

**INTERNATIONAL LAW ASSOCIATION
INTERNATIONAL COMMERCIAL ARBITRATION COMMITTEE**

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FINAL REPORT – REASONING OF ARBITRAL DECISIONS

June 2022

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I. INTRODUCTION

1. This is the Committee's Report on Reasoning of Arbitral Decisions reflecting the work of the Committee over the period 2016-2022 (extended for two years due to the sanitary Covid crisis). The Committee held in-person meetings in Sydney, Rome, London and Paris and one hybrid meeting in Paris and on-line. This Report concludes the activities of the Committee on this project.

A. OVERVIEW

2. Under most legal systems, the requirement to state reasons when rendering an arbitral award, is not very demanding. Indeed, where and to the extent such a requirement exists, it is generally to ensure that the parties to an arbitration can understand the tribunal's reasoning on key decisions. As long as this purpose is fulfilled, the requirement permits substantial variation in the style, structure, and substance of awards. It is therefore unlikely that the average, conscientious arbitrator would fall foul of the requirement.
3. Since the law provides a number of clear rules and guidance, which the evidence shows are in any event rarely transgressed, this report will identify best practices even where they are not strictly legally necessary.

B. SCOPE AND LIMITATIONS OF THE REPORT

4. This report draws upon and will discuss the requirement to state reasons as it applies to inter-state, investor-state, and commercial arbitrations, both domestic and international.¹ However, as the Committee's mandate is confined to international commercial arbitration, its focus is primarily on international commercial arbitration. It will not consider the reasons requirement as it applies to judicial bodies, except to distinguish it from the requirement to give reasons in rendering arbitral awards.

¹ We acknowledge, with great gratitude, the following: (i) national reports of the highest quality from the following jurisdictions: Australia, Brazil, Canada, Chile, Columbia, Egypt, England & Wales, France, Greece, India, Ireland, Israel, Italy, Kenya, Nigeria, Peru, Poland, Portugal, South Africa, Spain, Sweden, Switzerland, Tanzania, Uganda, and the US; (ii) a report on relevant ICSID jurisprudence, prepared under the aegis of Professor Stavros Brekoulakis; and (iii) inputs on the earlier draft of this report by several members of the Committee.

5. Arbitral institutions may also make decisions on various issues, such as on *prima facie* jurisdiction, arbitrator appointments and challenges, consolidation of proceedings, scrutiny of draft awards, and costs. These decisions are not treated like awards and are generally not subject to a review process, either because the institutional rules or domestic courts consider them to be administrative or final in nature, or by virtue of the immunity enjoyed by arbitral institutions. While there is some debate at the level of policy regarding whether or to what extent the reasons requirement may or should apply to decisions taken by arbitral institutions, this is outside the scope of the present report.

C. STRUCTURE OF THE REPORT

6. The second section of this report examines the origins, applications, and interpretations of the reasons requirement, identifying its sources in international and municipal law (**II.A**), its waivability (**II.B**), the arbitral decisions to which it applies (**II.C**), and its content as it relates to the form and substance of an award (**II.D**).
7. The third section of this report addresses the relevance of the requirement by identifying the consequences of non-compliance, including the legal consequences that obtain in post-award proceedings (**III.A**) and, even more importantly for international commercial arbitration, the non-legal consequences relating to perceptions of the arbitral process (**III.B**). The fourth section contains the report's conclusions (**IV**).

II. THE REQUIREMENT TO STATE REASONS

A. SOURCE OF THE REQUIREMENT

8. The law may articulate the reasons requirement positively, as a requirement of arbitral procedure or good practice for arbitral decisions, or negatively, as a requirement whose non-observance may be relevant for or – exceptionally in international commercial arbitration – indeed entails the annulment (set aside) of the award.
9. Where it is articulated only as a procedural requirement, non-compliance will usually not serve as a direct, stand-alone basis for the annulment of an award. In such jurisdictions, the reasons requirement is likely to receive some more detailed analysis in post-award proceedings indirectly, *i.e.* to the extent that the parties' agreement on procedural requirements calls for reasons to be given.

10. Consequently, most of the jurisprudence on the reasons requirement has originated from jurisdictions that treat a failure to state reasons as a direct or indirect ground for annulment of an award. Such jurisprudence evidently cannot be transposed to other jurisdictions and, for present purposes, serves only as a framework to illustrate sources, requirements, scope and effects of reasoning requirements.

1. International instruments

11. The ICSID Convention imposes a positive requirement that every arbitral award “state the reasons upon which it is based”.²
12. The ICSID regime is one of very few specifically to identify a failure to state reasons as a ground for the annulment of an arbitral award.³ As a result, the jurisprudence of the ICSID *ad hoc* annulment committees has contributed significantly to the development and exposition of the reasons requirement. At the same time, it needs to be emphasized that such jurisprudence cannot automatically apply by analogy to international commercial arbitration, which is based on different objectives and sources. However, it may be useful to address ICSID cases particularly to illustrate the scope of reasoning requirements.
13. The International Law Commission’s Model Rules on Arbitral Procedure (1958), intended to serve as a template for inter-State arbitrations (and indeed a source of inspiration for Article 52 of the ICSID Convention). These Rules provide both that an award must state the reasons on which it is based “in respect of every point on which it rules”⁴ and that the award may be annulled for a failure to state reasons.⁵ However, these Rules have not been adopted in any of the few publicly known inter-State arbitrations and have therefore not generated jurisprudence.

² ICSID Convention, Art. 48(3).

³ ICSID Convention, Art. 52(1)(e).

⁴ ILC Model Rules on Arbitral Procedure, Art. 29.

⁵ ILC Model Rules on Arbitral Procedure, Art. 35(c).

2. General principles of law

14. On two occasions, the International Court of Justice has been called upon by States to determine the validity of an inter-State arbitral award.⁶ In both cases, the challenging party invoked, and the Court considered, a failure to state reasons as a ground for the annulment of the award.⁷ Though the Court did not specify the source from which it derived the reasons requirement, it apparently drew on general principles of law.⁸

3. National arbitration laws

15. Historically, common law jurisdictions did not require arbitral awards to be reasoned while in civil law jurisdictions the opposite position was taken. More recently, the position in comparative law converged to a situation where often reasoning is required but may be waived by the parties to the arbitration. Thus, national laws commonly provide that awards must be reasoned,⁹ but they rarely provide that awards may be annulled for lack of reasons on a stand-alone basis.¹⁰ Even in such jurisdictions, lack of

⁶ *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 192 (*Honduras v. Nicaragua*); *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 53 (*Guinea-Bissau v. Senegal*). See also, in the context of review of decisions by international tribunals/organisations, *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166; *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Qatar), Judgment, I.C.J. Reports 2020*, p. 81.

⁷ *Honduras v. Nicaragua*, ICJ, 1960, p. 216; *Guinea-Bissau v. Senegal*, ICJ, 1989, p. 43.

⁸ See, Abyei Arbitration, Award, ¶¶ 507, 527, (relying on the ICJ decisions in *Honduras v. Nicaragua* and *Guinea Bissau v. Senegal* as reflective of general principles of law relating to the annulment of arbitral awards); ILC Commentary on Draft Convention on Arbitral Procedure, p. 105 (“The ultimate sources of the binding authority of an international tribunal award include that the tribunal faithfully has adhered to the fundamental principles of law governing its proceedings. An award rendered in violation of such fundamental principles is not binding upon the parties.”).

⁹ UNCITRAL Model Law, Art. 31(2); Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.) (Canada), Art. 31(2); International Arbitration Act (Australia), s. 16(1) (providing that the Model Law has the force of law in Australia); Arbitration Act (England & Wales), s. 52(4); Private International Law Act (Switzerland), Art. 189(2); Code of Civil Procedure (Italy), Art. 823.2; Code of Civil Procedure (France), Art. 1482(2); Judicial Code (Belgium), Art. 1713(4); Code of Civil Procedure (Greece), Art. 892.2(e); Arbitration Act (Spain), Art. 37.4.

¹⁰ *But see* Code of Civil Procedure (Greece), Art. 897(7) (An arbitral award may be set aside, in whole or in part, solely by a court decision on the following grounds: ... if the award is incomprehensible or contains contradictory provisions”); Civil Procedure Code (Italy), Art. 829.1(5) (providing that an award may be nullified for violating the reasons requirement); ; Israeli Arbitration Law, 5728-1968, Sec. 24(6), providing that the court may set aside an award if the arbitrator did not provide reasons, or if the reasoning is found to be insufficient; Code of Civil Procedure (Netherlands), Art. 1057(4) and 1065(1)(d) (providing that an award may only be set aside on certain grounds, including that it does not contain reasons for the decision given in the award).

reasons is interpreted very narrowly and relates primarily to a total absence of reasons and not to insufficient, contradictory or perfunctory reasoning.

16. However, several national laws do not include either a positive or negative articulation of the rule, either because it is regarded as not being susceptible of clear delineation or because it is not considered a default requirement, applicable in the absence of party agreement, in that jurisdiction.
17. An example of the former is Sweden, which did not include any such rule in its national law in part because of the difficulty involved in identifying the minimum requirements for an award to be considered reasoned.¹¹ An example of the latter is the United States federal law, which does not require arbitrators to provide reasons. Courts describe a “standard” award as involving “a mere announcement of [the] decision”,¹² requiring the “least explanation” on the spectrum of reasoned awards.¹³

4. Institutional rules

18. The rules of leading arbitration institutions - including the ICC, LCIA, SCC, and SIAC - require awards to state the reasons upon which they are based but often with an opt out for the parties to the arbitration.¹⁴

5. Parties’ agreement

19. Jurisdictions that do not impose such a requirement by law do permit parties to agree that reasons are required.¹⁵ Such agreement may be expressed in the parties’ arbitration agreement, incorporated by reference to arbitration rules that require awards to be reasoned, or included by agreement of the parties as part of the terms of reference and/or a procedural order. Where the arbitration rules require parties specifically to opt for

¹¹ Sweden national report, p. 1, relying on Bill to Parliament (prop.1998/99:35, pp.134 and 135).

¹² *Rain CII Carbon, LLC v. ConocoPhillips Company*, 674 F.3d 469, 474 (5th Cir. 2012) (US).

¹³ *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011) (US).

¹⁴ ICC Rules, Art. 32(2); LCIA Rules, Art. 26.2; SCC Rules, Art. 42(1); SIAC Rules, Rule 32.4.

¹⁵ US national report, p. 1.

reasoned awards, mere reference to the rules will not be sufficient to incorporate the requirement.¹⁶

20. The reasons requirement might also be implied from the function assigned to the arbitral tribunal or the context of the proceedings.¹⁷ This was confirmed in the Abyei Award in that the dispute therein pertained to matters of public importance (boundaries), the parties had specified a methodology for the committee to follow, and the proceedings involved extensive and detailed presentations by the parties.¹⁸ Such high-level factors will seldom found a reason requirement in international commercial arbitration as the issue will already be governed by the applicable law, arbitration rules or a specific agreement between the parties.

B. WAIVABILITY OF THE REQUIREMENT

1. Waivable

21. Most national laws that incorporate a requirement for reasons treat it as waivable.¹⁹ The same is true for the arbitration rules of leading institutions.²⁰ Accordingly, parties may dispense with the requirement by agreement, which must generally be express.²¹
22. Parties should consider whether waiving the reasons requirement meets their expectations from the arbitral tribunal and might affect their post-award remedies. While in most jurisdictions a waiver of the reasons requirement will not affect the right to challenge the award, it may significantly reduce the possibility that such a challenge

¹⁶ See, e.g., AAA Construction Industry Arbitration Rules, R-47(c) (“The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact, or conclusions of law no later than the conclusion of the first Preliminary Management Hearing...”).

¹⁷ Cf Abyei Arbitration, Award, ¶ 520.

¹⁸ Cf Abyei Arbitration, Award, ¶¶ 521-523.

¹⁹ UNCITRAL Model Law, Art. 31(2); Arbitration Act (England & Wales), Art. 52(4); Code of Civil Procedure (France), Art. 1506(4); Private International Law Act (Switzerland), Art. 189(2); Code of Civil Procedure (Greece), Art. 892.2(e). *But see* Civil Procedure Code (Italy), Art. 823.2 (stating the reasons requirement without permitting waiver thereof) and Art. 829.1(5) (providing that an award may be nullified for violating the reasons requirement, “notwithstanding any waiver”); and Arbitration Act (Spain), Art. 37.4 (providing that the award “shall always state the reasons upon which it is based”).

