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Does Everything Happen for a Reason? Reconsidering the Function and Purpose of the Duty to Give Reasons in International Arbitration

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Abstract

The giving of reasons for the decision in the form and contents of the award is becoming an increasingly common element of procedure in international commercial arbitration. This paper critically analyses the duty to give reasons across a range of contemporary arbitration contexts. It first examines the position of the duty in the broader international legal framework of commercial arbitration, before conducting a comparative analysis of the duty to give reasons in judicial, administrative law and investment arbitration contexts. It identifies the function and purpose of the duty to give reasons and concludes that the duty is currently applied in ways which undermine the party autonomy as well as compromising the finality and efficiency of award enforcement. Finally, it examines future implications of this finding and proposes remission as an alternative remedy upon breach.

Key Words: Arbitration, international law, New York Convention, reasons, procedure.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises exactly 15,013 words.

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I Introduction

Law and reason have long been close companions. The giving of reasons is "a function of due process, and therefore of justice".[1] As international arbitration has strived for legitimacy, the duty of the arbitrator to give reasons has become a fundamental element of procedure. Reasons guard against arbitrariness, they provides a sense of closure and understanding for the parties, and they enhance the quality of the decision-making process. Arbitration's survival as an institution of dispute resolution relies on party choice. In this environment, the benefits of reasons are of particular importance to maintain confidence in the system and ensure that parties continue to choose arbitration as their preferred method of dispute resolution. Under the framework of the New York Convention,[2] national courts play a critical role in application of the duty with the power to set aside an award for non-compliance. However as recent case law suggests, there is a fine balance to be struck in applying the duty to give reasons. Courts which too readily intervene to sanction a tribunal for inadequate reasons pose a threat to effective enforcement of awards. On the other hand, too deferential an approach risks normalising poorly reasoned awards, leading to unsatisfied parties and promulgating a suspicion of arbitrariness. Two recent enforcement proceedings in Australian and New Zealand courts have seen arbitral awards set aside on the basis of inadequate reasons.[3] These cases have raised questions about the proper purpose and function of the duty to give reasons in international arbitration. This paper seeks to explore this debate and critically analyse the contemporary application of the duty through a return to first principles. The fundamentals of arbitration are finality, party autonomy and effective enforcement. How might one frame the duty to best promote these principles?

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1 *Flannery v Halifax Estate Agencies Ltd* [1999] EWCA Civ 811, [2000] 1 WLR 377 at 381.

2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959) [The New York Convention].

3 *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 [*Ngāti Hurungaterangi*]; and *Westport Insurance Corporation and Others v Gordian Runoff Ltd* [2011] HCA 37, (2011) 281 ALR 593 [*Gordian Runoff*].

The paper proceeds in six parts. Part II traces the background and development of the duty to give reasons, and identifies the place of the duty within the international commercial arbitration legal framework. Part III analyses the consequences for breach in enforcement proceedings under art V of the New York Convention. Part IV undertakes a comparative analysis of the "reasons for reasons" across three contexts: judicial reasoning, judicial review of administrative decisions, and investment arbitration. It identifies the unique character and purpose of the duty in the commercial arbitration context. Part V examines the contemporary operationalisation of the duty in four case studies. It concludes that duty is often applied in ways which undermine the benefits of arbitration and dilute the unique advantages that arbitration offers over other forms of dispute resolution. Finally, Part VI explores the practical consequences of this conclusion both now and into the future, and argues for the remedy of remission as a solution.

II Background and framework of the duty to give reasons

A Historical Development

While early forms of arbitration shared many aspects of judicial procedure, the duty to give reasons was not one of them. In the 18th century, it was common practice for arbitrators to issue unreasoned awards to avoid judicial interference. In England, the writ of certiorari could be invoked to allow judicial review of the merits of the decision, and the entire award would be set aside.[4] However, if the arbitrator did not provide reasons for the award, the court were powerless to intervene.[5] The practice was followed in the United States, India, and Hong Kong.[6] Distrustful of the unsupervised legal reasoning of arbitral tribunals, a series of reforms were introduced at the turn of the century to enhance the supervisory jurisdiction of the court. The Common Law Procedure Act 1854 required a limited form of

4 Thomas Carbonneau "Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce" (1984) 19 Tex Int LJ 33 at 40.

5 *Gordian Runoff*, above n 3, at [32].

6 See Gary Born "International Commercial Arbitration Volume III" (2nd ed, Wolters Kluwer, 2014); and Thomas Carbonneau "Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions" (1985) 23 Colombia Journal of Transnational Law 579 at 582.

reasoning through the stated case procedure, whereby the arbitrator was given the power to state the award in the form of a special case for the courts.[7] Later courts held this procedure was unable to be contracted out of by the parties to the arbitration agreement, in order for the Court to "ensure the proper administration of the law by inferior tribunals".[8] The passing of the Arbitration Act 1950 codified this position. However, the development was widely criticised as encouraging greater judicial interference within a legal culture already suspicious of arbitration, and England built a reputation for being an unfriendly arbitration jurisdiction.[9] Thus although the requirement to give reasons originally arose from judicial mistrust of arbitration, by the 1970s the importance of reasons as a function of due process gained wider acceptance, and the Arbitration Act 1979 aimed to encourage reasoned awards as a matter of policy.[10]

In contrast, an award without supporting reasons was rare in civil law countries. Civil law systems generally favoured awards providing reasons, as this would enhance the understanding of the award by the parties and allow the courts to determine whether grounds existed for refusal of enforcement.[11] Reflecting this attitude, the 1961 European Convention on International Arbitration provided for a presumption of reason-giving in all arbitral awards.[12]

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7 Common Law Procedure Act 1854 (UK) 17 & 18 Vict c 125.

8 *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478 at 488.

9 David Hacking "The "Stated Case" Abolished: UK Arbitration Act of 1979" (1980) 14 The International Lawyer 95 at 97–98.

10 Thomas Bingham "Reasons and Reasons and Reasons: Differences Between a Court Judgment and an Arbitral Award" (1988) 4 Arbitration International 141 at 146. See Arbitration Act 1979 (UK), s 1(5)(b).

11 *Report of the Working Group on International Contract Practices on the Work of its 3rd session*, A/CN.9/216 (1982) at [80]; Antonide Netzer "Incorporation of the UNCITRAL Model Law on International Commercial Arbitration in the Russian Federation" (2010) 1 Yearbook on International Arbitration 29 at 54; and Thomas Carbonneau "The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity" (1980) 55 Tulane Law Review 1 at 11.

12 European Convention on International Arbitration 484 UNTS 349 (opened for signature 21 April 961, entered into force 18 October 1965), art VIII.

B The International Legal Framework

In modern times the duty to provide reasons is a generally accepted part of the procedural framework of international commercial arbitration. Despite this, the cornerstone instrument for international commercial arbitration, the 1958 Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention),[13] does not expressly provide for reasons as a procedural requirement. Perhaps realising this shortcoming, the 1985 Working Group on International Contract Practices recommended for the UNCITRAL Model Law (Model Law) to include a requirement of reasons as part of the form and content of the award.[14] The travaux préparatoires indicate that there was widespread support for requiring reasons, as it was already a requirement in several national arbitration laws and would serve to enhance due procedure.[15] While there was a risk that providing reasons would delay the issue of an award and render it more vulnerable to challenge, it was thought that if this requirement was subject to the agreement of the parties, it would strike a suitable balance between efficiency and due process.[16] This compromise resulted in what is now art 31(2):[17]

> … the award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

The presumption that arbitrators will be under a duty to provide reasons is a now a standardised part of national arbitration legislation, as legislation based on the Model Law has been adopted in 80 States.[18] Further, the provision of reasons as part of the required

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13 New York Convention, above n 2.

14 *Report of the Working Group on International Contract Practices on the Work of its Third Session* A/CN.9/216 (1982) at [77].

15 At [77].

16 At [80].

17 UNCITRAL Model Law on International Commercial Arbitration A/40/17 (1985, amended 2006).

18 UNCITRAL "Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006" (24 July 2018) UNICTRAL <www.uncitral.org>.

form and contents of an award is contained in the UNCITRAL Arbitration Rules, as well as in the rules of most major arbitration institutions.[19]

C Standard of Reasons

An important element of the duty is the requisite *standard* of reasons: how substantive should they be? In England the standard was first dictated by the Arbitration Act 1979. Under s 1(5)(b) if insufficient reasons were given for an award, the court could order the arbitrator to state their reasons in full. Since the purpose of this order was to place the court in a position to determine whether a review was available, the courts held that the arbitrator was not obliged to give reasons for findings of fact or a decision on any issue not subject to review.[20] Interestingly, in the maritime arbitration context, a customary practice had developed as early as the 1970s to render awards with detailed reasoning only where they had recognised precedential value.[21] This was to ensure that the standard form bills of lading could have consistent interpretation across the maritime industry.[22] However, by the 1980s the duty to give reasons was generating prominence as a standard feature of arbitration agreements and required further elaboration by the courts.[23] In 1981 the Court of Appeal in the much cited case of *Bremer* framed the required standard so:[24]

> All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what

19 UNCITRAL Arbitration Rules GA Res 65/22, A/Res/65/22 (2010), art 34; International Chamber of Commerce Arbitration Rules 2017, art 32(2); London Court of International Arbitration Rules 2014, art 26(2); Hong Kong International Arbitration Centre Administered Arbitration Rules 2013, art 34(4); Singapore International Arbitration Centre Arbitration Rules 2015, art 32(4).

20 *Poyser and Mills Arbitration* [1964] 2 QB 467, [1963] 2 WLR 1309; and see Michael Mustill and Stewart Boyd *The Law & Practice of Commercial Arbitration in England* (2nd ed, Butterworths, 1989) at 377.

21 Carbonneau, above n 6, at 587.

22 Francis O'Brien "Maritime Arbitration" (1978) 14 American Bar Association Selection of Insurance, Negligence and Compensation Law 222 at 227.

23 *Bremer Handelsgesellschaft mbH v Westzucker GmbH* [1981] 2 Lloyd's Rep 130 (CA) at 132.

24 At 132–133.

> happened, they have reached their decision and what that decision is…the arbitrators should end with their conclusion as the resulting rights and liabilities of the parties.

Wary of criticism claiming that the standard was inappropriate for the nature of arbitration, Donaldson LJ explained that this standard did not require legal skills and was not advanced by legal training.[25] It was "not technical" and arbitrators were "not expected to analyse the law and the authorities" so long as they explained how they reached their conclusion.[26] The decision has since been cited with approval in New Zealand and Australia.[27] The approach in Canada is similar, with a Quebec court noting that arbitrators are not required to state their reasons to a judicial standard, particularly when the parties have chosen arbitrators for their specialised commercial expertise rather than legal skills.[28] However, the position appears to be different in civil law jurisdictions. German, Austrian and Dutch courts have held that the duty to provide reasons is only breached where the reasons are totally lacking content, senseless, or contrary to the decision, and they are not required to discuss all issues raised by the parties.[29] Similarly, in Italy an arbitrator will only fall below the standard where the reasons are so inadequate as to render it impossible to identify the *ratio decidendi*,[30] and a French court has found the arbitrator does not need to list all the evidence the parties submit, or discuss how they are going to deal with the evidence.[31] This approach may in part reflect civil law tradition where judicial reasons are typically more brief and discursive than their common law cousins.[32]

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25 At 133.

26 At 133.

27 *Gordian Runoff*, above n 3, at [51]; and *Ngāti Hurungaterangi*, above n 3, at [63].

28 *Navigation Sonamar v Algoma Steamships Rapports* [1987] RJQ 1346 (Québec Supreme Court). (English translation and summary provided in *Case Law on UNICTRAL Texts*, A/CN.9/SER.C/ABSTRACTS/1 1993) at 7.

29 Hanseatisches Oberlandesgericht Hamburg [Hanseatic Higher Regional Court], 11 Sch 1/01, 8 June 2001 (English translation and summary provided in *Case Law on UNICTRAL Texts*, A/CN.9/SER.C/ABSTRACTS/50 2005) at 6; Oberster Gerichtshof [Supreme Court of Austria], G 3/16, 28 September 2016, 18; and *AZ NV v Nomen Nescio*, Hoge Raad [High Council] January 2010, BK 6056, 08/02129.

30 *Giovanni & Pietro Tassani v Italtinto* Riv dell'arb [1998] 245.

