Insufficient reasoning — a proper basis for setting aside an award?

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The most important product of the arbitration is the arbitral award. A (final) award is the culmination of the arbitration, it embodies the tribunal's ultimate and binding determination of the dispute between the parties and it is to a very large extent (even more so than court judgments) enforceable in foreign countries. But to what extent must arbitrators provide reasons in their award and what is the standard with which the reasoning must comply? Two separate questions arise in relation to reasons. The first is what constitutes good practice among arbitrators and forms a general requirement in arbitration, i.e. in a sense what level of reasoning that should — but not necessarily must in order for the award to be enforceable and unchallengeable — be contained in an award. The second question is under what circumstances challenges can be made to have an award set aside in instances where reasoning is alleged to be lacking or insufficient. The latter is arguably a more significant issue — at least from a strictly legal perspective — which this article will focus on, with particular regard to Swedish arbitration law.[2]

1 Introduction

In the absence of an internationally binding standard with respect to assessing if an award is duly reasoned, it is for each state to decide whether its arbitration law should contain a reasoning requirement (and if so to the extent of such requirement).[3] The Swedish Arbitration Act ("SAA"), however, does not contain an explicit requirement that an award — whether domestic or international — be reasoned.[4]

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[2] So-called quality arbitrations ("look and sniff", i.e. straightforward trade arbitrations before trade experts, where a quick factual determination by an expert is sought) does not customarily rely on reasoned decisions. The same is true for awards on agreed terms.

[3] Notably, there is no express provision in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention") in relation to reasons underlying awards and it does not include failure to state reasons as a ground for annulment or setting aside.

[4] However, the subject was touched upon in the committee report SOU 1994:81 s. 166 and discussed in more detail in the governmental bill prop. 1998/99:35 s. 133 f. After having pointed out that there are substantive arguments both for and against a statutory requirement of reasoned awards, the government decided not to include a reasoning requirement in the SAA given the overall purpose to limit the grounds on which an award may be set aside (particularly observing that had a reasoning requirement been introduced, the threshold from a qualitative

In this absence of statutory guidance, the Swedish Supreme Court has determined the Swedish position.

In *Soyak v Hochtief* (NJA 2009 s. 128), the Supreme Court rejected a challenge based on insufficient reasoning and held that *"[O]nly a total lack of reasons, or reasons that are so incomplete that they can be equated to a total lack of reasons"* can justify setting an arbitral award aside.[5] At the same time, the Supreme Court also observed that *"[P]roviding sufficient reasons in an arbitral award is a guardian of the rule of law, as it forces the arbitrators to analyse the legal issues and submitted evidence"*.

Parties prefer arbitration over litigation for a variety of reasons, the most important being procedural flexibility, neutrality, confidentiality and superior chances of recognition and enforcement.[6] The arbitration agreement is also based on the premise that the grounds for judicial review have been limited. However, it is safe to say that parties nonetheless expect the procedure to comply with basic tenets of due process to ensure minimum standards of objectivity, fairness and justice. That arguably includes understanding the reasons why the arbitrators have reached their conclusions. Insufficient or deficient reasoning is prone to dissatisfy the parties (or at least one of them) and ultimately risks undermining the legitimacy of arbitration by giving rise to distrust of arbitral adjudication. This being said, the standard of reasoning can not be too strict either as this might *inter alia* prolong the arbitral proceedings and increase the costs, thereby jeopardising the features that make arbitration more attractive compared to domestic court-based litigation. This paper aims at discussing whether the Supreme Court has struck a fair balance between the two competing goals of due process on the one hand, ensuring that the parties have a comprehensible and transparent award, and efficiency and finality of awards on the other.

The discussion of the *Soyak v Hochtief* case contained in Sections 3–4 should first be put into context. Therefore, Section 2.1 considers why reasoned awards are valuable and useful, while Section 2.2 and

viewpoint could not be set too low). Instead, a system where the parties are free to decide whether they want a reasoned award to be rendered was considered a more appropriate solution.

[5] In fact, this is the threshold when the arbitral rules chosen by the parties explicitly requires a reasoned award. In instances where the parties have not explicitly agreed that a reasoned award is to be rendered, or have not incorporated by reference in their agreement arbitral rules that requires reasons, it is not clear whether it is at all possible to set an arbitral award aside even though there is a total lack of reasons, since the SAA does not insist on reasoning. The Svea Court of Appeal appears to have interpreted NJA 2009 s. 128 as to effectively entail that lack of reasoning in an arbitral award can only constitute grounds for it to be set aside in case it follows from the arbitration agreement that the award is to be reasoned, see Svea hovrätt mål nr T 3780-12, delivered on 10 January 2014 (cf. also footnote 37).

[6] Two other advantages commonly ascribed to arbitration are speed and costs, although it nowadays can be questioned if international arbitration is more expeditious and less expensive than litigation in national courts when it comes to disputes of great legal and factual complexity and financial value.

2.3 contains a few observations about the current state of law in relation to reasoned awards internationally.