²⁰ LCIA Rules, Art. 26.2; SCC Rules, Art. 42(1); SIAC Rules, Rule 32.4; ACICA Rules, Art. 42.3.

²¹ CA Paris, 20 June 1996, Rev. arb. 1996.656. (France); Arbitration Act (England & Wales), s. 5(1); Israel national report, p.1.

will be viable.²² The absence of reasoning may well obscure any omissions the tribunal may have committed with respect to its conduct of the proceedings, exercise of jurisdiction, or determination of the law and facts. The English Arbitration Act acknowledges this difficulty by denying parties the right to challenge an arbitral award on a point of law if they have waived the requirement to apply reasons.²³

23. For disputes approaching even a threshold level of complexity, it is generally questionable whether parties should completely dispense with the requirement for reasons unless there are other good reasons to do so. Any efficiency gains resulting from such dispensation are in this respect to be balanced against the inability to review the award or the underlying procedure for defects.
24. On the other hand, simple disputes of the “look- sniff” variety, which involve an arbitrator with specialized knowledge exercising their best judgment to rule on the quality of a commodity, may not require or indeed lend themselves to reasoned decisions.²⁴ Submitting a dispute to a “look-sniff” arbitration may be considered an implied agreement to dispense with reasons;²⁵ or by law amounting to such a dispensation.²⁶
25. The two paragraphs above point to the fact that there are a myriad of different situations and arbitration schemes and, thus, that the parties may consider adapting reasoning requirements to their particular needs and the relevant circumstances.

²² Swiss Supreme Court, 4A_198/2012, 14 December 2012, para. 2.2.

²³ Arbitration Act (England & Wales), s. 69(1).

²⁴ Lord Bingham, “Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award” (1988) 4 *Arbitration International* 141, 145 (“[t]here are some arbitrations, those of the “look-sniff” variety in particular, where there is really no room for the giving of reasons...”).

²⁵ Barry Mansfield, *Arbitration Act 2010 and Model Law: A Commentary*. Clarus Press, 2012, p. 203 (Ireland).

²⁶ Code of Civil Procedure (Netherlands), Art. 1057(5)(a) (...the award shall contain no grounds for the decision given if...the award exclusively concerns the determination only of the quality or condition of goods...)

2. Non-waivable

26. The ICSID regime does not permit parties to waive the requirement to state reasons. The Convention drafters specifically rejected a proposal to allow such waiver.²⁷
27. ICSID *ad hoc* annulment committees have explained this particularity with reference to the special nature of investor-State arbitration. Specifically, since investor-State arbitrations involve sovereign States and implicate public interests, there is a particular higher burden on the tribunal to justify its decision.²⁸
28. In view of the increasing scrutiny of investor-State arbitration,²⁹ a good argument may be made for this approach generally to be followed even in non-ICSID investor-State arbitrations. However, where the applicable rules permit parties to agree that no reasons are to be given, and the parties so agree, the tribunal may choose not to give reasons.³⁰
29. The paragraphs above emphasize the distinct nature of intra-State and investment arbitration on the one hand and international commercial arbitration on the other hand. Legal history and comparative law indicate that in international commercial arbitration, arbitral decisions do not necessarily need to be reasoned, and party autonomy has a prominent role to play – such that parties may waive a reason requirement which otherwise would apply. This is also confirmed by the fact that by and large there is no stand-alone ground for setting aside for lack of reasoning or, where present, such

²⁷ M.I.N.E. v. Republic of Guinea (ICSID Case No. ARB/84/4), Decision on Annulment, ¶ 5.10.

²⁸ Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5), Decision on Annulment, ¶ 165 (“The legitimacy of an arbitral decision to invalidate a sovereign act would be severely undermined if the tribunal did not have to explain why the act contradicts the law.”).

²⁹ See, e.g., UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS), A/CN.9/WG.III/WP.142, 18 September 2017, ¶¶ 45-47 (noting the public implications of awards in, and concerns regarding the legitimacy of, investor-state arbitration). See also, UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Report on the work of its thirty-fourth session, A/CN.9/930/Add.1/Rev.1, 26 February 2018 (reflecting concerns regarding the coherence and consistency of decisions in investor-state disputes); UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, A/CN.9/WG.III/WP.150, 28 August 2018 (identifying divergent interpretations of substantive standards and issues of jurisdiction and admissibility, as well as procedural inconsistencies, across decisions in investor-state arbitration).

³⁰ See, e.g., UNCITRAL Arbitration Rules, Art. 34(3) (“The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given”).

standard is interpreted restrictively. In that situation, reasoning is, thus, considered less important than in public international law or investment law; and this in turn implies that any reason requirement can be waived or opted-out of.

C. DECISIONS TO WHICH THE REQUIREMENT APPLIES

1. Finality of the decision

(i) *Final decisions*

30. As a general rule and subject to the applicable law, the duty to provide reasons applies to decisions which are a final determination of an issue or claim³¹ – on grounds that pertain to, amongst others, jurisdiction and the merits³² – and thereby settle them at any stage of the proceedings once and for all. In other words, the requirement of providing reasons attaches to any final decision as for such decisions, given their importance and finality, the parties may expect to be capable of understanding why the arbitral tribunal came to its conclusion.

(ii) *Interim decisions*

31. Orders on provisional or conservatory measures are not subject to the requirement, since they can be lifted or modified at any time during the proceedings and they lapse upon the issuance of a final award.³³ Unless the relevant law characterizes such decisions as awards or expressly requires reasons,³⁴ in principle there is no legal duty to provide reasons. It is in recognition of this fact that the ICC Rules expressly provide in Article

³¹ This is a standard definition. See, e.g., D Sutton et al. (eds.), *Russell on Arbitration*, 23rd ed, London: Sweet & Maxwell, 2007, ¶¶ 6-002, 6-004, 6-007. See also, England & Wales national report, p. 2.

³² See, e.g., in France, CA Paris, 11 April 2002, *Sté ABC International v Sté Diverseylever Ltd* [2003] Rev Arb 150; CA Paris, 4 April 2002, *Sté NAFIMCO v Sté Foster Wheeler Trading Co AG* [2003] Rev Arb 144.

³³ Switzerland national report, p. 3.

³⁴ See, e.g., Singapore International Arbitration Act, s. 2(1).

28(1) that decisions on interim measures must contain reasons.³⁵ Likewise, awards in emergency proceedings are expressly required to contain reasons.³⁶

2. Basis of the decision

(i) Facts

32. Good practice implies that awards in purely or predominantly factual disputes are to be reasoned. The tribunal will be required to justify its findings of fact by identifying the applicable evidentiary standards and applying them to the evidence.³⁷ Where circumstantial evidence exists and /or adverse inferences are to be drawn, this will necessarily entail a more involved process. Factual findings that are crucial to the tribunal's decision should result from a proper fact finding procedure, and the award should describe the "elements and steps in this procedure".³⁸

(ii) Law

33. Most disputes involve mixed questions of fact and law. Legal analysis ordinarily requires identification and interpretation of the appropriate legal standards and application of the standards to the facts. Good practice, again, implies that the tribunal must provide reasons for each step of this analysis.

³⁵ Article 28(1) of the 2019 ICC Rules provides: "[A]ny such [interim or conservatory] measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate". See further, J Fry, S Greenberg, F Mazza, *The Secretariat's Guide to ICC Arbitration* (2012), p 291. See also, ACICA Rules, Art. 37.1(b) (providing that interim measures of protection may be ordered in the form of an award or any other form, provided reasons are given).

³⁶ Article 6(3) of Appendix V to the 2019 ICC Rules provides: "[T]he Order shall be made in writing and shall state the reasons upon which it is based . . .". See also, SCC Rules, Appendix II, Art. 8(2)(ii); ACICA Rules, Schedule 1, Art. 3.2 (providing that a decision on emergency interim measures of protection shall contain reasons for the decision) and Schedule 1, Art. 5.3 (providing that the arbitral tribunal is not bound by any decision or reasons of the emergency arbitrator).

³⁷ See *Ngāti Hurungaterangi v. Ngāti Wahiao*, [2017] NZCA 429 (New Zealand), ¶ 75 ("[t]he subject matter of the dispute was essentially factual, and could only be determined by making reasoned findings on the evidence").

³⁸ *Industria Nacional de Alimentos SA (Lucchetti) v Republic of Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, Dissenting Opinion of Sir Franklin Berman, ¶ 15.

(iii) Decisions based on equitable considerations

34. Jurisprudence from civil-law jurisdictions in particular indicates that the reasons requirement applies equally to decisions at law as well as decisions *ex aequo et bono*.³⁹ Specifically, awards rendered *ex aequo et bono* must “comprise an indication that the arbitrators took their own sense of fairness into account and explain why their decision is ‘fair’”.⁴⁰

(iv) Agreement

35. An award on agreed terms is not required to contain reasons for the outcome/settlement it records;⁴¹ but it should contain reasons for why the tribunal was authorized to issue such an award. The disposition, however, involves a mere restatement of the parties’ settlement agreement without any actual determination by the tribunal.⁴² An exception to this general principle arises if the applicable law places limits on the arbitral tribunal’s power to record settlement agreements. German law, for instance, expressly requires that the content of any such settlement must not violate public order.⁴³ In such circumstances, the tribunal should provide reasons in support of the validity of the settlement if there are doubts as to such validity.

3. Subject-matter of the decision

36. Though an arbitral award will often contain a section titled “reasons” or “tribunal’s analysis”, the requirement to state reasons may apply to portions outside that section if they finally determine material, contested issues.

³⁹ Bernhard Berger / Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed., Hart, Bern 2015, ¶ 1445; Italy national report, p. 4.

⁴⁰ France national report, p. 2, referring to Cass. 2^{ème} civ., 15 February 2001, Rev. arb. 2001.135; Cass. 1^{re} civ., 24 May 2018, n° 17-18796, unpublished (France).

⁴¹ UNCITRAL Model Law, Art. 31(2); Arbitration Act (England & Wales), s. 52(4); Code of Civil Procedure (Netherlands), Art. 1069(2)(b); Bernhard Berger / Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed., Hart, Bern 2015, ¶ 1543 and footnote n° 8; Colombian Arbitration Law, Art. 104(2); Egypt national report, p. 3.

⁴² Cass. 1^{re} civ., 14 November 2012, Gaz. Pal. 6 January 2013 (France), p. 21.

⁴³ Code of Civil Procedure (Germany), s. 1053(1).

(i) *Arbitral process*

37. Orders and directions addressing arbitral procedure ordinarily do not qualify as awards, since they are not directed towards the determination of any issues or claims and do not affect the parties' substantive rights.⁴⁴ Some caution, however, may be warranted when procedural decisions affect the parties' non-waivable due process rights, including the right to be heard and the right to equal treatment. In all cases, if parties have agreed on a procedural matter, there is no need for a tribunal to provide reasons for adopting such procedure. This follows from the general rule that awards by consent need not be supported by the tribunal's independent reasons. On the other hand, if a procedural issue is either contested or left unaddressed by the parties *and* it has the potential to affect the parties' due process rights, a tribunal may consider to give reasons first and foremost to explain to the parties why it came to its procedural decision and, second, to shield a future award. The award may not *per se* be subject to annulment for failure to state reasons but it might be liable to annulment for due-process violations in the conduct of the arbitration.⁴⁵ Although a failure to state reasons for fundamental procedural decisions cannot be viewed as dispositive evidence of such violations, it will make it difficult to disprove them. This will not frequently arise in practice as a party will have to object to the failure to give reasons and a tribunal may consider to supplement its procedural decision with some reasoning or even amending its decision.
38. A contemporary illustration of this concern is reflected in the 2021 ICC Practice Note, which requires tribunals to support any decision to conduct a hearing virtually with reasons.⁴⁶
39. Aside from these general principles, the applicable arbitration law may specifically require certain procedural decisions to be reasoned. For instance, as to the formal

⁴⁴ D Sutton et al. (eds.), *Russell on Arbitration*, 24th ed, London: Sweet & Maxwell, 2015 [6-002], cited with approval in *Brake v Patley Wood Farm LLP* [2014] EWHC 4192 (Ch) (England & Wales), ¶ 26.

