REASONING IN INTERNATIONAL ARBITRATION: THE EMERGENT APPROACH IN CANADA†

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Spurred on by the adoption of the UNCITRAL Model Law *and its attendant reasons requirement over three decades ago, reasoning in international arbitration has emerged as a relevant facet of Canadian arbitration law. All Canadian jurisdictions now require that arbitral tribunals provide reasons for their awards unless the parties agree otherwise, but offer nothing more in terms of particulars. This raises several questions. For instance, what constitutes an award such that a decision must be reasoned? What are the specifics of the duty to provide reasons? And what are the practical consequences of failing to give reasons or providing inadequate ones? This article examines the legal reasons requirement's implementation and development in Canada through legislation and the resulting case law. The analysis reveals that courts are inclined to evaluate reasons purposively: reasons must not only seize the substance of the dispute and provide conclusions on the claims submitted, but also explain to the parties why the tribunal decided as it did and permit*

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for effective judicial review. Given the experience in the domestic arbitration context, there is another related question: whether the more general approach to reasoning standards applicable to other adjudicators in Canada may also come to inform the reasoning requirement in international arbitration. Regardless of the particular contents of reasons adequacy, however, a want of reasons is not in and of itself a ground for Canadian courts to interfere with an international award. Parties must rather frame this omission within the grounds provided by applicable legislation. Furthermore, Canadian courts seized of set-aside and recognition and enforcement matters will seek to ensure the finality of awards. Case law suggests that courts will not interfere with an insufficiently reasoned award unless said defect impacts the award's outcome or prevents its outcome from being ascertained.

INTRODUCTION

Reasoning in judicial decision making is fundamental to a legal system that imbues its users, as well as the public at large, with confidence in the administration of justice.[1] While arbitration operates as a largely separate, independent, and autonomous system of private justice[2] with different priorities than its judicial counterpart, reasons also have functions and utilities therein. Indeed, in a seminal analysis on the duty to provide reasons, the venerable Lord Justice Bingham once set out 'reasons for reasons' in the arbitration and judicial contexts alike. The practical purposes[3] of reasons were said to include

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[1] See *R v Sheppard*, 2002 SCC 26 at para 5 [*Sheppard*]. For an interesting critique of formal reasoning requirements, see Lorne Sossin, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002) 27:2 Queens L J 809 at 831–38.

[2] See *Inforica Inc v CGI Information Systems and Management Consultants Inc*, 2009 ONCA 642 at para 14 [*Inforica*]; J Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd ed (JurisNet, 2012) at 259.

[3] As distinguished from the broader philosophical understanding of legal reasoning that has historically drawn attention in academia: see e.g. Julie Dickson, "Interpretation and Coherence in Legal Reasoning" in Edward N

explaining the result to the parties, guarding against arbitrariness and irrationality, allowing reviewing courts to ascertain reversible errors, and providing a means of intellectual discipline for the decision-maker.[4] Many of these features underpin the reasoning requirement in Canada generally[5] and also translate into the Canadian arbitral context. This has been evident in arbitration's ascension in Canadian dispute resolution, which has spurred a robust body of law on the basis of legislation adopting the substance of the *UNCITRAL Model Law*.[6] These statutes provide that awards must include reasons unless the parties agree otherwise.[7]

This article surveys the law applicable to reasons in international arbitration as developed in Canada. The analysis

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Zalta, ed, *Stanford Encyclopedia of Philosophy*, available online at: <https://plato.stanford.edu/entries/legal-reas-interpret/>. SI Strong refers to some of these practical purposes as 'non-structural rationales' for legal reasoning. Non-structural rationales include ensuring the nature and quality of justice dispensed, improving the quality of decision making, enhancing the legitimacy of the arbitral process, and explaining to the parties why the arbitrator decided as they did. Strong considers helping reviewing courts consider whether to uphold an award to be a structural rationale for reasoning: see "Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy" (2015) 37:1 Mich J Int'l L 1 at 13–20. Arbitral reasoning has also been said to contribute to the development of the common law of international transactions: see generally Thomas E Carbonneau, "Rendering Arbitral Awards with Reasons: The Elaboration of Common Law of International Transactions" (1985) 23 Colum J Transnat'l L 579.

[4] See Justice Bingham, "Differences Between a Judgment and a Reasoned Award" (1997) 16:1 The Arbitrator 19; Justice Bingham, "Reasons and Reasons for Reasons: Differences Between a Court Judgement and an Arbitration Award" (1988) 4:2 Arb Int'l 141.

[5] For a recent example, see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 79–81, 441 DLR (4th) 1 [*Vavilov*].

[6] *UNCITRAL Model Law on International Commercial Arbitration (1985)*, with amendments as adopted in 2006 (effective 7 July 2006) [*Model Law*]. For a discussion of the case law, see Parts II & III.

[7] See nn 14–25.

shows that Canadian courts tend to evaluate reasons purposively. Reasons have been required not only to be present where agreed upon and to deal fully with the issues or claims submitted, but also allow parties to understand why decisions were made and allow for judicial review of the award.[8] In determining adequacy standards in some arbitral contexts, courts have also made clear that they are prepared to borrow from the more generally applicable standards governing other adjudicators. These modern standards are often the product of what Canadian courts have termed the 'functional' approach to assessing reasons adequacy and emphasize an adherence to reasons' purposes—many but not all of which are similar to those in international arbitration.[9] This general approach has caught on in the domestic arbitration context.[10] It remains to be determined whether the approach will be adopted for reasoning standards applicable to international arbitrations and to what extent this would be desirable.

This article is divided into three parts. Part I discusses the legislated reasons requirement in Canada's various

[8] See Part II(1). Amorphous and rudimentary as this may be, commentators have noted that there is an inherent difficulty to establishing robust reasoning standards: see Strong, *supra* note 3 at 12; Pierre Lalive, "On the Reasoning of International Arbitral Awards" (2010) 1:1 J Int'l Disp Settl 55 at 57; Michael Hwang Sc & Joshua Lim, "How To Draft Enforceable Awards Under The Model Law" in Michael Hwang SC, ed, *Selected Essays on International Arbitration* (Academy Publishing, 2013) 304 at 310. Strong notes that in practice many procedural orders contain supplementary language to the effect that "[t]he award shall contain the reasoning of the Arbitrator, applicable precedent and findings of fact and conclusions of law": see *supra* note 3 at n 50.

[9] See *Sheppard*, *supra* note 1; *R v REM*, 2008 SCC 51 [*REM*]; *R v Walker*, 2008 SCC 34; *C (R) v McDougall*, 2008 SCC 53 [*McDougall*]. For a comparison of judicial and arbitral reasoning purposes and a discussion of the general approach to reasoning standards, see Part II; n 84.

[10] See Part II(3). A point on terminology: references to 'domestic arbitration' in this article usually denote commercial arbitrations governed by provincial, domestic arbitration legislation. Labour and family arbitration have developed divergently in notable respects and are therefore not always comparable to their commercial counterpart.

jurisdictions. This includes examining which decisions must be reasoned as well as the possibility of dispensing with the reasons requirement and of issuing dissenting opinions. Part II then provides an overview of the criteria for reasons adequacy in Canada. As reasoning standards often overlap and intermingle, this includes a look at the requirements developed across various areas of law. A comparative glance at other jurisdictions is also provided. Finally, Part III outlines what may occur when an international arbitral award is challenged on the basis that it fails to give reasons or provides insufficient reasoning. It is clear that Canadian courts seized of set-aside and recognition and enforcement matters will seek to ensure the finality of awards. The case law suggests that courts will not interfere with an award for want of reasons unless said defect impacts the award's outcome or prevents its outcome from being ascertained.

I. THE APPLICABLE LEGAL FRAMEWORK

Unlike their adjudicator-counterparts in the courts and administrative tribunals, private arbitrators have no duty at Canadian common law to provide reasons in their decisions.[11] Arbitration is a creature of contract and statute, subject only to what contracting parties adopt as applicable standards and/or to what the legislature requires. Commercial arbitration in particular is largely a product of private ordering and outside the bounds of the court system.[12] Even so, reasoning

[11] For authorities on reasons in private arbitration, see *City of Saint John v Irving Oil Co Ltd*, [1966] SCR 581 at 591; *Hashimoto v Century 21 Carrie Realty Ltd*, 2010 MBQB 271 at para 33. For a US authority along the same lines, see *Affymax, Inc v Ortho-McNeil-Janssen Pharma, Inc*, 660 F 3d 281 at 285 (7th Cir 2011). For the judicial duty to provide reasons, see Part II(3). For the duty of administrative decision makers to provide reasons, see Part II(3); *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 at paras 35–44 [*Baker*].

[12] See e.g. Kenneth S Carlston, "Theory of the Arbitration Process" (1952) 17:4 L & Cont Prob's 631 at 631. See also *Proposals for a New Alberta Arbitration Act*, Alberta Law Reform Institute, Report No 51, October 1988 [Alberta Law Reform Report] at 7. For a US authority, see *Astoria Medical*

requirements may be both an element of the arbitrator's mandate vis-à-vis the parties and, in certain cases, material in the event of subsequent set-aside proceedings or recognition and enforcement proceedings under legislation implementing the *New York Convention*.[13] It is in these latter contexts that legal reasoning requirements are particularly relevant.

The applicable legal standard for reasoning is determined by the jurisdiction in which the proceedings in question take place. Canada is a federal state whose constitution provides that its provincial governments have jurisdiction over the administration of justice within their borders.[14] This gives the provinces authority over arbitration legislation, and it is up to them to determine whether to incorporate a reasons requirement into their respective international arbitration statutes. Canada also has three territories, each of which has its own arbitration law. Except for Quebec, all of Canada's jurisdictions have distinct international and domestic arbitration legislation.