2 The requirement of reasons

2.1 Reasons for reasons

On a general note, there are many substantive arguments that can be advanced in favour for reasoned awards. The main arguments most frequently emphasized were first pronounced by the renowned British judge Lord Justice Bingham, who identified four (and a half) significant justifications for giving a reasoned award.[7] These have been quoted and referenced to many times since:

- The parties are entitled to know why they have won or lost.
- A reasoned award is a safeguard against arbitrariness, private judgment or an irrational splitting of the difference.
- A reasoned award allows the parties to be guided by it in respect of their future commercial conduct between one another.[8]
- A reasoned award can allow an appellate or supervisory court to review the decision effectively.
- The giving of a reasoned judgment is a valuable intellectual discipline for the decision maker. Bingham described this as a "half reason". The underlying rationale behind this argument is that a duty to provide sufficiently pertinent reasons prompts the arbitrators to ensure that they have considered all critical issues and that they have reached a well-founded conclusion that can be justified on a coherent and rational basis — if they can not explain a certain outcome in an intelligible way in writing, it might lead them to conclude that their preliminary inclination was in fact wrong and that it should be amended.

In addition to the above reasons, the following may be added. First, knowledge of on what grounds the tribunal's decision was made is critical to the legitimacy and acceptability of the decision and may therefore enhance the likelihood of voluntary compliance with the award. Secondly, sufficient reasoning minimises the risk of a party commencing setting aside-proceedings based on other grounds for

[7] Bingham, Differences Between a Judgment and a Reasoned Award, available at http://www.austlii.edu.au/au/journals/BalJlNTLawSoc/1997/137.pdf (first published in The arbitrator, vol 16, no. 1. May 1997). As Bingham observes, the reasons for a reasoned award mirrors in many, but not all, respects the reasons for a reasoned judgement by a domestic court. In Oil Basins Ltd. v BHP Billiton, the Victorian Court of Appeal supports this assertion (para. 56) by suggesting that "[I]n point of principle, 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." The case is discussed further infra, Section 2.2.

[8] This is discussed further in SOU 2007:26, p. 208 f. See also the New Zealand High Court's decision in Ngāti Hurungaterangi & Ors v Ngāti Wahiao [2016] NZHC 1486, para. 61.

challenge, as a failure to consider important submissions and evidence presented by the parties is in itself a ground for setting aside an award — as is basing an award on arguments that have not been discussed in the proceeding.[9] Thirdly, as pointed out in the preparatory works of the SAA, the reasoning of an award may in some instances be of importance in determining the scope of its *res judicata*.[10] Finally, a last argument of policy character in favour for reasoned awards is that, in order for arbitration to remain a preferred method of dispute resolution and at the same time develop productively, it must be able to generate meaningful legal principles to meet the need of greater substantive predictability in international transactions.[11] In other words, reasoned awards are beneficial for the development of a common law of international transactions and assist the effort to establish a greater degree of substantive adjudicatory basis in the area of international arbitration.[12]

2.2 International standards and case law

In light of the discussion in the preceding section on various reasons why reasoned awards are desirable, it not surprising to find a general international consensus in favour of reasoned awards. Thus, the vast majority of the most often used arbitration rules establish a presumption that an award shall state the reasons upon which it is based. This presumption can be rebutted only by an explicit party agreement to the contrary.[13] The same approach has been taken in the 1961 European Convention on International Commercial Arbitration (Art. VIII). The consensus is also reflected in the UN Model Rules on Arbitral Procedure of 1958 (Art. 29) and in the ICSID Convention Art. 48(3), which however do not provide the parties with an opportunity to derogate from the requirement.[14] The requirement that arbitral awards must state their reasons is also imposed by most developed arbitration statutes.[15] According to Born, it is now "*a nearly universal prin-*

[9] Such errors fall under the provision in item 2 of the first paragraph of Section 34 of the SAA on exceeding mandate.

[10] Prop. 1998/99:35 s. 133.

[11] Thomas e. Carbonneau, Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions, 23 Colum. J. Transnat'l L. 579 (1985).

[12] Ibid, p. 591 ff. Carbonneau admits that for such a development to be feasible, wider publication and reporting of arbitral awards is required. Fortunately, publication and reporting of arbitral awards has increased significantly since 1985.

[13] The following arbitration rules allows the parties to dispense of the reasons requirement: 2010 UNCITRAL Rules (Section 34.3), 2017 SCC Rules (Section 42.1), 2013 HKIAC Rules (Section 34.4), 2015 CIETAC Rules (Section 55), 2012 Swiss Rules (Section 32.3), 2018 VIAC Rules (Section 36.1), 2016 SIAC Rules (Section 32.4), 2014 LCIA Rules (Section 26.2), 2014 ICDR Rules (Section 30.1) and 1998 DIS (Section 34.3). The 2017 ICC Rules do not allow the parties to agree that the award shall not be reasoned (Section 32.2).

[14] See further concerning the requirement of reasons in the ICSID Convention infra, Section 2.3.