⁴⁵ See, e.g., UNCITRAL Model Law, Art. 34(2)(a)(ii), (iv); Code of Civil Procedure (France), Art. 1520(4); Private International Law Act (Switzerland), Art. 190(2)(d); Code of Civil Procedure (Greece), Art. 897(5); Arbitration Act (Spain), Art. 41.1(b), (d); Civil Procedure Code (Italy), Art. 829(9).

⁴⁶ ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration, ¶ 100 ("If an arbitral tribunal determines to proceed with a virtual hearing without party agreement, or over party objection, it should carefully consider the relevant circumstances, including those mentioned in paragraph 99, assess whether the award will be enforceable at law, as provided by Article 42, and provide reasons for that determination...").

requirements for an award, if an award has not been signed by all of the arbitrators, the Swedish Arbitration Act requires the award to indicate the reasons for that.⁴⁷ Arbitrators should pay special attention to these particularities, since they also indicate which procedural aspects the curial law considers material.

(ii) Procedural history

40. Recitations of the procedural history will ordinarily not qualify as reasons,⁴⁸ except where they form the basis of important procedural decisions in the arbitration, such as whether a claim is time-barred or whether certain evidence is admissible.⁴⁹

(iii) Jurisdiction

41. Unless the tribunal's jurisdiction is uncontested, any decision on jurisdiction should be supported with reasons. This duty exists as a corollary of an arbitral tribunal's well-recognised power to determine its own jurisdiction and to legitimize in the eyes of the parties why the arbitral tribunal accepted or declined jurisdiction.
42. Further, since an arbitral award may ordinarily be annulled if it constitutes as an excess or failure to exercise jurisdiction,⁵⁰ an unreasoned decision on jurisdiction does not meet the legitimate expectations of the parties as described above and does not assist a party wishing to challenge such an award nor the domestic court deciding on the challenge and, thus, does not lead to efficient proceedings.
43. The application of this requirement depends on the finality rather than the timing of the decision on jurisdiction. Thus, a final determination of the issue of jurisdiction in bifurcated proceedings would also be subject to the requirement (except in the ICSID

⁴⁷ Arbitration Act (Sweden), Art. 31.

⁴⁸ Switzerland national report, pp. 6-7.

⁴⁹ France national report, p. 5.

⁵⁰ See, e.g., UNCITRAL Model Law, Art. 34(2)(a)(ii), (iv); Code of Civil Procedure (France), Art. 1520(4); Private International Law Act (Switzerland), Art. 190(2)(d); Code of Civil Procedure (Greece), Art. 897(5); Arbitration Act (Spain), Art. 41.1(b), (d); Civil Procedure Code (Italy), Art. 829(9); Arbitration Act 1996 (England), s. 67.

system, where a positive jurisdictional/admissibility decision may not be styled an award).⁵¹

(iv) Merits

44. The focus of a typical arbitral award is the substance or “merits” of the dispute. The determination on merits is directed towards resolving the parties’ claims by answering the “questions” they give rise to. To meet the parties’ expectations, a tribunal must always provide reasons for its resolution of a claim (including a counterclaim or set-off claim) one way or the other in view of the finality of its decisions on these merits questions. These reasons usually take the form of findings of fact, interpretations of law, and applications of law to facts, and they form the core of the award. Reasoning is one thing; the extent and scope of the reasoning is another and much more important one. This report will go on to identify the specific topics that an award must address in order for the decision on merits to qualify as “reasoned”.⁵²

(v) Quantum

45. Where decisions on quantum logically follow from the decision on liability, and do not necessarily require further determinations of fact or law, there may be little reasoning involved, but where the parties contest either the applicable methodology or the amounts in dispute, tribunals should provide reasons to justify their decision as the parties are legitimately entitled to know how the tribunal came to the amount to be paid or received and, exceptionally subject to the applicable law and rules, to avoid an award being annulled for lack of reasoning on quantum.⁵³
46. Tribunals must ensure that they clearly explain how they apply a particular methodology to quantify loss, particularly when the loss in question is difficult to quantify with certainty. For instance, an ICSID tribunal awarded a nominal value of damages for a claim for loss of opportunity, on grounds that any estimation of such loss is an exercise

⁵¹ Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27), Decision on Annulment, ¶ 117.

⁵² See, Section II(D)(3)(ii) below.

⁵³ *Judgment of 6 January 2016, Youssef v. Al Mostakbal CBC*, Case Nos. 11, 12 & 14/132 (Cairo Ct. App.) (Egypt).

of discretion. The tribunal so held despite relying on commentary to the effect that loss of chance to make profit is assessed by reference to the degree of probability of the chance turning out in favour of a claimant. An ICSID *ad hoc* committee annulled this portion of the award. The committee found that the tribunal’s general affirmation of its discretion did not follow from its proposed analysis as regards loss of chance. The committee also considered that the tribunal had failed to explain “the concept of a nominal value or the reason to award a nominal value as opposed to any other value”.⁵⁴ This serves to illustrate that quantum awards are subject to reasoning but – unlike ICSID awards that are subject to a stand-alone setting aside ground for reasoning defects – international commercial arbitration awards are by and large not subject to such ground and a reasoning requirement as to quantum amounts to good practice in drafting awards rather than opening up prospects of successful set aside proceedings.

(vi) Costs

47. There is no default rule for the allocation of costs in international arbitration. The American tradition requires parties to bear their own legal costs; the English tradition follows the “costs follow the event” approach by compensating the successful party for its legal costs. Civil-law jurisdictions such as Austria, Germany and Switzerland provide for a proportional allocation of costs based on the parties’ relative success on the merits.⁵⁵ Some institutional rules leave the decision as to cost-allocation to the tribunal’s discretion while others prescribe an outcome-based approach, usually by reference to the relative success of the parties.⁵⁶
48. Decisions on costs may be based on any number of factors including the outcome of the arbitration, the complexity of arbitration, the parties’ conduct during the arbitration, and the cost allocation principles prevailing in the applicable law.⁵⁷ The tribunal’s decision

⁵⁴ Perenco Ecuador Limited v. Republic of Ecuador (ICSID Case No. ARB/08/6), Decision on Annulment, ¶¶ 461-469.

⁵⁵ See C Koch, Is There a Default Principle of Cost Allocation in International Arbitration? – The Importance of the Applicable Provisions and Legal Traditions, (2014) 31(4) Journal of International Arbitration 485.

⁵⁶ See P Pinsolle, Cost Allocation and Third-Party Funding in International Arbitration, (2018) 5(2) BCDR International Arbitration Review 307.

⁵⁷ ICC Rules, Art. 38(5); SCC Rules, Art. 49(6), 50; ACICA Rules, Art. 51.3, 51.4; ICC Commission Report: Decision on Costs in International Arbitration, Appendix A: Analysis of Allocation of Costs in Arbitral Awards, ICC Dispute Resolution Bulletin 2015 (2), p. 31.

to adopt one approach over the other, and its consideration of the relevant factors, should be supported by reasons. Since the parties' costs can vary significantly based on the tribunal's decision, it is important for the parties that a tribunal justifies this impact with reasons.

49. ICSID jurisprudence is unclear on whether the allocation of costs in an award must be reasoned, with earlier decisions finding it “quite common” and therefore acceptable for the cost allocation to not be reasoned,⁵⁸ and more recent decisions finding tribunals obliged to explain “why they exercised [their discretion to allocate costs] in a certain way”.⁵⁹ For the reason explained at the end of the previous section, ICSID jurisprudence is not without more transposable to international commercial arbitration.

(vii) Addenda

50. A post-award addendum intended to correct, interpret, or supplement the award is considered part of the award and should be reasoned to the extent the award needed to be.⁶⁰

(viii) Dissenting and separate opinions

51. Where dissenting and separate opinions, if acceptable under applicable law, rules or practice, do not form part of the award,⁶¹ it may not be required for them to state reasons.⁶² It would be anomalous, however, for such opinions to lack reasons, since their sole purpose is to express an arbitrator's reasons for departing from the majority. This expresses the broader point that in international commercial arbitration reasoning serves the interests of the parties to be informed about the “why” of arbitral decisions and dissenting and separate opinions contribute to that objective. In this respect, the

⁵⁸ CDC Group plc v. Republic of Seychelles (ICSID Case No. ARB/02/14), Decision on Annulment, ¶ 87.

⁵⁹ TECO Guatemala Holdings, LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23), Decision on Annulment, ¶ 359.

⁶⁰ ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration, ¶ 208 (“All decisions and addenda must state the reasons upon which they are based.”); See, e.g., J Paulsson, G Petrochilos, UNCITRAL Arbitration, Kluwer, 2018, p. 304, ¶ 17.

⁶¹ D Sutton et al. (eds.), Russell on Arbitration, 24th ed, London: Sweet & Maxwell, 2015, ¶ 6-058; Swiss Supreme Court, 4A_584/2009, 18 March 2010, ¶ 3.3.

⁶² England & Wales national report, p. 4. But see, Colombian Arbitration Law, Art. 138 (requiring a dissenting arbitrator to state the reasons for disagreement, in writing).

reasoning of dissenting and separate opinions does not relate to the finality of the arbitral decisions but to their legitimacy in the eyes of the parties.

4. Nature and title of the decision

52. As already mentioned, the requirement to provide reasons ordinarily applies only to an “award”.⁶³ Awards are those decisions that involve a “final determination of a particular issue or claim”, irrespective of their form.⁶⁴
53. Whether an award is titled “award”, “order”, or “decision” is generally irrelevant in assessing the applicability of the reasons requirement. Documents which are titled “orders” or “decisions” may well fall to be characterized as awards.⁶⁵ As an example, a “decision on preliminary objections” that finally determines the issue of jurisdiction would be subject to the requirement.⁶⁶

5. Capacity of the decision-maker

54. The duty to provide reasons applies to arbitral awards made by arbitral tribunals, not individual acts such as disclosures made by an arbitrator during the constitution of the tribunal. Thus, an arbitrator is only subject to the reasons requirement when speaking as the tribunal.

D. CONTENT OF THE REQUIREMENT

1. Introduction

(i) Purpose of requirement

55. For the purpose of enforcement, various national laws (and, implicitly, the New York Convention) equate arbitral awards with court judgments. As a corollary of this

⁶³ UNCITRAL Model Law, Art. 31(2).

⁶⁴ D Sutton et al. (eds.) *Russell on Arbitration*, 24th ed, London: Sweet & Maxwell (2015), ¶ 6-002, cited with approval in *Brake v Patley Wood Farm LLP* [2014] EWHC 4192 (Ch) (England & Wales), ¶ 26.

⁶⁵ See, e.g., J Paulsson, G Petrochilos, *UNCITRAL Arbitration*, Kluwer, 2018, p. 300, ¶ 6; and JM Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer, 2012, pp. 1263-1266.

⁶⁶ *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Annulment, ¶ 117.

equivalence, reasons – unless waived by consent – may be said to be an intrinsic feature of adjudication, as a matter of principle or policy.

56. The reasons requirement is frequently articulated in terms of the *outcome* it is intended to achieve. Simply put, the requirement is intended to enable a reader of the award to “understand”, “comprehend”, or “follow” the tribunal’s reasoning to its conclusion.⁶⁷ Any specific prescriptions or proscriptions would thus be directed towards the achievement of this outcome. Ultimately, reasons will be measured by reference to their effect, i.e., whether they are able to “explain the result arrived at by the Tribunal”.⁶⁸ As also note above, this includes the factual and legal premises that led the tribunal to its conclusions.⁶⁹ In international commercial arbitration, this corresponds to the finality of the arbitral process in that the parties can expect to properly understand why the arbitral tribunal in essence came to a certain outcome.

