[t]he arbitral tribunal shall state the reasons upon which the award is based".[1] In the Court's opinion, this provision shall be deemed violated if the reasoning of the arbitrator is improper, unintelligible or inadequate. Whereas impropriety reveals "a flaw in the decision-making process", unintelligibility "would be equivalent of providing no reasons at all." Finally, inadequacy has to do with "the degree of particularity of reasoning required having regard to the nature of issues falling for consideration".[2] For the sake of brevity, I will refer to all of them as forms of "perversity in reasoning".[3]

Since majority of jurisdictions have so far followed the UNCITRAL model law,[4] I will try in this paper to philosophically reflect upon this generally endorsed requirement of a "reasoned arbitral award",[5] and more particularly, upon the defect of "perversity in

* Full Professor, Faculty of Law, University of Belgrade

[1] *UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006)* (Vienna: United Nations, 2008)

[2] *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.* Civil Appeal No. 2153 of 2010, 18. December 2019, par. 36.

[3] The Court, on the other hand, attaches this term only to the first form – impropriety of reasoning.

[4] http://internationalarbitrationlaw.com/74-jurisdictions-have-adopted-the-uncitral-model-law-to-date/

[5] My focus will be on arbitral awards in commercial arbitrations. Despite some significant similarities, investment arbitration in many important respects deserves to be treated as a separate field of law. For an overview of differences, *see, e.g.*, Karl-Heinz Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today?' (2012) 28 *Arbitration International* 4: 577-590. When it comes to the topic of this paper, there are some additional differences worthy of noticing: "Reasons seem to be particularly important in the area of international investment law. Unlike international commercial arbitration, which is conducted entirely by and for professionals and whose awards are only rarely published, international investment awards may have a major political impact on an entire country … Thus, the reasons requirement, as a control mechanism in other sectors of arbitration, acquires a greater importance in international investment arbitration. Indeed, these considerations should lead to the drafting of awards that are accessible to reasonably intelligent people and are not so recondite that none but a small group of specialists can comprehend them." Guillermo Aguilar Alvarez and W. Michael Reisman, 'How Well are Investment Awards Reasoned?', in Guillermo Aguilar Alvarez and W. Michael Reisman (eds.), *The Reasons Requirement in International Investment Arbitration – Critical Case Studies* (Leiden: Martinus Nijhoff Publishers, 2008), 2. *Cf.*

reasoning". In everyday language, using this qualification would imply that one's decision, as a product of one's train of thought, is not reasoned (enough), i.e., that it is not based on (sufficient) reasoning.[6] It could also mean that the decision in question is not the result of logical thought. At the same time, the same qualification would have the potential bearing for the very reasoner – that in deciding so and so, one was not acting rationally, i.e., as endued with reasons. More precisely, that one was acting unreasonably, that is, arbitrary.[7]

Is the meaning of this qualification any different when used in the arbitration context to denote the quality of an arbitral award? Immediate caution in drawing such a conclusion might stem from the second part of the provision of Article 31(2), which stands awkwardly in comparison to the rest of the legal world, stating that parties are entitled to agree "that no reasons are to be given." This option, which is telling enough of the autonomous nature of arbitration law, nonetheless prompts one to ask: 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?[8] Put differently, is the option of accepting a reasonless arbitral award to be treated as the license to a potentially unreasonable, i.e. arbitrary decision of the arbitrator? Moreover, is the waiver option somehow to be understood as a general indication of lower standards of reasonableness in arbitration decision-making? If this is too counterintuitive reading, then it is necessary to reflect upon putative standards of expected reasonableness in arbitral decision-making, as a species of the legal decision-making. More specifically, is reasoning in law, including arbitration – logically-wise, or in some other respect – different from reasoning in non-

---

Pierre Lalive, 'On the Reasoning of International Arbitral Awards' (2010) 1 *Journal of International Dispute Settlement* 1: 55-65.

[6] Strictly speaking, while conclusion is a unit of logic, decision is not. "Both decisions and conclusions are required in almost every field of human endeavor, yet the proportions, mutual relations and relative dominance which are appropriate vary greatly from one field to another." John W. Tukey, 'Conclusions vs Decisions' (1960) 2 *Technometrics* 4: 429-43o. In the field of law, judgment or award, as an instance of decision-making, is the end-result of a number of conclusions reached by the decision-maker.

[7] https://wikidiff.com/reasonable/reasoned

[8] In some of the jurisdictions that do not follow UNCITRAL Model law, the non-reasoned arbitral award is in fact a default rule. The US *Federal Arbitration Act* contains no request regarding a reasoned arbitral award. The American Arbitration Association's R-46(b) is somewhat more specific: "The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate." (Commercial Including Procedures for Large, Complex Commercial Disputes Arbitration Rules and Mediation Procedures). Similarly, the *Swedish Arbitration Act* does not require at all that the arbitral award shall be reasoned. Of course, the parties themselves may request a reasoned award. In a case before the Swedish Supreme Court, this has prompted the discussion which standards are to be met in such a situation. I will return to this case.

legal contexts? If so, how does this affect available standards of appraisal of an arbitral award[9] as an instance of "perversity in reasoning", in light of a comparable appraisal of a court's judgment? Moreover, if standards for the latter are increasingly used for the appraisal of the former, what (if anything) can serve as a justifying ground for this trend which seemingly contrasts the perceived autonomy of arbitration law? In the remainder of the paper I will try to tackle each of these questions in the tradition of analytical legal philosophy.[10]

## Autonomy of and Reasonableness in Arbitration Decision-Making: Genealogy

A likely starting qualification of the aforementioned decision of the Indian Supreme Court's decision would be that it is "arbitration unfriendly". This somewhat funny designation, often met at arbitration blogs and portals, is the 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. Surely, every arbitration lawyer knows that perceived autonomy does not imply complete separation, because even private law "is still law", and as such it "carries an inescapable public element with it"[11] (e.g. the arbitrability of dispute, public policy limitation to the enforcement of arbitral award, etc.).[12] What does, then, autonomy of arbitration amounts to and how, if at all, is it related to the topic of our investigation? In order to come up with some insightful findings, I propose to initially rely on the

[9] This appraisal can be given in any of the following two procedures for challenging the arbitral award: parties "may (1) seek redress before the court in the same jurisdiction as the seat of the arbitration to have the award remitted back to the tribunal for reconsideration, set aside, annulled, or (2) challenge the award at the enforcement stage in an appropriate jurisdiction." Simon Sloane, Daniel Hayward and Rebecca McKee, 'Due Process and Procedural Irregularities: Challenges', in Emmanuel Gaillard and Gordon E Kaiser (eds.), *The Guide to Challenging and Enforcing Arbitration Awards* (London: Law Business Research Ltd, 2019), 54.

[10] On the uncontroversial, core content of this branch of jurisprudence, *see, e.g.*, Brian H. Bix, *A Dictionary of Legal Theory* (Oxford: Oxford University Press, 2004), 6. For a more comprehensive elaboration of distinctive tasks of the modern day analytical jurisprudence, *see*, Robert S. Summers, 'The *New* Analytic Jurists' (1966) 41 *New York University Law Review* 5: 861-896.

[11] Claudio Michelon, 'The Public Nature of Private Law?', in Claudio Michelon et al. (eds.), *The Public in Law Representations of the Political in Legal Discourse* (Farnham: Ashgate, 2012), 195.