[15] See e.g. Art. 189 (2) of the Swiss Federal Statute on Private International Law, s.52(4) of the UK Arbitration Act 1996 (reasons required unless otherwise agreed

ciple that, unless otherwise agreed, international arbitral awards must set forth the reasons for the tribunal's decision […]".[16]

As is evident from the above, most rules, conventions and national legislation provide that arbitrators have a duty to give reasons in the abstract. However, they do not typically define the standard that must be applied to determine the sufficiency of such reasons, or answer the question if a violation of the duty is sufficiently fundamental to warrant setting an award aside. Guidance as to the scope and breath of the reasoning that an award must contain must therefore be sought in case law. The judicial practice on matters relating to reasoned awards varies widely both within and between jurisdictions. Although it falls without the ambit of the present article to conduct a detailed investigation of existing foreign case law, a few cases will be mentioned.[17]

A number of national courts have quite recently decided that defective reasoning can constitute grounds for setting an award aside. For instance, the Austrian Supreme Court has in a recent decision partially set aside an arbitral award due to a violation of procedural *ordre public* on the basis that the arbitral tribunal insufficiently reasoned its award.[18] The Austrian Supreme Court thereby overturned its previous case law and deviated from prevailing scholarly opinion. Finding that the requirement of sound reasoning is a fundamental principle of the Austrian legal system, the Austrian Supreme Court held that the reasoning may not be illogical or in contradiction to the decision and it may also not be limited to meaningless phrases and has to deal with the parties' relevant arguments.[19] Similarly, the New

by the parties), Art. 1471 of the French New Code of Civil Procedure (only domestic arbitrations), Art. 1717.3 (a)(iv) of the Belgian Arbitration Act, Art. 945(2) of the Québec Code of Civil Procedure, Art. 31(3) of the British Columbia International Commercial Arbitration Act, Art. 31(3) of the Indian Arbitration and Conciliation Act, Schedule 1, Art. 31(2) of the New Zealand Arbitration Act, Art. Article 26 (11) of the Brazil Arbitration Act and Article 31(2) of the Russian Federation Arbitration Act.

[16] Gary B. Born, International Commercial Arbitration, 2nd edition, 2014, p. 3039.

[17] Importantly, the statutory grounds for challenging an award under domestic law are rarely identical (notwithstanding similarities in the statutory text), despite most arbitration regimes having, in a broad sense, adopted similar approaches of available grounds for challenging awards. For example, a few jurisdictions permit a limited right of appeal on questions of law while others do not. Moreover, some states distinguish between "international" and "domestic" arbitrations in this regard. Due to the particularities of each state's regime, insufficient reasoning as a basis for setting an arbitral award aside is dealt with differently and under different grounds for challenge depending upon the law of the state concerned. This aggravates the already difficult and delicate task of properly examining foreign case law, which is also the reason why most cases mentioned infra are just referenced and shortly commentated upon. The purpose is not to present any balanced or complete account of national case law.

[18] OGH, 28 September 2016, No. 18 OCg 3/16i.

[19] See e.g. Anne-Karin Grill & Sebastian Lukic, Austrian Supreme Court Establishes New Standards as Regards the Decisive Underlying Reasoning of Arbitral Awards, Kluwer Arbitration blog, 24 December 2016, available at http://arbitrationblog.kluwerarbitration.com/2016/12/24/austrian-supreme-court-establishes-new-standards-as-regards-the-decisive-underlying-reasoning-of-arbitral-awards/. The Austrian Supreme Court also articulated two qualifications for cases

Zealand Court of Appeal recently set aside an award finding that the reasons were "essentially conclusory in nature and to the extent that they purport to explain the result they [were] so inadequate and inconsistent that they fall short of discharging the panel's mandate to give a reasoned award".[20] The following passage, outlining circumstances where insufficient reasoning of an award may lead to it being set aside, is worth quoting:

> The reasons must reflect the importance of the arbitral reference and the panel's conclusion. There is no qualitative measure of adequacy. The reasons are not required to meet a minimum criterion or extent — or to satisfy the curial standard — except that they must be coherent and comply with an elementary level of logic of adequate substance to enable the parties to understand how and why the arbitrator moved in the particular circumstances from the beginning to the end points. They must engage with the parties' competing cases and the evidence sufficiently to justify the result. They must be the reasons on which the award is based; if they do not satisfy these requirements, they are not reasons.[21]

A most interesting example of contradictory conclusions reached within the same jurisdiction with regard to what level of reasoning that should be contained in an award, and a good illustration of the difficulties faced by courts in these situations, can be found two court decisions rendered in Australia. In *Oil Basins Ltd. v BHP Billiton*, the Victorian Court of Appeal stated that "*the requirement (for reasons) is no different to that which applies to a judge*".[22] In contrast, in *Gordian Runoff Ltd. v Westport Insurance Corporation* the New South Wales Court of Appeal rejected the requirement that an arbitrator's reasons should always be of a judicial standard and held that the arbitrator need only "*set out what, on their view of the evidence, did or did not happen and should*

when insufficient reasoning will not permit a setting aside; (i) if the parties expressly waive their right to receive a reasoned award and (ii) if the party has failed to submit a request for interpretation of the award, provided that such possibility has been agreed on.

