The Long Side Of Reasoned Awards:
Dispelling The Fallacy Of Saying Too Much

Over my 31-year career as an arbitrator, I have repeatedly heard my co-panelists and other arbitrators urge restraint in drafting the final award. The fear – sometimes expressed, sometimes implied – is that a reasoned award that is too detailed and too lengthy unduly exposes the decision to vacatur. That's silly, and it reveals a lack of courage and conviction in making awards. It is the fallacy of saying too much in reasoned awards.

Competent arbitrators should not worry about vacatur for giving in-depth analyses of the facts and law of a dispute. Indeed, the opposite is true: the law shows that risk of vacatur is greater where too little is said. Then the award may be deemed insufficient and vacated on grounds of exceeding authority.

But a scholarly discussion – even a lengthy one – will be immune from such vacatur. The panel or sole arbitrator only needs to drill down into the governing caselaw, ferret out the determinative facts, match those up in the discussion, and say it well. In other words, arbitrators need only do their appointed work: act like neutral judges and spend the required time to get the ruling right. A longer decision will simply be more correct.

The existing caselaw and commentary on reasoned awards focus on whether the award is sufficiently "reasoned" – that is, whether the discussion is above or below the floor of adequate analysis. We start with that, although the fallacy dispelled here looks not at what is too little, but rather whether there can be too much.

The Law Of "Reasoned" Decisions

The parties' contract or governing rules may specify how much detail a final award must contain. *Tully Construction Co. v. Canam Steel Corp*., 2015 U.S. Dist. LEXIS 25690 (S.D.N.Y. 2015). There are generally three templates: a line item award, a reasoned decision, and findings of fact and conclusions of law. *ARCH Development Corp. v. Biomet, Inc.*, Nos. 02 c 9013, 03 c

2185 (N.D. Ill. July 7, 2003) Unless required by the parties' contract or governing rules, a reasoned award is not necessary.

The required type of award may vary depending on the administering organization or the type of case. For example, CPR Non-Administered Arbitration Rules require "reasoning on which the award rests unless the parties agree otherwise." (Rule 15.2.) The American Health Lawyers Association Rules of Procedure for Commercial Arbitration also say that "an arbitrator should provide a concise statement of the reasons supporting his or her award unless the parties agree prior … that a reasoned award is not required. (Rule 7.8.)

As for the type of case, the default rule for American Arbitration Association ["AAA"] construction cases prescribes only a line item award (AAA Construction Rule R-47(b)); for AAA employment cases, the default rule is a reasoned award (AAA Employment Rule R-39.c); and for AAA commercial cases, the default rule is arbitrator discretion (AAA Comm'l Rule R-46(b)). All of these Rules are part of the parties' contract if the agreement states that they govern the arbitration. (*Tully, supra* at *34.)

Where a reasoned award is required, the minimal content is amorphously defined. *ARCH Development, supra.* ("no definite standard"; "somewhat vague range"). The cases use benchmarks such as: "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"; "the basic reasoning … on the central issue or issues"; "more than a simple result"; something that "sets out the arbitrator's key findings and, when necessary, the reasons for those findings"; a discussion that "is provided with or marked by … expressions or statements offered as a justification"; or a review of "the relevant facts or … parties' contentions" along with the "reason or rationale for the arbitrator's liability and damages determinations'. *Leeward Construction Co., Ltd. v.*

American University of Antigua-College of Medicine, 826 F.3d 634, 640 (2d Cir. 2016); *Rain C11 Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469 (5th Cir. 2012); *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836 (11th Cir. 2011); *Green v. Ameritech Corp.* 200 F.3d 967 (6th Cir. 2000); *Tully Construction Co. v. Canam Steel Corp.*, *supra*.

Given those loose parameters, many Federal Circuits have found that even lean decisions are still adequately reasoned awards. *Leeward, supra; Rain C11, supra; Cat Charter, supra.; Green, supra*. A couple of those rulings had to examine "the context" of the decisions to conclude they were sufficient. *Rain C11 Carbon, supra.* at 474; *Cat Charter, supra* at 844 - 845. These holdings therefore identify the floor of reasoning that will protect an award from vacatur or remand. They describe what is just enough.

Vacatur Or Remand Risk Exists When Too Little Is Said

When explanations fall below the floor of minimal reasoning, the ruling is subject to vacatur or remand. Thus, in *Tully, supra*., the District Court refused to confirm the two-page line-item award and instead ordered remand because the award lacked any reasons for the liability and damages determinations. Similarly, in *Smarter Tools, Inc. v. Chongqing SENCI Import & Export Trade Co., Ltd. et al.,* 2019 U.S. Dist. LEXIS 50633 (S.D.N.Y. Mar. 26, 2019), the District Court ordered remand for the arbitrator to clarify the findings in the six-page award and thus issue a reasoned decision in accordance with the parties' agreement.

Even when there is minimal reasoning, the risk of insufficiency remains. A less robust award may fail to address all of the claims and defenses that are raised, raising the possibility of vacatur based on an imperfectly executed award under FAA Section 10(a)(4). 9 U.S.C. § 10(a)(4). Accordingly, saying too little in an award creates exposure.