As an *UNCITRAL Model Law* country, Canada's various jurisdictions, through their respective international arbitration statutes, have incorporated the bulk of the *Model Law*'s provisions. While this includes the reasons requirement, the nuances discussed below suggest that the applicable law of the jurisdiction in question should nonetheless be reviewed when

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Group v Health Insurance Plan of Greater New York, 182 NE 2d 85 at 87 (NY Ct App, 1962).

[13] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June, 1985, 330 UNTS 3 (entered into force 7 June, 1959) [*New York Convention*].

[14] See *Constitution Act 1867*, 30 & 31 Victoria, c 3 (UK), s 92(14). However, federal legislation does govern arbitration proceedings involving federal governmental entities and certain types of matters: see *Commercial Arbitration Act,* RSC 1985, c 17 (2nd Supp), s 5(2) [*Federal Act*].

assessing Canada as an arbitral seat or for recognition and enforcement purposes.

1. The Reasons Requirement

Governing legislation in the common law provinces of Alberta,[15] British Columbia,[16] Manitoba,[17] New Brunswick,[18] Newfoundland,[19] Nova Scotia,[20] Ontario,[21] Prince Edward Island,[22] and Saskatchewan[23] dictates that reasons must be provided unless dispensed with by the parties. The same goes for Yukon[24] as well as the Northwest Territories and Nunavut.[25] Canada's civil law jurisdiction, the province of Quebec, is the only jurisdiction that does not have distinct legislation for domestic and international arbitration. Rules governing both can be found in the *Civil Code of Québec*[26] and the *Code of Civil*

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[15] See *International Commercial Arbitration Act*, RSA 2000, c I-5, s 31(2).

[16] See *International Commercial Arbitration Act,* RSBC 1996, c 233, s 31(2) [*BC Act*].

[17] See *The International Commercial Arbitration Act*, CCSM c C151, s 31(2).

[18] See *International Commercial Arbitration Act*, RSNB 2011, c 176, s 31(2).

[19] See *International Commercial Arbitration Act*, RSNL 1990, c I-15, s 31(2).

[20] See *International Commercial Arbitration Act,* RSNS 1989, c 234, s 31(2).

[21] See *International Commercial Arbitration Act,* SO 2017, c 2, sched 2, s 31(2) [*Ontario Act*].

[22] See *International Commercial Arbitration Act,* RSPEI 1988, c I-5, s 31(2).

[23] See *International Commercial Arbitration Act*, SS 1988–89, c I-10.2, s 31(2).

[24] See *International Commercial Arbitration Act,* RSY 2002, c 123, s 31(2).

[25] See *International Commercial Arbitration Act*, RSNWT 1988, c I-6, s 31(2); *International Commercial Arbitration Act*, RSNWT (Nu) 1988, c I-6, s 31(2).

[26] CQLR, c CCQ-1991 [CCQ]. The CCQ primarily governs the validity of arbitral agreements and the arbitrability of disputes, leaving the procedural aspects of arbitration to the *Code of Civil Procedure*: see Babak Barin & Eva Gazurek, "Enforcement and Annulment of Arbitral Awards in Quebec – Vive la différence!" (2004) 64 R du B 431 at 432.

Procedure ("CCP")[27]—the latter of which reproduces much of the substance of the *Model Law*. The CCP, which underwent a major revision in 2016, lays out the default procedural rules applicable to arbitrations.[28] Chapter V prescribes the rules governing awards, with article 642 providing the reasons requirement. This article is partly a reproduction of article 945.2 of the old CCP,[29] which used similar language.

At the federal level, Parliament has also enacted arbitration legislation that applies where a disputing party is the Canadian government, a federal departmental corporation, a Crown corporation, or where the dispute relates to maritime or admiralty matters.[30] The federal legislation notably governs investor-state arbitrations involving Canada that are seated in Canada. This legislation also contains a reasons requirement with which the parties can dispense.[31]

The ability to dispense with reasons is less evident in Quebec than in other Canadian jurisdictions. Article 642 CCP provides that arbitration awards "must … include reasons," without stating that the parties can agree otherwise.[32] This diverges from the *Model Law* in that it seems to suggest that dispensing with the reasons requirement is prohibited. However, in *Anvar c Zivari*,[33] a 2015 decision of the Superior Court of Quebec, the court held that an arbitral award without reasons, issued pursuant to an arbitration agreement that expressly did not require reasons, was valid. The court found that the reasons

[27] CQLR, c C-25.01 [CCP].

[28] See also art 2643 CCQ.

[29] CQLR, c C-25.

[30] See *Federal Act*, *supra* note 14, s 5(2).

[31] *Ibid* at Sched 1, s 31(2).

[32] *Supra* note 27.

[33] 2015 QCCS 1951, leave ref'd 2015 QCCA 1074 [*Anvar*].

requirement enshrines a principle of natural justice that, like other rights of this ilk, could be renounced by the parties.[34]

In sum, the various international arbitration statutes in Canada align with what has been described as a nearly universal principle[35] that, unless agreed otherwise, international awards must provide reasons. While contracting out of the reasons requirement must be done explicitly, the incorporation of reasoning standards by agreement can be achieved either without a clause or by reference to a particular set of arbitral rules that contains such a requirement. Institutional rules are often markedly similar in wording to the *Model Law* requirement.[36] Article 32 of the International Chamber of Commerce's *Arbitration Rules*, for example, simply provides that an award "shall state the reasons upon which it is based."[37] However, certain arbitral rules may also prescribe more or less exacting reasons requirements either on their face or in their interpretation. In limited circumstances, for example, investment arbitration awards may be subject to review by Canadian courts, i.e., where the dispute is not subject to the *ICSID Convention*[38] and Canada is the seat of arbitration.[39] In these situations, arbitral rules like the *ICSID Additional Facility*

[34] *Ibid* at paras 65–68.

[35] See Gary B Born, *International Commercial Arbitration*, 2nd ed (Alphen aan den Rijn: Wolters Kluwer, 2014) at 3039.

[36] See e.g. Strong, *supra* note 3 at 10–11.

[37] (2017) [*ICC Rules*]. See also e.g. London Court of International Arbitration, *Arbitration Rules* (2014) at art 26.2: "[t]he Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based."

[38] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 (entered into force on 14 October 1966) [*ICSID Convention*].

[39] See e.g. *United Mexican United States v Metalclad Corporation*, 2001 BCSC 664 [*Metalclad*]; *Bayview Irrigation District #11 v United Mexican States*, 2008 CanLII 22120 (Ont SC) [*Bayview Irrigation*]; *Crystallex International Corp v Bolivarian Republic of Venezuela*, 2016 ONSC 4693.

Rules[40] may impose an ostensibly more rigorous reasoning standard than that in the *Model Law*, which the court seized will apply.[41] The *Additional Facility Rules* provide that the tribunal must address "every question submitted to it, together with the reasons upon which the decision is based."[42] As such, in assessing applicable reasoning requirements, incorporated arbitral rules and their interpretation may be relevant in addition to—or in lieu of—applicable legislation and the standards derived therefrom.[43]

2. Reasons in Tribunal Awards, Decisions, & Other Pronouncements

The legislated reasons requirement is only applicable to awards, including partial awards, default awards, and consent awards.[44] Orders, decisions, and other pronouncements that do not constitute awards are not subject to the legislated reasons requirement.

Whether interim measures constitute awards and therefore require reasons depends on the applicable legislation and

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[40] International Centre for Settlement of Investment Disputes, *ICSID Additional Facility Rules* (April 2006), online (pdf): International Centre for Settlement of Investment Disputes <https://icsid.worldbank.org/resources/rules-and-regulations/additional-facility-rules/overview> [perma.cc/48XW-A53X].

[41] See e.g. *Metalclad*, *supra* note 39.

[42] *Supra* note 40 at art 52(1)(i) [emphasis added].

[43] For example, a differing reasoning standard prescribed by the arbitral rules was consequential in the UK case of *Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd*, [2001] UKPC 34 at paras 37–43. Therein, in determining whether an award's reasons were adequate, the court applied the standards imposed by the arbitral rules, rather than those in the law governing the arbitration. Despite the award falling short of legislated standards, the reasons in question were adequate according to the dictates of the applicable institutional rules.

[44] For a discussion of what constitutes an award, see Casey, *supra* note 2 at 352–54.

arbitral rules.[45] Previous iterations of certain international arbitration legislation in Canada, like that in Ontario, provided that interim measures were tantamount to awards for the purposes of enforcement.[46] This is no longer the case, however, following the incorporation of the 2006 *Model Law* amendments clarifying the scope of available interim relief. Under certain international arbitration legislation, enforceable interim measures can now be in the form of an award or in another form.[47] In Quebec, the 2016 revisions to the CCP provide for the enforcement of provisional measures at articles 638–641.[48] These provisional measures are variously described as decisions, measures, or orders, but not awards. On their face, these would therefore appear to escape the ambit of the reasons requirement. This is subject to the parties agreeing otherwise, the characterization of the measure, and, perhaps, whether the measure deals with the merits of the dispute.[49]

The question of whether an interim measure constitutes an award can be complex.[50] This results from the fact that awards,

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[45] We note that whether a measure is enforceable is a separate issue from whether an interim measure constitutes an award. Enforceable measures may include decisions (i) maintaining the status quo pending the final determination of the dispute, (ii) requiring action that would prevent harm to the arbitral process itself, (iii) providing a means of preserving assets out of which a subsequent award may be satisfied, or (iv) preserving evidence that may be relevant to the resolution of the dispute: see *Model Law*, *supra* note 6 at 17(2).