[20] Judgement of the New Zeeland Court of Appeal in Ngāti Hurungaterangi & Ors v Ngāti Wahiao NZCA 429, dated 26 September 2017.

[21] Ibid, para. 63. Interestingly, the Supreme Court of New Zealand dismissed the motion for leave to appeal of the Court of Appeal's judgement, holding that "[T]here may be room for debate as to whether the Court of Appeal's approach was too prescriptive for an award dealing with subject matter of the kind that arose in this case. But we do not see any real prospect that this Court would determine that adequate reasons were given in the award.", see judgement of Supreme Court of New Zealand, Ngāti Hurungaterangi & Ors v Ngāti Wahiao NZSC 200, dated 21 December 2017.

[22] Oil Basins Ltd. v BHP Billiton Ltd., Victoria Court of Appeal, Australia, 16 November 2007, [2007] VSCA 255, para. 50. The court added that "[O]f course it is understood that arbitrators may not always be skilful in the expression of their reasons. Consequently, it is accepted that a court should not construe an arbitrator's reasons in an overly critical way. But it is necessary that an arbitrator deal with issues raised and indicate the evidence upon which he or she has come to his or her conclusion. Accordingly, if a party has relied on evidence or material which the arbitrator has rejected, it is ordinarily necessary for the arbitrator to assign reasons for its rejection."

explain succinctly why, in light of what happened they have reached their decision and what that decision is."[23]

In the USA, unless contractually required, arbitrators need not explain their rationale for their award.[24] However, once parties impose a reasoning requirement in their contract, a certain minimum standard with which the reasoning must comply must be determined. US Circuit courts have taken varying approaches to determining the sufficiency of a reasoned award.[25] The matter recently came under review in the U.S. District Court for the Southern District of New York.[26] In this case the court referred to Second Circuit precedent, indicating "*that a 'reasoned award' requires something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel.*"[27] In other words, "*[a] reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it,*" but "*need not delve into every argument made by the parties.*" The court further stated that while an arbitrator is not obliged to discuss each piece of evidence presented, he or she must at a minimum provide some rationale for the rejection of arguments for liability. In the case at hand case, the arbitrator was found to have provided reasons that were insufficient to meet the necessary standard.[28] The court specifically noted that

> In dismissing [the Claimant's] arguments, the arbitrator conclusory states that '[h]aving heard all of the testimony, reviewed all of the documentary proofs and exhibits, [he does] not find support for [the Claimant's] claims ....'…… There is no reason given for this finding other than the negative credibility determination as to [the Claimant's] expert witness, Zukerman…… While this credibility determination does provide a rationale for rejecting STI's calculations of its lost profits and goodwill, it does not provide a basis for a dismissal of [the Claimant's] claims in their totality.[29]

[23] Gordian Runoff Ltd. v Westport Insurance Corporation, Court of Appeal of New South Wales, Australia, 1 April 2010, [2010] NSWCA 57, citing Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2) [1981] 2 Lloyd's Rep. 130, 132–33 (English Ct. App.).

[24] See the Commercial Arbitration Rules of the American Arbitration Association, art. 46(b) "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."

[25] Thomas H. Webster, Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication, Arbitration International 2006 p. 431 ff., at p. 440 ff.

[26] Smarter Tools, Inc. v Chongqing SENCI Import & Export Trade Co., 2019 U.S. Dist. LEXIS 50633 (S.D.N.Y. Mar. 26, 2019).

[27] See Ibid, Section III (A) of the judgement.

[28] It may be noted that rather than setting aside the award, the court determined that the proper remedy in the case at hand was to remand the award back to the arbitrator for clarification of his findings.

[29] It is also common that parties seek to have the substance of arbitral awards reviewed by invoking the doctrine of "manifest disregard of the law", which is defined very narrowly. Before a court may find that there has been a manifest disregard of the law, it must be shown that the tribunal has recognized the existence of a clearly governing legal principle but decided to ignore or pay no

Further examples of national courts that have expressed willingness to set aside or annul arbitral awards on the basis of insufficient reasoning can be found in the UNCITRAL's 2012 Digest of Case Law on the Model Law on International Commercial Arbitration.[30] For example, a German court has suggested that an award could be set aside if the reasoning lacks any substance, and is evidently paradoxical or conflicts with the decision made. Similarly, a court in the Netherlands considered that an award could be set aside if the reasoning was so incorrect that it constituted a failure to explain the award.

To be sure, there are also several jurisdictions in which the contents of the reasoning of the arbitral award escapes review save in exceptional circumstances. This is the case in major places of arbitration such as France, Switzerland and England.[31] French courts will not annul an award on the basis of contradictory or unclear reasoning and not even where the tribunal failed to respond to all of the arguments of the parties.[32] In Switzerland, the right to a reasoned decision is considered a part of the right to be heard and the latter is one of the grounds for setting aside an arbitral award under Art. 190 (2)(d) of the Swiss PILA. The Swiss Federal Supreme Court has held that while the right to be heard within the meaning of said provision does not require that an international arbitral award contains reasons, it does however impose a minimum duty on the tribunal to "*examine and deal with the relevant issues*".[33] If the arbitral tribunal neglects to take into consideration the claims, arguments or evidence presented by one of the parties that are relevant to the decision to be taken, the right of the party to communicate his point of view to the arbitrators is considered infringed because "*he [would then be] in the same situation as if he had not been allowed to submit his arguments to [the arbitrators] in the first place.*"[34] It thus appears that insufficient or incoherent reasoning per se is irrelevant to the question of whether an award should be set aside in Switzerland; what matters is whether the tribunal has failed to consider an essential issue in the claim or defence.[35]

attention to it (Westerbeke Corp. v Daihatsu Motor Co. Ltd, 304 F.3d 200, 209 (2d Circuit 2002).