⁶⁷ Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru (ICSID Case No. ARB/03/28), Decision on Annulment, ¶ 182; Total S.A. v. Argentine Republic (ICSID Case No. ARB/04/1), Decision on Annulment, ¶ 265; Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/05/16), Decision on Annulment, ¶ 104; M.I.N.E. v. Republic of Guinea (ICSID Case No. ARB/84/4), Decision on Annulment, ¶ 5.09; Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3) (Resubmission), Decision on Annulment, ¶ 247; CDC Group plc v. Republic of Seychelles (ICSID Case No. ARB/02/14), Decision on Annulment, ¶ 75; Caratube International Oil Company LLP v. Republic of Kazakhstan (ICSID Case No. ARB/08/12), Decision on Annulment, ¶ 102; EDF International S.A. SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic (ICSID Case No. ARB/03/23), Decision on Annulment, ¶ 198; CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Annulment, ¶ 97; Alapli Elektrik B.V. v. Republic of Turkey (ICSID Case No. ARB/08/13), Decision on Annulment, ¶ 197; Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Decision on Annulment, ¶ 167; TECO Guatemala Holdings, LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23), Decision on Annulment, ¶ 87; *World Trade Corporation Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm) (England & Wales), ¶ 8; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (Canada), ¶ 16; *Thoroughvision Pty Ltd v. Sky Channel Pty Limited & Anor* [2010] VSC 139 (Australia) ¶ 55; *Rami Kolker v Diplomat Motorcycles (1985) Ltd.*, Civil Appeal 1325/92, Nevo electronic database (13 June 1993) (Israel); Jean-François Poudret / Sébastien Besson, *Comparative Law of International Arbitration*, 2nd ed., Sweet & Maxwell, 2007, ¶ 749.

⁶⁸ Hussein Nuaman Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/7), Decision on Annulment, ¶ 126; *Judgment of 8 January 2010*, Case No. 08/02129 (Netherlands Hoge Raad).

⁶⁹ Wena Hotels Ltd. v Arab Republic of Egypt (ICSID Case No. ARB/98/4), Decision on Annulment, ¶ 79; El Paso Energy International Company v Argentine Republic (ICSID Case No. ARB/03/15) Decision on Annulment, ¶ 220.

57. Another purpose of the requirement is that it serves as a check against arbitrariness by ensuring that “there has been a minimum respect of the fundamental exigencies of justice by the tribunal”.⁷⁰
58. Reasons also contribute to an award’s *res judicata* effects i.e., its conclusive and preclusive effects. Whether one takes the view that *res judicata* should be limited to the dispositive part of the award or that it should extend to its underlying reasoning,⁷¹ it is clear that the reasoning may elucidate the scope of and foundation for the dispositions in the award.
59. Authorities differ on the audience to whom the tribunal’s reasons must be directed. While certain authorities require reasons to be generally comprehensible,⁷² others require only that reasons be comprehensible to the parties.⁷³ Still others require the award to be clear to the reviewing body, while recognising that the parties are the award’s primary addressees.⁷⁴ It has been considered that one of the main purposes for giving reasons in a decision is to provide a basis for judicial review of the decision.⁷⁵
60. In view of the private, often confidential nature of commercial arbitrations, in principle, awards in commercial arbitrations are directed to and need only be understood by the parties.⁷⁶

⁷⁰ Tza Yap Shum v. Republic of Peru (ICSID Case No. ARB/07/6), Decision on Annulment, ¶ 119. *See also*, Ngāti Hurungaterangi v. Ngāti Wahiao, [2017] NZCA 429 (New Zealand), ¶ 62.

⁷¹ *See*, ILA Final Report on *Res Judicata* and Arbitration, Seventy-second International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4-8 June 2006, Section V.

⁷² Abyei Arbitration, Award, ¶ 531 (“an award should contain sufficient ratiocination to allow the reader to understand how the tribunal reached its binding conclusions”).

⁷³ Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Decision on Annulment, ¶ 81 (“The object of both provisions is to ensure that the Parties will be able to understand the Tribunal’s reasoning”).

⁷⁴ Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey (ICSID Case No. ARB/11/28), Decision on Annulment, ¶¶ 98, 108 (“Therefore, an award is not subject to annulment if the reasons for a decision, though not stated explicitly, are readily apparent to the ad hoc committee.”)

⁷⁵ Tza Yap Shum v. Republic of Peru (ICSID Case No. ARB/07/6), Decision on Annulment, ¶ 112.

⁷⁶ *Hoban v Coughlan & Anor* [2017] IEHC 301 (Ireland); *Pakistan v Broadsheet LLC* [2019] EWHC 1832 (Comm) (England & Wales). *See also*, Ireland national report, pp 4-5.

61. On the other hand, investor-State and inter-State awards, which are often made public and affect public interests, should be reasoned in a manner that reflect this broader audience and impact.

(ii) *Inapplicability of judicial standards*

62. Arbitral awards are distinct from judicial decisions and are held to a different standard.⁷⁷ As indicated above, specific rules apply to reasoning for commercial arbitrations providing for waiver, not addressing the issue or not enumerating it as a stand-alone setting aside ground. For this reason, courts in common-law jurisdictions have emphasized that the arbitral-reasoning requirement is less onerous than its judicial counterpart.⁷⁸ Exceptionally, arbitral awards may be subject to the same standard as judicial decisions in some jurisdictions.⁷⁹
63. Nonetheless, as one would expect, both arbitrators and judges rely heavily on binding legal norms and facts while making decisions.⁸⁰

(iii) *De minimis nature*

64. The requirement to state reasons is generally recognized as imposing a *de minimis* obligation.⁸¹ Thus, it is met so long as reasons are stated, and a reviewing body will only verify their existence, not their sufficiency or adequacy.⁸² This begs the question of what constitutes “reasons”, and when they can be said to “exist”.

⁷⁷ See, e.g., Lord Bingham, “Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award” (1988) 4 *Arbitration International* 141.

⁷⁸ *Westport Insurance Corporation v Gordian Runoff Limited AS* [2011] HCA 37 (Australia), ¶ 53; *Delargy v Hickey* [2015] IEHC 436 (Ireland); *Hoban v Coughlan & Anor* [2017] IEHC 301 (Ireland).

⁷⁹ Colombia Country Report, Q. 9.

⁸⁰ SI Strong, *Legal Reasoning Across Commercial Disputes: Comparing Judicial and Arbitral Analyses*, OUP, 2020, pp. 126-131.

⁸¹ *Wena Hotels Limited v. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4), Decision on Annulment, ¶ 79.

⁸² *M.I.N.E. v. Republic of Guinea*, (ICSID Case No. ARB/84/4), Decision on Annulment, ¶ 5.08; CA Paris, 1-1, 29 May 2018, n°15/23187 unpublished (France); Cairo Court of Appeal, cases no. 61, 147 of J.Y 124, hearing session 2 September 200 (Egypt); *Benetton International v Eco Swiss China Time*, Dutch Supreme Court, 25 February 2000, NJ 2000, 508 (Netherlands) (setting aside is only possible if reasons are absent and does not allow a review of the adequacy of the reasoning); *Nannini v SFT Bank*, Dutch Supreme Court, 9 January 2004, NJ 2005, 190 (Netherlands) (an absence of reasons includes the situation that reasons are provided but that these fail to contain any persuasive explanation for the relevant decision); *Kers v Rijpma*,

65. Reasons have been described as “the factual and legal premises leading the Tribunal to its decision”⁸³ and, more specifically, as the arbitrators’ view of “what did or did not happen and why, in the light of what happened, they have reached their decision and what that decision is”.⁸⁴
66. Whether and to what extent reasons must be comprehensive, coherent, or correct to be said to “exist” is considered in the sections that follow.

2. Requirements as to form

67. It is generally accepted as a matter of law that there are no “rigid or formulaic requirements” as to the form in which reasons must be stated.⁸⁵ However, as a practical matter, the form in which reasons are stated can have an impact on the clarity of their substance.

(i) Order of reasons

68. There are no strict requirements as to the order in which reasons should appear.⁸⁶ One may begin the reasoning section of the award with an opening section or executive summary that provides context as to the legal and factual discussion that will follow. This may be followed by a summary of legal issues, a statement of material facts, an analysis of the legal issues and a conclusion containing the disposition.⁸⁷

Dutch Supreme Court, 22 December 2006, NJ 2008, 4 (Netherlands) (setting aside is only justified if reasons are absent or if the reasoning is so defective that it should be equated with an absence of reasons).

⁸³ Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Decision on Annulment, ¶ 79.

⁸⁴ *Bremer Handelsgesellschaft v Westzucker* (No. 2) [1981] 2 Lloyd’s Rep 130 (England & Wales), at 132-133.

⁸⁵ Enron Creditors Recovery Corporation v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Annulment, ¶ 95; England & Wales national report, p. 3.

⁸⁶ For instance, the order in which the dispositive part of an award and the reasons appear is considered irrelevant in Italy (see Italy national report, p. 7).

⁸⁷ SI Strong, Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy, (2015) 37(1) Michigan Journal of International Law 1, pp. 43-44.

(ii) Length of reasons

69. Though reasons are not required to be “elaborate or lengthy”,⁸⁸ and it has been recognized that reasons may be stated succinctly or at length,⁸⁹ reviewing bodies often refer to the length of reasons in assessing their compliance with the requirement.⁹⁰
70. Certain issues are best addressed through brief or simple reasons. This is especially the case when the applicable test is one of fairness and equity, requiring only that the arbitrator exercise their best judgment in light of the entirety of the factual circumstances of the case. As an example, in some situations, the determination of costs and quantum of damages may require no more than a statement of the methodology adopted, the factors considered, and the resulting amounts to be allocated or awarded.⁹¹
71. Similarly, a need for urgent or efficient resolution of an issue, for example, in an application for urgent relief from an emergency arbitrator, may override the need for detailed or lengthy reasons. In recognition of this imperative, arbitral institutions advise that awards arising out of expedited procedures may (or even should) state reasons “in as concise a fashion as possible”.⁹²

⁸⁸ *Thoroughvision Pty Ltd v. Sky Channel Pty Limited & Anor* [2010] VSC 139 (Australia) [55]; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Annulment, ¶ 168; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, ¶ 64; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment, ¶ 105.

⁸⁹ *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, ¶ 83.

⁹⁰ Paris, Ch. 1 p.1, 1st April 2010, Gaz. Pal. 27 July 2010 (France), p. 13 (“the court considers that the award which is 247 pages long with 1,417 paragraphs constitutes a diligent and careful reasoning”); *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on Annulment, ¶ 65 (“the reasoning of the Arbitral Tribunal as to the valuation of the compensation is lengthy and detailed, covering six pages of the Award”).

⁹¹ For an example of reasoning on costs issues, see *Detroit International Bridge Co v Canada* (PCA Case No. 2012-25), Award on costs, 17 August 2015. See also, CA Paris, 17 January 2002, *SA Peinture Normandie v SA Olin Lanctuit* [2002] Rev Arb 202: “Il ne saurait être reproché à l’arbitre de n’avoir pas motivé la répartition des frais d’arbitrage entre les parties dès lors que, si cette répartition par moitié entre les deux parties des frais et honoraires d’arbitrage n’est pas spécialement motivée, la justification de cette répartition résulte implicitement de l’ensemble de la sentence, chacun des litigants succombant sur partie de ses prétentions”.

⁹² ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration, ¶¶ 113, 151 (“The arbitral tribunal shall decide the application as promptly as possible, consistent with the nature of the application, and may state the reasons for its decision in as concise a fashion as possible ... Any award under the Expedited Procedure Provisions must be reasoned. In such arbitrations, it is particularly appropriate to keep the factual

(iii) Contemporaneity with decision

72. Exceptionally, an award may be communicated to the parties in several stages, and the reasons need not be delivered in the same document or at the same time as the operative part of the award.⁹³ In that case, in some jurisdictions, the “award” will be deemed to have been rendered in full only when its reasons are communicated to the parties.⁹⁴
73. As a matter of good practice, where possible, it is preferable to communicate the reasons and the decision contemporaneously. In jurisdictions that require an award to contain reasons, an unreasoned decision may be at risk of challenge. Further, the decision by itself may be insufficient to satisfy the parties. Without understanding the decision’s rationale, parties will be unable to decide whether to accept (and perform) or challenge it. Finally, since reasons form the basis of a decision, not its *post hoc* justification, they should in principle be prepared before a decision is rendered.

3. Requirements as to substance

(i) Lack of reasons

74. While it is clear that a total absence of reasons violates the requirement⁹⁵ unless waived, such a situation is “rarely, if ever, encountered in practice.”⁹⁶
75. An award will be found completely lacking in reasons if it contains only the arbitrator’s conclusions on each of the claims without any explanation of how they were arrived

and/or procedural sections of the award to what the arbitral tribunal considers necessary for the understanding of the award, and state the reasons of the award in as concise a fashion as possible.”).

⁹³ Gabrielle Kaufmann-Kohler / Antonio Rigozzi, *Arbitrage international – Droit et pratique à la lumière de la LDIP*, 2nd ed., Bern 2010, ¶ 732; Bernhard Berger / Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed., Hart, Bern 2015, ¶ 1382; England & Wales national report, p. 3.