[46] See *International Commercial Arbitration Act*, RSO 1990, c I.9, s 9.

[47] See e.g. *Ontario Act, supra* note 21, s 17(2).

[48] *Supra* note 27.

[49] See *Blondin c Sylvestre*, [2003] RJQ 2090 at para 48 (QC CA) [*Blondin*]. The court considers whether, under the old CCP, a domestic interim measure can be characterized as an award so as to be homologated. The court examines this issue through the prism of whether the measure in question finally decided issues on the merits. See also n 54.

[50] As such, a comprehensive overview cannot be done justice here. For an examination of the issue, see generally Jonathan Hill, "Is an Interim Measure

decisions, and orders are often undefined under applicable instruments.[51] The characterization of an interim measure is nonetheless relevant because, if it constitutes an award and the parties do not dispense of the reasons requirement, or if the parties have specified in their agreement that certain interim measures must be reasoned or have adopted a set of arbitral rules that provide as much,[52] the interim measure may be resisted in the same manner as is discussed below in Part III if the interim measure is not reasoned or is inadequately reasoned.[53]

To date, there are no reported cases where Canadian courts have grappled with this issue through the prism of the new *Model Law* provisions on interim measures. Suffice it to say that, in determining whether an interim measure is an award, the tribunal's characterization of the measure and the existence of final dispositions on the merits are likely material.[54]

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of Protection Ordered by an Arbitral Tribunal an Arbitral Award?" (2018) 9:4 J Int'l Disp Set at 590.

[51] Notably, the *Model Law* does not define an 'award.' According to the United Nations working group charged with developing the content of the *Model Law*, this was due to the complexity of the issue and in the interest of time: see *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UNCITRAL, 8th Session, UN Doc A/CN.9/264 (1985), at 72; *Report Of The Working Group On International Contract Practices*, UNCITRAL, 7th Session, UN Doc A/CN.91246 (1984), at paras 192–94.

[52] See e.g. *ICC Rules*, *supra* note 37, art 28.

[53] See *Model Law*, *supra* note 6, arts 17 I(1)(a)(i), (b)(ii).

[54] In the domestic context, courts have taken the position that only decisions dealing with the substance of the dispute may be characterized as an award, as doing otherwise may open up procedural measures to a level of scrutiny that is incompatible with arbitral autonomy: see e.g. *Inforica*, *supra* note 2 at paras 18, 29. See also n 49; J Kenneth McEwan & Ludmila B Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Aurora: Canada Law Book, 2008) at 9:30.10 ("Only decisions determining the substantive issues should be termed 'awards'. Matters relating to the conduct of the arbitration are not awards but, rather, are procedural orders and directions.") See also Casey, *supra* note 2 at 353

3. *Dissenting Opinions*

In Canada's common law provinces, awards are governed by provisions incorporating article 29 of the *Model Law* and can therefore be arrived at by majority decision.[55] Pursuant to article 31(1) of the *Model Law*, if an arbitrator refuses to sign an award because they are dissenting, reasons for the omitted signature must be stated in the award.[56] In accordance with the *Model Law*, provincial statutes are otherwise silent on matters related to dissenting opinions. Specific mandating provisions in the arbitration agreement are unnecessary for the release of a dissenting opinion.[57] In Quebec, article 642 CCP partially incorporates the substance of articles 29 and 31 of the *Model Law*.[58] Decisions are made by a majority of the arbitrators and, in the event that one of the arbitrators is unable or unwilling to

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(noting that the way the tribunal characterizes the award, even those which deal with procedure matters, is important). The decisions in *Inforica* and *Blondin*, discussed above, are in line with a US approach to this issue, which is that, if the interim measure finally and definitively disposes of an issue, it is considered an award: see *Ecopetrol SA v Offshore Exploration & Production LLC*, 46 F Supp 3d 327 at 339 (SDNY 2014); *Island Creek Coal Sales Co v City of Gainesville, Fla*, 729 F 2d 1046 at 1049 (6th Cir 1984), abrogated on other grounds in *Cortez Byrd Chips, Inc v Bill Harbert Const Co*, 529 US 193 (US S Ct 2000). For a similar authority in Australia, see *Resort Condominiums International Inc v Bolwell* (1993), 118 ALR 655 at 674 (QSC). See also Frédéric Bachand & Fabien Gélinas, "The Implementation and Application of the New York Arbitration Convention in Canada" (2014) 92:2 Can Bar R 457 at 463: "the notion of an award tends to be conceived broadly in domestic matters. For example, under the Uniform Conference of Canada's *Uniform Arbitration Act*, which has had a notable influence on the law of domestic arbitration, arbitral decisions recording settlements, granting interim measures, resolving only part of the merits, or granting costs all constitute awards. However, a fairly consistent line of cases stands for the proposition that mere procedural orders do not constitute awards."

[55] *Supra* note 6.

[56] *Ibid*.

[57] See e.g. *Noble China Inc v Lei*, 1998 OJ 4677 at para 54 (Ont Ct J [Gen Div]), 42 OR (3d) 69.

[58] *Supra* note 27.

sign, the award has the same effect as if it were signed by all of them, so long as the refusal or inability to sign is recorded.[59] Courts may consider dissenting opinions in deciding whether statutory grounds for setting aside an award have been made out.[60]

II. STANDARDS FOR REASONS ADEQUACY

While a reasons requirement for international arbitrations has been enacted in Canada, applicable legislation does not articulate what this requirement entails. The responsibility of developing reasoning standards has therefore been left to the courts.

Standards for reasons adequacy inform arbitrators' duties as well as the basis for a challenge to an eventual award for reasons-related issues. The reasons-adequacy analysis occurs where an award is challenged on the basis that reasons were required but were insufficient. Experiences in jurisdictions like Australia[61] and the United Kingdom[62] demonstrate that the requirement's amorphousness can easily lead to divergent interpretations of what reasons adequacy entails. The following discussion reveals that the Canadian experience has not yet been marked by the same controversy, though some questions grappled with in other jurisdictions have yet to be considered by local courts.

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[59] See *ibid*. See also *Pananis c DT Acquisition inc*, [2000] JQ 4770 at paras 23–34 (QC SC), 2000 CarswellQue 2487.

[60] See e.g. *Société d'investissements l'Excellence Inc c Rhéaume*, 2010 QCCA 2269 at para 40, leave ref'd [2011] SCCA No 57 [*Rhéaume*].

[61] See n 94. See also Benjamin Hayward and William Ho, "Balancing the scales: the standard of reasons required in commercial arbitration and litigation in Australia" (2012) 78:4 *Arbitration* 314 at 314–19.

[62] See e.g. the discussion regarding how evidence must be treated in an award's reasons in *Islamic Republic of Pakistan and another v Broadsheet LLC,* [2019] EWHC 1832 (Comm) at paras 21–44 [*Broadsheet*].

1. Overview

There is a fair amount of case law in Canada on the reasons requirement in the set-aside and recognition and enforcement contexts, discussed further in Part III. To date, however, decisions setting out the specific contents of the requirement have been few and far between. The following review surveys what requirements have emerged thus far.

In *Navigation Sonamar Inc c Algoma Steamships Ltd*,[63] eventual Supreme Court of Canada justice Charles Gonthier, then of the Superior Court of Quebec, presided over an application to set aside an international award *inter alia* on the basis that the reasons given therein were deficient. Commenting on the duty to provide reasons pursuant to the federal *Commercial Arbitration Code*,[64] which incorporates the *Model Law*, the court noted that a challenge on this basis was not an opportunity to examine findings on the merits. Rather, Gonthier J, looking to administrative law for guidance, found that the duty to provide reasons entails that these must be intelligible and allow for the parties to consider whether to challenge the decision.[65] The court also cited British jurisprudence finding that reasons must deal with the "substantial" points raised. Gonthier J noted with approval authorities providing that determining whether reasons are adequate must be done in light of the decision as a whole and, notably, what is implied.[66]

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[63] [1987] RJQ 1346 at 13–16 (QC SC), 1987 CarswellQue 1193 [*Navigation Sonamar*].

[64] See *Federal Act*, *supra* note 14 at sched 1.

[65] For another Canadian authority finding that the purpose of the reasons requirement in legislation applicable to international arbitration is to permit for effective judicial review, see *Anvar*, *supra* note 33 at para 67 (stating that reasons allow courts to determine whether tribunals have respected their jurisdiction).

[66] For a similar UK authority on examining awards as a whole, see *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd*, [2006] EWHC 727 (TCC) at para 57.

Also notable was the court's finding that 'judicial reasoning' is not required of "commercial" persons.[67] Disposing of the substance of the matter required only findings of fact and a discussion of key evidence. In the circumstances, the court found that, despite the lack of explanation as to the legal basis for the interpretation of certain contractual clauses, the findings as to their applicability were clear, and the conclusions based thereupon were stated. The reasons were therefore adequate.

In *United Mexican United States v Metalclad Corporation*,[68] an investment arbitration matter, an award was challenged on the basis that the tribunal failed to answer all questions submitted. While the Supreme Court of British Columbia's comments pertained to the dictates of the *ICSID Additional Facility Arbitration Rules*, which include a requirement to address every question submitted to arbitration, the review of the award was governed by British Columbia's international commercial arbitration legislation. Commenting on the duty to provide reasons in the *Additional Facility Rules*, the court stated the following:

> [T]he tribunal must answer the questions that have been submitted to it and give its reasons for its answers. In other words, the tribunal must deal fully with the dispute between the parties and give reasons for its decision. It is not reasonable to require the tribunal to answer each and every argument which is made in connection

[67] This seems to suggest that the basis for the arbitrator's appointment may influence the extent to which courts will require them to engage in legal reasoning. For a recent UK perspective, see *UMS Holding Ltd and others v Great Station Properties SA and another*, [2017] EWHC 2398 (Comm) at paras 35–36 [*UMS Holding*] (noting that a legal background does not necessarily raise the standard for reasoning in an award).