[30] The digest is available at http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf, see specifically p. 127 f. (accessed on 15 December 2018).

[31] See generally Thomas H. Webster, "Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication", Arbitration International, 2006, pp. 431–462.

[32] See generally Thomas H. Webster, "Terms of Reference and French Annulment Proceedings", Journal of International Arbitration 20(6) p. 561–587, 2003, at p. 567 ff.

[33] Decision of the Swiss Federal Supreme court dated March 22, 2007, 4P 172/2006, para. 5.2.

[34] Ibid.

[35] As for the complex state of law in England, see Thomas H. Webster, Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication, Arbitration International 2006 p. 431 ff., at p. 440 ff.

2.3 ICSID Arbitration

The most extensive international judicial treatment on the scope of the reasons requirement is probably the various decisions by ICSID annulment committees pursuant to Article 52 of the 1965 ICSID Convention.[36] As noted above, Article 48(3) of the ICSID Convention requires the tribunal to give reasons for its decision. That provision is bolstered by Article 52(1)(e), which provides that an award may be annulled when the tribunal has "failed to state the reasons on which [its decision] is based".

Early annulment committees conducted a very strict review so as to permit review of the correctness of the tribunal's decisions and determining whether the case was well or ill judged.[37] Subsequent committees have declined to follow such an approach in order to avoid turning annulment proceedings into appeal proceedings; assessing whether a tribunal has come to legally defensible conclusions would in practice amount to a substantive test of correctness.[38] The ad hoc Committee in MINE has for instance explained that

> ...the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (l)(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal's decision… In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.[39]

The MINE standard was later confirmed by the Mitchell committee, which added that "a failure to state reasons exists whenever reasons are purely and simply not given, or are so inadequate that the coherence of the reasoning is seriously affected."[40]

[36] The ICSID Convention establishes a unique internal procedure in case of annulment proceedings being brought a party. A request for annulment is thus to be submitted to an ad hoc Committee of three persons appointed by the Chairman of ICSID's Administrative Council, see Art. 52 (3). Unlike commercial arbitration awards, ICSID awards are not subject to annulment proceedings in national courts, either in the arbitral seat or elsewhere.

[37] See e.g. Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Soci et e Camerounaise des Engrais, ICSID Case No ARB/81/2, Decision on Annulment (3 May 1985), para. 120.

[38] Stephanie Mullen and Elizabeth Whitsitt, Quantum, annulment and the requirement to give reasons: analysis and reform, Arbitration International, 2016, pp. 59–80, at p. 63 ff.

[39] MINE, ICSID Case ARB 84/4 (1989), para. 5.08–5.09.

[40] Mitchell, November 1, 2006, Case No. ARB/99/7, para. 21. See also Amco Asia Corp, ICSID Case ARB/81/1, (1986) paras. 41–44; CAA & Vivendi Universal v Republic of Argentina, Decision on Annulment, 6 ICSID Rep (2002), paras. 61–65.

To conclude, ad hoc committees have emphasised the consistency and coherency rather than the correctness or extensiveness of reasoning. This is in line with national case law in countries where there has been a willingness to allow challenges to awards on the basis of insufficient reasoning.[41] Also, contradictory or frivolous reasons are to be equated with a failure to state reasons and can result in annulment. Contradictory reasons "*cancel each other and will not enable the reader to understand the tribunal's motives*".[42] Frivolous reasons "*are those manifestly irrelevant and knowingly so to the tribunal.*"[43]

3 Soyak v Hochtief

3.1 The parties' submissions and the Supreme Court's determination

After a dispute concerning construction works in Moscow had arisen between Soyak and Hochtief, the dispute was, in accordance with the parties' agreement, submitted for arbitration according to the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Rules"). The SCC Rules provides that the arbitral tribunal shall make its award in writing, and, unless otherwise agreed by the parties, shall state the reasons upon which the award is based.[44] Soyak brought challenge proceedings with respect to the resulting award before the Svea Court of Appeal and later the Swedish Supreme Court, requesting that the award ought to be wholly or partially set aside on the basis that the arbitral tribunal largely omitted to provide reasons and/or that the reasons provided were insufficient or contradictory. Soyak primarily claimed that the arbitrators had exceeded their mandate under item 2 of the first paragraph of Section 34 of the SAA by failing to give adequate reasons contrary to the express requirements of the chosen SCC rules. Alternatively, Soyak claimed that the arbitrators had committed a procedural error under item 6 of the aforementioned paragraph and that the error had likely had an effect on the outcome of the case.