31 Cour de cassation [French Court of Cassation], 16 December 2004 reported in 2005 Rev Arb 217.

32 See S I Strong "Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy" (2015) 37 Mich J Int L 1.

Additionally, common law countries broadly accept that the standard is dependent on the circumstances.[33] As commercial arbitration is so flexible, it is not useful to determine absolute rules and the adequacy of reasons must be evaluated with reference to their particular context. One New Zealand court explained that there is "no qualitative measure of adequacy" but that the nature and extent of the duty was dependent on circumstances including "the subject matter being arbitrated, its significance to the parties and the interests at stake".[34]

While there appears to be relative uniformity of approach within civil and common law jurisdictions, it appears that the content of the duty may vary considerably, reflecting different legal cultures that have different conceptions about what constitutes adequate reasons.[35]

III The Duty to Provide Reasons: Consequences for Breach

This section will examine the other side of the reasons "coin" − the consequences for breach of duty to provide reasons. Essentially, should the arbitrator fail to provide reasons, or provide inadequate reasons, what are the consequences? Under some circumstances, a failure to provide adequate reasons may constitute grounds for refusal of enforcement. This section will first briefly analyse the role of the court in challenging and enforcing awards, before examining the balance between party autonomy and minimum standards of procedural fairness under art V of the New York Convention. It will then identify the differences between challenging an award for failure to give reasons under international

33 *Gordian Runoff,* above n 3, at [51]; *Ngāti Hurungaterangi,* above n 3, at [62]; *R v F (Arbitration: Reasons)* [2013] 5 HKLRD 278; and *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 (HC) at [103].

34 *Ngāti Hurungaterangi*, above n 3, at [62].

35 Jean-François Poudret and Sébastien Besson *Comparative Law of International Arbitration* (2nd ed, Thomson Sweet & Maxwell, 2007) at 666–667.

arbitration conventions and national legislation. Finally, it will examine the various remedies available upon successful challenge of an award.

A Role of the Courts in Challenging Arbitral Awards

The enforcement regime envisioned by the New York Convention was one of unified and simple international standards, grounded on a pro-enforcement presumption.[36] Thus, provided an award is duly authenticated with a copy of the original agreement to arbitrate, it is presumed to be binding and enforceable.[37] The burden is on the claimant to prove in the enforcement jurisdiction courts that one of the grounds for refusal under art V(1) are met. Even then, the court has discretion to refuse enforcement of the award,[38] but the discretion is narrow and limited by the presumption of finality in arbitration awards.[39] Alternatively, the court may elect to refuse enforcement at its own motion under art V(2) if the subject matter is not capable of settlement, or if it is contrary to public policy. The applicable law in this assessment is the law of the seat, in the absence of any choice or indication by the parties.[40]

However, empirical research shows that the majority of awards rendered do not require enforcement, with most parties complying with the award voluntarily.[41] Only a small percentage of awards are contested through the operationalisation of article V of the New York Convention. Nevertheless, national courts play a critical supervisory role in the international commercial arbitration regime. As noted memorably by Reisman:[42]

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36 See Albert Jan van den Berg "New York Convention of 1958: Refusals of Enforcement" (2017) 18 ICC International Court of Arbitration Bulletin 1.

37 New York Convention, above n 2, arts III – IV.

38 Art V(1).

39 *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [2002] 1 All ER (Comm) 819; *Kanoria v Guinness* [2006] EWCA Civ 222, [2006] 1 Lloyd's Rep 701; and *Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs* [2009] EWCA Civ 755, [2010] 2 WLR 805.

40 New York Convention, above n 2, art V(1)(a).

41 S Greenberg and others *International Commercial Arbitration – An Asia-Pacific Perspective* (CUP, Cambridge, 2011) at 430.

42 Emmanuel Gaillard and Domenico di Pietro *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, London, 2008) at 1.

> The genius of the [New York Convention] is to be found in the way in which it mobilises national courts as enforcement agencies while simultaneously restricting the scope of national judicial supervision over international arbitration awards.

Therefore, although it is expected that courts are deferential to the arbitral tribunal, the "buck" as it were, stops with them. National courts may be conceptualised as the guardians of procedural integrity, to protect the quality and enhance the legitimacy of awards. For example, in the case of *Jerling v Moss*,[43] the reasons contained in the award revealed the arbitrator had wrongfully refused to allow one of the parties to give evidence in relation to prior contractual negotiations, and the award was set aside for breach of natural justice.[44] However, despite the pro-enforcement character of the New York Convention, in reality there is a range of judicial attitudes towards enforcement, reflecting different legal cultures. There are broadly two perspectives of the role of the courts in international arbitration. One view, which may which may be characterised as "deferential", is reluctant to refuse enforcement save only the most exceptional circumstances. One court even went so far as to frame pro-enforcement as a matter of comity.[45] This view reasons that the parties have chosen to use a private system: to accept a low judicial standard for review is to unwarrantably interfere with the parties' right to conduct their private affairs as they choose.[46] The other view may be characterised as "interventionist". Proponents of this view are more readily willing to intervene and refuse enforcement, reasoning that justice dictates that certain standards apply to dispute resolution, whether public or private.[47]

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43 *Jerling v Moss Brothers* [2013] NZHC 2893 [*Jerling v Moss*].

44 At [54]–[60].

45 *A v R (Arbitration: Enforcement)* [2009] HKCFI 342, [2009] 3 HKLRD 389 at [22].

46 Mark Saville "Arbitration and the Courts" (Denning Lecture 1995, The Bar Association for Commerce, Finance and Industry, 1995) at 2.

47 At 2.

B Party Autonomy and Minimum Standards of Procedural Fairness under Article V of the New York Convention

The most fundamental identifying feature of arbitration is party autonomy, and with this, the inherent flexibility afforded to the parties in choosing a procedure that best accords with their particular circumstances.[48] This principle is enshrined under art V(1)(d), where an award rendered contrary to the express procedural standards agreed to by the parties may be denied recognition or enforcement.[49] However, there are limits to party autonomy. In choosing arbitration, parties have also agreed to minimum standards of procedural fairness. These standards are "inherent in the adjudicative character of international arbitration",[50] and are captured under arts V(1)(b) and (2)(b) of the New York Convention and art 18 of the Model Law. Article V(1)(b) provides that an award may be denied recognition where:

> The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case…

In a similar vein, art 18 of the Model Law provides that "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". These are mandatory standards, and cannot be contracted out of in the arbitration agreement.[51] They represent internationally recognised minimum standards of procedure and capture the core

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48 See Alan Redfern and Martin Hunter *Law and Practice of International Commercial Arbitration* (4th ed, Oxford University Press, 2004) at 315; and C Chatterjee "The Reality of The Party Autonomy Rule In International Arbitration" (2003) 20 Journal of International Arbitration 539.

49 New York Convention, above n 2, art V(1).

50 See Gary Born *International Commercial Arbitration Volume II* (Wolters Kluwer, 2014) at 1743; and Amokura Kawharu "Arbitration of Treaty of Waitangi Settlement Disputes" (paper presented at AMINZ-ICCA International Arbitration Day Conference, Queenstown, April 2018) at 20.

51 See Michael Pryles "Limits to Party Autonomy in Arbitral Procedure" (2007) 3 Journal of International Arbitration 327; and Andrew Barraclough and Jeff Waincymer "Mandatory Rules of Law in International Commercial Arbitration" (2005) 6 Melb J Intl L 205.

principles of natural justice: equality of the parties and opportunity to be heard.[52] Failure to comply with these standards risks refusal of enforcement under art V. Beyond these minimum standards, party autonomy may also be overridden and the award refused enforcement under art V(2)(b) if the agreed procedure does not comply with the public policy of the enforcement jurisdiction. State parties to the New York Convention may provide in their national arbitration legislation as a matter of policy that arbitral proceedings must satisfy minimum standards of procedural fairness such as due process, natural justice, procedural regularity or fair and equitable treatment.[53] These requirements may be construed widely or narrowly depending on the deferential or interventionist culture of the enforcement or seat jurisdiction.

Failure to provide reasons is not captured as a minimum standard of mandatory procedure under art V.[54] A party wishing to protest enforcement for alleged failure to state reasons will have to pose a challenge under art V(1)(b) as an element of the parties' agreement, or under art V(2)(b) as a breach of public policy of the enforcement jurisdiction. It has also been argued (with little success) that an award rendered without adequate reasons amounts to the tribunal acting outside the scope of its mandate under art V(1)(c).[55] The consequences for breach of duty to give reasons under the New York Convention is thus properly framed as sanction for failing to comply with party autonomy, rather than failure to comply with a fundamental standard of procedural fairness.

This is a curious result, especially considering that the Model Law explicitly provides for a presumption of reason-giving in the required form and contents of award.[56] If it was considered a sufficiently important element of procedure to warrant inclusion under art 31(2) of the Model Law, why not provide for it as a ground for challenge independent of

52 Georgios Petrochilos *Procedural Law in International Arbitration* (Oxford University Press, New York, 2004) at 355.

53 Born, above n 6, at 1770.

54 New York Convention, above n 2, art V 1(a)−(d).

55 *R v F*, above n 33, at 1.

56 Model Law, above n 16, art 31(2).

party autonomy? Could it be that this was mere oversight on the part of the drafting committee? Or is it that the reasons requirement was not considered sufficiently important to justify setting aside an award?

Unfortunately the answers to these questions must be left to guesswork, as the travaux préparatoires do not shed light on the issue.[57] One answer may lie in the choice to draft the reasons requirement in the Model Law as a presumption. It is not mandatory – parties may contract out of the requirement if they so choose. As noted above, the Working Group had held that the current construction of the duty was more suitable to strike a balance between efficiency and due process.[58] Following this line of reasoning, it may have been thought unsuitable to include failure to provide reasons as a ground for refusal of enforcement, and better captured under art 36(1)(a)(iv) as a breach of procedure agreed to by the parties. Alternatively, it is possible that the Working Group did not consider reasons to have the same fundamental status as other elements of due process, such as equal treatment of the parties. The reasons requirement could have merely been included to encourage best practice in rendering an award, rather than as a fundamental element of procedure.

C Pathways to Challenge for Breach of Duty to Give Reasons Under International Arbitration Conventions and National Legislation

As the refusal of enforcement procedure will occur in the national courts, the courts either apply their national arbitration legislation to determine whether grounds for refusal of enforcement exist, or the national arbitration legislation of the seat.[59] Given over 80 states have adopted the Model Law, in the majority of cases the applicable law will be the limited grounds under art V of the New York Convention, as reflected in art 36 of the Model Law. However, this exercise may be complicated somewhat if the applicable law of the

57 See *Report of the Working Group on International Contract Practices on the Work of its Third Session* A/CN.9/216 (1982).

58 See Part II B.

59 More often than not, these are the same as the national courts of the seat will most likely be the first jurisdiction where enforcement is sought.

jurisdiction has enacted the Model Law with qualifications. These specific instances will be discussed below.

As outlined previously, an award rendered without reasons, or without sufficient reasons is most likely to be challenged as a breach of the procedure agreed to by the parties under art V(1)(d) of the New York Convention.[60] In most cases the procedural rules agreed to will include a requirement for reasons as part of the institutional rules of the arbitral centre chosen by the parties.[61] In other cases, the parties may choose to specifically include the duty in the arbitration agreement in ad hoc proceedings.

An award rendered in breach of the duty to give reasons may also be challenged on the grounds that it is a breach of public policy of the jurisdiction where enforcement is sought under art V(2)(b) of the New York Convention.[62] This ground varies considerably depending on the legal culture of the particular enforcement jurisdiction. For example, in *The Montan*, the parties had agreed for the arbitrator to not provide reasons for the award.[63] The English Court of Appeal remitted the award back to the arbitrators, as an unreasoned award was contrary to public policy.[64] In France, the requirement to give reasons is considered a rule of public policy,[65] however this will only constitute grounds for refusal of enforcement if the parties have chosen French law to govern proceedings, and have not specifically provided otherwise in their agreement.[66] In New Zealand, it is unsettled as to whether failure to provide reasons might amount to a breach of public policy. In *Kiwi*

60 Or the equivalent under art 36(1)(a)(iv) of the Model Law.

61 As noted at II B, NOTE 15 the majority of international arbitration centres include a provision for rendering an award with reasons in their institutional rules.

62 Or the equivalent under art 36(2)(b)(ii) of the Model Law.

63 *Mutual Shipping Corporation v Bayshore Shipping Co* [1985] 1 Lloyd's Rep 189 (CA) [*The Montan*].