[68] *Supra* note 39.

> with the questions which the tribunal must decide.[69]

The petitioner, Mexico, alleged that the arbitral tribunal failed to answer questions related to minimum standard of treatment provisions, whether there had been bad faith in bringing the claim to arbitration, the issue of fraud, and how damages had been calculated. The court found that the impugned questions submitted to the tribunal had either been rendered moot by other holdings in the award, did not affect the award, or formed part of the decision's general and implied reasons.[70] It therefore rejected the argument that the impugned reasons were inadequate.[71]

In Quebec, domestic and international arbitrations are governed by the same legislation, which reflects the substance of the *Model Law*.[72] As such, the province's reasons requirement does not differ materially from those elsewhere in Canada.[73]

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[69] *Ibid* at para 122.

[70] *Ibid* at para 130.

[71] Duly note that, in finding that failing to address certain questions was not a breach of procedure because this did not affect the award, the court may have read down the applicable requirement.

[72] Although Quebec has not formally adopted the *Model Law* wholesale, the CCP provisions applicable to international arbitrations reflect its substance and are interpreted in consideration of the instrument: see e.g. arts 649–55 CCP. For an authoritative discussion of the relationship between the CCP, *Model Law*, and *New York Convention*, see *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at paras 44–47. It should also be noted that the CCP does not provide for appeals of arbitral awards on the merits, and that the reasoning standard therein is therefore not subject to different considerations in this respect than the reasons requirements in other international legislation.

[73] And indeed, some have argued that, because of the prevailing uniformity in arbitration legislation across all provinces, including Quebec, Quebec court rulings in the international arbitration context should be considered useful precedent across Canada: see e.g. Anne-Marie L Lizotte, "Quebec Authorities

Decisions interpreting the CCP reasons requirement have found that reasons must be intelligible and explain the conclusions in the award so as to help the parties understand why they were reached.[74] Reasons are not required to treat every argument or piece of evidence submitted[75] and may dispose of certain issues impliedly or in effect.[76] A good example of these principles at work is in *Canadian Royalties Inc c Nearctic Nickel Mines Inc*.[77] Therein, the Superior Court of Quebec presided over a request for homologation (recognition and enforcement) and a challenge to that request on the basis that the award's reasons were inadequate. The arbitral tribunal had allegedly failed *inter alia* to consider an argument as to why a clause giving rise to the underlying claim had not been triggered, and the award purportedly lacked an explicit conclusion that certain conditions for the triggering had been fulfilled. The court disagreed, finding that, despite the lack of explicit treatment of certain components of the clause, the argument related thereto, and pertinent evidence, it was implied in the award that the condition in question had been met. This was supported by the fact that the tribunal had a sufficient evidentiary basis for coming to its conclusions.

In International Commercial Arbitration: Are They Relevant Throughout Canada?" (2009) Ann Rev Civ Lit F at s I.

[74] See *Canadian Royalties Inc c Nearctic Nickel Mines Inc*, 2010 QCCS 4600 at paras 111–13 [*Canadian Royalties*], aff'd 2012 QCCA 385, leave ref'd 2012 CarswellQue 6925 (SCC). For similar UK authorities, see *Compton Beauchamp Estates Ltd v Spence*, [2013] EWHC 1101 at para 51 (Ch) [*Compton Beauchamp Estates*] (wherein the UK court notes the importance of explaining why a tribunal decided as it did); *UMS Holding*, *supra* note 67 at para 118.

[75] See *Canadian Royalties*, *supra* note 74 at para 112; *Compagnie d'assurances Standard Life du Canada c Lavigne*, 2008 QCCA 516 at paras 49–52.

[76] See *Coderre c Michaud*, 2008 QCCA 888 at para 135 [*Coderre*]; *Canadian Royalties*, *supra* note 74 at para 115; *Superior Energy Management v Manson Insulation Inc*, 2011 QCCS 5100 at para 57.

[77] *Supra* note 74 at paras 118–29.

The arbitral reasoning standards articulated above share some of the hallmarks of the judicial standard. As with courts, arbitral tribunals have been required to seize the substance of the matter, dispose of the issues submitted, and treat the relevant evidence and arguments.[78] Reasons have also been required to explain why conclusions were reached and allow for judicial review. Arbitrators, like judges, however, are not required to explicitly treat all evidence or address every argument put forward.[79] Courts may also whittle down the issues to those that are "live."[80] The standards articulated above seemingly provide no such discretion to an arbitral tribunal—at least to the extent that this would constitute a failure to dispose of all claims submitted and adhere to the terms of reference. Local courts have given tribunals some flexibility in finding that certain issues can be disposed of implicitly or in effect.[81] In other

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[78] See discussion of the Canadian judicial reasoning standard in Part II(3). In other jurisdictions, requirements of this nature have been found to call for reasons beyond those that merely provide conclusions on each claim: see e.g. *Gora Lal v Union of India*, (2003) 12 SCC 459 (Indian S Ct) [*Gora*]. For a similar German authority requiring that arbitral tribunals address only the main arguments submitted, see Higher Regional Court [OLG] Rostock, 18 September 2007, Case No 1 Sch 04/06.

[79] For similar UK authorities, see *Hussman (Europe) Ltd v Al Ameen Development & Trade Co*, [2000] 2 Lloyd's Rep 83 at para 56; *UMS Holding*, *supra* note 67 at para 28. This approach has also been endorsed in the US: see e.g. *Leeward Construction Company, Ltd v American University of Antigua–College of Medicine*, 826 F 3d 634 at 640 (2nd Cir 2011) [*Leeward*].

[80] See *REM*, *supra* note 9 at para 41; *Long v Red Branch Investments Limited*, 2017 BCCA 256 at para 62 [*Long*].

[81] For other international arbitration cases in Canada wherein the court allowed for implied reasons, see e.g. *Depo Traffic v Vikeda International*, 2015 ONSC 999 at para 43 [*Depo Traffic*]; *Consolidated Contractors Group SAL (Offshore) v Ambatovy Minerals SA*, 2017 ONCA 939 at para 62, 70 CLR (4th) 51, leave ref'd 2018 CanLII 99661 (SCC) [*Consolidated Contractors*]. Under a more onerous reasoning standard, implied reasons have also been found to be permissible in ad hoc committee decisions concerning the ICSID reasoning requirement: see e.g. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on Annulment of the Award, para 116 (November 2, 2015); *Teinver SA, Transportes De Cercanías SA and Autobuses Urbanos Del*

jurisdictions, however, courts have also drawn a clear distinction between claims and issues, such that all of the former must be dealt with but not necessarily all of the latter.[82] This has not yet occurred in Canada, and it would certainly be a helpful development for arbitrating parties if the courts provided guidance on this point.

2. Reasoning Standards Across Areas of Law, Jurisdictions

The decisions above reveal that, due to the limited guidance in Canada on reasons adequacy in international arbitration and the overlap between the various reasoning standards, jurisprudence on reasons in the judicial and administrative contexts can, to a certain extent, be a useful frame of reference in determining the content of the reasons requirement in international arbitration. Given the general intermingling

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Sur SA v Argentine Republic, ICSID Case No. ARB/09/1, Decision on Annulment, para 230 (May 29, 2019).

[82] In the UK, a 'failure to deal with all issues' is a specific ground for refusing to recognize an award: see *Arbitration Act 1996* (UK), s 68(2)(d) [UK Act]. Courts have clarified that this provision requires that all claims be dealt with but not necessarily all facets of a dispute: see e.g *Margulead Ltd v Exide Technologies*, [2004] EWHC 1019 (Comm) at para 43 [*Margulead*] ("The meaning of 'failure to deal with all the issues' must therefore refer to a failure to deal with a claim or a distinct defence to a claim advanced before the tribunal and not merely to an omission to give reasons for the tribunal's conclusion in respect of such claim or defence. It is in those cases in which the award expresses no conclusion as to a specific claim or a specific defence that the award can be said to have failed to deal with an issue.") See also *Compton Beauchamp Estates*, *supra* note 74 at para 51; *UMS Holding*, *supra* note 67 at para 28; *World Trade Corporation Ltd v C Czarnikow Sugar Ltd,* [2004] EWHC 2332 (Comm) at para 20. These decisions all note that only "essential" issues need to be addressed. In the US, see e.g. *Leeward*, *supra* note 79 at 640 [emphasis added]: "A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it." Commentators have also noted the importance of allowing arbitrators, like judges, to determine what is relevant to the dispute: see e.g. Jan Hendrik Dalhuisen, "Legal Reasoning and Powers of International Arbitrators" (2015) at 4, available online:
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393705>.

between arbitration and administrative law, including standards for reasoning,[83] it stands to reason that this will remain the case going forward. Furthermore, as is discussed below, courts have increasingly adopted the general approach to assessing reasons adequacy in domestic arbitration cases. As such, and while the inclination should be tempered, it is worth considering the direction in which these other reasoning standards are heading in thinking about standards for international arbitration moving forward.

Today, the general approach to reasoning standards set out by the Supreme Court of Canada arguably informs and provides a framework for the duty to provide reasons across almost all contexts, including domestic commercial arbitration.[84] Under

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[83] As the Supreme Court of Canada has noted, the review of arbitral awards is a similar exercise to the review of administrative tribunal decisions, with courts analysing the decisions of expert, non-judicial decision-makers: see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 105. The willingness of courts seized with international arbitration matters to look to administrative law standards was evidenced in *Navigation Sonamar*, where Gonthier J relied on several administrative law decisions in delineating the duty to provide reasons pursuant to federal international arbitration legislation: see *supra* note 63 at 13–14. See also e.g. *Canadian Royalties*, *supra* note 74 at para 112, n 31. For a discussion of the overlap between administrative and judicial standards, see Part II(3).