[12] The relation private-public is so intricate in arbitration law that, in vacating an arbitral award, the Higher Regional Court (OLG) of Frankfurt/Main (court order of 16.01.2020 case no. 26 Sch 14/18) has recently stated in an *obiter dictum* that dissenting opinion of the member of arbitration panel violates the German public policy on account that the internal deliberations of the panel enjoy the protection of confidentiality, which is protected by fundamental principles of German law. For an overview and criticism, *see*, Peter Bert, 'OLG Frankfurt: Dissenting opinion eines Schiedsrichters führt zur Aufhebung des Schiedsspruchs' (June 2, 2020), at www.zpoblog.de/?p=8460

genealogical approach, whose ambition is "to trace the social and cultural factors that have contributed to bringing about the phenomenon in question."[13] It is hoped that the undertaken historical reconstruction and reevaluation will reveal whether the autonomous status of arbitration decision-making affects in any way the presumed standards of its reasonableness.

Already a cursory look at the history of arbitration shows that commercial arbitration was indeed developed independently from the majority of material and procedural rules and principles of the given legal systems.[14] Divergent historical factors contributed to this course of action, but one thing seemed to be constant – "Ancient and modern traders have always felt a great reluctance about becoming involved in litigation."[15] What was from the beginning perceived as the main advantage of arbitration, as a distinctive dispute-settlement tool?[16] An obvious answer – both back then and still nowadays, irrespective of the enormously changed societal contexts – is that parties have

[13] Sylvie Delacroix, *Legal Norms and Normativity – An Essay in Genealogy* (Oxford and Portland: Hart Publishing, 2006), 96. Genealogy is in the service of the functional analysis of the studied phenomenon: "In asking 'why do we have this or that institution?' (and hoping to produce an elaborate answer), a genealogy indeed presupposes that the object it studies can meaningfully be treated as *functional*, that is, as serving an end other than itself." *Ibid*, 101.

[14] While this fact alone is undisputed, more controversial is whether the term 'arbitration' can be meaningfully extended to the early medieval practices, commonly designated as 'lex mercatoria' ("courts of the fair", "business men's tribunals" "boards of arbitrators"). The conclusion of one such historical study is that "if the term 'arbitration' is used merely as descriptive of a simple and speedy determination of a cause, without reference to a formal procedure but in accord with the customs of a trade, the designation arbitration is proper. If, however, arbitration is taken to mean the voluntary submission of disputed matter to one or more arbitrators who will make an award … then these proceedings in the Merchant Courts and the gilds were not arbitrations, for both the gilds and fair courts had a fixed jurisdiction". Earl S. Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 *University of Pennsylvania Law Review and American Law Register* 4: 137.

[15] *Ibid*, 144.

[16] Using as example the historical development of English arbitration-like tribunals from the medieval times, one is left with the impression that no unison answer exists with respect to the question whether, despite their distinctiveness, these tribunals were to be treated as part of the then judicial system. Take the case of the English medieval "court of piepowder" (named after the phrase 'dusty feet', from French, *pieds poudrés*), which was "the humble court of the market which the disputes of wayfaring merchants, the footed men, were settled." (Charles Gross, 'The Court of Piepowder' (1906) 20 *The Quarterly Journal of Economics* 2: 231). In its *Commentaries*, Blackstone speaks of it as part of the system of "of the public courts of common law and equity": "The lowest, and at the same time the most expeditious, court of justice known to the law of England, is the court of *piepoudre*, *curia pedis pulverizati*; so called from the dusty feet of the suitors." (William Blackstone, *Commentaries on the Laws of England* [Oxford: Clarendon Press, 1765–1770], Book III, par. 32) Gross argues that this court "was a separate organic unit in the judicial machinery of England." (Gross, 'The Court of Piepowder', 247) Wolaver is less determined on this issue, arguing that everything hinges upon the question: "how shall we regard proceedings that are not conducted in accord with the practices of established state courts?" Wolaver, 'The Historical Background of Commercial Arbitration', 146.

been commonly relying on getting an efficacious and less costly solution of a dispute. Take, for instance, the English medieval 'court of piepowder'. As noted by Gross, "[a] striking feature" of this tribunal was its "summary procedure". Rapidity in deciding cases came from the fact that "[f]ormalities were avoided", and, hence, "an answer to the summons was expected within a day, often indeed within an hour."[17]

Presumably, at least some of the cases brought before the early arbitration tribunals were not of the present-day "look-sniff" type, in which the "dispute turns on a single short issue of fact".[18] What supposed qualities were, then, to be expected from the person to whom the dispute was handed over? Or, to use the famous Aristotle's saying, if "to appeal to a judge is to appeal to what is just",[19] was there ever any different expectation when appealing to an arbitrator? The legacy of the early commercial arbitration-like tribunals once again speaks for itself. Here is the passage from one of the most influential 17th century treaties on 'lex mercatoria' regarding the expectations of parties when they "do make choice of honest men to end their causes":

> these men (by some called good men) give their judgments by Awards, according to equity and conscience, observing the Custome of Merchants, and ought to be void of all partiality more or less to the one and to the other; having only care that right may take place according to the truth, and that the difference may be ended with brevity and expedition.[20]

Despite the fact that the focus was on "brevity and expedition", it is still possible to draw the analogy with Aristotle's judge, because what parties have also been expecting from commercial arbitrators was competence and fairness.[21] Put differently, capriciousness and arbitrariness in the decision-making have been always considered

[17] Gross, 'The Court of Piepowder', 243.

[18] *Oil Basins Ltd v BHP Billiton Ltd & Ors* [2007] VSCA 255, 57.

[19] Aristotle, *Nicomachean Ethics* (translated and edited by Roger Crisp) (Cambridge: Cambridge University Press, 2004), Book V, 1132a

[20] Gerard Malynes, *Consuetudo, vel lex mercatoria, or The ancient law-merchant divided into three parts: according to the essentiall parts of trafficke. Necessary for all states-men, judges, magistrates, temporall and civill lawyers, mint-men, merchants, mariners, and all others negotiating in all places of the world* (London : Adam Islip, 1622) Part of the treatise (pp. 305-307) reprinted as Gerard Malynes, 'Lex Mercatoria: Of Arbitrators and their Awards' (1993) 9 Arbitration International 3: 323.

[21] In summarizing historical records, Wolaver concludes that "[t]he market master appeared as an understanding and capable individual, well versed in this laymen's lore". Wolaver, 'The Historical Background of Commercial Arbitration', 145.

incompatible with the required virtues of the role of the arbitrator.[22] At this point, it is of lesser significance to determine whether rules, guiding these early arbitrations, were of legal nature.[23] Something else is far more important – in reaching their decisions, arbitrators were certainly expected to follow what English lawyers commonly refer to as rules of "natural justice",[24] which by default exclude arbitrary and unreasonable behavior.

Of what importance is this brief historical detour for the subject matter of the paper? I consider it necessary for a full and proper understanding of the waiver that parties have under the present-day Article 31(2) of the UNCITRAL Model law. Put succinctly, the fact that parties can nowadays agree that "no reasons are to be given" by the arbitral award should by no means be interpreted as if they would be satisfied with some whimsical arbitral decision, such as the one reached by tossing a coin. A brief genealogical reconstruction of the institution testifies to the fact that, despite urge for an expeditious procedure, this was something parties never expected when submitting their dispute to an arbitrator.[25]

Furthermore, the hoped-for fairness of the arbitrator is now a well-entrenched duty,[26] stemming from the rules of arbitral procedure, particularly those requesting equal treatment of parties and observance of the *audi alteram partem* principle (Art. 18 of the

[22] "Insomuch that he may not be called an Arbitrator, who to please his friend maketh delays, and propagateth their differences, but he is rather a disturber and an enemy to justice and truth;" Malynes, 'Lex Mercatoria', 323.

[23] As put by Wolaver, "It is perfectly certain the merchant had a great need of rule and law, but it was rule and law in the market and as he and his kind knew and practiced it." (*Ibid*, 144) In relying on Cicero's distinction between judge and arbitrator, Malynes points out, *inter alia*, that "the one is bound to the Law, the other is not; the one doth consist in Fact, the other in Justice". Malynes, 'Lex Mercatoria', 327.