Neither of Soyak's grounds were successful. After having determined that an alleged failure to give sufficient reasons, contrary to an express requirement contained in the applicable arbitration rules, constitutes a procedural error and not an excess of mandate, the Supreme Court reasoned as follows:

> Provided that the parties have agreed that the arbitral award shall include reasons,[45] the standard the reasons of the arbitral award should meet must be established.

[41] See Section 2.2 supra.
[42] Caratube, ICSID Case No. ARB/08/12, 21 February 2014, para. 102.
[43] Ibid.
[44] The rules applicable at the time were the 2007 SCC Rules. The relevant Art. 36 (1) of the 2007 SCC Rules is identical to Art. 42 (1) of the 2017 SCC Rules now in force.
[45] To be precise, the parties had not so agreed explicitly but instead incorporated by reference in their agreement arbitral rules (the SCC rules) that required rea-

There can be various causes as to why an arbitration clause provides that an arbitral award shall include reasons. The parties may also, where more precise instructions on what the reasons shall include are lacking, have more or less far-reaching expectations on the explanations of the arbitral tribunal's reasoning. However, the issue of the parties' expectations as to the reasoning, whether justified or not, and the issue of what can be considered to be good practice amongst arbitrators, must be separated from the issue of whether the arbitrators' reasoning is so lacking as to constitute a ground for challenge.

Providing sufficient legal reasons in an arbitral award is a guardian of the rule of law, as it forces the arbitrators to analyse the legal issues and submitted evidence. However, when it comes to challenge proceedings, the interest of having complete reasons for the award must be weighed against the interest of ensuring the finality of the arbitral award. Challenge proceedings do not grant grounds for a test of the merits of the arbitral tribunal's conclusions. As a result of the foregoing, and having regard to the difficulties with respect to scope that a qualitative review of the reasons would cause, only a total lack of reasons, or reasons that are so incomplete that they can be equated to a total lack of reasons, can constitute a procedural error. Should such a material procedural error be at hand, it could also be presumed that the lack of reasons has affected the outcome of the case.

4 Examination of the Supreme Court's judgement

4.1 Preliminary comments

In the author's view, the analysis of the appropriate standard of review for determining whether an award is sufficiently reasoned must in essential respects be taken further than is indicated by the Supreme Court's rationales, which are very brief and not as comprehensive as one would have hoped.

A first observation is that the judgment leaves important issues unresolved. One is whether a complete lack of reasons constitutes grounds for setting an award aside in cases where the parties have neither explicitly agreed that a reasoned award is to be rendered nor have incorporated by reference in their agreement arbitral rules that requires reasons.[46] Another, more vital, is what the current threshold actually entails. The Supreme Court did not provide the much-needed clarification that was expected in this regard. In what cases can reasons be considered so incomplete as to be able to draw the conclusion that they can be equated to a total lack of reasons? For example, is the requirement to give reasons satisfied as long as there are a few hurried and inconsiderate sentences when ruling upon issues that may be described as having a "conclusive" nature? To give a practical example, is it sufficient for arbitrators to write:

sons. As noted earlier, the Svea Court of Appeal has interpreted this passage in the judgment as to effectively entail that lack of reasoning in an arbitral award can only constitute grounds for it to be set aside in case it follows from the arbitration agreement that the award is to be reasoned (footnote 6).

[46] See footnote 6 and the discussion in Lindskog, Lagen om skiljeförfarande (7 sep. 2018, Zeteo), kommentaren till 34 kap. 1 §, avsnitt 5.2.2.

Having considered the evidence and submissions made by both parties in relation to the requirement for notice of acceptance of a repudiatory act as a basis for termination of contract, we find that we agree with the Claimant and that appropriate notice was given in this case.[47]

Soyak v Hochtief appears to leave this this issue unresolved.[48] However, to the extent that the appellant's objections relate to matters of evidence, it could be concluded from another passage in the judgment that it is sufficient that the award contains a statement on what has been shown in the case and not necessarily a statement as to on what the tribunal has based its conclusion in this regard.[49]

Former Chief Justice of the Supreme Court Stefan Lindskog is of the opinion that it would be quite sufficient to state the quoted reasons in order to avoid a successful challenge, at least if the arbitrators in an intelligible manner have set out the facts and legal reasoning on which the parties have relied.[50] Arguably, the quoted reasons are not so incomplete that they can be equated to a total lack of reasons. Another uncertainty of what the state of the law is concerning the current threshold regards reasoning that lacks substance and is evidently paradoxical or conflicts with the decision made. In other words, can contradictory, frivolous or *pseudo* reasons constitute grounds for setting an award aside? This remains to be seen. Notably however, it is as hard to understand how and why the arbitrators' have reached their conclusions by such reasoning as it is with the reasoning quoted above (which basically only says that the tribunal prefer the arguments of one of the parties over the other).