[84] For the approach's applicability in the commercial arbitration context, see e.g. *Peters v D'Antonio*, 2016 ONSC 7141 at paras 25-27 [*Peters*]. For further discussion of reasoning standards in domestic arbitration, see Part II(3). For a succinct discussion of the evolution of the reasons requirement applicable to courts generally, see *Brown v Hudson's Bay Co*, 2014 ONSC 1065 at paras 55-56 [*Brown*]. The Supreme Court has also recently confirmed that reasons generally serve the same purposes in both the administrative and judicial contexts: see *Vavilov*, *supra* note 5 at para 79. See also *Clifford v Ontario (Attorney General)*, 2009 ONCA 670 at para 29, leave ref'd [2009] SCCA No 461 [*Clifford*]. Some courts have also taken the view that assessing reasons should be approached 'contextually': see esp. *Lawson v Lawson* (2006), 81 OR (3d) 321 (Ont CA) and its progeny. This approach would nonetheless appear compatible with—if not the other side of the same coin to—its functional counterpart, which accounts for context in determining reasons adequacy according to the purposes of reasons in a given situation. Indeed, these approaches appear to have merged lexically into a 'contextual and functional

the 'functional' approach to reasons adequacy, reasons are assessed according to their purposes. These generally include justifying and explaining the result at which the decision-maker arrived; telling the losing party why they lost; allowing for the consideration of possible grounds for appeal or review; and satisfying the public that justice has been done.[85] Whether these purposes have been accomplished is considered in light of the evidentiary record, live issues as they emerged at trial, and the submissions of counsel.[86]

Assessing reasons purposively is in fact congruous with the approach that courts have taken to applying reasons requirements pursuant to international arbitration legislation.[87] This being said, the reasons requirement in international arbitration is not and should not be considered a wholesale derivative of these other standards. Judicial decisions and private arbitration awards serve distinct audiences with needs that are often incongruous. The former are widely reported and published in service of the parties as well as the public at large; the latter are generally for the private benefit of the parties to the dispute.[88] In many jurisdictions, including

approach' in some decisions: see e.g. *Gholami v The Hospital of Sick Children*, 2018 ONCA 783 at para 63 [*Gholami*].

[85] See *McDougall*, *supra* note 9 at para 98 (citing *R v Walker*, *supra* note 9).

[86] See *REM*, *supra* note 9 at para 57.

[87] See *Navigation Sonamar*, *supra* note 63 at 13, 16 (the court notes that reasons were adequate in part because they allowed for the determination of whether there were reviewable errors); *Canadian Royalties*, *supra* note 74 at para 111; *Anvar*, *supra* note 33 at para 67; *Promutuel Dorchester société mutuelle d'assurance générale c Ferland*, [2001] JQ 3322 at para 64 (QC SC), JE 2001-1512. Strong is also of the opinion that approaching arbitral reasoning standards functionally is desirable because it helps these transcend differences in approaches to reasoning requirements across legal traditions: see *supra* note 3 at 13. On reconciling different legal backgrounds on arbitral tribunals as this concerns approaches to reasoning, see generally Dalhuisen, *supra* note 82.

[88] An important albeit limited exception is investment arbitration, where most awards are published. Investor-state arbitration serves not only private

Australia, New Zealand, and the UK, courts have actively resisted imposing judicial standards on arbitral tribunals, favouring instead those more attuned to the nature of arbitration.[89] The UK standard requires only that arbitrators "set out what, on their view of the evidence, did or did not happen and should explain *succinctly* why, in the light of what happened, they have reached their decision and what that decision is."[90] In the US, the prevailing standard for reasoned awards requires that reasons fall on a continuum between a 'standard' award, which lays out only the result, and something short of an award that provides full findings of fact and conclusions of law on each issue.[91] This entails providing 'statements' justifying the decision.[92]

Underlying this divergence in standards is the notion that, in assessing reasons, arbitration's particularities should be taken into account. Courts in many jurisdictions have taken the position that arbitral awards should not be burdened by the

interests but also more public purposes. It is rooted in public international law and is at its core dispute resolution relating to a host government's treatment of foreign nationals.

[89] For Australian authorities, see n 94. In New Zealand, see *Ngati Hurungaterangi, Ngati Taeotu me Ngati Te Kahu o Ngati Whakaue v Ngati Wahiao*, [2017] NZCA 429 at para 63 [*Ngati Hurungaterangi*]. In the UK, see e.g. *UMS Holding*, *supra* note 67 at para 134: "All that can be said is that such an approach to writing the reasons for an award is different from the current practice of the courts when writing judgments." See also Born, *supra* note 35 at 3274–75.

[90] See *Westzucker GmbH v Bunge GmbH; Bremer Handelgesellschaft mbH v Westzucker GmbH (No 2)*, [1981] 2 Lloyd's Rep 130 at 132–33 (EWCA) [*Bremer*] [emphasis added].

[91] See e.g. *Leeward*, *supra* note 79 at 640; *Stage Stores Inc v Gunnerson*, 477 S W 3d 848 at 858–59 (Tex Ct Ap 2015) [*Stage Stores*].

[92] See e.g. *Stage Stores*, *supra* note 91 at 858–59; *Denison Mines (USA) Corporation v KGL Associates Inc*, 381 P 3d 1167 at 1176 (UT App 171 2016).

complexities and technicalities of court judgments.[93] In Australia, for instance, appellate courts, after some controversy, concluded that even in complex matters, arbitration awards do not require the same amount of detail as court judgments.[94] The reasons for this distinction were perhaps most poignantly articulated in *Gordian Runoff Ltd v Westport Insurance Corp* by the New South Wales Court of Appeal, which found the following:

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

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[93] In addition to what follows, see e.g. *Saudi-Egyptian Company for Touristic Development v Meridian SA*, Cairo Court of Appeal, 7th Economic Circuit, Egypt, 3 April 2007, case No 123/119.

[94] Certain Australian courts found that the level of detail in a complex arbitration subject to appeal should be approximate to that in a similar court case: see e.g. *BHP Billiton Ltd v Oil Basins Ltd*, [2006] VSC 402 at para 23 [*BHP Billiton*]; *Ottoway Engineering Pty Ltd v ASC AWD Shipbuilder Pty Ltd*, [2017] SASC 69 at paras 128–134. However, this view has met resistance or has simply not been followed in several decisions; notably, by the High Court of Australia itself: see *Westport Insurance Corp v Gordian Runoff Ltd*, [2011] HCA 37 at paras 49–56 [*Westport Insurance 2*]. Although the High Court did not make an explicit determination on the comparison, it did not endorse a shared standard and took no issue with a finding in the decision below that made a strong and express distinction between arbitral and judicial standards: see *Gordian Runoff Ltd v Westport Insurance Corp*, [2010] NSWCA 57 at para 218 [*Westport Insurance 1*]. See also *Thoroughvision Pty Ltd v Sky Channel Pty Ltd*, [2010] VSC 139 at para 55 [*Thoroughvision*] ("The decision of the Court of Appeal in Oil Basins Ltd v BHP Billiton Ltd confirms that an arbitrator must address each issue raised for decision within the scope of the arbitration agreement. However it does not follow that the position outlined on the basis of the authorities to which reference has been made is rendered any different, or that the nature and extent of reasons is not to be fashioned by reference to the nature of the matters in dispute and, proportionately, having regard to the complexity of the issues, the importance, monetary or otherwise, of the arbitration proceedings and the nature of the arbitral proceedings, expeditious or otherwise, as agreed between the parties.")

> context to the right of appeal available to parties. The arbitration award is the result of a private consensual mechanism intended to be shorn of the costs, complexities and technicalities often cited (rightly or wrongly, it matters not) as the indicia and disadvantages of curial decision making.
>
> That some difficult and complex arbitrations tend to mimic the procedures and complexities of court litigation may be a feature of some modern arbitration, but that can be seen perhaps more as a failing of procedure and approach rather than as reflecting any essential character of the arbitral process that would assist in a conclusion (erroneous in principle) that arbitrations should be equated with court process and so arbitrators should be held to the standard of reasons of judges.[95]

In making this statement, the *Westport* court implicitly harkens back to arbitration's first principles to support the need for a distinction in standards: in order for the mechanism to retain its advantages, the law must not impose a reasoning standard that detracts from its ability to deliver a speedy resolution. The imposition of a judicial standard risks having this effect.

Indeed, despite the tendency of arbitral tribunals to issue detailed and formal awards,[96] reduced length and intricacy may be justified by the nature of arbitration itself and the need to avoid the tediums of judgment drafting in the interests of the speed and efficiency fundamental to the dispute resolution

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[95] See *Westport Insurance 1*, *supra* note 94 at paras 216–17.

[96] See Strong, *supra* note 3 at 14, 40. This inclination can also produce formulaic or standardized awards, and is partly attributable to increased arbitral training and certification. As a whole, this trend has been criticized for allegedly making international arbitration too judicial: see e.g. Dalhuisen, *supra* note 82 at 4.

mechanism.[97] Promoting these qualities seems to entail a reasoning standard that allows tribunals to focus on relevant evidence and the crux of a dispute rather than one requiring that they expound upon contradictory evidence or controversial points of law. It has been found in the UK, for instance, that only evidence relied upon must be addressed in an award, notwithstanding objections thereto and allegedly key evidence introduced by the losing party.[98]

Divergence from other standards can also be justified on the basis that certain functions of reasons in other contexts, such as allowing for the determination of whether there are grounds to appeal or review an award, are of limited import in international arbitration, where there is only qualified judicial review and no judicial appeals on the merits.[99] Because of the purposefully limited[100] recourses available against an award in international arbitration, the level of detail required in an award is presumably less than if it were possible to appeal findings of fact and law, as is possible under domestic arbitration legislation.[101]

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[97] See also Dalhuisen, *supra* note 82 at 4–5.