⁹⁴ Switzerland national report, p. 9.

⁹⁵ *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on Annulment, ¶ 21; *Judgment of 25 November 2014*, Case No. 245/14 6YRPRT (Porto Tribunais da Relação).

⁹⁶ *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), ¶ 167; *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, ¶ 122.

at.⁹⁷ Reasoning so inadequate that its coherence is seriously affected may also be considered to be a failure to state reasons.⁹⁸

(ii) *Insufficient or inadequate reasons*

76. As a general rule, reasons may be terse.⁹⁹ National laws do not require reasons to be stated in granular detail.
77. By contrast, under the ICSID regime, awards must contain reasons having some substance that allow the reader to follow the tribunal’s reasoning on facts and law, as opposed to purely formal or apparent reasons.¹⁰⁰ They must be “adequate and sufficient reasonably to bring about the result reached” by the tribunal. Insufficient or inadequate reasons have been considered to be reasons that “cannot, in themselves, be a reasonable basis for the solution arrived at”, as opposed to wrong or unconvincing reasons.¹⁰¹
78. The US regime, exceptionally, permits parties to choose between awards with differing degrees of detail. Parties may opt for either a “reasoned opinion” or “findings of fact and conclusions of law”,¹⁰² with the former requiring “something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel”¹⁰³ and the latter requiring more “exhaustive” reasons.¹⁰⁴

⁹⁷ *Gora Lal v. India*, (2003) 12 SCC 459 (India).

⁹⁸ *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on Annulment, ¶ 21.

⁹⁹ *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), ¶ 105.

¹⁰⁰ *Klöckner Industrie-Anlagen GmbH v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, ¶ 119.

¹⁰¹ *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, ¶¶ 123, 131.

¹⁰² AAA Construction Arbitration Rules, R-47(c).

¹⁰³ *Leeward Construction Company, Ltd. v. American University of Antigua – College of Medicine*, 826 F.3d 634, 640 (2d Cir. 2016) (US).

¹⁰⁴ *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011) (US); *Rain CII Carbon, LLC v. ConocoPhillips Company*, 674 F.3d 469, 474 (5th Cir. 2012) (US).

79. The following sections address specific deficiencies that may be characterised as “insufficient” or “inadequate” reasoning.

a. Failure to address questions submitted

80. The issues raised and relief requested by the parties give rise to “questions” of fact and law that form the core of any dispute.¹⁰⁵ A tribunal is required to answer each question submitted or issue put to it,¹⁰⁶ and a failure to do so may amount to a failure to state reasons.¹⁰⁷ In the ICSID regime, this may be the case if “no reasons are given by the tribunal for not addressing the question and such question would be determinant for understanding the reasoning of the award”.¹⁰⁸

¹⁰⁵ Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic (ICSID Case No. ARB/03/19), Decision on Annulment, ¶ 291; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11), Decision on Annulment, ¶ 97.

¹⁰⁶ ICSID Convention, Art. 48(3); Arbitration Act (England & Wales), s. 68(2)(d); *Nyutu Agroviet Limited v Airtel Networks Limited* [2015] eKLR (Kenya).

¹⁰⁷ Libananco Holdings Co. Limited v. Republic of Turkey (ICSID Case No. ARB/06/8), Decision on Annulment, ¶ 192; *Nannini v SFT Bank*, Dutch Supreme Court 9 January 2004, NJ 2005, 190 (Netherlands) (an absence of reasons includes the situation that reasons are provided but that these fail to contain any persuasive explanation for the relevant decision); *Judgment of 18 April 2017*, Case No. ECLI:NL:GHARL:2017:3283 (Arnhem-Leeuwarden Gerechtshof) (Netherlands).

¹⁰⁸ Libananco Holdings Co. Limited v. Republic of Turkey (ICSID Case No. ARB/06/8), Decision on Annulment, ¶ 192.

b. Failure to address parties' arguments or evidence

81. The tribunal's reasons need not address every argument, authority, or piece of evidence submitted by the parties.¹⁰⁹ Reasons need only reflect those "pivotal or outcome-determinative point[s]" that are "necessary to the tribunal's decision".¹¹⁰
82. However, where the tribunal rejects a claim for insufficient evidence, it must at least summarily address the evidence that the parties deem to be "highly relevant to their case" and provide reasons for its conclusion that such evidence is of no assistance.¹¹¹ While reviewing bodies will not usually consider whether a tribunal has correctly evaluated evidence, they may review the reasoning in this regard to determine whether any procedural irregularities exist.¹¹²

¹⁰⁹ EDF International S.A. SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic (ICSID Case No. ARB/03/23), Decision on Annulment, ¶ 197; Enron Creditors Recovery Corporation v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Annulment, ¶¶ 72, 341; M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador (ICSID Case No. ARB/03/6), Decision on Annulment, ¶ 67; Helnan International Hotels A/S v. Arab Republic of Egypt (ICSID Case No. ARB/05/19), Decision on Annulment, ¶ 36; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11), Decision on Annulment, ¶ 67; Tza Yap Shum v. Republic of Peru (ICSID Case No. ARB/07/6), Decision on Annulment, ¶ 119; *The United Mexican United States v. Metalclad Corporation*, 2001 BCSC 664 (Canada), ¶ 122; *O'Connell v Awada*, 2019 ONSC 273 (Canada), ¶ 38; *Leeward Construction Company, Ltd. v. American University of Antigua – College of Medicine*, 826 F.3d 634, 640 (2d Cir. 2016) (US); Paris, P. 1, Ch. 1, 29 sept. 2011, Gaz. Pal. 15 November 2011, p. 16 (France); *Hasid Bros. Construction Company Ltd. v. Nagi Rahamim*, Civil Appeal 2470/02, Nevo electronic database (15 May 2002) (Israel); Jean-François Poudret / Sébastien Besson, *Comparative Law of International Arbitration*, 2nd ed., Sweet & Maxwell, 2007, ¶ 749; Egypt Country Report pp. 5-6, 8; Spain Country Report, pp. 4-5; *Pakistan v. Broadsheet LLC* [2019] EWHC 1832, ¶34 (Comm) (England & Wales) ("the tribunal does not have to deal in its reasons with each point made by a party in relation to the essential issues or refer to all the relevant evidence"); *UMS Holding Ltd. v. Great Station Props. SA* [2017] EWHC 2398, ¶28 (Comm) (England & Wales) ("the tribunal's duty is to decide the issues put to it for decision and to give the reasons for doing so. It does not have to deal in its reasons with each point made by a party in relation to those essential issues or refer to all the relevant evidence").

¹¹⁰ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No ARB/97/3), Decision on Annulment, ¶ 64; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No ARB/98/2), Decision on Annulment, ¶ 84; *Adem Dogan v. Turkmenistan* (ICSID Case No. ARB/09/9), Decision on Annulment, ¶ 263; *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, ¶ 126.

¹¹¹ *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, ¶ 131.

¹¹² *Republic of Kazakhstan v Ascom Group S.A. et al*, Svea Court of Appeal, Case No. T 2675-14, Judgment of 9 December 2016 (Sweden).

83. In practice, tribunals usually acknowledge parties' arguments by summarising them in detail, even if they do not influence the ultimate decision.¹¹³ It is not, however, necessary to restate all of the parties' arguments and evidence, since the parties will be familiar with these.¹¹⁴

c. Failure to cite to authority

84. A tribunal's failure to support its findings with references to authority does not constitute a failure to state reasons, particularly if the propositions are well-known or if supporting references can be found in the parties' submissions.¹¹⁵ This must be distinguished from reasoning that intentionally misapplies well-settled aspects of the applicable law, which may be subject to a higher reasoning standard.¹¹⁶

(iii) *Disproportionate reasons*

a. Disproportionate to complexity of issues

85. Since reasons must help the parties understand the tribunal's decision, it naturally follows that more complex disputes warrant more detailed reasoning.

86. Illustratively, Australian Courts have found reasons lacking when an award failed to explain why "the various integers" of the "complex statutory provision" applicable to the case were satisfied.¹¹⁷

¹¹³ England & Wales national report, p. 5.

¹¹⁴ Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey (ICSID Case No. ARB/11/28), Decision on Annulment, ¶ 98.

¹¹⁵ Hussein Nuaman Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/7), Decision on Annulment, ¶ 128.

¹¹⁶ US national report, pp. 6-7.

¹¹⁷ *Westport Insurance v Gordian Runoff* [2011] HCA 37 [55]-[56] (Australia).

b. Disproportionate to importance of issues

87. Disputes that arise out of political situations and implicate interests other than the purely economic may be subject to a heightened reasoning requirement.¹¹⁸
88. In the *Abyei* arbitration, the tribunal was reviewing the decision of the Abyei Boundary Commission, which had been tasked with delimiting international boundaries in the context of the Sudan peace process. The tribunal recognised that that the Commission “was created as part of an extraordinarily complex political process, which is not comparable to ordinary commercial or investment arbitrations”.¹¹⁹ Since the Commission’s conclusions “would have a major political impact” on the country and its people, its reasoning “had to be commensurate to the importance of its conclusions”.¹²⁰
89. In a dispute between two Māori communities over title to ancestral lands, an arbitral panel constituted under a trust deed presided over hearings for 13 full days. This included the examination of several witnesses and experts on both sides, extensive legal submissions, and site visits. The dispute before the panel turned, to a great extent, on the strength of each side’s evidence of possession. Somewhat paradoxically, the award’s reasoning spanned only five paragraphs, ultimately rejecting both groups’ claims for exclusive ownership and splitting the land equally. The reasoning was conclusory and the award did not engage with the parties’ competing cases and evidence sufficiently to justify the outcome.
90. The New Zealand Court of Appeal held that the dispute fell “at the upper end of the spectrum of subject-matter importance referred for arbitration” since it involved “grievances of great historical and spiritual significance to the parties”.¹²¹ The Court annulled the award on the basis that its reasons were “not commensurate with the importance of the subject matter”.¹²²

¹¹⁸ See also Arbitration Act (England & Wales), s. 69(3) and Commercial Arbitration Act (NSW) (Australia), s. 34A (3) (lowering the threshold for granting leave to appeal an award on a question of law if “the question is one of general public importance”).

¹¹⁹ *Abyei Arbitration*, Award, ¶ 520.

¹²⁰ *Abyei Arbitration*, Award, ¶ 522.

¹²¹ *Ngāti Hurungaterangi v. Ngāti Wahiao*, [2017] NZCA 429 (New Zealand), ¶ 70.

¹²² *Ngāti Hurungaterangi v. Ngāti Wahiao*, [2017] NZCA 429 (New Zealand), ¶ 104.

(iv) *Contradictory reasons*

91. In ICSID jurisprudence, contradictory reasons are frequently cited as the prime example of a failure to state reasons.
92. Contradictory reasons exist when a tribunal arrives at mutually incompatible legal or factual conclusions within the same decision. The application of “different (and mutually incompatible) legal theories in accepting jurisdiction over one head of claim while rejecting another” may constitute a contradiction in reasoning. Applying the same legal theory and reaching “opposite assessments of identical or substantially similar facts” may also be considered contradictory.¹²³ Since contradictory reasons “cancel each other out”,¹²⁴ they “effectively amount to no reasons at all”.¹²⁵
93. In order to amount to a failure to state reasons, contradictory reasons must be apparent on the face of the decision and serious enough to vitiate the tribunal’s reasoning as a whole.¹²⁶ Contradictions will not violate the reasons requirement if they are merely “arguable”.¹²⁷
94. “Even if” reasoning, reflecting the tribunal’s consideration of alternative avenues to its conclusion, is obviously not contradictory.¹²⁸
95. Some national laws also provide for the annulment of awards that contain contradictory reasons.

¹²³ Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27), Decision on Annulment, ¶ 121.

¹²⁴ Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment, ¶ 64; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11), Decision on Annulment, ¶ 65; Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9), Decision on Annulment, ¶ 103.

¹²⁵ AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary (ICSID Case No. ARB/07/22), ¶ 53; Malicorp Limited v. Arab Republic of Egypt (ICSID Case No. ARB/8/18), ¶ 45; Egypt national report, pp. 5-6.

¹²⁶ Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27), Decision on Annulment, ¶ 119; Patrick Mitchell v. Democratic Republic of the Congo (ICSID Case No. ARB/99/7), Decision on Annulment, ¶ 21.