64 At 192. This decision has been criticised. See Born, above n 6, at 3048 ("it is rare a court will impose national procedural standards contrary to the specific agreement of the parties").

65 See Emmanuel Gaillard and John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, Cambridge, 1999) at 762–763.

66 Nouveau Code de Procédure Civile (New Code of Civil Procedure), art 1495.

Empire Confectionary,[67] the High Court observed that even if the arbitrator had failed to provide reasons on a material matter, it was doubtful that it would amount to a breach of natural justice (and thus a breach of public policy) but left the question open.[68]

Finally, national legislation in certain jurisdictions may specifically provide for a mandatory duty to provide reasons.[69] If the parties have chosen a seat that provides for a mandatory duty, than any an enforcement court will likely find that an award rendered without reasons is liable to challenge as a breach of the procedure agreed to by the parties.[70] However, where the law of the seat has no duty to provide reasons**,** but the national arbitration legislation of the jurisdiction where enforcement is sought provides for a mandatory duty, the ability to refuse enforcement is uncertain. It may amount to a breach of public policy, although courts will be reluctant to impose their own public policy standards on an award, particularly when the parties have chosen procedural law that provides otherwise.[71] For example, a German court granted enforcement to a poorly reasoned award rendered in the United States, despite it being contrary to domestic public policy.[72]

D Remedies for Refusal of Enforcement

The final question to be determined by the court upon a finding of a successful claim for breach is the appropriate remedy. In most cases, the Model Law will govern this determination, although many jurisdictions may modify the Model Law provisions, or provide a distinct remedy in their national arbitration legislation. The first and most obvious

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67 *Kiwi Empire Confectionary Limited v Singh* [2013] NZHC 1272.

68 At [8].

69 Examples of national legislation that provide for a mandatory duty include the French Code of Civil Procedure, art 1482; Belgian Judicial Code, art 1713(4); Russian Arbitration Law, art 32(2); Ukrainian Arbitration Law, art 31(2); and
Brazilian Arbitration Act (Law 9.307/96, amended by the Law 13.129/2015), art 26.

70 Model Law, art 34(2)(a)(iv). See also Born, above n 6, at 3270.

71 Born, above n 6, at 3047.

72 Hanseatisches Oberlandesgericht Bremen [Hanseatic Higher Regional Court Bremen], 30 September 1999 reported in (1999) 31 YB Comm Arb 640.

remedy is the setting aside, or annulment, of the award. The court has discretion to set aside the award if it meets any of the grounds under art 34(2) of the Model Law.[73] Even if the claimant has successfully proved that a breach of duty has taken place, the court may still choose to enforce the award. Setting aside has the legal effect of rendering the award void in the jurisdiction where the attempted enforcement proceedings took place.[74] However, this exercise is exceptional, as it goes against the fundamental nature of arbitral awards as final and binding.[75]

Alternatively, the court may remit the award back to the tribunal. This remedy is open to the courts under art VI of the New York Convention, where upon an application to set aside, the court "may, if it thinks proper, adjourn the decision on the enforcement of the award". This process suspends the setting aside proceedings and aims to give the arbitral tribunal an opportunity to correct their decision. The introduction of the Model Law clarified this position, as art 34(4) provides that the court may order remission of the award to the arbitral tribunal "where appropriate and so requested by a party".[76] However, national arbitration legislation may provide for variations to this process. In New Zealand, s 5 of the Arbitration Act 1996 states that if leave to the High Court is granted, the court may (at its own election) confirm, vary, set aside or remit the award to the tribunal for consideration.[77] Under the Arbitration Act 1996 (UK), s 68 allows a challenge to the award on the grounds of serious irregularity. Under these proceedings, the court has discretion to remit the award (whole or in part) for reconsideration, set aside the award or declare the award to be of no effect.[78]

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73 Or the equivalent under art V of the New York Convention.

74 Born, above n 6, at 3390. However, Born notes that the award may still be recognised and enforced in other jurisdictions. See discussion from 3638−3646.

75 *World Bus Paradise Inc v Suntrust Bank* 403 F 468 (11th Cir 2010) at 470 ("Arbitration's allure is dependent on the arbitrator being the last decision maker in all but the most unusual cases"); and Lucy Reed "Ab(use) of due process: sword vs shield" (2017) 33 Arbitration International 361.

76 Model Law, above n 16, art 34(4).

77 Arbitration Act 1996 (NZ), s 5(4)(a).

78 Arbitration Act 1996 (UK), s 68(3).

IV Reasons for Reasons – Justification for the Duty to Give Reasons

In order to critically evaluate the duty to give reasons in commercial arbitration, it must first be determined why it exists and whether it is fit for purpose. Despite the widespread presence of reasons in international arbitration, some commentators criticise the imposition of such a requirement. Others suggest the duty to give reasons is essential to any dispute-resolution process to uphold the rule of law. This section will examine the theoretical debate behind the duty to give reasons and identify the specific purpose of the duty in the commercial arbitration context.

A Criticisms of Reasons in Commercial Arbitration

Opponents of the duty to give reasons in commercial arbitration contend it may unnecessarily judicialise the arbitration process. The main "selling point" for arbitration in the dispute resolution market is its reputation as a neutral, flexible, and efficient method of resolving cross border disputes.[79] These qualities provide arbitration with a competitive advantage over other dispute resolution options, namely litigation. Providing reasons is a feature characteristic to the judiciary and litigation, and imposing a requirement for reasons may dilute the unique advantages enjoyed by arbitration.

First, requiring arbitrators to give reasons is time-intensive and may drag out the arbitration process, undermining the fast and efficient nature of arbitration. Critics already bemoan the trend that arbitration is becoming too much like litigation, with the introduction of complex and formal procedural frameworks and an unwavering focus on legal accuracy and certainty.[80] The reasons requirement may only serve to exacerbate this trend.

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79 See Thomas J Stipanowich "Arbitration: The New Litigation" (2010) 1 University of Illinois Law Review 1.

80 Sundaresh Menon "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)" (paper presented at the ICCA Congress 2012, Puerto Rico, October 2012) at [25]–[28]. Such procedural frameworks include the IBA Guidelines on the Taking of Evidence. See International Bar Association *IBA Guidelines on the Taking of Evidence in International Commercial Arbitration* (adopted May 29 2010).

Second, it may be an unrealistic to require detailed reasons from practitioners with no formal judicial training. This may be particularly pronounced in standard "look-sniff" arbitrations or if the arbitrators are elected by the parties' on the basis of subject-matter expertise, rather than legal experience.[81] Other commentators suggest that duty may conflict with the arbitrators' independence and ability to creatively and flexibly resolve commercial disputes.[82]

Further issues arise when considering the duty's potential in opening up yet another ground for review of the award. This may further undermine another key benefit of arbitration – efficient and fast enforcement – introduced by the New York Convention through the presumption of finality. As noted by Chan Seng Onn J in *TMM Division*,[83] failure to provide reasons is a relatively simple ground to allege because "counsel can always come up with a further 'why' question to any reason given for a conclusion".[84] The duty may provide a pathway for baseless contests of awards, and parties may then find themselves in a lengthy litigation battle when they have presumably chosen arbitration for its relative finality.[85]

Finally, more than any other ground for review, the failure to provide reasons risks crossing over into an appeal on the merits. Schreuer notes that:[86]

> …of all grounds for annulment, an evaluation of the tribunal's reasoning is most likely to blend into an examination of the awards substantive correctness and hence to cross the border between annulment and appeal.

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81 As was the case in *Navigation Sonamar v Algoma Steamships Rapports* [1987] RJQ 1346 (Québec Supreme Court).

82 Alan Scott Rau "Integrity in Private Judging" (1997) 38 South Texas Law Review 485 at 533.

83 *TMM Division*, above n 33.

84 At [109].

85 See *World Bus Paradise Inc*, above n 75, at 470 and Peter Gillies and Niloufer Selvadurai "Reasoned Awards: How Extensive Must the Reasoning Be?" (2008) 74 Arbitration 125 at 126.

86 Christopher Schreuer *The ICSID Convention – A commentary* (2nd ed, Cambridge University Press, 2001) at 815.

The refusal of enforcement under the New York Convention is not an appeal, and is traditionally limited to very narrow grounds, based on procedural anomaly, or very exceptionally, some manifest error of law (although this is rare).[87] A risk of pseudo-appeal on the merits is controversial and violates the presumption of finality.[88]

A Justifying Reasons: Comparative Analysis

If the reasons requirement judicialises arbitration and undermines so many of its foundational advantages, why is the duty so widespread? This paper hypothesises that there must be a distinct purpose and function of the duty in the commercial arbitration context that justifies its imposition and maintains the competitive advantage. To test this theory, the nature and purpose of the duty in three other contexts is examined: judicial reasons, administrative reasons and investment arbitration reasons. Then, the unique nature of the duty in the commercial arbitration context is identified and contrasted with these other contexts.

1 Judicial Reasoning

Law and reason have long been lauded close companions, and the practice of giving judgments is a demonstration of that close assimilation.[89] Besides the obvious function of informing parties exactly why they have won or lost,[90] reason giving is a cornerstone of open justice and the rule of law.[91] Justice must be seen to be done, and providing reasons acts as a safeguard against arbitrariness by ensuring the adjudicator has decided the issues

87 For example, see Arbitration Act 1996 (UK), ss 68–69; Arbitration Act 1996 (NZ), sch 2, art 5; Civil Procedure Law of the People's Republic of China (People's Republic of China) National People's Congress, 9 April 1991, arts 217(4)–(5); Argentine Civil and Commercial Procedure Code 1981, art 758; Abu Dhabi Code of Civil Procedure, art 91(2)(v); and Libyan Code of Civil and Commercial Procedure, art 767.

88 See Born, above n 6, at 3169.

89 See *Bell-Booth v Bell-Booth* [1998] 2 NZLR 2 (CA) at 6 per Thomas J.

90 Bingham, above n 10, at 141; and *Meek v City of Birmingham District Council* [1987] EWCA Civ J0218-4, [1987] 1 RLR 250 at 254.

91 See David Neuberger "Arbitration and the Rule of Law" (paper presented to Chartered Institute of Arbitrators' Centenary Conference, Hong Kong, March 2015).

by rational application of the facts to principles of law,[92] and not on arbitrary grounds. This assures the public of the legitimacy of the judicial system. Fuller argued that the defining characteristic of adjudication within in a liberal democratic regime was the participation of the parties.[93] Citizens are not merely objects of rule application, but are autonomous agents who take part in making the law of their own society.[94] By explaining the reasons for the decision, judges demonstrate how arguments put forward by the parties have been understood or accepted. This respects party autonomy and allows the participants to then assess for themselves the wisdom and worth of exercising their rights of appeal.[95] Without giving reasons, "the parties have to take it on faith that their participation in the decision has been real".[96] This also serves an important purpose in increasing the acceptability of a decision. Social psychology shows that procedures are viewed as fairer when they vest process control or voice in those affected by a decision, and the parties are more likely to respect and comply with the outcome.[97] Reasons thus "provide citizens with a content-independent basis for obeying the law".[98]

Providing reasons also serves a vital fact-finding function. While demonstrable rational reasoning is critical, in the practical operation of law the facts matter most and will be the most determinative of outcome.[99] A final ruling on the correct factual background of the

92 Bingham, above n 10, at 142. The principle that justice must not only be done, but should be seen to be done was first articulated by Lord Hewart in *Rex v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233 at 259.

93 Lon Fuller and Kenneth Winston "The Forms and Limits of Adjudication" (1978) 92 Harv Law Rev 353.

94 Melvin Aron Eisenberg "Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller" (1978) 92 Har Law Rev 410 at 431.

95 Mathilde Cohen "Reason Giving in Court Practice: Decision-Makers at the Crossroads" (2007) 14 Colombia Journal of European Law 77 at 91; and *Bell-Booth*, above n 89, at 6.

96 Fuller and Winston, above n 93, at 388.

97 Mathilde Cohen "When Judges have Reasons Not to Give Reasons: A Comparative Law Approach" (2015) 72 Wash & Lee L Rev 483 at 506; and E Lind and Tom Tyler *The Social Psychology of Procedural Justice* (Plenum Press, New York, 1998) at 8.