[98] See e.g. *UMS Holding*, *supra* note 67 at para 134.

[99] An interesting question is whether greater detail may nonetheless be required of an international award where there is a possibility of appealing the award to an appellate arbitral panel: see e.g. American Arbitration Association, *Optional Appellate Arbitration Rules* (2013), effective November 1 2013, online (pdf) <https://www.adr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf>; CPR Institute, *Appellate Arbitration Procedure* (2015) effective 2015, online (pdf) <https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure/_res/id=Attachments/index=0/CPRArbitrationAppealProcedure2015.pdf>; JAMS, *Optional Arbitration Appeal Procedure* (2003), effective June 2003, online (pdf), <https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf?>.

[100] See Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford: Oxford University Press, 2015) at 569–70.

[101] As mentioned above, it has been found controversially in Australia that the level of detail in a complex arbitration that is subject to appeal should approximate that in a similar court case: see *BHP Billiton*, *supra* note 94 at

Moreover, ensuring that the public can 'see that justice be done,' another function of judicial reasoning, is also presumably less relevant in what is otherwise largely an autonomous, parallel, and confidential system of private dispute resolution.

On the other hand, justifying and explaining the result of a decision to the parties is an important purpose of reasoning in international arbitration just as in litigation. And so long as these reasoning standards remain generally similar, especially in their shared purposive approach, there will be an inclination to borrow from one another. Unlike with domestic arbitration,[102] Canadian courts have yet to explore the applicability of the modern, functional approach to reasoning requirements in international arbitration. The law of arbitration in Canada would benefit from clarity on this point. Nevertheless, given that those judicial and administrative standards are likely to continue to influence decisions concerning arbitral awards moving forward, they are worth discussing presently.

3. The Functional Approach to Reasoning

The general approach to determining reasons adequacy in Canada is well-established. The Supreme Court of Canada has developed an aforementioned 'functional' method of determining whether reasons are sufficient.[103] Especially at first instance, the purposes of delivering reasons in a decision are

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para 23. The High Court of Australia declined to endorse this approach: see *Westport Insurance 2*, *supra* note 94 at paras 49–56. See also Casey, *supra* note 2 at 372 ("In an arbitration decided under the Domestic Acts, where there is a possibility of an appeal on a question of law, it is useful to the court if the authorities relied on are set out with brief reasons as to the legal principles or conclusions taken from the cases but without a detailed analysis"). In the UK, the inability to review the factual findings of international awards has been cited as a justification for not requiring a thorough discussion of evidence in those awards: see *UMS Holding*, *supra* note 67 at para 134.

[102] See Part II(3).

[103] See generally *REM*, *supra* note 9; *McDougall*, *supra* note 9.

generally to justify and explain the result; to tell the losing party why they lost; to allow for the consideration of possible grounds for appeal or review; and to satisfy the public that justice has been done. As is evident below, it is most often the first and third functions that are explicitly at issue in reasons-related cases.

In *R v REM*, the Supreme Court found that reasons must show that the adjudicator "has seized the substance of the matter" and that "[p]rovided this is done, detailed recitations of evidence or the law are not required."[104] Whether the substance of a matter has been seized is assessed in light of the evidentiary record, the live issues at trial, and the submissions of counsel.[105] The court in *REM* also found that the level of detail in reasons could vary according to the circumstances. Less detailed reasons are permissible "in cases where the basis of the trial judge's decision is apparent from the record, even without being articulated," while more detailed reasons are called for "where the trial judge is called upon 'to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue.'"[106] This variance in detail according to the circumstances is a standard similar to that which has been imposed on arbitrators in other jurisdictions.[107]

The approach outlined in *REM* has also been adopted in administrative law. In *Clifford v Ontario (Attorney General)*, a case involving the review of an administrative tribunal decision, the Ontario Court of Appeal noted that, in light of the approach in *REM*, reasons are evaluated according to the purposes

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[104] *Supra* note 9 at para 43.

[105] *Ibid* at para 57.

[106] *Ibid* at para 44.

[107] For an Australian authority, see *Thoroughvision*, *supra* note 94 at para 55. See also Hayward & Ho, *supra* note 61 at 324. For a similar New Zealand authority, see *Ngati Hurungaterangi, supra* note 89 at para 63.

required of them.[108] In the administrative law context, this was found to include letting the individual whose rights, privileges, or interests are affected know why the decision was made, as well as allowing for effective judicial review.[109] As with court decisions, this was said to be accomplished if, when read in context, reasons demonstrate why the tribunal acted as it did. Specifically, "[t]he basis of the decision must be explained and this explanation must be logically linked to the decision made," meaning that the tribunal need not refer "to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision."[110] In the circumstances, the court held that evidence not referenced by the tribunal in question could not be assumed to be misapprehended and that the existence of evidence that was not referred to and that could have led to a different decision, as well as implicit findings of credibility and reliability, did not lead to a breach of the duty to provide reasons.[111] Rather, what might have otherwise been said and considered was held to be immaterial so long as what *was* said and considered as a basis for reaching conclusions on live issues was sufficient.

The Supreme Court of Canada has confirmed aspects of the reasoning standards set out above in two relatively recent matters. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, a domestic labour arbitration matter, the court noted the following:

> [R]easons may not include all the arguments, statutory provisions, jurisprudence or other

[108] *Supra* note 84 at para 29. See also *Gichuru v Law Society of British Columbia*, 2010 BCCA 543 at para 30.

[109] These somewhat reflect the Supreme Court of Canada's own historical comments on the desirability of administrative tribunals providing reasons: see e.g. *Northwestern Utilities Ltd and al v Edmonton*, [1979] 1 SCR 684 at 706.

[110] *Clifford*, *supra* note 84 at para 29.

[111] *Ibid* at paras 39–41.

> details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion … In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision ... the [relevant] criteria are met.[112]

The court also confirmed the purposes of reasons in *Canada (Minister of Citizenship and Immigration) v Vavilov*,[113] another administrative matter. Noting that reasoning standards are generally the same in administrative and judicial matters, and in discussing these reasons requirements generally, the court mirrored its decision in *REM* and cases that have followed, noting that reasons function to "explain how and why a decision was made ... show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner … [and] shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power."[114] The court also reiterated that reasons promote careful thinking and analysis in decision making as well as meaningful judicial review.[115]

Instances where the reasons of courts and administrative decision-makers have been found to be inadequate since the advent of modern reasoning standards include where there was

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[112] 2011 SCC 62 at para 16 [*Nurses*].

[113] *Supra* note 5.

[114] *Ibid* at para 79.

[115] *Ibid* at paras 79–81.

a failure to outline the rationale for rejecting key evidence;[116] a failure to consider a key piece of evidence or failure to resolve conflicting evidence on a key issue;[117] a failure to explain the reasons for preferring certain evidence over others on central issues;[118] a failure to adequately address key issues;[119] and a failure to provide reasons for certain findings and conclusions or to provide an evidentiary basis for those findings.[120] Recent instances where courts have found that reasons *were* adequate include a decision citing the *types* of clauses relied upon without

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[116] See e.g. *Guttman v Law Society (Manitoba)*, 2010 MBCA 66 at para 62; *College of Physicians & Surgeons (Ontario) v Noriega*, 2012 ONSC 4084 at para 4.

[117] See e.g. *McCormick v Greater Sudbury Police Service*, 2010 ONSC 270 at paras 109–170; *Brown, supra* note 84 at paras 53-110; *Martin v Barnett*, 2015 BCSC 426 at paras 48–51 [*Martin*]; *Ottenbreit v Paul*, 2015 SKQB 326 at paras 68–69, 7 Admin LR (6th) 293; *Guelph Taxi Inc v Guelph Police Service*, 2016 ONSC 7383 at paras 8-9 (Div Ct); *Dhesi v Canada (Attorney General)*, 2018 FC 519 at paras 17–26; *Simpson v 603418 Ontario Inc*, 2018 ONSC 5156 at para 81 (Div Ct) [*Simpson*]. But see *Canadian Property Holdings Inc v Winnipeg (City) Assessor*, 2012 MBCA 118 at paras 12–15 [*Canadian Property Holdings*] (the court finds that the preference of certain evidence over others could be ascertained by the record and did not require justification).

[118] See e.g. *Sharif v Alberta (Workers' Compensation Board Appeals Commission)*, 2011 ABCA 75 at paras 15–16; *Mackenzie v British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 354 at paras 57–68. But see *Gallant v Brake-Patten*, 2012 NLCA 23 at paras 123–25, leave ref'd [2012] SCCA No 257 (the court finds that preferring certain evidence over others can be done implicitly).

[119] See e.g. *Lloyd v Alberta (Transportation Safety Board)*, 2012 ABQB 443 at paras 52–58; *Business Development Bank of Canada v Noble*, 2013 NLCA 63 at paras 64–68; *Wall v Independent Police Review Director*, 2014 ONCA 884 at paras 48–67; *New Brunswick Legal Aid Services Commission v Paulin*, 2017 NBQB 92 at paras 38–43; *Simpson, supra* note 117 at para 81.