[24] *Ibid*, 146. This conclusion can be backed up by the records regarding the rationalization of the evidence procedure in the piepowder courts: "The piepowder courts are also interesting on account of their early use of a rational method of proof." In fact, they "helped to rationalize the procedure of the royal tribunals." Gross, 'The Court of Piepowder', 246.

[25] To argue otherwise would be to say that parties opting for arbitration have been always opting for what Raz qualifies as "system of absolute discretion", in which "tribunals are not obliged to follow any common standards and can decide whatever they think best". Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 2002), 138.

[26] In setting aside the arbitral award in a recent case (*China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] SGCA 12), the Singapore Court of Appeal has discussed in *obiter dicta* the arbitrator's obligation to arbitrate in good faith. According to Campbell, the Court's conclusion is that breach of this obligation "would take into account two things. The first is some element of intention: ie the party in breach of its good faith obligation would have acted with the clear intention of disrupting the proceedings. In other words, actions that we would be likely to label as bad faith conduct. Second, the relevant party's conduct would have a significant adverse impact on the arbitral proceedings: ie the conduct in question would have to be something that was far from trivial." Mark Campbell, 'Setting Aside Arbitral Awards In Singapore: Due Process and Good Faith Obligations' (2020) 36 *Arbitration International* 3: 439.

UNCITRAL Model law).[27] Kurkela and Turunen emphasize the connection between developed due process requirements of "transnational law on good procedure" and the quality and acceptability of the arbitral award. In their words, "[t]he better opportunities the parties have to provide a basis for the decision are, the more correct the substantive outcome is likely to be. Also, a good procedure legitimizes the result: the award. If the procedure is good, the parties are more likely to accept the result."[28] The implication for our topic is obvious: if the stated procedural rules of fair arbitration path the way to a final decision, then the arbitral duty to obey them excludes by default the option that an unreasonable final decision might be something to be welcomed by either of the parties.[29]

To sum up. Our inquiry started from what might be taken as the clearest indication of the autonomous status of arbitration in the legal world – the present day waiver rule from Article 31(2). Since the option of not asking for a reasoned decision may also be interpreted as sending a more general message with respect to putative lower standards of reasonableness in arbitration (or their lack of), we tried to determine whether autonomy of arbitration could be read in light of some such message. The undertaken brief genealogic reconstruction clearly demonstrates that no such reading is justified. While autonomous nature of arbitration stemmed from the virtues of expeditious, informal and less costly procedure, reasons for resorting to arbitration and preserving its autonomous status 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. The fair procedure requirements are now incorporated through the UNCITRAL Model law and they are universally binding for all types of arbitration, including the one under Article 31(2). They serve as a further reminder that *agreeing to a reason-less*

[27] The accompanying Explanatory Note to the UNCITRAL Model law states that the "Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings." This is particularly true of Article 18, "which sets out fundamental requirements of procedural justice". 'Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006', in *UNCITRAL Model Law on International Commercial Arbitration* 1985, 31, par. 31

[28] They add that "a fair procedure has intrinsic value, in commercial arbitration as well. The arbitral proceedings need to be fair for no other reason beyond the parties having a right to have their disputes decided in a fair proceeding. Even a good and correct result does not compensate for a bad and unfair procedure." Matti S. Kurkela, Santtu Turunen and Conflict Management Institute (COMI*), Due Process in International Commercial Arbitration (2nd ed.)* (Oxford: Oxford University Press, 2010), 202-203.

[29] As pointed out in *Commercial Court Report on Arbitration* (1978) (Cmnd. 7284), which was a preparatory document leading to the adoption of the English 1979 *Arbitration Act*: "The making of an award is, or should be, a rational process. Formulating and recording the reasons tends to accentuate its rationality."

*arbitral award is by no means the license to an unreasonable one*. Consequently, if presumed standards of reasonableness apply to this exceptional case of arbitration decision-making, then, *a fortiori*, these standards are valid in standard cases in which parties do opt for a reasoned decision.[30]

## On Reasonableness and Legal Reasoning

So far so good, but now it is time to redirect ourselves towards saying something about standards of reasonableness, in general, and reasonableness in law, in particular. This will enable us in the next step to make further distinction between some such standards in judicial and arbitration decision-making. Eventually, we will have more material to dwell upon the question of what may count as an instance of "perversity in reasoning" in the arbitration matters.

Let me start with an immediate caveat, brought by Artosi, who notes that "[r]easonableness is not a philosopher's term. Nowhere in philosophical literature will you find such clear-cut definitions of reasonableness as you find for the twin concept of rationality." Moreover, "[v]ery little, if anything, is said about the reasonable person's epistemic features."[31] McMahon's recent philosophical analysis of the general concept of reasonableness is a welcome exception in that respect.[32] I will here largely follow his analysis and then try to apply it to the specific subject of our concern.

McMahon proceeds by differentiating between the two ways the word reasonableness is used. We may speak of reasonableness in the *concession* and in the *competence sense*. When we say to someone, 'Be reasonable', we expect him to make some sort of concession. Reasonableness in this sense finds its application in some cooperative contexts, and, thus, it is intricately connected to concepts of fairness and justice. But reasonableness in the second sense is far more important for our discussion. When we say, for example, that conclusion is reasonable we actually use reasonableness in

[30] "Most arbitration agreements in the international realm require arbitrators to produce a 'reasoned' or 'fully reasoned' award." Stacey I. Strong, 'Reasoned Awards in International Commercial Arbitration' (2016) at http://arbitrationblog.kluwerarbitration.com/2016/02/19/reasoned-awards-in-international-commercial-arbitration/

[31] Alberto Artosi, 'Reasonableness, Common Sense, and Science', in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds.), *Reasonableness and Law* (Dordrecht: Springer, 2009), 69.

[32] Christopher McMahon, *Reasonableness and Fairness – A Historical Theory* (Cambridge: Cambridge University Press, 2016)

the *competence* sense. The word reasonable here denotes competent reasoning. More precisely, "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."[33]

Some of the employed words or phrases in this quotation, such as "competent", "cognitive product" or "relevant mental capacities", are in need of further analytical elucidation. Let us start with "cognitive products", and focus on "conclusions" as one type of such products. Calling one conclusion "reasonable" has, according to McMahon, a further implication of "expressing an unwillingness to move to [its] final acceptance." What we are instead doing is that "we are affirming the *prima facie* plausibility of the conclusion in light of the available evidence." The unwillingness to move to final acceptance stems from the possibility that there emerges contrary evidence, capable of overturning the conclusion. If we are assured that this will not happen, we will not characterize conclusion as reasonable, but "accept it as true or correct."[34] It is important to bear in mind that "the evidence or reasons supporting the conclusion must … attain a certain threshold level of strength before a competent reasoner will be prepared to affirm the *prima facie* plausibility of the conclusion in light of the evidence." This means, first, that reasonableness in the competence sense "is treated as admitting of degrees".[35] And second, when employed in this way, "reasonableness is being assimilated to (or confused with) *justification*." That is, "reasonable", in this sense, serves as "an epistemic term that marks a certain context-sensitive justificatory status."[36]

Now it is time to return to other concepts, which McMahon does not analyze in more detail, mostly due to the fact that he is primarily interested in reasonableness in the concession sense. As for "competence", he notes that "the general competence of a person as a reasoner is a matter of his generally proceeding in a way that manifests the proper functioning of the relevant capacities."[37] But, as pointed out, these "relevant capacities" change with a context or a role of a reasoner. Namely, reasonableness of our "cognitive products" is subject to different standards of assessment depending on the

[33] *Ibid*, 62.
[34] *Ibid*.
[35] *Ibid*.
[36] *Ibid*, 63.
[37] *Ibid*, 62.

fact whether we reason in some everyday situation, or in some scholarly debate, or in the capacity of some sort of authority. Differences of this sort often stem from the availability of or constraints upon supporting evidence or reasons.