Saying A Lot Is Quite OK

None of the above discussion answers the question raised by this article: is there exposure to vacatur or remand if the decision is expansive? This arbitrator concludes there is no such risk if the award – even a very lengthy award - is a full and correct exegesis of the facts and law. The issue of the minimal floor of reasoning is simply not relevant.

This arbitrator is not aware of court decisions that have vacated or remanded awards that are lengthy but which have not strayed beyond the scope of the dispute that is presented for decision. True, an award may be vacated if the award provides relief against persons who are not parties in the case, or provides relief that exceeds the claims, or fails to decide all of the issues presented in the case. Those are examples of exceeding authority or rendering an incomplete award under FAA Section 10(a)(4). But those flaws apply to an award of any length; they are not unique to expansive awards. An award that is proverbially "just right" – neither too little nor too much under the vacatur laws – will withstand challenge even if lengthy and complex.

Expansive Reasoned Awards Are Warranted

There are sound reasons for providing full, complete, and even lengthy awards to the parties and counsel. First, they are entitled to it. Both sides should know why claims or defenses succeeded or failed; both sides should know how the deciders saw the facts; and both sides deserve to be told why cited caselaw was apt or distinguishable. Indeed, the parties have paid for it. Arbitrators typically get deposits to cover future time on the case. The estimates likely include substantial time to draft a well-reasoned award.

Second, the losing side especially needs to understand why the ruling came out as it did. As between client and counsel, a fuller discussion can blunt any claims of attorney non-

performance. Counsel gets the dispute with the facts and law set, but parties and counsel still have expectations on outcomes. Where the award makes clear that the facts and/or law drove the outcome, disappointment can be assuaged, and there should be little second-guessing of counsel's strategies or actions. The adage is that you write for the loser.

For these reasons, unless the parties direct otherwise, this arbitrator always provides a fulsome reasoned award even where the contract does not require it.

Arbitrators Should Do The Work And Not Worry About Saying Too Much

Competent arbitrators should never worry about doing a more in-depth analysis of the facts or law in an award. The mere breadth of an award will never increase the specter of vacatur or remand, provided that the arbitrator adheres to the scope limits of the case. So long as the decision addresses everything that must be decided, but nothing more, the award will be safe. Under those circumstances, there is no risk of a Section 10(a)(4) vacatur based on exceeding authority or an inadequate decision. *Leeward, supra*, 826 F.3d at 638 (arbitration awards generally accorded great deference).

The fallacy of saying too much evaporates when arbitrators spend the necessary time and effort to recite the key facts from the record, discuss both apt and distinguishable legal authority, marry the facts and law with thoughtful rationale, and provide the logical legal and equitable relief. Such solid presentations will withstand scrutiny even if there is a challenge. Most of the grounds of vacatur are rooted in process flaws such as a failure to postpone, failure to consider evidence, and arbitral bias. (FAA Section 10(a)(1 – 3).) None of those should exist in a complete discussion of the merits of the case. To the contrary, a more thorough discussion will better show the opposite: that the process was fair, that both sides had full opportunities to adduce evidence, and that the arbitrator decided solely on the facts and law.

The vacatur grounds of exceeding authority or imperfectly executing arbitral duties even more clearly disappear with a fulsome award. The decision can – and should – discuss each claim and defense separately, and state how the final conclusions and relief tie into them. With that neat package, the arbitrator shows that he or she has capably performed the required tasks, irrespective of the length of the award.

Indeed, in those few jurisdictions where manifest disregard of the law remains a non-statutory basis for vacatur, a more complete award eliminates that grounds also. A hardy discussion of the law will show manifest *regard* of the law raised by the parties. There is no vacatur for erroneous conclusions of the law. *Sarofim v. Trust Company of the West*, 440 F.3d 213, 218 (5th Cir. 2006); *BEMI, LLC v. Anthropologie, Inc.*, 301 F.3d 548, 554 – 555 (7th Cir. 2002). Conscientious arbitrators will intelligently read and apply relevant authority. Thus, complete work is a bulwark against vacatur.

This does not mean that all awards should be 30 to 50 pages. The breadth of an award should also follow the principle of proportionality: an award should be long enough to address all relevant and compelling fact and law issues, and to derive from that the proper legal and equitable relief for just the claims and defenses that are raised. But it should not be any longer than it needs to be. (See *Tully, supra*, referring to two awards of seven pages and eight pages, respectively, that were sufficiently reasoned.) Merely adding pages is wasteful and unnecessarily costly to the parties. Achieving the right balance of completeness and restraint is why effective arbitrators are repeatedly asked to handle cases: they deliver what the parties and counsel expect and what efficient and effective arbitration promises.

Conclusion

The fallacy of saying too much is another arbitration myth that should be tossed by arbitrators. It is an unacceptable excuse for arbitrators to not do the hard work required of them. No law supports it, and parties and counsel are entitled to fulsome explanations unless they agree otherwise. Arbitrators, be confident! Be courageous! Be expressive!

Stuart M. Widman – May 6, 2019