[120] See e.g. *Brian Neil Friesen Dental Corp v Manitoba (Director of Companies Office)*, 2011 MBCA 20 at paras 85–99; *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at paras 100–106; *Figueiras v York Police Services Board*, 2013 ONSC 7419 at paras 58–74; *Eng v Vancouver (City)*, 2014 BCSC 1001 at paras 40–56; *Martin, supra* note 117 at para 48.

citing the specific clauses at issue;[121] where, despite certain gaps in the weighing of evidence, the impugned conclusions were supported by the evidence as a whole;[122] where, despite their terseness, the reasons provided a sufficient understanding of why the adjudicator made findings of fact or law;[123] and where, despite certain arguments on an issue or aspects of an issue not being addressed, the reasons still met the incumbent standards in deciding the issue.[124]

As mentioned, the functional approach to reasoning has also been employed in the domestic arbitration context. In the recent case of *Wang v Takhar*, for example, a domestic award was challenged *inter alia* on the basis that it failed to make explicit findings of fact on a live issue.[125] In reviewing the award, the court looked to judicial standards and administrative law cases for guidance in assessing the adequacy of the reasons in question. Notably, it cited with approval the Ontario Court of Appeal's decision in *Gholami v The Hospital of Sick Children*, which reiterates the purposes of reasons in the judicial context; namely, justifying and explaining the result, informing the losing

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[121] See e.g. *BTC Properties II Ltd v Calgary (City)*, 2012 ABCA 13 at paras 17–21.

[122] See e.g. *Wood-Tod v The Superintendent of Motor Vehicles*, 2020 BCSC 155 at paras 66–84. See also *Burgess v Stephen W Huk Professional Corp.*, 2010 ABQB 424 at para 110; *Connors v Mood Estate*, 2011 NSSC 287 at para 22; *Moïse c Canada (Citoyenneté et Immigration)*, 2019 FC 93.

[123] See e.g. *Shannon v Shannon*, 2011 BCCA 397 at para 27; *Canadian Property Holdings*, *supra* note 117 at paras 12–15; *Card v Alberta (Minister of Health)*, 2014 ABQB 763 at paras 41–45; *Sautner v Saskatchewan Teachers' Federation*, 2017 SKCA 65 at paras 55–63; *Long*, *supra* note 80 at paras 62–63; *Mak v Vancouver (City) Board of Variance*, 2018 BCSC 888 at paras 17–23; *Hristova v CMA CGM (Canada) Inc.*, 2019 FC 1611 at paras 19–42; *Wan v The National Dental Examining Board of Canada*, 2019 BCSC 32 at paras 139–70.

[124] See e.g. *Garbutt v British Columbia (Minister of Social Development)*, 2012 BCSC 1276 at paras 7–14; *Phillips Legal Professional Corporation v Vo*, 2017 SKCA 58 at para 118; *Ménard c Canada (Attorney General)*, 2018 FC 719 at paras 18–32.

[125] 2019 ONSC 5535 [*Wang*].

party why they lost, enabling informed consideration as to whether to appeal, and allowing the public to determine whether justice has been done.[126] The court in *Wang* noted that case law had established that "reasons are sufficient if they show *why* the judge arrived at the decision" and that "it is not necessary for the reasons to demonstrate *how* the judge reached a decision," meaning that only relevant evidence need be mentioned.[127] Turning to the award, the court applied these authorities and held that certain parts of the reasons in question were inadequate because they failed to make comprehensible why an aspect of the award was rendered. Specifically, there were no discernable findings linking the evidence to the conclusion on the issue in question.[128] It was therefore not possible for the losing party to understand why part of the award was made against them.[129]

The relationship between domestic arbitration, judicial reasoning standards, and the functional approach generally was made explicit in a prior decision by the name of *Peters v D'Antonio*.[130] In that case, Thomas J of the Ontario Superior Court of Justice set aside an award because it did not provide reasons, contrary to applicable legislation. In determining what was required of reasons in domestic arbitration, the court

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[126] *Supra* note 84 at para 63. For another recent decision noting the importance of reasons in domestic awards to permitting appellate review and ensuring public confidence, see *Wawanesa Mutual Insurance Company v Renwick*, 2020 ONSC 2226 at para 52 [*Wawanesa*].

[127] *Supra* note 125 at para 60 [emphasis added]. See also *Wawanesa*, *supra* note 126 at para 52.

[128] *Wang*, *supra* note 125 at paras 71–72.

[129] For another decision setting aside an award in the domestic arbitration context for failure to explain why a decision was made, see *Tall Ships Landing Devt Inc. v City of Brockville*, 2019 ONSC 6597 at paras 51–61. The emphasis on the importance of clearly linking evidence to findings is redolent of the prevailing approach in the United Kingdom: see *Bremer*, *supra* note 90 at 132–33.

[130] *Supra* note 84.

described the development and foundations of modern reasoning requirements as follows:

> The modern approach to the delivery of reasons can be traced to the decision of Binnie J. in *R. v. Sheppard*, [2002] 1 S.C.R. 869 (S.C.C.) (*Sheppard*). Dealing with a mere five lines of reasons for conviction in a criminal case from Newfoundland, Binnie J. said the following at para. 24:
>
>> [T]he requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the reasons justify and explain this result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.
>
> The view of the Supreme Court of Canada on the topic of reasons was modified by the Chief Justice in the Court's 2008 decision in *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3 (S.C.C.). There, she adopted the functional approach to the adequacy of reasons. While agreeing with the three purposes set out in Sheppard above, the Chief Justice at para. 16 directed that the reasons must be considered in context with the evidence, the issues and arguments at trial.
>
> There is no doubt based on the progeny of *Sheppard* and *M. (R.E.)*, that the duty to deliver reasons applies not just to criminal cases, but to family and civil trials and motions as well as

> rulings of boards and tribunals. In addition, *it is statutorily mandated here*.[131]

The effect of the finding on the law applicable to reasons was seemingly to incorporate the functional approach into domestic arbitration. The court found that the award should be set aside for want of reasons *inter alia* because "[t]he applicant here is entitled to know why his position on the arbitration did not prevail and to assess his options, if any. If an appeal results, the court requires reasons to review and other members of the public, perhaps those working in real estate, would benefit from the explanation of how the dispute was resolved."[132]

This development in domestic arbitration begs the question: will and should reasoning standards for international arbitration mirror their domestic counterparts? While an exhaustive canvassing of this question is beyond the scope of our analysis, the following observations seem material. Firstly, given domestic arbitration's ready use of certain judicial and administrative reasoning standards, it would be undesirable if an assimilation of international and domestic standards had the effect of incorporating more exacting tests for reasons adequacy through the backdoor. Courts in many jurisdictions, including robust venues for arbitration, have drawn nuanced distinctions between curial and arbitral standards on the basis that an assimilation would otherwise have a deleterious effect on arbitration's ability to deliver swift and cost-effective resolutions to disputes. Canadian courts would be well-served to have this in mind when determining the extent to which international arbitration should follow its domestic counterpart. Secondly, however, the primary effect of assimilating domestic and international standards would likely be extending the application of the functional approach to reasons adequacy to international arbitration—an adaptation for which the existing purposive test for reasons adequacy in

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[131] *Ibid* at paras 25–27 [emphasis added].

[132] *Ibid* at para 39.

international arbitration is, as mentioned, well-suited. Thirdly, in assessing reasons according to their purposes in a given context, the functional approach to reasons adequacy leaves enough room for arbitration's particularities to be accounted for in the analysis. Whether reasons let the parties know why the decision-maker decided as it did and allow the parties to ascertain grounds for review can have different answers as to the required rigour of evidentiary and legal reasoning depending on the decision-maker and nature of the proceeding—be it arbitration, an administrative matter, or a court case. These questions may even have different answers in domestic and international arbitrations, where the availability of appeals on the merits for the former seems to call for more detailed reasons in order to allow for an effective review. Indeed, most Canadian domestic arbitration statutes provide for appeals of awards to the courts. It would therefore seem appropriate for reasoning standards in domestic arbitration to be more robust than their international counterpart, even if not entirely derivative of judicial standards.

Ultimately, the cases mentioned in this Part make clear that reasoning standards in Canada will likely continue to intermingle in light of the commonalities in the curial review of first-instance decisions. Moreover, *Peters* and other domestic arbitration decisions[133] suggest that judicial and administrative reasoning standards, and the modern, functional approach to reasoning more generally, will likely continue to be influential in the domestic arbitration context. It remains to be determined whether the more general standards applicable to other adjudicators will also come to guide standards for reasoning in international arbitration in kind. Clarity on this point is crucial, as it will inform whether an international arbitration award can be recognized and enforced in Canadian jurisdictions—a process discussed below.

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[133] See *Wang*, *supra* note 125; *Wawanesa*, *supra* note 126.

III. SETTING ASIDE, RESISTING RECOGNITION AND ENFORCEMENT OF AWARDS FOR WANT OF REASONS

Provincially and federally, recognition and enforcement proceedings are generally governed by legislation adopting the *New York Convention* and *Model Law*.[134] In Quebec, recognition and enforcement is governed by the CCP, which provides a similar framework.[135] Set-aside proceedings are also governed by legislation incorporating the substance of the *Model Law*.[136]

International arbitration legislation is considered to be a complete code in Canada.[137] Courts will refrain from looking beyond applicable legislation in determining whether to interfere with an award,[138] and applications alleging reasons-related issues must therefore be framed within a ground in said legislation. While insufficient reasons may indeed be an error of

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[134] See nn 14–25.

[135] See *supra* note 27, art 653.

[136] See nn 14–25, 27.