The context of adjudication (be it in court or in arbitration) is obviously one such specific context in which involved parties assume distinctive roles. These specific roles highlight two important specificities of the reasoning in a legal context. First, when it comes to 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.). Meeting these requirements triggers a reasonable expectation (not necessarily "final acceptance"!) that the reasoner's general capacity is enriched with some specifically tailored capacity of a lawyer.[38] This expectation is, for example, testified by the saying 'Iura novit curia' (the court knows the law).[39] And second, the expected specific capacity of the reasoner in the legal context consists of certain acquired skills and knowledges, which reveal distinctiveness of legal reasoning.[40] Proceeding from Sir Edward Coke's famous reprimand, directed towards James I, that adjudication requires not "natural", but "artificial reason", Bickenbach tries to analytically capture this specificity of legal reasoning. In his words, the artificiality "is not a matter of the *form* of reasoning used, or whether specialized and nonstandard rules of inference link premises and conclusion." It is primarily "a matter of the perspective, or locus of the reasoner, including the expectations, presumptions and duties of the social, and professional, roles that reasoner occupies." As such, reasoning of legal practitioners "is practical, normative, institutional and substantively constrained reasoning".[41] That is, while reasoning in general is about providing reasons (arguments), legal reasoning is about providing only valid legal

[38] The same holds for arbitration. Strong notes that "the underlying assumption is that anyone appointed to an *ad hoc* tribunal or to an arbitral roster is already competent to serve as an arbitrator as a result of that person's extensive experience as counsel." She, nonetheless, contrasts this assumption with the fact that "new arbitrators typically come to their duties with very little in the way of formal training." Stacey I. Strong, 'Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy' (2015) 37 *Michigan Journal of International Law* 1: 5.

[39] Reasonableness of this expectation, as all lawyers know, is constantly being refuted.

[40] The thesis on the distinctiveness of legal reasoning is by no means universally endorsed by legal philosophers. For an open denial, *see, e.g.*, Larry Alexander, 'Banality of Legal Reasoning' (1998) 73 *Notre Dame Law Review* 3: 517-533. Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning* (Cambridge: Cambridge University Press, 2008) For a less skeptical, yet still cautious attitude, *see*, Frederick Schauer, *Thinking Like A Lawyer – A New Introduction to Legal Reasoning* (Cambridge, Mass., London: Harvard University Press, 2009)

[41] Jerome E. Bickenbach, 'The "Artificial Reason" of the Law' (1990) 12 *Informal Logic* 1: 24.

reasons (arguments) [*substantive constraint*], i.e. justifying [*normative*] one's course of legal action [*practical*], within a given institutional setup [*institutional*].

Any legal action (e.g. bringing charges, filing complaint, reversal of judgment) is grounded in valid and applicable law. This means that legal reasoning is paradigmatically undertaken in the process of interpretation and application of valid legal provision(s). This calls for the clarification of the relationship between the concepts of interpretation and argumentation. Interpretation is about establishing the normative meaning of an authoritative text, i.e. valid legal provision. The normative meaning "can be argued for, or against, with the help of arguments. Consequently, what is traditionally called 'a method of interpretation,' is in fact a type of argument used to interpret a text."[42] Reasoning in adjudication (be it by court or arbitrator) is paradigmatically about justifying legal decisions (judgments, arbitral awards), with the help of some valid legal reasons (arguments).

Now, what is the epistemic status of legal "cognitive products" (e.g. decisions in the adjudication process)? In short, apart from general inclination of evidence law towards truth in fact-finding,[43] truthfulness is not the value that lawyers normally ascribe to their "cognitive products".[44] For example, no legal practitioner will be ever heard saying that the final court decision or arbitral award is 'true', simply in virtue of its finality.[45] In that respect, legal decision/conclusion serves as a prime example of what McMahon discusses as *gradated*, that is, *more or less reasonable (i.e. justified)* "cognitive product". One may ask at this point: if legal "cognitive products" cannot be assessed as 'true' or 'correct', are we to conclude that legal reasoning somehow manages to escape the iron law of deductive logic, in which reasoning with correct major and minor premises necessarily

[42] Andras Jakab, 'Judicial Reasoning in Constitutional Courts: A European Perspective' (2013) 14 *German Law Journal* 8: 1220.

[43] Although "formal legal truth", i.e. that what is established as fact by the legal fact-finder (judge or lay jurors or both), should coincide with "substantive truth", it is often not so. For an analysis, *see*, Robert S. Summers, 'Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases' (1999) 18 *Law and Philosophy* 5: 497-511. For an in depth philosophical account of rules of evidence, *see*, Ho Hock Lai, *A Philosophy of Evidence Law – Justice in the Search for Truth* (Oxford: Oxford University Press, 2008)

[44] See, in general, Pierluigi Chiassoni, *Interpretation without Truth – A Realistic Enquiry* (Cham: Springer, 2019)

[45] Quite different is the question whether legal theory (particularly the one with ambition to be treated as a scientific discipline) operates with *assertoric* statements, those which assert the existence of facts and, hence, are true if the facts they assert obtain. *See, e.g.*, Jules L. Coleman, 'Truth and Objectivity in Law' (1995) 1 *Legal Theory* 1: 33-68.

leads to a logically correct conclusion? Most certainly, this would be an absurd conclusion. The problem is here with the way the question is formulated. As put by Bickenbach:

> Being engaged in the process of legal argumentation … means precisely not being an abstract reasoner, concerned exclusively with the formal structure of a set of propositions, some identified as premisses, others as conclusions. Legal argumentation is a dynamic process, it is exploratory, creative, and interpretive. The lawyer, judge, or legal scholar is not presented with static premisses from which he or she must draw conclusions by instantiating inference rules; the job is almost entirely that of finding, and then making sense of the premisses within a given legal context.[46]

Hence, when trying to grasp the specificity of legal reasoning, one has to put in the proper relation the process of legal argumentation (interpretation) and inferences of deductive logic. Turning back to Bickenbach:

> It is simply false that when advocates set out their legal submissions at trial, or when judges make their way through the submissions to arrive at a decision, or when legal scholars criticise the decision, that considerations of deductive validity play any role whatsoever in the process. But, again, this is not because legal argumentation is an instance of a non-deductive form of reasoning, or because it is deductively invalid. Deductive validity is an inappropriate model of legal argumentation because it simply cannot do justice to what actually takes place in legal argumentation.[47]

Simply put, deduction enters the stage once interpretation is completed. Hence, "any version of the legal syllogism, however complex, will fail to capture the essential, interpretive logic of the process of legal argumentation."[48]

Sartor provides a further elaboration of this thesis, which may sound appealing to any practicing lawyer. He offers "a sufficientist understanding of reasonableness in legal decisionmaking". According to it, "cognitive or moral optimality are not required for reasonableness; what is needed is just that a determination – be it epistemic or practical – is sufficiently good (acceptable, or at least not unacceptable)."[49] Put differently, "reasonableness pertains to determinations that are good enough though not necessarily optimal; reasonable choices need to 'satisfice'; they are not required to maximize."[50]

To sum up. Reasonableness is, in epistemic terms, context-bounded justificatory status of a certain cognitive product. Legal context is determined by "artificiality" of legal reasoning, which is substantively and institutionally constrained. Substantive constraint

[46] Bickenbach, 'The "Artificial Reason" of the Law', 24.
[47] *Ibid*, 31.
[48] *Ibid*, 30.
[49] Giovanni Sartor, 'A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review', in Bongiovanni, Sartor and Valentini (eds.), *Reasonableness and Law*, p. 17.
[50] *Ibid*, 18.

implies that legal conclusion can be 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. Within a "sufficientist understanding" of reasonableness in legal decision-making, it is possible to operate with the following 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"*.