A final uncertainty is whether an award that is only reasoned in part will meet the standard and be considered a fully reasoned award. A practical example could be that the respondent raises two major defences, one concerning statutory limitation and the other concerning force majeure, and the award lacks reasoning with respect to first issue but not with respect to the second. Or what if the award sets out the arbitrators' findings and the necessary reasons for those findings with respect to a main claim, but only contains a line or two of unexplained conclusions with respect to a counterclaim? A reasonable view would, in the author's opinion, be that there must be sufficient reasoning with respect to all central issues raised before the tribunal, but unfortunately, *Soyak v Hochtief* did not clarify how these situations should be dealt with.

[47] The example has been retrieved from Geoff Farnsworth, "Sufficiency of reasons in arbitration awards", p. 72, available at http://www.austlii.edu.au/ au/journals/ ANZMarLawJl/2012/4.pdf.

[48] Cf. S. Jarvin, Kraven på domskäl i skiljedomar, JT 2009–10 p. 705.

[49] Cf. p. 138 in the judgment and the comparison to Section 7 of Chapter 17 of the Code of Judicial Procedure; as Jarvin notes, it is doubtful whether the Supreme Court outlined the requirements on a Swedish court to provide reasons correctly in this regard, see Jarvin, Kraven på domskäl i skiljedomar, JT 2009–10 p. 716).

[50] Cf. Lindskog Lagen om skiljeförfarande (7 sep. 2018, Zeteo), kommentaren till 34 kap. 1 §, avsnitt 5.2.2., footnote 212.

4.2 Balancing of policy arguments

There is no doubt that the *Soyak v Hochtief* judgment stands for the proposition that the policy goal of finality of arbitral awards weighs heavier than, and should prevail over, the demand for transparency in arbitration and ensuring that awards are supported by clear and comprehensible reasoning. However, one must not forget that poorly written awards, where the reasoning is clearly insufficient,[51] may in fact increase the time and cost associated with final resolution of the dispute. This is so because poorly written awards almost inevitably lead to uncertainty and doubt about what facts the tribunal has found to be substantiated and what it has decided on important issues of law, which in turn increases the likelihood of future court intervention by way of a challenge. Therefore, instead of strengthening the finality of the award, poorly written awards do in fact the opposite, leading to the very same inefficiencies and delays which the Supreme Court sought to avoid. In cases where the arbitration agreement is contained a long-term contract and early-arising disputes are submitted to and resolved by a tribunal or where there are several arbitration agreements contained in different related contracts between the same parties (e.g. in the construction industry), a readily intelligible reasoned award is especially valuable as an explanation of the rationale in an early decision may not only provide resolution of current issues but also suggest the likely outcome of similar or related issues in the future.[52]

It seems that "*regard to the difficulties with respect to scope that a qualitative review of the reasons would cause"* was the main reason that led the Supreme Court to reach its conclusion. Undeniably, it is true that arbitrators have the right to be wrong on the merits under Swedish law and that, as a matter of principle, courts should not engage in an analysis of whether the arbitrators' analysis was correct or their reasoning persuasive. Therefore, it is also true that inadequate or insufficient reasons must be distinguished from reasons which are claimed to be legally or factually wrong. Yet, it is questionable whether this distinction is as problematic and delicate as suggested by the Supreme Court. A certain decision may subsequently be found to be right or wrong, but this is something different than concluding that there exists real doubt about what the decision was and why. In the words of the New Zeeland Court of Appeal in Ngāti Hurungaterangi & Ors v Ngāti Wahiao:

[51] Is important to emphasize that the author, by using the expression "poorly written awards", refers to awards that provide insufficient reasoning such that it does enable the reader to understand why the tribunal reached its decision, as opposed to awards that are claimed to be legally or factually wrong (see also the discussion infra).

[52] Beaumont, Reasons and reasons for reasons revisited: has the domestic arbitral award moved away from the fundamental basis behind the reasoned award, and is it now time for realignment?, Arbitration International, 2016, 32, p. 533.

> [T]he reasons are not required to meet a minimum criterion or extent — or to satisfy the curial standard — except that they must be coherent and comply with an elementary level of logic of adequate substance to enable the parties to understand how and why the arbitrator moved in the particular circumstances from the beginning to the end points.

Similarly, ICSID ad hoc committees have held that while the requirement of reasons does not permit any inquiry into the quality or persuasiveness of reasons, it does permit an analysis of whether a reader can understand how the tribunal arrived at its conclusion. In the words of the annulment committee in *AMCO*:

> If it be true that a full control and review of the reasoning followed by an ICSID tribunal would transform an annulment proceeding into an ordinary appeal, it is also true that supporting reasons must be more than a matter of nomenclature and must constitute an appropriate foundation for the conclusions reached through such reasons.[53]

To be sure, the production of a comprehensible and coherent award is not something which should provide a demanding task to arbitrators entrusted by the parties to settle a dispute by adjudication under law. They are not being asked to go into great detail, only to reasonably rationally explain the reasons for their determination by reference to the parties competing cases.

In light of the above considerations, it is submitted that the Supreme Court's restrictive approach with regard to the nature and extent of the reasons required is unfortunate as it does not — at least not on its face — appear to cover fundamental defects in the tribunal's reasoning such as serious incoherency or inexplicableness. The minimum requirement should be that reasons — notwithstanding possible errors made in fact or law — must be sufficient to explain the decision-making process, or in other words be able to be understood, in relation to key issues.