¹²⁷ Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9), ¶ 103.

¹²⁸ Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey (ICSID Case No. ARB/11/28), ¶ 111.

96. For instance, the Italian Code regards awards as null and void if they are internally contradictory.¹²⁹ Case law has clarified that this refers to contradictions within and between the reasons and the disposition. Again, the key consideration is whether the contradictions render the rationale of the decision impossible to understand.¹³⁰
97. The Greek Code similarly permits the annulment of an award if it “contains contradictory provisions”.¹³¹
98. In other jurisdictions, contradictory reasoning affecting the outcome of the case is not subject to specific rules and by and large does not amount to prospects of setting aside if there is no stand-alone reasoning ground for setting aside. However, considering the legitimate expectations of the parties to be capable of understanding final arbitral decisions, arbitrators should take special care to ensure contradictions do not arise between separate sections of an award, especially if they are being drafted by different persons.

(v) *Perfunctory reasons*

99. Perfunctory reasons may be understood as reasons that are artificial, clearly inadequate, or lacking sufficient substance to enable the reader of an award to follow the tribunal’s reasoning.¹³²

¹²⁹ Civil Procedure Code (Italy), Art. 829.1(11).

¹³⁰ Corte di Cassazione, judgments 21.3.1987, no. 2807 (Sez. Un.), 14.2.2003, no. 2211, 22.3.2007, no. 6986, 23.11.212, no. 20755 (*contra*, holding that the only contradiction relevant is the one among different sections of the dispositive part, Corte di Cassazione, judgment 15.5.2009, no. 11301) (Italy).

¹³¹ Code of Civil Procedure (Greece), Art. 897(7) (An arbitral award may be set aside, in whole or in part, solely by a court decision on the following grounds: ... if the award is incomprehensible or contains contradictory provisions”).

¹³² See, e.g., Klöckner Industrie-Anlagen GmbH v United Republic of Cameroon (ICSID Case No. ARB/81/2), Decision on Annulment, ¶ 119 (stating, in relation to the requirement for a statement of reasons on which the award is based, in Art. 52(1)(e) of the ICSID Convention, that “[t]his does not mean just any reasons, purely formal or apparent, but rather reasons having some substance, allowing the reader to follow the arbitral tribunal’s reasoning, on facts and on law”.); Pierre Lalive, On the Reasoning of International Arbitral Awards, (2010) 1 Journal of International Dispute Settlement 55, 59 (“... the requirement of a reasoned award [is that the award] must make sense and cannot be satisfied by an artificial or clearly inadequate set of reasons”).

100. ICSID *ad hoc* committees have, accordingly, recognized that perfunctory reasons may amount to a failure to state reasons,¹³³ but the standard of tolerance is high. Less-than-fully-stated reasons or poorly articulated chains of reasoning will not lead to annulment.¹³⁴
101. “Meaningless phrases” without substance do not amount to reasons, or at any rate to sufficient reasons.¹³⁵ For instance, the phrase “having carefully considered all arguments by the parties and scrutinized the evidence” would be impermissibly vague, since it fails to indicate the precise manner in which the tribunal evaluated the arguments and evidence to arrive at its conclusion. On the other hand, such language may be useful to deal with non-outcome determinative arguments or evidence to clearly convey a message that a tribunal has reviewed the full file in all relevant parts in its deliberations and preparation of the award.
102. The ICJ decision in *Guinea-Bissau v. Senegal* appears as an outlier in this regard. In this case, the Court upheld an arbitral award that disposed of one of two questions submitted to it with a single sentence. In that sentence, the tribunal cited its conclusion on a separate issue and the text of the provision at issue, without describing these factors or their relevance in any detail. Yet, the Court upheld the award on the basis that it was possible for the parties to determine the tribunal’s reasons “without difficulty”.¹³⁶
103. US Courts have similarly found sufficient a “summary ... analytical discussion” in which the tribunal simply accepted the arguments of one side.¹³⁷
104. The preferable approach is for tribunals, from the perspective of meeting the parties’ expectations, to do more than merely *identify* the arguments or evidence upon which

¹³³ *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on Annulment, ¶ 167; see also, Christoph Schreuer et al, *The ICSID Convention, A Commentary*, 2nd edn., CUP, 2010, p. 997.

¹³⁴ See, e.g., *Amco Asia Corporation v Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, ¶ 7.56 (“[w]hile the [second tribunal] is sometimes laconic in its reasons or not totally clear in its reasoning, this does not constitute failure to state reasons...”).

¹³⁵ *Oberster Gerichtshof*, 28 September 2016, No 18 OCg 3/16i [2016] OGHE 399 (Austria).

¹³⁶ *Guinea-Bissau v Senegal*, ¶ 43.

¹³⁷ *Leeward Construction Company, Ltd. v. American University of Antigua – College of Medicine*, 826 F.3d 634, 640 (2d Cir. 2016) (US).

their conclusions are based. A well-reasoned award should explain the tribunal's evaluation of those arguments and evidence, especially as it relates to competing or alternative arguments and evidence raised in the proceedings.

105. Adoption of the claimant's arguments with limited independent analysis from the tribunal may be more appropriate when the respondent has refused to participate actively in the proceedings. Thus, a default award may, in some jurisdictions, be held to a lower standard than an award addressing contesting submissions.¹³⁸ However, in order to ensure that the award is effective from a due process perspective, the tribunal should nonetheless, to the extent feasible in default proceedings, consider the merits and make a determination of the substance of the dispute, including by testing the participating party's assertions and satisfying itself that the party's arguments are well-founded.¹³⁹

(vi) *Frivolous reasons*

106. Frivolous is understood to mean something that lacks legal basis or merit, is not serious, or not reasonably purposeful.¹⁴⁰ For instance, decisions based on bias or intuition may be considered frivolous, as they essentially amount to no reasons at all.¹⁴¹ Under the ICSID regime, frivolous reasons are understood to be reasons that are "manifestly irrelevant and known to be so to the tribunal";¹⁴² they are not considered to constitute reasons and, therefore, provide grounds for annulment.¹⁴³

¹³⁸ *Delargy v Hickey* [2015] IEHC 436 (Ireland).

¹³⁹ N Blackaby et al, Redfern and Hunter on International Arbitration, 6th edn., OUP, 2015, pp. 411, 512. See also, UNCITRAL Model Law, Art. 25(b); ICSID Arbitration Rules, Article 42(4). *But see*, Code of Civil Procedure (Netherlands), Art. 1043a(2) (providing that if the respondent fails to submit its defence without asserting well-founded reasons, the tribunal may immediately make an award).

¹⁴⁰ Bryan A Garner (ed.), Black's Law Dictionary, 9th edn., Thomson Reuters, 2009, p. 738.

¹⁴¹ C Giannakopoulos, Reconceptualizing 'Failure to State Reasons' as a Ground for Annulment under Article 52(1)(e) of the ICSID Convention, (2017) 8(1) Journal of International Dispute Settlement 125,

¹⁴² Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11), Decision on Annulment, ¶ 65.

¹⁴³ M.I.N.E. v. Republic of Guinea (ICSID Case No. ARB/84/4), Decision on Annulment, ¶ 5.09; see also, Hussein Nuaman Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/7), Decision on Annulment, ¶ 126.

107. Certain ICSID *ad hoc* committees have, however, taken issue with the ambiguity of the term “frivolous”, preferring to focus on whether the reasons enable the reader to understand the award.¹⁴⁴
108. The Committee did not find any case law as to frivolous reasoning in international commercial arbitration.

(vii) Implied reasons

109. The International Court of Justice has held that reasoning relying “on inference and implication” is acceptable, if it is intelligible and apparent.¹⁴⁵
110. ICSID *ad hoc* committees have also frequently held that reasons need not be set out explicitly.¹⁴⁶ Implicit reasons satisfy the requirement so long as they can reasonably be inferred without difficulty or engaging in guesswork.¹⁴⁷ ICSID *ad hoc* Committees have even gone so far as to describe the original tribunals’ reasoning by supplying additional reasons which are said to be implicit.¹⁴⁸ However, an *ad hoc* committee will not be

¹⁴⁴ Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5), Decision on Annulment, ¶ 169; AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary (ICSID Case No. ARB/07/22), Decision on Annulment, ¶ 54.

¹⁴⁵ *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166, ¶ 96.

¹⁴⁶ TECO Guatemala Holdings, LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23), Decision on Annulment, ¶ 88.

¹⁴⁷ Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Decision on Annulment, ¶ 81; Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey (ICSID Case No. ARB/11/28), Decision on Annulment, ¶ 108; Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic (ICSID Case No. ARB/13/8), Decision on Annulment, ¶ 142; Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/05/16), Decision on Annulment, ¶ 83.

¹⁴⁸ Wena Hotels v Egypt (ICSID Case No ARB/98/4), Decision on Annulment, ¶¶ 81, 98: “The object of both provisions is to ensure that the Parties will be able to understand the Tribunal’s reasoning. This goal does not require that each reason be stated expressly. The Tribunal’s reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision . . . [T]his Committee need not inquire on its own initiative whether the Tribunal’s calculation is based on April 1, 1991 as the ‘dies a quo’, as this appears implicitly from the Tribunal’s statement with respect to the day when the expropriation of Wena’s rights occurred. Although this is outside the scope of examination as required in a proceeding under Article 52(1), the Committee has anyhow made its own calculation . . .”.

inclined to construct implicit reasons to justify the tribunal's decision if these "do not necessarily follow or flow from the award's reasoning".¹⁴⁹

111. As a matter of good practice—and fully acknowledging that every human being takes some matters for granted and unnecessary to state—implied reasons should be avoided; and one may not presume that a tribunal's reasons were implied rather than express. There is a risk that the parties or the reviewing body may read into the award "implied" reasons that the tribunal never intended. For their part, tribunals can guard against this by expressly disclaiming any unintended implications that may arise from the award. This may be done by stating that the tribunal's decision and its reasons are as expressly recorded in the award—and nowhere else.
112. However, certain sections of the award may be better suited to implied reasoning than others. This is true where the implications are obvious and are unlikely to lead to more than one result. As an example, the Swiss Supreme Court has ruled that an explicit statement of reasons for the tribunal's decision on costs is unnecessary if the considerations that motivated the tribunal are recognizable.¹⁵⁰
113. Similarly, the Paris Court of Appeal considered that a tribunal's reasons for deciding that parties should bear arbitration costs equally were implicit on a reading of the whole award, which denied all of the parties' claims.¹⁵¹

(viii) *Adopted reasons*

114. It is not uncommon for awards to adopt, even in their entirety, sections of legal reasoning from prior awards on related issues. While such reasoning may be considered as lacking diligence, it is nevertheless sufficient.

¹⁴⁹ Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic (ICSID Case No. ARB/13/8), Decision on Annulment, ¶ 142; Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/05/16), Decision on Annulment, ¶ 83.

¹⁵⁰ See, e.g., Swiss Supreme Court, 8 July 2003, 4P.67/2003 (partially published under the reference: 129 III 675), ¶ 6.2.

¹⁵¹ Paris, Ch. 1, 17 January 2002, Rev. arb. 2002, pp. 202-203 (France).

115. Thus, an ICSID tribunal may use the reasoning in prior decisions as a basis for its own decision.¹⁵² It may also properly adopt the reasoning of another case without saying anything more, so long as the basis of the decision is “sufficiently apparent”.¹⁵³

(ix) Incorrect reasons

116. The reasons requirement is not concerned with quality — i.e., whether the reasons are correct or convincing.¹⁵⁴ It should not matter whether the arbitrator reasoned “well, badly or indifferently”.¹⁵⁵
117. A reviewing body will not scrutinize an award for errors of fact or law on the merits.¹⁵⁶ It is thus irrelevant if a party or the reviewing body disagrees with the tribunal’s reasoning,¹⁵⁷ even if it is convinced that the tribunal “committed serious error”.¹⁵⁸

¹⁵² Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/07/17), Decision on Annulment, ¶¶ 190, 201.

¹⁵³ Enron Creditors Recovery Corporation v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Annulment, ¶ 95.