## Judges and Arbitrators: Different Standards of (Un)reasonableness?

McMahon's remark that "the threshold would be a point of transition from unreasonableness to reasonableness",[51] and *vice versa*, may serve as the epistemic orienteer for our target topic – "perversity in reasoning" in arbitration. But, if this point is located somewhere at the continuum between the two extremes, are we able to narrow down uncertainty with respect to its more precise location? Moreover, bearing in mind the autonomous nature of arbitration, is this threshold point located differently for arbitral awards then for court's judgments? In this part of the paper, I will try to show that both institutional and substantive constraints of legal reasoning may help us in locating this point more precisely.

Let us, for start, remind ourselves of common reasons for insisting on reasoned legal decisions. The groundwork in this area has been offered by Lord Bingham.[52] Since we take the court's judgment as a paradigmatic instance of legal decision-making, which is based on the established facts and valid legal norms, his well-known 1988 article proceeds from listing reasons for having it. Those are the following reasons: 1) parties are entitled to be informed why they have won or lost the case;[53] 2) it is a protection against "arbitrariness, private judgment or an irrational splitting of the difference between what

[51] McMahon, *Reasonableness and Fairness*, 63.

[52] To be sure, noticing differences between judges and arbitrators was something to be found in earlier treatises on the subject matter. Take, for example, the already mentioned Malynes' work (see, Malynes, 'Lex Mercatoria', 327-328). However, although grasping some of the everlasting differences between the two adjudicators, the earlier comparisons suffer from being heavily determined by the then existing legal and institutional framework.

[53] The Rt Hon. Lord Justice Bingham, 'Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award' (1988) 4 *Arbitration International* 2: 141.

one party claims and the other admits";[54] 3) in a set of cases, court's reasoning provides guidance to parties in their future conduct; 4) judicial review and the option of reversal would not be available to appellate courts without a reasoned judgment;[55] 5) finally, "as half a reason", the giving of a reasoned judgment is in itself "a valuable intellectual discipline for the decision maker".[56]

Before inquiring how the listed "reasons for providing reasons" fare in arbitral proceedings, one has obviously to proceed from some general theory regarding the nature of arbitration as a form of adjudication. Without going here in a detailed reconstruction of arguments from the opposing "contractualist" and "jurisdictional" theories of arbitration, it would be fair to say that the prevailing view in the doctrine and in the comparative practice is that of the "mixed" theory.[57] According to it, "we have a private justice system created by contract". Within this model, "arbitrators are decision-makers and perform a quasi-judicial function without exercising any (state) judicial power". When acceding to this view, the furthest one can go would be to say: "the arbitration function is equivalent to the function of a judge", although not completely identical to it.[58] This view captures the earlier discussed autonomy of arbitration, without completely stripping it away from the public law layer, which, *inter alia*, pertains to standards of reason-giving decisions. Hence, at the most abstract level, it is possible to state a preliminary finding: despite the fact that all the listed reasons "in favour of giving reasons generally apply" to arbitral awards,[59] *the private law element in arbitration affects the role of arbitrator and the scope of her concomitant duty of providing reasons*.

When put in more specific terms, the private law element is reflected, first, in *the institutional constraint of the finality of arbitral award*. The autonomous status of

[54] *Ibid*, 142.
[55] *Ibid*.
[56] *Ibid*, 142-143.
[57] Gaillard is, nonetheless, of opinion that this label is utterly unhelpful, particularly in philosophical grounding of international arbitration. Thus, he advances a view according to which "the juridicity of arbitration is rooted in a distinct, transnational legal order, that could be labeled as the arbitral legal order, and not in a national legal system, be it that of the country of the seat or that of the place or places of enforcement." This theoretical view "corresponds to the international arbitrators' strong perception that they do not administer justice on behalf of any given State, but that they nonetheless play a judicial role for the benefit of the international community." Emmanuel Gaillard, *Legal Theory of International Arbitration* (Leiden and Boston: Martinus Nijhoff, 2010), 35.
[58] Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer, 2003), 80.
[59] Bingham, 'Reasons and Reasons for Reasons', 145.

arbitration largely hinges upon the premise "that the award should be final and there should be no judicial review on its merits."[60] This is commonly a major, if not the key, reason for parties to opt for arbitration.[61] The second specificity stems from the previous private law element and it pertains to the *substantive constraints of narrow legal grounds for challenging the finality of arbitral award*. As put by Schmitthoff: "Provided that the arbitration proceedings are conducted in accordance with the requirements of natural justice, the parties are normally prepared to accept that the arbitrator may err in his decision on a point of fact or law."[62] Thus, he distinguishes between the two types of judicial review of arbitral awards. Whereas the first concerns the observance of requirements of natural justice,[63] the second type of judicial review pertains to the merits "and here the issue is whether the arbitrator has fallen into an error."[64]

Significantly narrower legal grounds for challenging the arbitral award have an immediate implication for the workload of reasoning to be provided by the arbitrator. Lord Bingham tried to summarize[65] this workload against the backdrop of a comparable reasoning load of judges: a) arbitrators are not called upon to provide as detailed reasoning why the party lost the case as courts are; b) it is not necessary that an arbitrator recapitulate the evidence on each and every disputed factual issue;[66] c) it is no incumbent upon an arbitrator to provide excessive reasoning why one piece of evidence was

[60] "[P]arties preferring arbitration to litigation expect at least finality of the settlement of their dispute and avoidance of costly and lengthy appellate proceedings." Clive M Schmitthoff, 'Finality of Arbitral Awards and Judicial Review', in Julian D. M. Lew (ed.), *Contemporary Problems in International Arbitration* (Dordrecht: Springer, 1987), 230.

[61] "[T]he presumed intention of the parties [is] that the arbitral adjudication, in contrast to a trial of issues in a court, should be final, in the interests of economy of time, effort and expense." Petar Gillies and Niloufer Selvadurai, 'Reasoned Awards: How Extensive Must the Reasoning Be?' (2008) 74 *Arbitration* 2: 126.

[62] Schmitthoff, 'Finality of Arbitral Awards and Judicial Review', 230.

[63] A number of procedural incidents, such as limiting or refusing cross-examination, or excluding evidence on some procedural grounds, may raise the question whether the due process standards are met. IBA Arbitration Committee, *Annulment of arbitral awards by state court: Review of national case law with respect to the conduct of the arbitral process* (October 2018), p. 2. This is an extensive comparative study of procedural grounds for judicial review of arbitral awards in 13 jurisdictions, which attract the majority of international arbitrations.

[64] Schmitthoff, 'Finality of Arbitral Awards and Judicial Review', 231. More precisely, those grounds "include mistakes of law or fact going to the overall merits or substance of an arbitral decision, as distinct from strictly procedural or jurisdictional errors." Joseph D. Pizzurro, Robert B. García and Juan O. Perla, 'Substantive Grounds for Challenge', in Gaillard and Kaiser (eds.), *The Guide to Challenging and Enforcing Arbitration Awards*, 74.

[65] His findings are stated in general terms, despite the fact that they were based primarily in the then positive English law (*1979 Arbitration Act*).