98 Cohen, above n 97, at 500.

99 See James Spigelman, 'Truth And The Law' (The Sir Maurice Byers Lecture at the New South Wales Bar Association Address, Sydney, 26 May 2011).

case provides will test the truth of the assertions of fact made by the parties and provide the foundation for resolution of the dispute. While the ruling of truth in court is dependent on the arguments presented, and thus may be distinct from the substantive facts, at minimum the appearance of truth-seeking is necessary for public confidence in the judicial system.[100] Summers argues that without judicial findings of fact that generally accord with truth, citizens would "lose faith in the adjudicative process as a fair and reliable means of dispute resolution".[101]

Reasons also provide a guide to future conduct.[102] For the parties, learning by mistake and correction will improve future behaviour. Without reasons, parties will have to guess why their past actions were sanctioned or accepted, and their future conduct may be based on a misinterpretation of the decision.[103] In a broader sense, common law systems operating on a doctrine of precedent require reasons to guide the decisions of future courts. Those benefitting from the reasons therefore go beyond the immediate parties and extend to the public and the judicial system generally. Even in civil law systems, case law may be taken into account by the courts to ensure justice is administered with certainty and consistency.[104]

Further, giving a reasoned judgment enables an appellate court to review the decision and determine whether it is subject to any reversible error.[105] This has a dual purpose of allowing the parties to identify error and challenge the findings, and to ensure judicial accountability. Cohen notes that as judges are not held accountable at the ballot box, their accountability in a democratic society stems from the reasoned explanations they produce.[106]

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100 At 102−103.

101 Robert Summers "Formal Legal Truth and Substantive Truth in Judicial Fact-finding – their Justified Divergence in Some Particular Cases" (1999) 18 Law and Philosophy 497 at 502.

102 Bingham, above n 10, at 142.

103 Fuller and Winston, above n 93, at 388.

104 See Strong, above n 32.

105 At 142.

106 Cohen, above n 98, at 507.

Finally, the reasons requirement is a form of intellectual discipline for the decision-maker.[107] A decision-maker required to give reasons is more likely to carefully consider supporting and opposing arguments, respond accurately to the facts, and observe precedent.[108] Reasons may be conceptualised as a method of quality control as the process of seeking justification is a critical aspect of law making. Fuller observed that "when men [and women] are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness".[109]

2 Judicial Review of Administrative Decisions

Failure to give reasons may constitute a ground for judicial review of administrative decisions. While administrative decision-making is not strictly an adjudicative process, examining this practice provides valuable insight into reason-giving in a public context. While there is no general common law duty for public decision-makers to provide reasons,[110] there is a growing trend towards the presumption that reasons should be given as a necessary element of procedural fairness.[111] However, there are critiques of this approach. Courts must be careful not to impose an undesirable legalism into areas where a high degree of informality is appropriate and add to delay and expense.[112] As such, the giving of reasons is generally limited to circumstances where there is a right of appeal from

107 Bingham, above n 8, at 143.

108 Cohen, above n 97 at 512; and Martin Shapiro "The Giving Reasons Requirement" in Martin Shapiro and Alex Stone Sweet *On Law, Politics, and Judicialization* (2002, Oxford University Press) 229 at 235.

109 Lon Fuller "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harv Law Rev 630 at 636.

110 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [76] and [79] per Elias CJ.

111 *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405, [2002] WLR 2397 at [15]; *Waikanae Christian Holiday Park Inc v New Zealand Historic Places Trust Māori Heritage Council* [2015] NZCA 302, [2015] NZAR 302 at [70]; and *Discount Brands Ltd v Westfield (New Zealand) Limited* [2005] NZSC 17, [2005] NZLR 597 at [56].

112 *Stefan v General Medical Council* [2002] UKPC 10, [1999] 1 WLR 1293.

the decision,[113] where fundamental human rights are concerned,[114] and when departing from a line of authority.[115]

The justification for this requirement shares several purposes with judicial reasoning. It aims to improve the quality of the decision-making process in focusing the decision-makers mind. Further, reasons may be deemed necessary when the decision is particularly "public" in nature, whereby the duty serves to enhance open government and transparency, and to ensure public confidence in the decision.[116] The judiciary as the enforcement agency for this duty incentivises good decision-making and assist the courts in performing their supervisory function if judicial review proceedings are launched.[117]

3 Reasoning in Investment Arbitration

The reasons requirement in investor-state arbitration is contained under the International Centre for Settlement of Investment Disputes Convention as both a procedural requirement under art 48(3), and as a ground of annulment under art 51(1)(e).[118] The International Centre for Settlement of Investment Disputes Arbitration Rules also provide under r 47(1)(i) that the award is to be rendered together with reasons.[119] It is notable that unlike commercial arbitration, the duty to provide reasons is mandatory and not subject to the parties' agreement.

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113 *Naden v Auckland Racing Club (Inc)* HC Auckland M72/95, 21 May 1996 at 16.

114 *R (Faulkner) v Secretary of State for the Home Department* [2005] EWHC 2567, [2006] INLR 502.

115 *Horsham District Council v Secretary of State for the Environment* [1992] 1 PLR 81 (CA).

116 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

117 *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1769 at [7].

118 International Centre for Settlement of Investment Disputes Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States 575 UNTS 159 (opened for signature 18 March 1965, entered into force 14 October 1966).

119 International Centre for Settlement of Investment Disputes *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* (adopted 10 April 2006), r 47. Note that the proposed 2018 amendments to the ICSID Arbitration Rules will retain the requirement with a minor rephrase to better reflect art 48(3) of the Convention. See *ICSID Proposals for Amendment of the ICSID Rules Working Paper* (ICSID Secretariat, Working Paper, Volume 3, August 2018) at [593]–[595].

Landau notes that the justification for the duty to provide reasons in the investment arbitration context is markedly different.[120] First, the greater public interest in investor-state arbitration demands a greater degree of transparency in the adjudicatory process. Investment disputes require arbitral tribunals to rule on the manner in which States exercise their right to sovereignty, and review the activity of all three branches of government. Van Harten argues that this dynamic "engages the regulatory relationship between state and individual, rather than a reciprocal relationship between juridical equals", as is the case in commercial arbitration.[121] Any sanctions will have a direct impact on the relationship of the State to its constituency, and the cost of any damages will be ultimately born by the public.[122]

Second, the unique nature of the investment-arbitration procedural framework requires greater precautions to shield the process from arbitrariness. Investment treaties provide for the exclusive jurisdiction of arbitrators, removing the dispute from the domain of domestic courts.[123] Arbitrators are delegated vast discretion in the application of broad, open-textured standards typical of investment treaties, and there is no binding doctrine of precedent or formal appeal process to restrict this discretion.[124] The mandatory giving of reasons is thus a critical safeguard against arbitrariness, thereby promoting the legitimacy of the system as a whole.

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120 Toby Landau "Reasons for Reasons The Tribunals Duty in Investor-State Arbitration" in Albert Jan van den Berg (ed) *50 Years of the New York Convention ICCA International Arbitration Conference* (Wolters Kluwer, Bedfordshire, 2009) 187 at 194.

121 Gus Van Harten *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2008) at 45.

122 Landau, above n 120, at 196. Landau notes the example of *CME v Czech Republic (Final Award)* (2003) 9 ICSID Rep 264, where the tribunal ordered the Czech Republic to pay US$ 353 million to the investor. This amount equated to the Czech Republic's entire health-care budget for the relevant year.

123 Van Harten, above n 121, at 72.

124 Landau, above n 120, at 198.

B Reasoning in Commercial Arbitration

While arbitration shares many elements with other forms third party adjudication, it also has unique characteristics which distinguish it from these forms. Accordingly, when considering the reasons for reasons in other forms of dispute resolution, this section will identify the unique features of arbitration that may qualify the reasons for reasons in the arbitration setting, and render other justifications void. It then notes the shared justifications for reasons in arbitration.

1 Unique Features of Arbitration that Qualify the Reasons Requirement

First, unlike litigation or administrative decision-making, arbitration has no formal appeal process. Arbitral awards are rendered on the presumption that there are limited forms of review given the deferential approach to the parties' autonomy and presumptive finality of international arbitral awards. As such, arbitration is typically subject to less institutional oversight than other forms of adjudication and devoid from the extent of public scrutiny or accountability present in other forms of third party decision-making. While a key function of reasoning in the judicial and administrative law context is to aid appellate bodies in determining whether there are grounds for review or precedent, the same cannot be said of arbitration.[125] Tribunal reasons do perform an important function in allowing the court to determine whether the limited procedural grounds for challenge exist, but the remedy of setting aside is not an appeal.[126] Given the narrower scope of the review exercise, arguably the reasons provided in an award need not be as detailed as a judgment or a decision of a public authority dealing with a dispute of comparable magnitude.[127] This is because the relevant beneficiary for the reasons is more accurately the parties to the arbitration, rather than a third party enforcement or review agency as in judicial or administrative law.

125 New York Convention, above n 2, art V.

126 See *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (No 1)* [2012] 4 HKLRD 1 (CA) at [7].

127 Gillies and Selvadurai, above n 85, at 126.

Second, arbitration does not operate within a system of *stare decisis*. While a tribunal may consider the doctrine of precedent in the applicable law to the dispute, previous decisions of tribunals do not restrain the decision-making power of the tribunal in any formal sense.[128] Commercial arbitration is fundamentally a private method of dispute resolution, and the majority of awards are not publically available. Thus the potential for future tribunals to use past awards even as guidance in a more general sense is limited. Again, this suggests the reasons need only be detailed to a level deemed acceptable to the immediate parties, rather than any potential future tribunal.

Third, a defining characteristic of arbitration is its essentially private nature. It does not take place in a public forum, and the contents of the award usually remain confidential between the parties. Further to this, commercial arbitration is traditionally used to resolve private law rather than public law issues.[129] This means that the level of public interest in the dispute is generally low, and may only be in the more general sense of facilitating the growth of commerce. Accordingly, reasons need not be stated at a level required to facilitate public understanding as would be expected in judicial, administrative or investment arbitration settings.

2 Reasons for Reasons in Third Party Adjudication Common to Arbitration

As arbitration is effectively another form of third party dispute resolution, the justifications for reasoned arbitration awards parallel with other forms of reasoning. Several aspects of reasoning in these contexts are equally applicable to arbitration.

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128 Alternatively, Carbonneau suggests that the mandatory provision of reasons may stimulate and foster the development of a common law of international transactions. However, until the publication and accessibility of arbitral awards becomes more widespread, the potential for this development appears limited. See Carbonneau, above n 6, at 581.

129 Although the potential for arbitration in typically more "public" realms such as family law is being increasingly explored. See Robert Fisher and Kate Tolmie Bowden "The Future for Fighting Families New Directions for the development of family law dispute resolution in New Zealand" (paper presented to AMINZ Conference, Queenstown, August 2014).

First, the importance of reasons in respecting party participation and providing closure is common to all forms of third party adjudication. A fully reasoned award may persuade the losing party that the decision was the right one, even if it did not achieve the desired result.[130] Specific to the arbitration context however, is that it is less well-established as other forms of dispute resolution. Providing reasons therefore takes on added importance to ensure closure and satisfaction with the outcome so that the parties (or "customers" in the dispute resolution market) continue to rely on arbitration as the preferred method of resolving cross-border disputes.[131]

Second, requiring reasons as a deterrent against arbitrariness is vital to ensure arbitration is conducted in accordance with the rule of law. This is particularly important in the arbitration context where the continued appearance of legitimacy is vital to ensure faith in a system otherwise removed from institutional supervision.[132]

Third, requiring reasons to provide a final and conclusive account of the material facts acts as a critical foundation for resolving the dispute at the centre of arbitration. In circumstances where the differences between factual accounts are vast, the benefits of having an objective outsider seek the relative truth of the matter may provide added closure and in some cases, act as a stepping stone to settlement.

Finally, the provision of reasons as function of intellectual discipline is equally applicable to commercial arbitration, if not more so. Born notes that the importance of demonstrating that the decision-maker has applied legal rules to factual determinations is even more

130 S I Strong, above n 32, at 17.

131 See Daniel Kalderimis "International Arbitration in a Brave New World" (paper presented to AMINZ-ICCA International Arbitration Day, Queenstown, April 2018).