¹⁵⁴ Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment, ¶ 64; Enron Creditors Recovery Corporation v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Annulment, ¶ 74; Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru (ICSID Case No. ARB/03/28), Decision on Annulment, ¶ 182; Total S.A. v. Argentine Republic (ICSID Case No. ARB/04/1), Decision on Annulment, ¶ 271; Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/05/20), Decision on Annulment, ¶¶ 135, 176; Joseph C. Lemire v. Ukraine (ICSID Case No. ARB/06/18), Decision on Annulment, ¶ 278; Patrick Mitchell v. Democratic Republic of the Congo (ICSID Case No. ARB/99/7), Decision on Annulment, ¶ 65; Cour de Cassation, 14 June 2000, Rev. arb. 2001.729 (France); Egypt national report pp. 5-6.

¹⁵⁵ *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375, ¶ 33(vi) (TCC) (England & Wales).

¹⁵⁶ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Decision on Annulment, ¶ 272; Paris, P.1, Ch. 1, 18 November 2010, Rev. arb. 2010.982 (France); E Gaillard, *La jurisprudence de la Cour de cassation en matière d'arbitrage international*, Rev. arb., 2007.697, ¶ 20.

¹⁵⁷ *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, ¶ 75; *ABB AG v. Hochtief Airport GmbH* [2006] EWHC 388, ¶67 (Comm) (England & Wales) (“It is not a ground for intervention that the court considers that it might have done things differently or expressed its conclusions on the essential issues at greater length”).

¹⁵⁸ *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001) (quoting *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000) (US) (quoting *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). *But see, Stolt-Nielsen S.A., et al v Animalfeeds International Corp.*, 559 US 662 (2010) (US) (finding that a tribunal’s failure to identify and apply a rule under applicable laws and its imposition, instead, of its own policy preferences, was an excess of powers).

Under the ICSID regime, even a manifestly incorrect application of the law is not a ground for annulment.¹⁵⁹

118. In Greece, an award will not be annulled for incorrect application or evaluation of evidence. And a failure to explain how the tribunal arrived at a particular outcome based on its factual determination is not sufficient for the annulment of the award. However, the award must set out the relevant factual circumstances which support the outcome of the decision.¹⁶⁰

(x) Additional or alternative reasons

119. Tribunals sometimes provide additional or alternative reasons in support of a decision. As long as these reasons do not confuse the basis of the decision, they may provide a reviewing body with an alternative ground on which to uphold the decision¹⁶¹, if and to the extent review as to reasoning is available. Nonetheless, tribunals, in all cases to meet the parties' expectations unless waived, must be careful to ensure that the additional reasons do not contradict the reasons for the decision. Naturally, additional reasons do not affect the tribunal's principal/primary reasoning and cannot be relied upon to allege contradictions.¹⁶²
120. Additional reasons can also augment the persuasiveness of the decision and provide parties with satisfactory reasons for the decision. For instance, where a tribunal has denied jurisdiction or rejected a claim as inadmissible, it may consider it appropriate to indicate that it would have also rejected the case or the claim on merits,¹⁶³ without fear of self-contradiction.¹⁶⁴ Another instance is where a tribunal reinforces the application

¹⁵⁹ M.I.N.E. v. Republic of Guinea (ICSID Case No. ARB/84/4), Decision on Annulment, ¶ 5.08.

¹⁶⁰ Greece national report, p. 8.

¹⁶¹ SI Strong, "Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy" (2015) 37(1) Michigan Journal of International Law 1, 24.

¹⁶² Daimler Financial Services AG v Argentine Republic (ICSID Case No. ARB/05/1), Decision on Annulment, ¶ 135. *See also*, Greece national report, p. 8.

¹⁶³ Humphrey Lloyd et al, Drafting Awards in ICC Arbitrations, (2005) 16 ICC Court Bulletin 19, 33.

¹⁶⁴ Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey (ICSID Case No. ARB/11/28), Decision on Annulment, ¶ 111. *See also*, Section II.D.3(iv) above.

of an outcome under one applicable law, on the basis that this is also recognised as a general principle of law or under transnational rules.

III. THE RELEVANCE OF THE REQUIREMENT

A. LEGAL

1. Institutional scrutiny

121. Several arbitration institutions provide for scrutiny of awards submitted by the tribunal prior to publication.¹⁶⁵ The scrutiny process is designed to ensure that awards are “of the best possible quality and more likely to be enforceable”.¹⁶⁶ As part of this process, the institution may draw the tribunal’s attention to points of substance.¹⁶⁷

122. As discussed below,¹⁶⁸ poorly reasoned awards, subject to the applicable law or rules, might be at a higher risk of being set aside or being refused to be enforced and may extend the process for scrutiny by eliciting more extensive recommendations for corrections and clarifications from the institution.

2. Post-award proceedings before the tribunal

(i) Interpretation and correction

123. Many jurisdictions permit parties to request the arbitral tribunal to explain, interpret, or correct a specific point or part of the award.¹⁶⁹ Such requests are justified if there is genuine ambiguity in the award.¹⁷⁰

¹⁶⁵ ICC Rules, Art. 34; SIAC Practice Note – 01/14, ¶ 4(e).

¹⁶⁶ ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration 2021, ¶ 163.

¹⁶⁷ ICC Rules, Art. 34.

¹⁶⁸ See Section III.A.3 below.

¹⁶⁹ UNCITRAL Model Law, Art. 33(1)(b); Code of Civil Procedure (Austria), s. 610; Arbitration Act (Brazil), Art. 30; Colombian Arbitration Law, Art. 39; Egyptian Arbitration Law, Art. 49 and 50; Code of Civil Procedure (France), Art. 1485, 1506.4; Code of Civil Procedure (Germany), s. 1058; Civil Procedure Code (Switzerland), Art. 388(1); Arbitration Act 1996 (England & Wales), s. 57(3)(a).

¹⁷⁰ *Torch Offshore LLC & Anr. v Cable Shipping Inc.* [2004] EWHC 787 (Comm) (England & Wales), ¶ 26.

124. Unclear, insufficient, or implied reasoning is likely to trigger requests for interpretation or correction of the award. This is true even if the award does not completely lack reasons and is therefore in technical compliance with the requirement to state reasons.

(ii) *Supplementation*

125. Most jurisdictions also permit parties to request an additional award to address any claims that were submitted to the tribunal but omitted from the award.¹⁷¹
126. The ICSID Convention also permits parties to request the tribunal to decide any question which it had omitted to decide in the award.¹⁷² This may be the appropriate remedy in cases where an ICSID tribunal has failed to deal with a question submitted to it.¹⁷³ Supplementation, may not, however, be the appropriate remedy where the answer to the omitted question may affect the tribunal's arguments or conclusions in the award.¹⁷⁴ It has been considered to be a more appropriate remedy where there is an unintentional omission to decide a question.¹⁷⁵
127. Incomplete reasons, especially if they fail to address any claim in its entirety, are likely to trigger such requests. As discussed above, failure to address any claim or "question" submitted to arbitration will also constitute a total failure to state reasons as to such claim or question.¹⁷⁶

¹⁷¹ UNCITRAL Model Law, Art. 33(3); Code of Civil Procedure (Austria), s. 610; Arbitration Act (Brazil), Art. 30; Arbitration Act (England & Wales), s. 57(3)(b); Code of Civil Procedure (France), Art. 1485, 1506(4); Code of Civil Procedure (Germany), s. 1058; Civil Procedure Code (Switzerland), Art. 388(1).

¹⁷² ICSID Convention, Art. 49(2).

¹⁷³ *Wena Hotels Limited v. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4), Decision on Annulment, ¶ 100; *Enron Creditors Recovery Corporation v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Annulment, ¶ 73.

¹⁷⁴ *M.I.N.E. v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment, ¶¶ 5.12-5.13; *Wena Hotels Limited v. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4), Decision on Annulment, ¶ 101.

¹⁷⁵ *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision on Annulment, ¶ 162.

¹⁷⁶ *See above*, Section II.D.3(ii)(a).

3. Post-award proceedings before the reviewing body

(i) *Set aside or annulment*

128. A violation of the reasons requirement may result in annulment of the award either directly, if the jurisdiction permits annulment for a failure to state reasons, or indirectly, where a failure to state reasons is viewed as a symptom of other defects fatal to the award. As described by an *ad hoc* annulment committee, “the more lucid and explicit the reasons set out by a tribunal, the easier it should be to observe what a tribunal is in fact doing by way of compliance” with all its other duties.¹⁷⁷

a. For failure to state reasons

129. The UNCITRAL Model Law, and, as discussed above, most national laws do not specify a failure to state reasons as a stand-alone basis for setting aside arbitral awards. In these many jurisdictions, awards cannot directly be challenged on the basis of reasoning deficiencies.

130. Yet, the ICSID Convention as well as a few national laws do provide for awards to be set aside on the grounds that they lack reasons or contain contradictory reasons.¹⁷⁸ In view of the extraordinary nature of the remedy of annulment, these legal systems can be presumed to accord heightened importance to the reasoning of arbitral decisions. Tribunals operating within these jurisdictions should pay special attention to the quality of reasoning in their awards.

¹⁷⁷ Hussein Nuaman Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/7), Decision on Annulment, ¶ 127.

¹⁷⁸ ICSID Convention, Art. 52(1)(e); Code of Civil Procedure (Greece), Art. 897(7) (An arbitral award may be set aside, in whole or in part, solely by a court decision on the following grounds: ... if the award is incomprehensible or contains contradictory provisions”); Civil Procedure Code (Italy), Art. 829.1(5) and 829.1(11); Judicial Code (Belgium), Art. 1717(3)(a)(iv); Code of Civil Procedure (Netherlands), Art. 1065(1)(d) Voluntary Arbitration Law (Portugal), Art. 46(3)(a)(vi); Israeli Arbitration Law, 5728-1968, Sec. 24(6); Chile Country Report, Q. 16 (domestic awards that fail to state reasons may be annulled pursuant to extraordinary recourse available under the Civil Code of Procedure).

b. For excess of mandate

131. Some international and national instruments provide for awards to be set aside in case the tribunal has exceeded its mandate or its powers.¹⁷⁹ This may also occur when a tribunal operates beyond the scope of its jurisdiction. If an award fails to provide adequate reasons for the decision on jurisdiction, it may be susceptible to setting aside. While the inadequacy of reasons alone may not justify annulment, it may be a relevant factor to assess lack of jurisdiction, justifying annulment.
132. In the *Abyei* arbitration,¹⁸⁰ the tribunal went so far as to hold that the obligation to provide reasons was “integral” to the Abyei Boundary Commission’s mandate such that a failure to state reasons would constitute an excess of mandate justifying annulment. In this way, a failure to state reasons was characterised as a species of excess of mandate rather than an independent ground of annulment. This approach has not been commonly followed.
133. In the United States, a decision by a tribunal that is based on policy considerations and ignores applicable legal principles, may be considered to be an excess of mandate.¹⁸¹

c. Failure to decide all issues (*infra petita*)

134. *Infra petita* results when the tribunal fails to decide all the issues put to it by the parties.
135. Certain national laws identify *infra petita* as a stand-alone basis for annulment.¹⁸² With the exception of the ICSID regime,¹⁸³ most legal systems do not explicitly link *infra*

¹⁷⁹ ICSID Convention, Art. 52(1)(b); UNCITRAL Model Law, Art. 34(2)(a)(iii); Arbitration Act (England & Wales), s. 67, 68(2)(b); Code of Civil Procedure (Netherlands), Art. 1065(1)(c).

¹⁸⁰ Abyei Arbitration, Award, ¶ 525 (“It follows that a failure to state reasons on the part of the ABC Experts would amount to the contravention of an obligation that was integral to their mandate and, as explained immediately below, could constitute an excess of mandate.”).

¹⁸¹ *Stolt-Nielsen S.A., et al v Animalfeeds International Corp.*, 559 US 662 (2010) (US); US national report, pp. 6-7.

¹⁸² Arbitration Act (England & Wales), s. 68(2)(d); CPC (France), Art. 1520(4).