[66] Bingham, 'Reasons and Reasons for Reasons', 152.

preferred over some other;[67] d) finally, "[a]n arbitrator is not called upon to make any detailed analysis of the legal principles canvassed before him or to review in any detail the legal authorities cited. It is enough if he briefly summarises the arguments put to him and expresses his legal conclusion in a way that makes it intelligible."[68]

These observations echo the prevailing sentiment of the arbitration professional community, which perceive the arbitrator as a sovereign not only in the process of fact-finding and assessing submitted evidence, but also in the determination of the applicable law, as well as its interpretation and implementation in the given factual setting. Courts' treatment of arbitral awards largely matches this expectation of the arbitration community. A cursory comparative overview of the global judicial practice can easily confirm that each of the aforementioned two types of judicial review "rarely succeeds" in setting aside of arbitral award.[69]

Let me start with illustrative judgments of the merits type of judicial review. A German court has on a challenge on the question of law responded with the assertion that "the state court only has to understand whether the arbitral tribunal used the law chosen by the parties to decide, but not whether it correctly applied and interpreted that law."[70] A Belgian court made an even more straightforward distinction for our purposes:

> When a motion for setting aside is raised against an arbitral award on the basis of lack of reasoning, the Court should only establish that the award is reasoned, meaning that the arbitrator has answered to all the arguments raised, without going into the details of each argument. The control of the duty to state reasons does not consist in a review of the merits. The relevance of the reasoning of the arbitrator must not be examined.[71]

Similarly, the Polish Supreme Court has recently stated that, unlike in the case of state court judgment, an arbitral award should contain "reasoning and not a full substantiation." According to the Court, it is "sufficient if one may establish, on the basis

---

[67] *Ibid*, 153.
[68] *Ibid*, 154.
[69] Gillies and Selvadurai speak of it as a "notorious" fact. (Gillies and Selvadurai, 'Reasoned Awards: How Extensive Must the Reasoning Be?', 126) IBA Arbitration Committee's report is opened with the remark that "courts generally support the arbitration process and it is rare for an award to be set aside for procedural reasons only." (IBA Arbitration Committee, *Annulment of arbitral awards by state court*, 2) The same applies to the merits ground. Simply put, although "not impossible", it "is not easy" to raise a successful challenge against an arbitration award on merits ground. Pizzurro, García and Perla, 'Substantive Grounds for Challenge', 83.
[70] Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001, available at http://www.dis-arb.de/de/47/datenbanken/rspr/hanseat-olg-hamburg-az-11-sch-01-01-datum-2001-06-08-id1274
[71] Court of Appeal Brussels, *Management Service bvba v. Vlaamse Media* Maatschappij, 6 December 2011 (quoted from IBA Arbitration Committee, *Annulment of arbitral awards by state court*, 7)

of the award, what premises the arbitration court followed when deciding the parties' claims." Put differently, defects in reasoning cannot constitute grounds for vacating the award "as long as it is possible to control the award."[72] Since the United States *Arbitration Act* contains no provision for judicial determination of legal issues, the US Supreme Court established in the *Wilko* case the doctrine, according to which mere errors of law or mistakes of fact are not grounds for vacating an award and only in the exceptionable case of the "manifest disregard for the law" this would be possible.[73]

Equally large amount of power is given to arbitrators with respect to the procedural matters. Simply put, "[t]he panel is in control of the evidentiary proceedings and may limit or bar evidence from the proceedings in its discretion".[74] Again, by way of illustration, here are some exemplary courts' decisions pointing in that direction. A Brazilian court dismissed an appeal based on the allegation that the arbitral tribunal did not respect the principle of due process of law when it refused to appoint an expert to examine its claim for loss of profits, arguing, *inter alia*, that the arbitral tribunal has the power to decide on the procedural directions.[75] Similarly, a Turkish court has been recently called upon to determine whether the arbitral tribunal's failure to refer the calculation of damages to experts constitutes a violation of public policy. The appeal was dismissed on grounds that the arbitral tribunal possesses broad authority over evidentiary matters and that it has discretionary power to obtain an expert report.[76] In a similar vein, an English court has found:

> Arbitrators who are required to give reasons in their awards do not have to list all the argument or items of evidence as advanced which they accept and which they reject.

---

[72] The Court was of the opinion that "in the case at hand, the manner in which the arbitration tribunal had formulated its justification of the award did not prevent the discovery of its motives. The claimant was also unsuccessful in showing that the motives behind the arbitral award were obviously contradictory or illogical." Maciej Durbas and Rafał Kos, 'Words, words, words: concise reasoning not grounds to vacate award', at https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Poland/Kubas-Kos-Gakowski/Words-words-words-concise-reasoning-not-grounds-to-vacate-award

[73] *Wilko v. Swan*, 346 U.S. 427 (1953), at 436.

[74] Kurkela, Turunen and COMI, *Due Process in International Commercial Arbitration*, 178.

[75] Cesenge Engenharia Ltda v. Mineração Gypsum Brasil Ltd, Minas Gerais Court of Appeal, District of Belo Horizonte, 03.12.2015, Civil Appeal n°1.0024.09.499044-7/002 (quoted from, IBA Arbitration Committee, Annulment of arbitral awards by state court, 15)

[76] *See*, Okan Demirkan, Begüm Yiğit, 'Turkish Court of Appeals: The Arbitral Tribunal's Failure to Obtain an Expert Report Does Not Constitute a Violation of Public Policy' (2017), http://arbitrationblog.kluwerarbitration.com/2017/01/13/turkish-court-appeals-arbitral-tribunals-failure-obtain-expert-report-not-constitute-violation-public-policy/

> They should identify usually the primary evidence which they do find compelling where the case depends upon factual findings because that will be part of the reasoning."[77]

## New Trends in Arbitration: Mimicking Litigation?

In contrast to the mentioned widespread court practice, routinely labeled as "arbitration friendly", one may point to a series of important and more recent court decisions, which have caused raised eyebrows among arbitration lawyers.[78] These decisions 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."[79]

Let us start with recent jurisprudence of the Tribunal Superior de la Justicia, Madrid, which has set aside arbitral awards in three 2015 cases after reviewing the merits of the decisions and finding the incorrect application of the law to be contrary to Spanish public order.[80] In one of the cases, the Court found that the legal grounds upon which the tribunal made its decision were so obviously flawed that they vitiated the reasoning provided by the tribunal. According to the Court, such erroneous analysis of the law, as expressed in the reasoning of the tribunal, constituted itself an expression of arbitrariness as prohibited by the Spanish Constitution. Put succinctly, the Court held that the committed errors rendered the award arbitrary, unreasoned, and contrary to public order.[81]

Similarly, the Austrian Supreme Court in its 2016 decision[82] considered if and under what circumstances defective reasoning of an arbitral award may lead to its annulment. As noted by commentators, "[u]p until recently, scholarly opinion in Austria also supported the finding of the Austrian Supreme Court that the failure to include any decisive

---

[77] Schwebel v Schwebel [2011] 2 AER (Comm) 1048 at para 23. (quoted from IBA Arbitration Committee, *Annulment of arbitral awards by state court*, 39)

[78] "[R]ecent court decisions seem to suggest that, in light of a growing suspicion of arbitration within many communities, courts may be rediscovering their scepticism about unfettered arbitral power and reasserting their own power to scrutinise awards more closely." Pizzurro, García and Perla, 'Substantive Grounds for Challenge', 83.

[79] Gillies and Selvadurai, 'Reasoned Awards: How Extensive Must the Reasoning Be?', 131.

[80] Judgment of the Superior Court of Justice of Madrid, 28 January 2015, Nº 13/2015; Judgments of the Superior Court of Justice of Madrid, 6 April 2015, Nº 7/2015 and 14 April 2015 Nº 31/2015; Superior Court of Justice of Madrid, Judgment dated 28 January 2015.