132 The "legitimacy crisis" argument is usually used in reference to investment arbitration, however arguably other forms of arbitration are tainted with this stigma by association. See Susan Frack "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521; and Michael Waibel and others *The Backlash Against Investment Arbitration Perceptions and Real*ity (Kluwer Law International, 2010).

important in the arbitration context where arbitrators do not have the training, or institutional responsibilities of the judiciary.[133]

In summary, the provision of reasons in arbitration serves many important purposes. It protects the parties from the risk of arbitrariness on the part of the arbitrator and ensures the arbitrators are disciplined and rational in their application of principles to the objective and accurately ascertained facts. Good reasoning and fact finding serve to achieve the goals of arbitration by increasing acceptability of the decision and quieting disputes. While the justifications for the duty in arbitration share many joint purposes with judicial, administrative, and investment arbitration contexts, the unique nature of arbitration and the distinct framework within which it operates result in a distinct purpose that serves to maintain its competitive advantage. In arbitration, the primary beneficiaries of the duty are the immediate parties and the arbitrator themselves, rather than the general public or appellate bodies. Accordingly, in operationalising the duty, the primary beneficiaries are the focus. Rather than serving a higher public purpose, the arbitrator is justified in tailoring the extent of the reasons to the specific needs of the parties. This may mean that in some situations, the parties are justified in doing away with the reasons requirement in their agreement to arbitrate. This reflects a key cornerstone and defining feature of arbitration – its inherent flexibility and the ability of users to tailor procedural requirements to their specific needs.

V Finding the Balance: Case Studies

Having determined the purpose of reasons in the commercial arbitration, this section will seek to examine the contemporary application of the duty to give reasons. Is the current duty being applied in a way that is fit for purpose? It is evident that the duty to provide reasons overall is a key element of due process, but the duty is not without its shortcomings. The parties' have chosen arbitration for its relative finality, but breach of duty to give reasons may widen the narrow grounds for appeal and risk crossing into an appeal on the

133 Born, above n 6, at 3042.

merits. It is clear, then, in proceedings challenging an award for breach of duty, the court must strike a delicate balance to ensure the benefits of the duty are retained without undermining the integrity of the institution of arbitration.

This section does not examine the duty in arbitration proceedings itself but instead will focus only on court proceedings in the enforcement jurisdiction where the award is challenged for breach of duty under art V of the New York Convention. It examines two key factors which influence the application of the duty. First, whether the enforcement jurisdiction is of a deferential or interventionist legal culture. Second, when the circumstances of the case are such as to warrant a higher standard of the duty. These contexts are explored through the use of four case studies from a range of jurisdictions: New Zealand, Australia and Hong Kong.

A First Factor: Legal Character of the Domestic Jurisdiction

The legal character of the particular enforcement jurisdiction is deduced first from the judicial attitudes in enforcement decisions, and second, the national arbitration legislation. For current purposes, the relevant legislation is that of the arbitral seat, as although it is not necessarily the same as the enforcement jurisdiction, courts will be reluctant to impose their national standards on parties that have expressly chosen the procedural law of another jurisdiction to apply to their dispute.

The first case study, *R v F*, is a Hong Kong seated arbitration.[134] Hong Kong, as a former British colony, is a common law jurisdiction. Although common law jurisdictions historically were suspicious of arbitration as an alternative form of dispute resolution, the Hong Kong government in recent years has actively sought to encourage arbitration through a range of policy initiatives.[135] Hong Kong is a popular choice for arbitral seat,[136]

134 *R v F*, above n 33.

135 See KPMG *Enhancing Hong Kong's position as the leading international arbitration centre in Asia Pacific* (Report prepared for Hong Kong Trade Development Council, November 2016).

136 Loukas Mistelis "Arbitral Seats: Choices and Competition" (26 November 2010) Kluwer

with the Hong Kong International Arbitration Centre handling 297 arbitration cases in 2017.[137] As such, the legal character of the region is pro-enforcement and the courts typically maintain a deferential stance.[138]

The second case study, *Gordian Runoff*, is an Australian review proceeding under the Arbitration Act 1984 (NSW) concerning a domestic arbitration.[139] Australia is a common law jurisdiction and judicial attitudes towards the duty to give reasons may reflect traditional English attitudes of interventionism. In particular, domestic arbitration legislation was modelled after the Arbitration Act 1979 (UK) before reform in 2010.[140] However, recent scholars note the increasing prevalence of international arbitration in Australia and subsequent shift in legal attitudes.[141]

1 R v F

R v F is a Hong Kong Court of First Instance decision concerning the giving of reasons in a Hong Kong-seated arbitration award conducted under the HCIAC Rules.[142] F had agreed to purchase R's business. The agreement to purchase contained a holdback clause whereby a percentage of the purchase price was payable upon satisfaction of two conditions. A dispute arose as to whether one or both of the conditions were met, and F refused to pay

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Arbitration Blog <www.arbitrationblog.kluwerarbitration.com>.

137 HKDC Research "Arbitration and Mediation Industry in Hong Kong" (5 June 2018) <www.hong kong-economy-research.hkdc.com>.

138 See David Kwok "Pro enforcement Bias by Hong Kong Courts: The Use of Indemnity Costs" (2015) 32 Journal of International Arbitration 677 at 681.

139 *Gordian Runoff*, above n 3. While in Australia, the relevant procedural legislation for international arbitration cases is the International Arbitration Act 1974 (Cth), the relevant reasons requirement is identical in both Acts and codifies the Model Law. Accordingly, useful guidance on the Australian approach to the duty may be taken from the decision.

140 New South Wales, Parliamentary Debates, Legislative Council, 12 May 2010, 22432 – 22435, John Hatzistergos (Attorney General).

141 See Gregory Nell "Recent Developments in the Enforcement of Foreign Arbitral Awards in Australia" (2010) 26 A&NZ Mar LJ 24; and Marilyn Warren, Chief Justice of Victoria "Australia - A vital commercial hub in the Asia Pacific region: Victoria - a commercial hub" (Monash Law Chambers, Melbourne, 25 February 2015).

142 *R v F*, above n 33.

the holdback amount. R commenced arbitration to recover the holdback amount, and F counterclaimed for damages payable to several warranties for goods included in the sale. The Tribunal upheld R's claim, but found for the F on the warranties issue. R applied to set aside the finding as to the counterclaim under art 34 of the Model Law.[143] R argued that the arbitral tribunal had failed to provide reasons by noting in the award that the counterclaim as to the warranties was "upheld, as claimed", without further elaboration as to the reasons why the counterclaim was upheld.[144] R claimed the tribunal had acted outside its jurisdiction,[145] had failed to have regard to the agreed arbitral procedures under the Agreement,[146] and had made an award that was contrary to public policy.[147]

Au J first emphasized that findings of fact or law are not reviewable or correctable, as the award should be "final and binding on both parties".[148] Importantly, in light of this principle, applications to set aside an award should be "exceptional".[149] In determining whether the reasons were insufficient in relation to warranties counterclaim, his Honour noted that R had not provided any evidence, nor made any submissions to rebut or respond to F's counterclaim.[150] On that context "what the tribunal must have meant was that they had accepted [Witness A's] evidence on this as this was not challenged and contested."[151] This was the "clear and obvious reasoning … which reason must also be obvious to the parties".[152] Au J was of the opinion that when determining the adequacy of reasons, the court must consider that an arbitral award is "intended to be read by the parties (who would

143 At 2. The Model Law is incorporated into Hong Kong domestic law under Schedule 5 to the Hong Kong Arbitration Ordinance, but for convenience is here simply referred to by Model Law article.

144 At [46].

145 Model Law, above n 16, art 34(2)(a)(iii).

146 Article 34(2)(a)(iv).

147 Article 34(2)(a)(ii).

148 At [31].

149 At [31].

150 At [46].

151 At [46].

152 At [46].

be familiar with the background and how the issues were argued) and unlike a judgment of the Court, not to be made public".[153]

The decision is illustrative of Hong Kong's pro-enforcement stance for arbitral awards, and highlights the deferential approach intended under the Model Law. The Hong Kong Arbitration Ordinance was enacted without further modifications or expansions on the grounds of review, and does not recognise error of law as a valid ground. The purpose of the reasons requirement in this context is solely to reveal whether grounds for review exist under the Model Law, not whether the tribunal has committed an error of fact or law.[154] Findings of fact or law are "final and binding on both parties", this being a "fundamental feature" of international arbitration.[155] On this approach, curial recourse against an award cannot be used as an opportunity to invite the judge to scrutinise the merits of the tribunal's reasoning.

2 Gordian Runoff

Gordian is a 2011 High Court of Australia decision on appeal from the New South Wales Court of Appeal to review an award for manifest error of law under s 38 of the Commercial Arbitration Act 1984 (NSW).[156] The underlying arbitration in *Gordian* concerned a dispute over the interpretation of the Insurance Act 1902 (NSW) between an insurer, Gordian Runoff, and a reinsurer, Westport Insurance. Notice of arbitration was served in 2004 and the Tribunal issued an award in 2008 in favour of the reinsurer. However, before examining the specifics of the case, it is worth briefly outlining the legal framework for domestic and international arbitration in Australia for context.

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153 At [36].

154 See Robert Morgan "Challenges to Awards: Reasons, Indemnity Costs and the CJR" (2013) 4 Asian Dispute Review 93 at 95.

155 *R v F*, above n 33, at [31].

156 *Gordian Runoff*, above n 3. While the Commercial Arbitration Act 1984 (NSW) is concerned with domestic arbitration, the relevant reasons requirement under s 29(1)(c) is identical to the requirement in the International Arbitration Act 1974 (Cth) which codifies the Model Law. Accordingly, useful guidance on the Australian approach to the duty may be taken from the decision.

Prior to reforms in 2010, the Australian legal framework varied considerably between domestic and international arbitration.[157] The International Arbitration Act 1974 (Cth) applied to international arbitration and contained grounds of review identical to the Model Law. Domestic arbitrations are conducted under the relevant state arbitration legislation. This legislation is generally uniform but may contain some variation between states. The Commercial Arbitration Act 1984 (NSW) provides for error of law as a ground for review in addition to the grounds under the Model Law.[158] The ground is limited to questions of law that "could substantially affect the rights of one or more parties to the arbitration agreement".[159] Additionally, the court may set aside the award if there is strong evidence that the arbitrator made an error of law and that the determination of the question "may add, or may be likely to add, substantially to the certainty of commercial law."[160]

The interpretative arguments comprising the substance of the dispute were reasonably complex and for these purposes are unnecessary to traverse in detail.[161] Suffice to say that the arbitrators upheld the reinsurer's interpretation of the Insurance Act, and insurer applied to have the award set aside.[162] Gordian Runoff claimed, inter alia, that the arbitrators had failed to adequately state the reasons for their conclusion, and the award was in breach of s 29(1)(c) of the Arbitration Act, which amounted to a manifest error of law under s 38(5)(b)(i) and was reviewable by the court. [163] In doing so, they relied on the decision of

157 In 2010 the introduction of the Commercial Arbitration Bill saw the enactment of uniform domestic arbitration legislation across all States and Territories. However this case was decided before the reforms to the New South Wales state legislation came into force. See Commercial Arbitration Act 2010 (NSW); and New South Wales, Parliamentary Debates, Legislative Council, 12 May 2010, 22432–22435, John Hatzistergos (Attorney General).

158 Section 38(5)(b)(i)

159 Commercial Arbitration Act 1984 (NSW), s 38(5)(a). The Act has now been repealed and replaced but the error of law ground has been retained. See by the Commercial Arbitration Act 2010 (NSW), s 34A.

160 Commercial Arbitration Act 1984 (NSW), s 38(5)(b)(ii).

161 For a full case summary, see Tim Griffiths and Jacqui Mitchell "Arbitration and the Twilight Zone – Case Note: Westport Insurance v Gordian Runoff" (2012) 23 ILR 150.

162 *Gordian Runoff*, above n 3, at 594.

163 *Gordian Runoff*, above n 3, at [17].

Oil Basins Ltd v BHP Billiton Ltd,[164] where a unanimous Victoria Court of Appeal held that the reasons requirement under the Commercial Arbitration Act 1984 (Vic) required arbitrators to provide reasons to a judicial standard.[165] The Court of Appeal rejected this argument, but it dismissed the appeal on other grounds.[166] On leave to the High Court, a majority found in favour of the reinsurer on the reasons issue, finding the arbitrator had failed to provide reasons to the standard required under s 29(1)(c).[167] The differences in the decisions of the two courts highlights the diversity of judicial attitudes and interpretations of the purpose of the duty to give reasons in arbitration, even within national jurisdictions.