¹⁸³ *Enron Creditors Recovery Corporation v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Annulment, ¶ 72 (“Failure to deal with questions submitted to the tribunal has been considered in the case law of annulment committees to be a failure to state reasons for purposes of this provision.”); *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Annulment, ¶ 192 (“lack of consideration of a question submitted to a tribunal could amount to a failure to state reasons if no

petita to the requirement to state reasons. Yet, it is clear that this defect results from the tribunal's failure to state reasons for an issue that it was bound to decide.

d. For departure from agreed procedure or relevant provisions of the curial law

136. Arbitration laws commonly provide for an award to be annulled if the arbitral procedure was not in accordance with the agreement of the parties;¹⁸⁴ or the curial law, failing such agreement.¹⁸⁵
137. Where the reasons requirement is derived from the parties' agreement, including by their adoption of arbitration rules that require reasons, an unreasoned award might be challenged for failure to comply with the procedure agreed on by the parties.¹⁸⁶
138. Similarly, where the curial law requires the award to state reasons, annulment of an award that fails to state reasons may be sought on the ground that the procedure was not in accordance with the curial law.
139. Notably, under the English Arbitration Act, a failure to comply with the requirements as to the form of the award, which includes a requirement for reasons, may be a serious irregularity that entitles a party to challenge the award. If the serious irregularity is found to cause substantial injustice to the party, the award may be set aside.¹⁸⁷ This is, however, a high threshold to meet.¹⁸⁸
140. The Brazilian Arbitration Act provides that an award is null and void if it does not comply with certain requirements in the Act, including that it contain the grounds of the decision with "due analysis of factual and legal issues".¹⁸⁹ The Ugandan Arbitration

reasons are given by the tribunal for not addressing the question and such question would be determinant for understanding the reasoning of the award").

¹⁸⁴ UNCITRAL Model Law, Art. 34(2)(a)(iv); Arbitration Act (England & Wales), s. 68(2)(c).

¹⁸⁵ UNCITRAL Model Law, Art. 34(2)(a)(iv).

¹⁸⁶ See, e.g., *Hoban v Coughlan & Anor* [2017] IEHC 301 (Ireland) (finding that the award was sufficiently reasoned and consequently rejecting a challenge made on the ground that the arbitral procedure was not in accordance with the parties' agreement). See also, Ireland national report, pp. 6-7.

¹⁸⁷ Arbitration Act (England & Wales), s. 68(2)(h).

¹⁸⁸ England & Wales national report, pp. 9-11.

¹⁸⁹ Arbitration Act (Brazil), Art. 26(II) and art. 32(III).

Act contemplates that an award may be set aside if it is not in accordance with the Act, which requires that the award contain reasons.¹⁹⁰ An award that fails to state reasons could then, in principle, be annulled on the ground that it violates the requirement for reasons under the Ugandan Arbitration Act.¹⁹¹

141. Subject to specific provisions of national law as in England and Brazil, the general question arises whether a statutory provision, the New York Convention or an institutional rule requiring compliance with the procedure agreed to by the parties including to state the reasons for an award, implies that the agreed procedure prohibits unreasoned awards or requires that an award not only states its reasons but that such reasoning also is to meet reasoning standards as described above in the Report. Such question boils down in essence to the interpretation of the applicable law, the New York Convention and the institutional rule involved.

e. For violation of due process

142. Arbitration laws commonly provide for an award to be annulled if the arbitration was conducted in violation of due process or fundamental rules of procedure.¹⁹² Due process norms include the right to be heard and the right to equal treatment.
143. While inadequate reasons do not always mean that a party's right to be heard was violated,¹⁹³ they might in some circumstances indicate implicitly that the tribunal failed to afford the parties a reasonable opportunity to present their cases.¹⁹⁴ This is particularly likely where the tribunal gives disproportionate weight to the arguments or evidence adduced by one side without sufficient justification.

¹⁹⁰ Arbitration and Conciliation Act (Uganda), s. 31(6), s. 34(2)(a)(vii).

¹⁹¹ Uganda Country Report, Q. 16, 17.

¹⁹² ICSID Convention, Art. 52(1)(d); Code of Civil Procedure (France), Art. 1520(4).

¹⁹³ *Schreter v. Gasmac Inc.*, (1992) 7 OR3d 608 (Ontario Super. Ct.) (Canada).

¹⁹⁴ See Cass Civ 1, 14 June 2000, *Inter Arab Investment Guarantee Corporation v Banque arabe et internationale d'investissements* [2001] Rev Arb 729 (France): "[E]xcept in those instances, set forth in Article 1502 of the New Code of Civil Procedure, where due process [*le principe de la contradiction*] or international public policy have been violated, the reasons for an arbitral award are beyond the scope of the judge's review of the legality of the award".

f. For violation of public policy

144. Arbitration laws commonly provide for an award to be annulled if it violates public policy.¹⁹⁵
145. Generally, national systems do not view an absence of reasons as contrary to public policy.¹⁹⁶
146. However, the Austrian Supreme Court has held that insufficient reasons can constitute a violation of procedural public policy, setting aside an award on this basis.¹⁹⁷
147. Greek courts have held that if the absence of reasons or the incorrect and insufficient reasoning is such that it fails to support the dispositive part of the award, then the award will violate public policy.¹⁹⁸
148. While this may not be adopted widely, these decisions highlight that certain jurisdictions may elevate the reasons requirement to the status of public policy. In this respect, the Committee notes that the argument that parties in many jurisdictions can waive the requirement, has not been addressed in the assessment whether this has an impact on the public policy nature of the requirement.

¹⁹⁵ UNCITRAL Model Law, Art. 34(2)(b)(ii); Arbitration Act (England & Wales), s. 68(2)(g); Code of Civil Procedure (France), Art. 1520 (5); Code of Civil Procedure (Netherlands), Art. 1065(1)(e).

¹⁹⁶ See, e.g., Cass Civ 1, 14 June 1960, *Elmassian* [1960] Rev Arb 67 (France); Cass Civ 1, 14 June 2000, *Inter Arab Investment Guarantee Corporation v Banque arabe et internationale d'investissements* [2001] Rev Arb 729 (“intrinsically incoherent [reasoning] does not fall within the definition of substantive public policy”) (France); Swiss Federal Tribunal, 15 March 2011, No DFT 4A_481/2010, (2012) 30 ASA Bull 393; See T Giovannini, “Reasoning in Arbitral Awards, Why? How? Control and Sanction under Swiss law”, 39th ICC Institute Annual Conference, 17 December 2019, p. 12.

¹⁹⁷ Oberster Gerichtshof, 28 September 2016, No 18 OCg 3/16i [2016] OGHE 399. In a subsequent decision, the Austrian Supreme Court held that insufficient reasoning could not be raised as a ground for annulment where the applicant could have requested an interpretation of the award but failed to do so (Oberster Gerichtshof, 15 May 2019, No 18OCg1/19z).

¹⁹⁸ Greece national report, p. 6, citing SC 1665/2009, SC 1618/2007, SC 1273/2003, SC 149/1986, CAA 6886/1984, CAA 1466/1983, CAA 249/1975, CA of Patra 469/1974, CAA 5227/1974, CAA 2190/1972.

(ii) *Refusal to recognise or enforce*

149. The New York Convention does not list a failure to state reasons as a ground for the refusal to recognise or enforce a foreign arbitral award. It is therefore rare for a national court to refuse recognition or enforcement on this basis.
150. In jurisdictions that require arbitral tribunals to respect the requirements of a fair trial or that equate arbitral proceedings to court proceedings, recognition or enforcement of an award that fails to state reasons may be refused on public policy grounds.¹⁹⁹
151. Belgium, exceptionally, identifies a failure to state reasons as a ground to refuse recognition or enforcement, if “reasons are prescribed by the rules of law applicable to the arbitral proceedings under which the award was rendered”.²⁰⁰ Brazilian courts may, in principle, refuse recognition or enforcement of an award that fails to state reasons, where this is a requirement under the curial law.²⁰¹ Thus, while a failure to state reasons does not generally operate as a stand-alone basis to refuse recognition or enforcement, it is identified as a sufficiently egregious violation of curial law to warrant sanction.
152. Again, the question arises whether deficient reasoning in these respects may be equated with absence of reasons for purposes of refusing to recognize and enforce arbitral awards.

(iii) *Appeal on point of law*

153. While arbitral awards are ordinarily not subject to appeal, certain common law jurisdictions permit appeals on point of law if “on the basis of findings of fact in the award ... the decision is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt”.²⁰² Further, if in the appeal proceedings the court finds that the reasons in the award are lacking or

¹⁹⁹ Italy national report, pp. 2, 10; Colombia national report, Q. 9, 18.

²⁰⁰ Judicial Code (Belgium), Art. 1721(1)(a)(iv) (“The Court of First Instance may only refuse to recognise or enforce an arbitral award, irrespective of the country in which it was made, in the following circumstances ... the award is not reasoned whereas such reasons are prescribed by the rules of law applicable to the arbitral proceedings under which the award was rendered”).

²⁰¹ Brazil Country Report, pp. 3, 9.

²⁰² Arbitration Act (England & Wales), s. 69(3)(c)(i); Commercial Arbitration Act 2010 (NSW) (Australia), s. 34A.

insufficiently detailed, it may order the tribunal to state its reasons in sufficient detail to enable determination of the appeal.²⁰³ This approach reflects the common law tradition of *stare decisis* and the public policy favouring uniformity in the law.²⁰⁴

154. Thus, while incorrect or insufficient reasoning may not fall foul of the requirement to state reasons,²⁰⁵ it may leave the award open to appeal and at risk of variation, remission, or annulment by a supervisory court.²⁰⁶ Tribunals operating in jurisdictions that permit such appeal should ensure that their legal reasons are supported by the weight of applicable authority and described with sufficient references to authority in the award.

B. NON-LEGAL

1. Satisfaction of the parties

155. By providing parties, and especially the losing party, with satisfactory reasons for their decisions, tribunals increase the likelihood of voluntary compliance therewith.

2. Legitimacy of the arbitral process

156. Reasons enhance the legitimacy of the arbitral process by indicating that the tribunal's decision has not been arrived at arbitrarily.²⁰⁷ The legitimacy of the tribunal's decision-making process depends on its intelligibility and transparency, and a statement of reasons "guarantees procedural legitimacy and validity".²⁰⁸ A reasoned award indicates that the tribunal decided the dispute in a judicial manner and complied with the "fundamental principles of the processes by which civil disputes are to be resolved (insofar as they apply to arbitration)".²⁰⁹

²⁰³ Arbitration Act (England & Wales), s. 70(4).

²⁰⁴ T.E. Carbonneau, "Rendering Arbitral Awards with Reasons: the Elaboration of Common Law of International Transactions" (1985) 23 Columbia Journal of Transnational Law 578.

²⁰⁵ *See above*, Section II.D.3(ix).

²⁰⁶ Arbitration Act (England & Wales), s. 69(7).

²⁰⁷ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Decision on Annulment, ¶ 250.

²⁰⁸ *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Annulment, ¶¶ 163, 166.

²⁰⁹ Humphrey Lloyd et al, *Drafting Awards in ICC Arbitrations*, (2005) 16 ICC Court Bulletin 19, 21.

IV. CONCLUSIONS

157. Some of the key practical conclusions that can be drawn from the contents of this report, subject to the applicable law, are as follows:

- (i) While most legal systems require arbitral awards to be reasoned, few identify the failure to provide reasons as an independent ground of annulment. Such a failure might, however, be considered as reflective of other annullable defects in the award.
- (ii) Where the reasons requirement derives from the agreement of the parties, including by designation of institutional rules, a failure to provide reasons may incur sanction for having departed from party agreement provided the requirement to state reasons is, under the applicable law or rules, interpreted broadly as to not only state reasons but also to require sufficient reasons as outlined in this Report.
- (iii) Reasons must be provided irrespective of the basis of the decision i.e., whether based on law, fact or equity. Only awards on agreed terms need not contain reasons, subject to contrary requirements under the applicable law.
- (iv) Final decisions that determine an issue or claim must be reasoned. In some instances, the reasons requirement may also apply to decisions on interim measures of protection.
- (v) Decisions on contested procedural issues that may affect the parties' due process rights should summarily be reasoned to inform the parties as to why an arbitral tribunal came to a certain procedural conclusion.
- (vi) Decisions on quantum and costs should also be reasoned where a particular methodology or cost allocation principle is preferred over others and/or where these issues are contested.
- (vii) The primary purpose of the reasons requirement is to enable the reader of an award, particularly the parties and reviewing bodies, to understand the tribunal's reasoning and the result arrived at. The content of the requirement, therefore, is

focussed on the presence and coherence of the reasons, as opposed to their correctness or adequacy.

- (viii) While a complete absence of reasons will contravene the reasons requirement, other defects in reasoning, subject to the applicable law, may also not meet the parties' expectations and increase risks at the post-award stage.