[81] Eduardo Soler-Tappa and Beverly Timmins, 'Madrid court sets aside awards on grounds of public order after reviewing merits' (2015) https://hsfnotes.com/arbitration/2015/06/18/madrid-court-sets-aside-awards-on-grounds-of-public-order-after-reviewing-merits/

[82] Supreme Court, September 8 2016, Docket 18 OCg 3/16i.

reasoning in the arbitral award whatsoever or to include only insufficient reasoning, did not constitute a violation of Austrian procedural *ordre public*."[83] In the case at point, the Court found that the requirement of sound reasoning is a fundamental principle of the Austrian legal system, and, thus, that an arbitrator's failure to comply with it constitutes a violation of procedural public policy. In particular, the Austrian Supreme Court held that arbitral awards are to be set aside if an arbitral award entirely lacks reasons on a major issue of dispute, or if the decisive underlying reasoning (*Begründung*) consists merely of "meaningless phrases" (*inhaltsleere Floskeln*). Regarding the required threshold point of sufficiently reasoned (*ausreichend begründet*) arbitral award, according to the Court, it is met if the arbitral tribunal discusses its own position in the course of the proceeding and in the subsequent award makes reference to this position. Similarly, if arbitral award, in the *Begründung* section, makes reference to the submissions of one party only, such reference does not imply "insufficiency" in the given context.[84]

Significant attention, in this respect, was drawn by decisions of Australian courts. The initial judgment was the one of the Victorian Court of Appeal in the *Oil Basins* case.[85] The crux of the dispute revolved around the normative meaning of the phrase 'overriding royalty' in a commercial agreement. The case ended up before the Court of Appeal, which agreed that "the present case called for reasons of a judicial standard". Put in more general terms, "the extent to which an arbitrator needs to go into explaining his or her decision depends on the nature of the decision.'[86] For example, "where there is a conflict [of evidence] of a significant nature, to provide reasons for choosing one side over the other."[87] Drawing from its jurisprudence, the Court tried to generalize as much as possible the arbitrator's duty to provide adequate reasoning, by way of comparison with judge's duty of the same sort. It concluded that

[83] Sebastian Lukic and Anne-Karin Grill, 'Austrian Supreme Court Establishes New Standards as Regards the Decisive Underlying Reasoning of Arbitral Awards' (2016) at http://kluwerarbitrationblog.com/2016/12/24/austrian-supreme-court-establishes-new-standards-as-regards-the-decisive-underlying-reasoning-of-arbitral-awards/

[84] Lukic and Grill, 'Austrian Supreme Court Establishes New Standards as Regards the Decisive Underlying Reasoning of Arbitral Awards', at http://kluwerarbitrationblog.com/2016/12/24/austrian-supreme-court-establishes-new-standards-as-regards-the-decisive-underlying-reasoning-of-arbitral-awards/

[85] *Oil Basins Ltd v BHP Billiton Ltd & Ors* [2007] VSCA 255.

[86] *Ibid*, par. 54.

[87] *Ibid*, par. 55.

> there is not a great deal of difference between that idea and the imperative that those who make binding decisions affecting the rights and obligations of others should explain their reasons. Each derives from the fundamental conception of fairness that a party should not be bound by a determination without being apprised of the basis on which it was made. So in arbitration, the requirement is that parties not be left in doubt as to the basis on which an award has been given. To that extent, the scope of an arbitrator's obligation to give reasons is logically the same as that of a judge.[88]

In 2011, the Australian High Court handed down the judgment in a more than seven years long, four-tiered case – *Westport Insurance Corporation v Gordian Runoff Ltd.*,[89] which concerned the arbitral award dealing with a reinsurance dispute. High Court heard an appeal against a judgment of the New South Wales Court of Appeal, which departed from the reasoning of Victorian Court of Appeal in the *Oil Basins* case. Namely, the NSW Court of Appeal highlighted the commonly endorsed distinction between the required reasoning of judges and arbitrators as two "fundamentally different mechanisms" for solving disputes – "The court is an arm of the state; its judgment is an act of state authority … The arbitration award is the result of a private consensual mechanism intended to be shorn of the costs, complexities and technicalities often cited (rightly or wrongly, it matters not) as the indicia and disadvantages of curial decision making." Hence, the fact that some more complex arbitrations tend to mimic the procedures of court litigation "can be seen perhaps more as a failing of procedure and approach rather than as reflecting any essential character of the arbitral process that would assist in the conclusion (erroneous in principle) that arbitrations should be equated with court process and so arbitrators should be held to the standard of reasons of judges."[90]

The High Court, however, "granted special leave to appeal on the ground that the Court of Appeal had erred in not concluding that the arbitrators had failed to give reasons".[91] Turning back to the *Oil Basins* case, the High Court noticed that the reference to reasons of a "judicial standard" placed an "unfortunate gloss" on the statutory provision regarding the reasoned arbitral award, but otherwise approved the observations of the Victorian Court of Appeal "to the effect that what is required to satisfy that

[88] *Ibid*, par. 56.
[89] *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37.
[90] *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57, 216-217.
[91] *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37, 52.

provision will generally depend upon the nature of the dispute and particular circumstances of the case."[92]

Finally, turning back to the opening case of this paper, here is the lengthy quote from par. 36 of the Indian Supreme Court's ruling, which tries to bring more analytical clarity regarding the threshold of a sufficiently reasoned arbitral award:

> When we consider the requirement of a reasoned order three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasoning in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act [proper conduct of the arbitration, M. J.]. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue.[93]

## Conclusion: Guidelines for Avoiding the Trap of "Perversity in Reasoning"

The very fact of the widespread courts' jurisprudence in matters of challenging arbitral awards on grounds of their unreasonableness testifies to parties' general expectation that, once they have opted for a reasoned award,[94] standards of such a decision are met. Members of the arbitration community themselves more openly declare nowadays that, despite arbitrators are not judges, to the extent that they "have a duty to the parties, the basic requirement of justice is the same." Simply, "[a]rbitrators need to give good reasons for their decisions in order for justice to be done."[95] However, as the Swedish Supreme Court acknowledges in its landmark case regarding reasoning standards in arbitration, "the question of the parties' expectations as to the reasoning, whether justified or not, and the question of what can be considered to be good practice amongst

[92] *Ibid*, 53.
[93] *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.* Civil Appeal No. 2153 of 2010, par. 36.
[94] Either by declining to use the waiver option, in jurisdictions following UNCITRAL Model law, or by explicitly requesting reasoned award, in jurisdictions in which non-reasoned award is a default rule.
[95] "It is, therefore, even more important in arbitration, which risks being tarnished with the worst elements of a closed and secret system, that arbitrators work hard to show to the parties that they are committed to upholding justice and the rule of law by providing high-quality, reasoned awards." James Hope and Mattias Rosengren, 'A call for reason' (2013) available at https://iclg.com/cdr/arbitration-and-adr/a-call-for-reason

arbitrators, need to be distinguished from the question of whether the arbitrators' reasoning is so lacking as to constitute a ground for challenge."[96]

The prior philosophical inquiry into reasonableness in legal decision-making, and more particularly, in arbitration, provided more solid justificatory grounds for otherwise intuitively appealing Sir John Donaldson's definition of a "reasoned award" as "one which states the reasons for the award in *sufficient detail* [M. J.] for the court" to review it.[97] Thus, irrespective of variations across jurisdictions that concern specific legal grounds for mounting challenges against arbitral awards on account of unreasonableness, as well as the overall pro/anti-arbitration attitude of respective courts,[98] it is possible to come up with a couple of *general guidelines for arbitrators that will enable them to avoid the trap of "perversity in reasoning"*. It is important to emphasize that the following guidelines are fully compatible with the autonomous nature of arbitration law, thereby implying that "the value of giving full reasons for the outcome needs to be balanced against the interest of finality in arbitral awards."[99] Consequently, the threshold point below which the decision would constitute "perversity in reasoning" is, generally taken, significantly lower in the case of arbitral award than in the case of court's judgment.[100]

*First*, it is patently clear that merely putting a heading that indicates that the arbitrator is providing reasoning for her decision shall not suffice. As put by the US Court of Appeals for the Second Circuit, "a reasoned award is something more than a line or two of unexplained conclusions".[101] This, furthermore, implies that not falling beyond the reasoning standard is as much about the quality, as about the quantity of the stated reasons. In words of the Austrian Supreme Court, the required threshold point of sufficiently reasoned decision will equally be unsatisfied if the award consists merely of

---

[96] Swedish Supreme Court, *Soyak v Hochtief*, 31 March 2009 ("Soyak II", NJA 2009, p 128), quoted from, Hope and Rosengren, 'A call for reason', https://iclg.com/cdr/arbitration-and-adr/a-call-for-reason

[97] *Trave SchifJahrtsgesellschaft m.b.H.& Co. K.G. v Ninemia Maritime CO/paration* [1986] I QB 802 at 807D.