(a) The Court of Appeal decision

The joint judgment of the Court of Appeal indicates strong support for a deferential approach to the grounds for review under the Model Law. Noting that reference to international authority on the Model Law was legitimate as the inspirational source for the grounds under the Commercial Arbitration Act,[168] there was "no express support"[169] in any contemporary writings and "no record in the discussions"[170] leading to the Model Law of any desire to raise the standard for reasons to that of a judge. Importantly, this was found to be so even where "issues of fact and law were appellable by rehearing".[171] The suggestion in *Oil Basins* that the standard should be equated with court process was "erroneous in principle".[172] In coming to this conclusion, the Court made some important points regarding the underlying difference between arbitration and court litigation, and it is worth quoting the passage in full:[173]

164 [2007] VSCA 255, (2007) 18 VR 346.
165 At [49]–[54].
166 *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57, (2010) 267 ALR 74.
167 At [55]–[56].
168 At [211].
169 At [213].
170 At [209].
171 At [209].
172 At [217].
173 At [216].

> Though courts and arbitration panels both resolve disputes, they represent fundamentally different mechanisms of doing so. The court is an arm of the state; its judgment is an act of state authority, subject generally in a common law context to the right of appeal available to parties. 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.

Thus the reasons requirement in the arbitration context comprehends a more limited standard. It is a "statement of reasons for making the award, not a statement of reasons for not making a different award"[174] – it does not require the arbitrator to "resolve any other issues or deal with other matters not necessary to explain why they have come to the view that they have."[175]

(b) The High Court decision

When determining the required standard for the reasons given, the majority in the High Court did not reject the *Oil Basins* approach outright, but commented that characterising the standard for reasons as a judicial standard places an "unfortunate gloss" upon the terms of s 29(1)(c).[176] "More to the point" were observations that the standard "[depends] upon the nature of the dispute and the particular circumstances of the case."[177] The circumstances here were such that the tribunal's application of s 18B of the Insurance Act was a critical element in reaching their conclusions.[178] The arbitrators were obliged to explain in their reasons *why* the various integers in that statutory provision were satisfied – which they had failed to do.[179] Keifel J agreed with the majority on this point, and thought the statements of Donaldson LJ in *Bremer* were "apt to apply to s 29(1)(c)."[180] His honour then went on to note that while finality in arbitration proceedings was important, ultimately the inclusion of a ground of error of law "allows for an appeal, albeit one limited to a question of law"

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174 At [218].

175 At [218].

176 *Gordian Runoff*, above n 3, at [53].

177 At [53]

178 At [55].

179 At [55]–[56].

180 At [169]. See also *Bremer*, above n 23, at 132–133.

and subject to the requirement of wide commercial significance.[181] Against that background, s 29(1)(c) therefore "comprehends something of a public, as well as a private, element in the making of an award".[182]

Two observations are prompted by this reasoning. First, is unfortunate that none of the judges in the High Court thought it necessary to elaborate further on the broader circumstances that justified greater detail in the reasoning. It is thus unclear whether such detailed explanation of the reasons was thought necessary in all contexts of a similar commercial character, or whether the case is confined to the particular involvement of that provision in the Insurance Act. This makes the dicta of the case difficult to extrapolate to other contexts. Second, and most importantly for present purposes, there is an unmistakeable disparity of approach between the courts as to the appropriate function and purpose of reasons in the arbitration context. While the Court of Appeal found a more limited duty appropriate as reflective of the distinct, private consensual function of arbitration, the High Court held that it was not inherently limited but dependent on the circumstances, even going so far as to suggest the duty performs a public function. The problem with the later view is that it imports a higher standard of reasons (indeed one more suitable to judicial contexts) as arbitrators must consider that their reasons are sufficient to contribute to the certainty of commercial law.[183]

3 Conclusions on the Legal Character Factor

While *Gordian* is a decision on a domestic arbitration concerning state legislation, it is an interesting example of how the inclusion of an error of law ground may colour the function of the reasons requirement. If the statute provides for a review on error of law grounds, this obligates the arbitrator to provide sufficient legal reasoning in their award for the court to determine whether such error exists.[184] The giving of reasons in this context is not limited

181 At [172].

182 At [168].

183 At [20].

184 See Gillies and Selvadurai, above n 85, at 126.

to ensuring the structural integrity of the arbitration proceedings. While this was a domestic arbitration concerning domestic law, this effect is likely to take place in jurisdictions which legislate for a limited review on the merits for both international and domestic arbitration.[185]

This decision is in marked contrast to the scope of review under the Model Law as demonstrated in *R v F*, where tribunals have interpreted the reasons requirement strictly to avoid crossing into a review on the merits. Notable also is the contrasting reasoning as to the proper beneficiaries for the reasons in an arbitral award. Au J in *R v F* was adamant that the reasons need only be sufficiently clear to the parties given the essential private nature of commercial arbitration. *Gordian* instead suggests that in the making of an arbitral award, arbitrators are not entirely divorced from public accountability.

B Second factor: Subject-matter of the Case

Arbitration is increasingly used to resolve disputes outside the scope of traditional commercial contexts, such as trust law, Treaty of Waitangi dispute settlement, peace agreements and climate change. As already mentioned, the standard of reasons is dependent on the circumstances of the case.[186] In arbitration's new frontiers, will the standard of reasons also reach new heights? This section seeks to explore these recent developments with reference to two case studies: *Ngāti Hurungaterangi* and *The Government of Sudan v The Sudan People's Liberation Movement/Army* (*Abyei*).[187] In both cases, the subject-matter was of particular political and social importance. The *Ngāti Hurungaterangi* arbitration concerned a dispute over the division of beneficial title in a Treaty of Waitangi land settlement. In *Abyei*, arbitration was used to resolve an intra-state dispute over the delimitation of borders between North Sudan and South Sudan. As the arbitration

185 For example, the Arbitration Act 1996 (UK), ss 68–69; and Arbitration Act 1996 (NZ), sch 2, art 5.

186 See Section II C.

187 *Sudan v The Sudan People's Liberation Movement/Army (The Abyei Arbitration) (Final Award)* (2009) XXX RIAA 145 [*Abyei*]; and *Ngāti Hurungaterangi*, above n 3.

proceedings in that case were conducted between a state and a domestic liberation movement, the case does not engage enforcement issues under the New York Convention,[188] and is not directly in line with the other case studies in this paper. Nevertheless, the case warrants a brief discussion as the arbitration tribunal made several important points regarding the duty to give reasons in contexts of significant political importance.

1 The Government of Sudan v The Sudan People's Liberation Movement/Army *(*Abyei*)*

The *Abyei* case took place in April 2009 at the Permanent Court of Arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army. Sudan had been ravaged by decades of conflict between the northern and southern Sudanese following independence from British Colonial rule in 1956. A previous attempt at peace in 1972 had failed,[189] and after two decades more of brutal war where one million lives were lost and over four million internally displaced,[190] a Comprehensive Peace Agreement was negotiated and signed in late 2004.[191] However, the status as to the Abyei region remained one of the most highly contested issues and the parties could not agree on its delimitation. The parties agreed under the Abyei Protocol to create the Abyei Borders Commission (ABC) and accompanying panel of Experts, who were to delimit Abyei.[192] Following

188 There are unanswered questions as to whether the *Abyei* arbitration could be widely enforceable under the New York Convention as it was not a "commercial" arbitration. See discussion in Wendy Miles and Daisy Mallett "The Abyei Arbitration and the Use of Arbitration to Resolve Inter state and Intra-state Conflicts" (2010) 1 Journal of International Dispute Settlement 313 at 334−337.

189 David Shinn "Addis Ababa Agreement: was it destined to fail and are there lessons for the Current Sudan Peace Process?" (2004) 20 Annales d'Ethiopie 239.

190 US Committee for Refugees *Sudan: Nearly 2 Million Dead as a Result of the World's Longest Running Civil War* (US Committee for Refugees, Danforth Report 5, April 2002).

191 "Comprehensive Peace Agreement Between the Government of The Republic of The Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army" (2005) United Nations Peacemaker <www.peacemakrer.un.org>. The CPA concerns arrangements as to governance, land ownership and national resource management. See also Christopher Zambakari "In search of durable peace: the Comprehensive Peace Agreement and power sharing in Sudan" (2012) 18 Journal of North African Studies 16.

192 *Abyei*, above n 187, at [201].

extensive hearings and research, a decision was released in 2005.[193] Sudan rejected the report, claiming the ABC had exceeded their mandate. Tensions rose and conflict broke out in May 2008 resulting in mass violence.[194] The parties eventually agreed to settle the dispute by arbitration.[195] There were two key issues for determination.[196] First, whether the ABC had exceeded their mandate to define and delimit the Abyei area. Second, if the Tribunal determined that the ABC had exceeded their mandate, the Tribunal were to define the boundaries of the Abyei area based on the submissions of the parties. For the purposes of this paper, this analysis will focus solely on the Tribunal's findings in relation to one of the sub-issues: that, in failing to provide reasons, the ABC had exceeded their mandate.[197]

The Tribunal began their analysis on the issue by determining whether reasons were appropriate in the circumstances as the parties had not explicitly provided for a reasons requirement in in the Abyei Protocol.[198] The Tribunal surmised that the duty to give reasons could be "inferred from the context in which the ABC was intended to operate".[199] The ABC played a critical role in the Sudan peace process, and their report would have a "major political impact" and was of "significant public interest".[200] Stakeholders were entitled to a full understanding of the reasons why the ABC had reached their decision, as this was "critical to the legitimacy and acceptability of the decision"[201] and would "dispel any hint of arbitrariness and ensure the presence of fairness which is undoubtedly necessary for the acceptability and successful conclusion of the peace process."[202] Accordingly, the Tribunal

193 At 1254.

194 Miles and Mallett, above n 188, at 317.

195 The Arbitration Agreement between The Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area was signed in July 2008. See *The Abyei Arbitration*, above n 187, at 168.

196 At [6].

197 From [673]. The issues are explored more closely at [6].

198 At [521].

199 At [520].

200 At [522].

201 At [522].

202 At [524].

concluded that the parties reasonably expected for the duty to give reasons to be included in the ABC's mandate.[203]

The Tribunal then turned to the appropriate standard for reasons. They began by examining the scope of the reasons requirement in investment arbitration proceedings, but cautioned against applying the same standard, noting the "very specific context of these proceedings, which do not easily analogize to annulment proceedings in the area of investment arbitration".[204] In this context, the standard of reasoning required for each of the conclusions had to be suitable to the importance of the conclusions reached.[205] The Report had to contain "sufficient explanation to allow the reader to understand how the ABC Experts reached each conclusion of their 'final and binding' decision".[206]

Abyei was a unique process in many respects, and caution must be used when attempting to draw out generally applicable principles. It is important to note that the Tribunal were not performing a de novo review of the issues but reviewing the decision of another authority, the Expert panel. As such, the Tribunal's conclusions as to the appropriate nature and standard of reasons will necessarily be of a different character than reasons in arbitration proceedings. Nevertheless, the decision raises several noteworthy issues. First, it is extraordinary that the Tribunal held that ABC were obligated to provide extensive reasons, despite the fact that the parties had not explicitly provided for such a duty in their arbitration agreement. This move has been criticised by commentators as contrary to the intention of the parties – had they wanted the ABC to provide reasons, they would have imposed an express requirement.[207] While in commercial arbitration proceedings it would be ordinarily be inappropriate to impose a reasons requirement in the absence of the express intention of the parties, arguably in Expert panel proceedings in such highly politically charged circumstances, the move was justified. The stakeholders for the decision were

203 At [525].

204 At [532].

205 At [534].

206 At [535].

207 Gary Born and Adam Raviv "The Abyei Arbitration and the Rule of Law" (2017) 58 Harv Intl LJ 177 at 197.

broader than just the immediate parties to the dispute, as the outcome would affect all Sudanese people, ranging from the Presidency to the local residents of Abyei.[208] The need for reasons for the "greater good" in ensuring peace then perhaps outweighed strict adherence to party autonomy. Second is the curious result that the failure to give reasons was the sole issue on which the mandate of the ABC was deemed to have been exceeded and the decision set aside.[209] One is left with a nagging doubt as to the authenticity of these findings as to reasons (indeed, they were not raised by the parties in argument).[210] Was the failure to give reasons thus simply a proxy to ensure a different substantial outcome, one that the parties would be happy with?

2 Ngāti Hurungaterangi

Ngāti Hurungaterangi concerned a dispute between two hapū with competing claims to ancestral lands returned from 115 years in Crown ownership.[211] But before addressing the substance of the dispute it is necessary to briefly review the legal framework for arbitration in New Zealand. The Arbitration Act 1996 governs both domestic and international arbitration, however sch 2 contains further rules that apply by default only to domestic arbitration.[212] Schedule 2 provides for a limited appeal on a question of law if the parties have so agreed, or with the leave of the High Court.[213] However, the same question could have been submitted to the Court as an application to set the award aside under art 34(2)(a)(iv) of the Model Law (contained under sch 1 of the Arbitration Act) for non-compliance with the arbitral procedure, namely the requirement to give reasons under art 31(2).