4.3 Effect on the outcome of the case

The statutory requirement that the irregularity "probably influenced the outcome of the case" is a causal requirement. Basically, the court shall consider how the arbitrators would have judged if the irregularity had not been committed.

It follows from the *Soyak v Hochtief* judgment that it is only where there is a total lack of reasoning (or where the reasoning must be considered so insufficient that it can be considered to be the same as a total lack of reasoning) that a procedural error can be said to have occurred. On the other hand, the Supreme Court took the view that a total lack of reasoning creates a presumption of causality. Provided that the current threshold for challenge is reformulated and that a

[53] Amco Asia Corp, ICSID Case ARB/81/1, (1986) paras. 520–21.

procedural error can be said to have occurred also when the award is inexplicable, being based on inconsistent or illogical reasons, the question arises whether the losing party will be able to establish the probability of the outcome having been affected.[54]

As noted earlier (Section 2.1), providing sufficient reasoning functions as a form of intellectual discipline for arbitrators as it prompts them to give appropriate attention to the arguments and evidence presented and form considered conclusions. Bingham addressed the purpose and importance of the reasoning requirement in this regard when admitting that *"[I] cannot, I hope, be the only person who has sat down to write a judgment, having formed the view that A must win, only to find in the course of composition that there are no sustainable grounds for that conclusion and that on any rational analysis B must succeed*".[55] Similarly, another judge has noted that *"[r]easoning that seemed sound when 'in the head' may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he [or she] has written will be wondering how an audience would react*".[56]

If there is clearly no reasonable connection between the written bases invoked by a tribunal and the conclusions reached by it, it appears rather plausible that the outcome of the case could have been different had such irregularity not occurred.[57] Therefore, in the author's view, reasoning that is inconsistent, incomplete or illogical to the extent that its meaning becomes paradoxical or conflicts with the deci-

[54] Just a few days before this article was sent to the editorial board of SvJT, the Supreme Court rendered a ruling in NeuroVive v CicloMulsion (case no. T 796-18). In its ruling, the Supreme Court stated that while the starting point is that the court shall consider how the arbitrators would have judged if the irregularity had not been committed, some procedural irregularities are such that a comparison of this kind cannot be made. Therefore, the influence-test may be performed differently depending on the nature of the irregularity. The Supreme Court also clarified that serious irregularities create a presumption of causality, and referred in this regard to Soyak v Hochtief. Interestingly, the Supreme Court further explained that "a presumption that a procedural irregularity has influenced the outcome of the case can be justified by the fact that some irregularities are such that it can be difficult to prove that they have influenced the outcome, while they at the same time may give rise to serious doubt of whether due process has been adhered to. That could be the case when, for example, an award lacks reasons" (para. 19). Also, when assessing whether or not the irregularity in the case at hand probably had influenced the outcome of the case, the Supreme Court took into consideration that important principles of legal certainty had been disregarded (para. 26).

[55] Bingham L.J., Differences Between a Judgment and a Reasoned Award, available at http://www.austlii.edu.au/au/journals/BalJlNTLawSoc/1997/137.pdf, p. 9 (first published in The arbitrator, vol 16, no. 1. May 1997).

[56] R. A. Posner, Judges' Writing Styles (And Do They Matter?), 62 U. CHI. L. REV. 1421, 1447-48 (1995), available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2887&context=journal_articles.

[57] Cf. also the discussion in footnote 63, which suggests that firm evidence or positive support that the outcome could have been influenced might not be needed in cases where the irregularity is such that it can be difficult to prove that it has influenced the outcome, while it at the same time results in important principles of legal certainty being ignored.

sion made should be considered likely to have affected the outcome of the case.

5 Concluding remarks

Ensuring the finality of arbitral awards and construing narrowly the grounds for setting aside are key objectives both in public and commercial arbitration. However, for arbitration to remain a preferred method of dispute resolution, procedural safeguards of the adjudicative process and the principle of finality of awards must be well balanced. It is argued that there is a need for a recognition of a higher reasoning standard in arbitral awards than what seems to be current state of law in Sweden in order to allow challenges to awards whose reasoning — be it because of its incompleteness or illogicalness — is so insufficiently expressed as to raise a substantial doubt about on what grounds the decision was taken, i.e. a failure to explain the award. Without intelligible reasons the losing party will likely feel that the relevant issues have not been adequately addressed and deem that due process has not been adhered to. This not only increases the likelihood of a challenge — it may also lead to distrust of arbitral adjudication at large. Furthermore, finality of the disputed matter (aside from the award) may very well rest in the giving of a reasoned award "*that meets those objectives outlined by Bingham by leaving the parties in no doubt why the matter was decided the way it was*".[58]

[58] A. Beaumont, Reasons and reasons for reasons revisited: has the domestic arbitral award moved away from the fundamental basis behind the reasoned award, and is it now time for realignment?, Arbitration International, 2016, 32, p. 526 f.