[98] Várady argues that, with the increasing complexity of commercial arbitration, it is becoming more difficult to say what shall count as a "pro-arbitration" stance of courts. Tibor Várady, 'What Is 'Pro-Arbitration' Today?' (2014/2015) 21/22 *Croatian Yearbook of Arbitration*: 7-26.

[99] Swedish Supreme Court, *Soyak v Hochtief*, p. 128.

[100] As with all the guidelines that will be discussed, this general distinction is relative to particular jurisdictional standards. For instance, the raised bar of reasonableness standards of courts' decisions in the jurisprudence of the European Court of Human Rights may have some bearing on the matching standards for arbitral awards in the respective jurisdictions. For a comprehensive analysis of the right to a reasoned judgment in the practice of the ECtHR, *see*, Bojan Spaić and Goran Dajović, *Right to a Reasoned Judgment – Practice of the European Court of Human Rights* (Podgorica: Center for Democratic Transition, 2016)

[101] *Leeward Const. Co., Ltd. v. Am. Univ. of Antigua-College of Medicine,* 826 F.3d 634, 640 [2d Cir. 2016]

"meaningless phrases". That is, either the stated 'reasons' are not valid/applicable legal reasons at all or they cannot be intelligibly, i.e. in a coherent and non-contradictory manner, connected to the established facts of the case. To use the passage from the Swedish Supreme Court's decision, such "reasoning in the circumstances" would be so defunct as to "be considered to be the same as a total lack of reasoning."[102] Or, in the vocabulary of the Indian Supreme Court, such arbitral award would be entirely "unintelligible".

*Second*, arbitrator's discretion in interpreting and implementing the applicable law is not absolute. It is common wisdom among arbitration lawyers that one should keep in mind "the distinction between non-reasoned awards and awards that wrongly applied the law to the facts. The absence of reasons renders the award defective, but this is not the case where the arbitrators got the law wrong."[103] However, even in jurisdictions, like the US, in which the non-reasoned award is a default rule, the courts have developed the doctrine of "manifest disregard for law", which shows that not every error of legal interpretation is acceptable after all. As already mentioned, mere errors of law or mistakes of fact are acceptable. In order for an error to be qualified as "manifest disregard … the arbitrator must have correctly stated and understood, but deliberately ignored, the applicable law."[104]

Public policy is more often used by the courts as a ground for setting aside those arbitral awards in which the application of law was as unreasonable as to constitute the violation of this principle of public law.[105] In a 2019 decision, the Indian Supreme Court

---

[102] In a decision (I ZB 21/21) published on 18 February 2022, the German Federal Court of Justice (BGH) partially set aside an ICC award on account of failing to provide reasons for a key aspect of its decision. While the Court stressed that arbitral tribunals are not required to reason their findings in as much detail as German state courts, the Court, nonetheless, found that the ICC did not pass this minimal threshold for a reasoned award, inasmuch as it had failed to provide any reasons for some of its key findings. In addition, it treated some disputed facts as undisputed, thereby violating the party's right to be heard. For a short summery and comment of the decision, see, BGH confirms arbitration-friendly approach in setting aside decision - HANEFELD Rechtsanwälte (hanefeld-legal.com)

[103] Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge: Cambridge University Press, 2015), 198.

[104] Having in mind that US arbitrators "are not required to explain the basis for their decisions … a reviewing court must assess 'manifest disregard' by trying to infer from the facts of the case whether a decision reflects that the arbitrators appreciated the existence of a clearly governing legal principle and, nevertheless, decided to ignore it." Andrew P. Tuck, 'The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas' (2008) 14 *Law and Business Review of the Americas* 3: 577-578.

[105] Discussing Serbian legal framework for challenging arbitral award, Stanivuković notes that even in the instances of the arbitrator's apparent mistakes with respect to questions of fact and law, it is generally

stated that the award can be interfered on the ground of error in application of law only if it affects the Public Policy of India. In particular,

> there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within 'the fundamental policy of Indian law', namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.[106]

*Third*, notwithstanding the fact that most arbitration lawyers would not welcome the trend of litigation-like arbitration cases, hardly would anyone be ready to deny "the growing complexity of commercial arbitration", which requires skillful management of the arbitration procedure and due care in drafting and issuing a final award.[107] Some authors even argue for a conceptual distinction of "Complex International Contracts" that are distinguishable from other contracts by a number of special and legal characteristics.[108] One of the side effects of complex international arbitration is an emerging standard of judicial review,[109] according to which the sufficiency threshold for a reasoned arbitral award shall be deemed at the level closer to the court's judgment, insofar as the complexity of the arbitration case mimics that of litigation. This is, in the terminology of the Indian Supreme Court, the "adequacy" requirement, according to which the degree of particularity of reasoning depends on "the nature of issues falling for consideration", and, hence, cannot be formulated *in abstracto*. As stated in the *Oil Basins* case decision, which was subsequently confirmed by the Australian High Court, arbitrators should be aware of

---

granted that the court is not called upon to set aside the arbitral award, unless such a mistake constitutes one of the few recognized venues for its setting aside, one of which is public policy principle. Maja Stanivuković, 'Poništaj arbitražne odluke u domaćoj sudskoj praksi' ('The Annulment of Arbitral Award in Our Judicial Practice') (2006) 4 *Arbitraža, časopis Spoljnotrgovinske arbitraže pri Privrednoj komori Srbije*: 185.

[106] Ssangyong Engineering & Construction Co Limited Vs National High ways Authority of India, 8 May 2019, sec. 26, available at https://indiankanoon.org/doc/95111828/

[107] Carl F. Ingwalson, Jr. and Vivien B. Shelanski (eds.), *College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd ed.)* (Huntington: JurisNet, 2014), 2.

[108] First such characteristic concerns factors of culture, language and distance; second is illustrated in the fact that they "usually involve large volumes, both in terms of cost and size of the projects."; third pertains to "a so-called relational nature of the contract, leading to the questions of transaction specific investments, framework type character, mutual trust and cooperation duty, need for special risk allocation system, etc."; finally, these contracts are specific in terms of the governing law, which may have no connection to any of the parties involved, or may refer to more than one law (*dépeçage*). Joachim G. Frick, *Arbitration in Complex International Contracts* (The Hague, Zürich: Kluwer Law International, Schulthess, 2001), 6.

[109] Generally, more worrisome upshot of this trend may appear in the international corporate community opting for a more flexible means of dispute resolution, such as international commercial mediation. *See*, Stacey I. Strong, 'Beyond International Commercial Arbitration? The Promise of International Commercial Mediation' (2014) 45 *Washington University Journal of Law & Policy* 1: 11-39.

this "sliding scale – as the order of magnitude of the dispute in its various dimensions increases, the higher the standard of reasoning expected." Simply put, "complexity justif[ies] the imposition of a more demanding standard of reasoning",[110] thereby widening the potential trap of the arbitrator's falling into "perversity in reasoning".

[110] Gillies and Selvadurai, 'Reasoned Awards: How Extensive Must the Reasoning Be?', 131. Commentators note that, although the High Court's decision does not contribute to the clarification of "the uncertainty surrounding the extent to which arbitrators are to provide reasons for their award," it is, nonetheless, "beneficial as it assists in avoiding the denial of natural justice and enhances confidence in the arbitration process, albeit creating potential delays in preparing the award." Geoff Farnsworth, 'Sufficiency of Reasons in Arbitration Awards' (2012) 26 *Australian & New Zealand Maritime Law Journal* 1: 75.