Turning to the facts, the land at the centre of the dispute was held on joint trust, and the deed provided that the division of beneficial entitlement was to be determined by

208 *Abyei*, above n 187, at [708].
209 At [770].
210 Born and Raviv, above n 207, at 197.
211 *Ngāti Hurungaterangi*, above n 3.
212 Arbitration Act 1996, s 6.
213 Schedule 2, art 5.

arbitration if the parties could not reach agreement.[214] Unable to settle on division of beneficial ownership, the parties commenced arbitration proceedings in 2012. The arbitral panel, consisting of a retired appellate court judge and two Māori elders, delivered their final award in November 2014. The award determined that the lands were to be apportioned equally between Ngāti Whakaue and Ngāti Wahiao. Having heard evidence for a full 13 days from a wide range of sources, the Tribunal's reasons amounted to just five paragraphs.[215] Ngāti Whakaue was granted leave to appeal the award on the question of error of law under art 5, sch 2 of the Arbitration Act. The central issue for present purposes was whether the tribunal erred in failing to provide adequate reasons for their binding of equal division of beneficial ownership. In 2016, the High Court found that the reasons provided were "undeniably sparse"[216] but not so brief as to amount to an error of law.[217] In a joint judgment the Court of Appeal overturned the High Court decision, holding that the tribunal had failed to discharge their mandate to provide adequate reasons, and the award was set aside.[218] Application for leave to appeal to the Supreme Court was denied.[219]

(a) The High Court decision

In the High Court, Moore J first considered the particular circumstances of the case, noting the immense volume of evidence, both oral and written from a wide variety of sources, presented over a period of 13 days.[220] His honour found that much of the evidence was directly contradictory, and "simply incapable of being resolved through conventional judicial measures".[221] He then examined the standard to give reasons, framing it as something of a spectrum. The lower end of the spectrum "involves carefully considering the evidence in the round and presenting an overall conclusion".[222] The other approach

214 *Ngāti Hurungaterangi*, above n 3 at [27]–[28].
215 *Hurungaterangi v Wahiao* [2016] NZHC 1486 at [120].
216 At [120].
217 At [134].
218 *Ngāti Hurungaterangi,* above n 3.
219 *Ngāti Wahiao v Ngāti Hurungaterangi* [2017] NZSC 200.
220 *Hurungaterangi v Wahiao*, above n 215, at [112]–[118].
221 At [121].
222 At [130].

would be to undertake a "strict and meticulous analysis of the evidence in relation to the specific parcels of land" and make "credibility or reliability findings in relation to the witnesses specifying who it preferred and for what reasons".[223] The latter approach he considered to be "both unsound and undesirable" given the time constraint and the flexible and evolving nature of the evidence.[224] While the "lack of engagement was regrettable",[225] the reasoning was acceptable in the circumstances. It is notable that in reaching this conclusion, Moore J was bolstered by the importance of arbitral finality:[226]

> It has repeatedly been emphasised that, through the Arbitration Act 1996, Parliament has chosen to place a premium on finality, certainty and party autonomy. The proper role of the Court is to intervene only where minimum standards of competence or fairness have been breached. I do not consider that the inadequacies in the present Award can be said to have reached that level.

The Panel had "determined the legal rights in the land, and stated the findings of fact which led it to its conclusion".[227] In the circumstances, no more was required either under the arbitration agreement or the Arbitration Act.[228]

(b) The Court of Appeal

The Court of Appeal began their analysis with a discussion of the purpose and justification for the duty. They noted that reasons "dispel any suggestion of arbitrariness, and help to ensure the resulting decision is reasonable".[229] Further, citing *Flannery*, reasons serve to inform a disappointed party whether they have an available right of appeal.[230] While the Court accepted that *Flannery* concerned the judicial duty to give reasons, "the principle holds equally true [for] the arbitral process."[231] As to the nature of the duty, the standard

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223 At [123].
224 At [126].
225 At [120].
226 At [137].
227 At [136].
228 At [136].
229 *Ngāti Hurungaterangi* above n 3, at [61].
230 At [62].
231 At [62].

required is "necessarily dictated by the context" but must "reflect the importance of the arbitral reference and the panel's conclusion."[232] The Court then turned to a discussion of *Abyei* and the contextual factors that justified imposition of the duty in that case, noting the strong political and historical background.[233] They considered that the Court's statements in *Abyei* as to the appropriate standard for reasons "apply equally to this arbitration",[234] and the case before them therefore "[fell] at the upper end of the spectrum of subject-matter importance".[235] The choice of a retired Supreme Court judge as arbitrator was also thought to be significant: "his appointment must have reflected an expectation that the panel's reasons would be expressed with the depth and substance necessary to mark the solemnity of the task".[236] An "impressionistic approach" to the evidence was inappropriate in these circumstances.[237] Ultimately, the Court held that the reasons were "so inadequate and inconsistent that they fall short of discharging the panel's mandate to give a reasoned award".[238]

Two key observations arise from these decisions. First, the policy approach employed by each court as to the purpose and function of the duty was markedly different. The High Court adopted a deferential approach, taking care to emphasise the importance of finality in arbitration.[239] Like *R v F*, this echoes notions of the courts as performing a limited role, merely ensuring procedural fairness. The Court of Appeal in contrast employed a more interventionist approach. While they conceded that "brevity is often acceptable in an arbitral panel's assessment of evidence and factual findings, reflecting the principles of arbitral finality and party autonomy",[240] this was qualified by the Court's right to intervene

232 At [63].
233 At [66]−[69].
234 At [69].
235 At [70].
236 At [71].
237 At [74].
238 At [104].
239 *Hurungaterangi v Wahiao,* above n 215, at [109].
240 *Ngāti Hurungaterangi* above n 3, at [69].

where the circumstances justify it.[241] One wonders whether this approach was influenced by the nature of the claim as an appeal on a question of law, rather than an application to set aside the award for non-compliance with the arbitral procedure.

Second, it is notable too that the Court of Appeal considered the function of the reasons requirement as serving a higher public purpose than ordinarily required in commercial arbitration. In their analysis as to the appropriate standard for reasons, the Court considered that the standard employed by the tribunal in *Abyei* was equally applicable to the dispute before them.[242] With respect, this may be overstating the issue. *Abyei* concerned the final and binding delimitation of a boundary of a highly contested area following decades of brutal civil war. The stakes were considerably higher – if the Expert panel had not reached a decision that was accepted by the parties, it was likely the region would descend once more into violent conflict. In this context, the adjudicator unquestionably performs a public function. The duty is accordingly wider in scope to take into account the diverse stakeholder interests and to ensure the decision has a level of public accountability. Against that background, it is likely the Court misinterpreted the duty of the *Ngāti Hurungaterangi* tribunal as performing a public function, thereby raising the standard of reasons beyond that which is required in traditional commercial arbitration contexts.

3 Conclusions on the Subject-matter Factor

Ngāti Hurungaterangi raises important questions as to the nature of reasons in unorthodox arbitration cases. Courts must take care to strike the right balance in applying the duty to a standard suitable to the particular nature of the case, without risking judicialisation of arbitration and thus undermining its benefits. *Ngāti Hurungaterangi* was one such case where the arbitrators should have provided more reasons in the circumstances. A mere five paragraphs of reasoning was insufficient to address all the issues to a level of detail necessary to ensure party acceptance. This fails to recognise the importance of party

241 At [69].

242 At [69] comparing to the *Abyei* arbitration, and at [62] comparing to the judicial standard.

participation and treats the parties as mere objects of rule application. In this case, both parties were unsatisfied with the outcome and sought to appeal and set aside the decision. Closure and satisfaction with an outcome are particularly important in arbitration to ensure it continues to be seen as an attractive and viable option of dispute resolution. Following *Ngāti Hurungaterangi* it is unlikely that Māori parties will choose arbitration to resolve disputes in future, and the industry will suffer as a result.

However in sanctioning the arbitral tribunal, arguably the Court of Appeal made the mistake of setting the standard for reasons too high. Likening the duty to give reasons in arbitration to its judicial counterpart or the standard proposed by the tribunal in *Abyei* imports a public element unsuitable to the nature of arbitration. It has been suggested that a comparison with reason-giving in Waitangi Tribunal decisions would surely have been the more appropriate standard.[243] While *Ngāti Hurungaterangi* does take place against a public background in that it concerned a Treaty of Waitangi settlement, the parties had chosen arbitration as their method of dispute resolution, and not litigation. Imposing too high a standard judicialises the arbitral process and undermines party choice.

C Conclusions on Case Law

This section has analysed the ways in which the duty to provide reasons is influenced by two factors: the legal culture of the particular jurisdiction, and the subject-matter and context of the arbitration. They have demonstrated that enforcement proceedings, while necessary to ensure effective compliance with the duty, risk crossing over into an appeal on the merits. In legal cultures with an interventionist culture, this risk is heightened and the duty is pitched at an unreasonably high standard. In *Gordian*, the ground of error of law and the willingness to question the decision-making ability of the tribunal lifted the standard for reasons and led to the setting aside of the award. Instead, it is better to view the duty and the role of the court restrictively as demonstrated by the analysis in *R v F* –

243 Kawharu, above n 50, at [46].

the ground of review for reasons is limited to ensuring the structural integrity of the arbitral procedure.

The contrasting outcomes in *R v F* and *Gordian* exemplify the diversity of judicial approach across enforcement jurisdictions. This introduces an undesirable degree of uncertainty in the international arbitration framework. If some jurisdictions, like Australia, are more willing than others to entertain applications for review on grounds for failure to adequately state reasons, than this may encourage strategic delaying tactics on the part of unsatisfied parties. In particular, it may further invite "Trojan Horse" claims, whereby the parties re-characterise their unmeritorious case as a procedural challenge in the hopes of achieving annulment.[244] This effect may be further exaggerated in jurisdictions that allow for a limited appeal on the merits. On the other end of the spectrum, parties seeking enforcement in deferential jurisdictions such as Singapore or Hong Kong may receive very different treatment of their claim.[245] The enforceability of the award is thus overly dependent on the chosen law of the seat. While it may be within the sovereign right of the State to impose their own procedural requirements, the New York Convention aims to harmonise enforcement across jurisdictions. The Model Law operationalises this aim by providing for uniform application in domestic arbitration law. It is concerning that these aims may be undermined by judicial attitudes.

Turning to the subject-matter factor, in circumstances where the arbitration proceeds against a background of cultural, social or historical significance, as in *Ngāti Hurungaterangi*, the role of the arbitrator may be interpreted as performing a public function, and the standard for reasons is raised a level suitable to ensure public accountability. However despite the potential public element of that their dispute involves, the parties have still chosen arbitration as their preferred method of dispute resolution. They can be taken to have chosen arbitration because it is *different* to litigation – its characteristic finality, flexibility and efficiency render it an attractive alternative dispute resolution

244 J Jensen "Setting Aside Arbitral Awards in Model law Jurisdictions: The Singapore Approach from a German Perspective" (2015) 4 European International Arbitration Review 55 at 55–56.

245 As exemplified in *TMM Division*, above n 33; and *R v F*, above n 33.

option. As noted by Au J in *R v F*, the target audience for the reasons in arbitration is the immediate parties, and the tribunal need not provide reasons to a standard sufficient to enhance public understanding, convince relevant stakeholders or provide guidance for future tribunals. Applying public standards into an inherently private method of dispute resolution (such as in *Abyei*) risks undermining party choice by judicialising arbitration. This too leaves the award vulnerable to challenge by an inappropriate focus on legal accuracy and certainty, and goes beyond merely ensuring the procedural integrity of the arbitration process.

VI Implications for International Arbitration as a System

The previous section concluded that where the legal culture of the enforcement jurisdiction is interventionist, and where the subject-matter of the dispute imports a public element to determination of the arbitral award, the standard of reasons is set at a level too high to be suitable to the nature of commercial arbitration. In this section, the broader implications of this conclusion will be explored, with reference to the key cases discussed earlier. It will first suggest a solution to striking the right balance as to the standard of reasons: substituting the annulment remedy with remission and clarification. It will then consider the trend of commercial arbitration increasingly applied to a wider range of disputes beyond the traditional private party paradigm, and the consequences this may have for the justification and function of the reasons requirement.

A Rethinking the Remedy: the Potential for Remission and Clarification as Alternatives to Annulment

The case studies suggest a something of a procedural paradox as to the standard to give reasons. As demonstrated in *Ngāti Hurungaterangi*, requiring a low standard of reasons may result in unsatisfied parties, or promulgate a suspicion of arbitrariness. Unsatisfied parties are likely to try and challenge the decision or get it set aside. This fails to quiet disputes, undermines the finality of arbitration and damages the arbitration market. On the other hand, as demonstrated in *Gordian*, a high standard of reasons may judicialise the

process and provide more gateways for parties to challenge the decision and attempt to sneak in a review on the merits. This too undermines the finality and efficiency of arbitration. How is this paradox to be escaped? The answer lies in the consequences and remedy for breach of duty to give reasons.

Currently the consequence for a breach of duty to give reasons is usually annulment, or setting aside (this was the result in *Ngāti Hurungaterangi* and *Gordian*). Annulment is granted when the procedural integrity of arbitration is violated. Setting aside the award under these circumstances is in line with the intention of the parties because although arbitration is final, parties have impliedly consented to minimum standards of procedural fairness.[246] These fundamental procedural standards are reflected in the limited grounds under the Model Law and the New York Convention, and capture key principles such as equality of the parties, decision according to law, and the absence of bias.[247] The presumption of enforcement and finality provides that so long as these standards are met, the decision must remain final and the parties will have to live with the decision of the arbitrator.[248] However, as discussed previously, breach of the duty to give reasons is not a matter of *fundamental* procedural fairness.[249] It is not drafted as a mandatory ground of challenge, but instead left to the agreement of the parties under art V(2)(b). The purpose of the duty as identified in this paper is a function of intellectual discipline on the part of the arbitrator, to enhance the acceptability of the decision, and as a shield against arbitrariness. Unlike the fundamental standards of procedural fairness such as equality of the parties, the reasons requirement is subject to the parties' agreement.

Against this background, annulling an award for failure to give reasons is too heavy a sanction and is unnecessary to achieve the purpose of the duty.[250] Courts should be hesitant

246 Kawharu, above n 50.

247 Reed, above n 75, at 372.

248 See *TMM Division*, above n 33, at [62] ("The foundational principle which courts ought not to lose sight of was that parties who chose arbitration as their preferred system of dispute resolution had to live with the decision of the arbitrator, good or bad").

249 See section III B.

250 Poudret and Besson have also expressed this view. See Poudret and Besson, above n 35, at [749].

to annul an award based on failure to meet a high standard of reasons (especially when the standard is set at an unreasonably high level) as this undermines the importance of finality and the pro-enforcement bias contained in the New York Convention. If set aside, the parties are still left with an unresolved dispute. They will have to trigger once more the arbitration agreement, appoint a new Tribunal and commence arbitration de novo. Indeed, they are left worse off as undoubtedly will have expended considerable time and expense in obtaining the first award. The Court of Appeal in *Ngāti Hurungaterangi* acknowledged this result themselves:[251]

> We appreciate that the result of our judgment is that the parties' expenditure of considerable costs and resources over a prolonged period has not brought about the finality that underpinned their agreement to refer their dispute for adjudication by a suitably qualified panel. We regret that result. But it is the inescapable consequence of the panel's performance.

However, in circumstances where the tribunal has breached their duty to provide reasons, is annulment really an "inescapable consequence"? Granted, some form of sanction is necessary on the part of the courts to police the requirement and ensure "quality control" for reasons. But, arguably, the remedy of remission would be more appropriate to achieve the joint aims of the duty, without unduly undermining the principle of finality.

Remission, as discussed previously,[252] is a remedy available under art 34(4) of the Model Law. Remission is a court-ordered process that suspends the setting aside proceedings and aims to give the arbitral tribunal an opportunity to correct their decision. It does not require the re-opening of proceedings which have closed, and cannot result in any change of outcome on the merits,[253] thus dissuading unsatisfied parties' from attempting "Trojan

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251 *Ngāti Hurungaterangi*, above n 3, at [109].

252 See Part III D.

253 See Jordan Tan and Andrew Foo "Challenging Arbitral Awards before the Singapore Courts for a Tribunal's Failure to Give Reasons" (14 March 2018) Kluwer Arbitration Blog <www.arbitrationblog.kluwerarbitration.com>.

Horse" claims. It is perhaps more appropriate when the grounds for annulment rest on only one critical issue, but the rest of the award is deemed acceptable. The issue can therefore be resolved without undermining the finality of the award. In this sense, it is highly practicable in that it allows minor errors to be corrected without resorting to setting aside proceedings. Perhaps realising the benefits of remission in respecting the parties' choice to arbitrate, the Arbitration Act 1996 (UK) provides for a presumption of remission.[254] Setting aside is therefore only available where remission is not appropriate. This presumption "recognises the importance of arbitration in respect of party autonomy and the respect that is to be given to the parties' agreement and the process which they have implemented for arbitration."[255]

Remission is not without its critics. Some have suggested that regular remittance may reduce the motivation for arbitrators to be thorough and diligent in reasoning through a decision, as the court will likely give them a second chance should either of the parties wish to challenge the award.[256] However this argument is unconvincing when considering the professional reputation (and future earning potential) of the arbitrator is dependent on a well-reasoned award. It is also possible that a presumption in favour of remission may actually have the opposite effect on finality – courts may be more inclined to intervene instead of simply dismissing an application for refusal of enforcement. This risk may have been realised in England where the court-driven widening of the circumstances in which remission may be granted has led to an "excessive judicial intrusion in the arbitral process".[257] This may be resolved somewhat by limiting the presumption of remission strictly in circumstances where application for setting aside rests of inadequacy of reasons.

Remitting the award to the tribunal will offer the tribunal a chance to expand on their reasons, sufficient to ensure acceptability of the decision and assure the parties that the tribunal have applied the law to the facts without any arbitrariness. Changing the remedy

254 Arbitration Act 1996 (UK), s 68(7).

255 *Maurice J Bushell & Co v Graham Irving Born* [2017] EWHC 2227 (Ch) at 3.

256 Tan and Foo, above n 253.

257 Johan Steyn "England's response to the model law of arbitration" (1994) 60 Arbitration 184.

for alleged failure to give reasons, or failure to give adequate reasons, would achieve the clarity that reasons provide, without risking effective enforcement or enabling challenge as a proxy to get the findings set aside.

B Beyond the Traditional Commercial Paradigm: Consequences for the Function of the Duty to Give Reasons

Over the last 50 years, arbitration has primarily been used to resolve commercial disputes between private parties, and the function and application of the duty to give reasons reflects this context. Reasons are directed at the parties, to assure them that their participation in the decision has been genuine, and that the decision making process has been made without bias or arbitrariness. Arbitrators are not expected to explain justifications for their decision at a level suitable to enhance public understanding, or act as guidance for future tribunals.

In recent years, however, arbitration has moved beyond the traditional private commercial paradigm and is increasingly used in all manner of disputes, some of which are of a quasi-public nature. Arbitration is flexible enough to address all manner of disputes, some of which may lie beyond the institutional competence of traditional court systems and dispute resolution processes. For example, arbitration clauses are now incorporated into international trust deeds, and arbitrators may be afforded the opportunity to develop the law of equity, particularly in the offshore trust context.[258] *Ngāti Hurungaterangi* demonstrates the potential of arbitration as a method of dispute resolution in the Treaty of Waitangi context. As noted by Kawharu, the inherent flexibility of arbitration enabled the parties to incorporate kaupapa Māori[259] and concepts such as inclusiveness, harmony and respect into a binding form of dispute resolution.[260] In these contexts, the reasons contained in the award may need to be more comprehensive as a guide to future conduct and to ensure

258 See Jeremy Johnson and Dylan Pine "The Arbitration of Trust Disputes" Jeremy Johnson and Dylan Pine "The Arbitration of Trust Disputes" (paper presented to AMINZ-ICCA International Arbitration Day Conference, Queenstown, April 2018).

259 Māori ideology – a philosophical doctrine, incorporating the knowledge, skills, attitudes and values of Māori society.

260 Kawharu, above n 50.

greater accountability of the tribunal. The potential for arbitrators to develop the law in critical areas such as equity raise questions about the role of precedent. The private nature of awards may stifle the development of the law. The function of the duty to provide reasons in these circumstances may need reconsidering. The tribunal is fulfilling a quasi-public function, and in the interest of transparency the duty of the arbitrator may be more akin to the judicial or administrative law context.

However, this paper has argued that even where a dispute takes place against a public background, the parties in choosing arbitration have bargained for a process that is *different* from litigation. They can be taken to have chosen arbitration for its unique qualities and advantages over other methods of dispute resolution: its flexibility, privacy, and finality. If the courts interpret public circumstances as imposing public standards into an inherently private process, the competitive advantage enjoyed by arbitration over other forms of dispute resolution will suffer. This is demonstrated by the facts of *Ngāti Hurungaterangi*, where the parties ended up in a lengthy litigation battle despite having agreed to arbitration for its efficiency and finality.

The solution to this dilemma, it is suggested, may be found in the core element of arbitration: party autonomy. The onus should be on the parties to shape the arbitration agreement to reflect the public nature of the dispute. If deemed necessary by the parties, the arbitration agreement could provide that reasons are to be provided to a judicial standard and made publicly available. After all, they are the ones best placed to determine the appropriate procedures suitable to their particular circumstances. Raising the procedural standards is a move best catalysed by the parties themselves, rather than as a court-led movement. This will ensure that courts do not overstep their role as the guardians of procedural integrity. Further, this approach is also a conceptually appropriate result when considering that the New York Convention is drafted so that breach of duty may only pose a challenge to enforcement when in breach of the parties' agreement, rather than as a standalone mandatory ground of challenge. Any developments in the duty are thus best addressed through the parties' agreement.

While it may be questioned whether parties can be expected to anticipate this need, the introduction of arbitration centres specialising in public interest disputes may be a useful development. The centre may provide a set of rules pre-tailored to suit disputes with a large degree of public interest which the parties can choose to adopt in their arbitration agreement. Party-led standards as to reasons appropriate in circumstances involving a large degree of public interest will ensure that arbitration can continue to develop to address changing needs of the parties, without risking judicialisation and undermining the competitive advantages of arbitration.

VII Conclusion

This paper has highlighted a number of issues in the operationalisation of the duty to give reasons across a range of contemporary arbitration contexts. It has demonstrated that the duty is applied in ways which risk undermining the benefits of arbitration and diluting the unique advantages that arbitration offers over other forms of dispute resolution. The primary submission of this paper is that the erroneous application is a result of a misunderstanding of the unique purpose and function of the duty to give reasons in the arbitration context. While the duty to give reasons in arbitration shares many of the purposes of reasons in judicial, administrative and investment arbitration contexts, such as a guard against arbitrariness and encouraging intellectual discipline on the part of the decision maker, courts must be cautious not to conflate the function of the duty in arbitration with its judicial or investor-state contemporaries. Arbitration has unique defining features such as privacy, flexibility and efficiency. In arbitration, the duty to give reasons is coloured by these unique features and serves to enhance them.

In practical terms, the case studies revealed that identification of the correct purpose still leaves courts with a dilemma as to the appropriate standard required. Too high a standard for reasons and the courts risk judicialising arbitration and permitting pseudo-appeals on the merits. Too low a standard and the parties may find the decision unsatisfactory, and seek to appeal or challenge the decision – thus arbitration has failed to achieve its aim of quietening disputes. This paper has argued that the solution is to reform the remedy for

breach of duty to give reasons from annulment to remission. Remission will offer the arbitrators a second chance to explain the reasons for their decision at a level sufficient to enable acceptance and closure of the parties. Remission will also counter the risk of parties seeking to utilise Trojan Horse claims and deter parties from using the duty as a delaying tactic.

Finally, this paper has considered the application of the duty to give reasons in the future. New global problems continue to arise and require resolution, and arbitration is well placed to take on this challenge. The trend of arbitration as applicable to a wider range of contexts merits further consideration as to how this may affect the duty in years to come. While the prospect of arbitration called upon to resolve disputes of a public nature suggests the standard for reasons should set higher, this issue is best resolved by the parties themselves in the arbitration agreement rather than any court intervention. This ensures that arbitration maintains its undeniable stance in favour of party autonomy, and the courts do not overstep their role as guardians of procedural integrity.

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