[137] In the recognition and enforcement context, see *CJSC "Sanokr-Moskva" v Tradeoil Management Inc*, 2010 ONSC 3073 at para 28, leave ref'd 2010 CarswellOnt 9192; *Activ Financial Systems, Inc v Orbixa Management Services Inc.*, 2011 ONSC 7286 at para 66 [*Activ Financial Systems*]. In the set-aside context, see *United Mexican States v Karpa*, 2003 CanLII 34011 at paras 52–53 (Ont SC); *Consolidated Contractors Groups S.A.L. v Ambatovy Minerals S.A*, 2016 ONSC 7171 at para 13, aff'd 2017 ONCA 939, leave ref'd 2018 CanLII 99661 (SCC) [*Consolidated v Ambatovy*]. This suggests that parties are unable to expand the scope of judicial review to include such things as relief against legal errors—a constraint similar to that in the US: see *Hall Street Associates, LLC v Mattel, Inc*, 552 US 576 (2008). Born has criticized restrictive approaches of this nature as being contrary to party autonomy: *supra* note 35 at 3378. Legislation in Israel and Hong Kong, for instance, explicitly permits heightened review: see Hong Kong, *An Ordinance to reform the law relating to arbitration, and to provide for related and consequential matters*, 2011, Schedule 2, §5; Israel, *Arbitration Law, 5728-1968*, s 29B.

[138] This is required where the proceedings are governed by legislation incorporating the *Model Law* privative clause: see e.g. *BC Act*, *supra* note 16, s 5.

law on the face of the record,[139] they are not a stand-alone ground for setting aside or resisting the recognition and enforcement of an award.[140] Moreover, as is the case in these proceedings generally,[141] Canadian jurisprudence on the issue

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[139] See *Blanchard v Control Data Canada Ltée*, [1984] 2 SCR 476 at 500 [*Blanchard*]. See also *Murphy v Murphy*, 2013 ONSC 7015 at para 37, rev'd on unrelated grounds 2015 ONCA 69.

[140] See *Schreter v Gasmac Inc* (1992), 89 DLR (4th) 365 at 377 (Ont Ct J [Gen Div]) [*Schreter*]; *Activ Financial Systems*, *supra* note 137 at para 51. See also Casey, *supra* note 2 at 442.

[141] An oft-cited excerpt from Campbell J's decision in *Mungo v Saverino*, 1995 CarswellOnt 3298 at paras 71–73 (Ont Ct J [Gen Div]) is as follows: "[t]he great merit of arbitrations is that they should be, compared to courts, comparatively quick, cheap, and final. There is a trade-off between perfection on the one hand and speed, economy, and finality on the other hand. If you go to arbitration, you can get quick and final justice and you can get on with your life. If you go to court, you can get exquisitely slow and expensive justice and you can spend the rest of your life enduring it and paying for it. ... For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second guess other tribunals and thus defeat the greatest benefit of arbitration, its finality. ... It is therefore important for the court to resist its natural tendency, faced with a clear and attractive argument on jurisdiction and natural justice, to plunge into the details of the arbitration and second-guess the arbitrator not only on the result but also on the punctilio of the process. If an arbitration is basically fair, courts should resist the temptation to plunge into detailed complaints about flaws in the arbitration process." See also *Quintette Coal Ltd v Nippon Steel Corp.* 1990 CarswellBC 232 at para 32: "The 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes' ... are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia." This holding has been interpreted as prescribing a narrow scope of possible intervention in international awards: see e.g. *Food Services of America Inc v Pan Pacific Specialties Ltd* (1997), 32 BCLR (3d) 225 at paras 14–15 (BC SC) [*Food Services of America*]; *Domotique Secant inc v Smart Systems Technologies Inc*, 2005 CanLII 36874 at para 22 (QC CS), aff'd 2008 QCCA 444. See also *Rhéaume*, *supra* note 60 at para 47. The principle of non-intervention and

of reasons has reflected the need to ensure finality in arbitral awards.[142] Only in exceptional cases will an award be set-aside or refused recognition and enforcement for want of reasons. Indeed, the following discussion suggests that an award will likely only be interfered with if the reasons are so defective that they impact the award's outcome or prevent its outcome from being ascertained.

1. Reasons-Related Grounds for Set-Aside, Resisting Recognition & Enforcement

Bases for resisting awards can fit within multiple grounds, which can themselves overlap and bleed into one another.[143] Nevertheless, the more relevant grounds for resisting recognition and enforcement or setting aside awards for want of reasons in Canada have proven to be related to arbitral procedure and public policy. Grounds that have received less favourable treatment by the courts in this regard or whose interpretation seem less congruous with this basis are procedural fairness and jurisdiction. And despite the difference in purposes served by set-aside and recognition and enforcement provisions, the similarities between the *Model Law* and *New York Convention* in terms of language and criteria for

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need to uphold awards is also of long standing in the UK: see e.g. *S v A and another*, [2016] EWHC 846 (Comm) at para 48; *Broadsheet*, *supra* note 62 at para 17. These cases reference Lord Bingham's guidance in *Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd*, [1985] 2 EGLR 14. For a US authority along the same lines, see *Cat Charter LLC v Schurtenberger*, 646 F 3d 836 at 842 (11th Cir 2011).

[142] For a similar Swedish authority on finality and arbitral reasoning, see *Soyak v Hochtief*, T-4387-07, (2009), Swedish Supreme Court [*Soyak*].

[143] See United Nations Commission on International Trade Law, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, UNCITRAL OR, 2012 at 145.

resisting awards are such that the same analysis is presumably performed in both instances.[144]

a. Arbitral Procedure[145]

The failure to follow arbitral procedure denotes situations where the arbitration did not conform with either the agreement of the parties or the applicable law. Courts and commentators alike are of the opinion that a want of reasons could constitute such a failure where reasons are required by law or by agreement.[146]

In *Navigation Sonamar*,[147] Gonthier J examined whether the reasons in an award constituted a defect in procedure according to whether these had disposed of the claims submitted,

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[144] See generally, for example, *Corporacion Transnacional de Inversiones, SA de CV v STET International, SpA* (1999), 45 OR (3d) 183 (SC), 1999 CarswellOnt 2988, aff'd 49 OR (3d) 414 (CA), leave ref'd [2000] SCCA No 581 [*Corporacion Transnacional*]; *Louis Dreyfus, s.a.s. (SA Louis Dreyfus & Cie) c Holding Tusculum, b.v.*, 2008 QCCS 5903 [*Louis Dreyfus*]. In both decisions, the court cites the *Model Law* and *New York Convention* for the same propositions.

[145] See *Model Law*, *supra* note 6, arts 34(2)(a)(iv), 36(1)(a)(iv); *New York Convention*, *supra* note 13, art V(1)(d).

[146] See *Metalclad*, *supra* note 39 at paras 126, 129; Blackaby, *supra* note 100 at 590. See *contra Food Services of America*, *supra* note 141 at para 32 (wherein the court rejects the notion that the issuance of reasons "after the fact" can be characterized as being part of the arbitral procedure). See also the French position, which is that, with the exception of due process or public policy violations, reasons may not be reviewed by a court examining the validity of an award: Cour de cassation, chambre civile, 14 June 2000, XXVI YB Comm Arb 270 at 271–72; Cour de cassation, chambre civile, 11 May 1999, 1999 Rev arb 811. Along these same lines, see in the US e.g. *Halliburton Energy Services, Inc v NL Industries*, 553 F Supp 2d 733 at 780 (SD Tex 2008): "Even if a reviewing court questions the procedures the panel followed, vacatur for procedural defects may not result unless the effect was to deprive a party of due process. … The fact that an arbitration award contains inconsistencies is similarly not sufficient for vacatur."

[147] *Supra* note 63 at 6, 13–16.

explained the result, and allowed grounds for review to be ascertained. The reasons in the circumstances were held to be sufficient because they addressed the issues submitted to arbitration by laying out the conclusions and facts upon which these were based. Despite lacking reasoning as to the applicable law, the award sufficiently disposed of the claims and was clear enough to ascertain grounds for review. The award's reasons were therefore adequate and the award thus conformed with the applicable procedure.

More recently, *Metalclad* was another instance where an award was the object of an application for set-aside on the ground that its reasons were in breach of the applicable procedure. As with *Navigation Sonamar*, the *Metalclad* court looked to whether the award dealt with the issues submitted in determining if there had been a breach. It also stated, however, that in the absence of an express ground of annulment for insufficient reasons like that in the *ICSID Convention*,[148] the severity of the breach would be a key consideration.[149] In the circumstances, Mexico unsuccessfully argued that the arbitral procedure had been breached because, while the award in question broached the issues submitted, it did not address certain arguments related to those issues.

If the adequacy of reasons is assessed according to their purposes, including explaining why a tribunal ruled the way it did on the issues submitted and allowing for the ascertainment of grounds for judicial review, one can imagine a more problematic situation than those above wherein an award attempts to address an issue but the reasons are ultimately insufficient according to the standards discussed in Part II(1). This could perhaps be due to a marked lack of coherence or intelligibility, constituting a failure to deal with the issue

[148] *Supra* note 38, art 52(1)(e).

[149] *Supra* note 39 at para 129.

altogether.[150] Such a situation might also arise where the reasons are so terse that they fail to demonstrate that an issue has been addressed.[151]

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[150] Intelligibility was indeed mentioned as a criterion by the authorities relied on in *Navigation Sonamar*: see *supra* note 63 at 12. For foreign authorities finding that a lack of coherence in an arbitral award constitutes defective reasoning, see e.g. Cairo Court of Appeal, 5 May 2009, Case No 112/124; Court of Cassation, Tunisia, 27 November 2008, Case No 20596/2007; Corte di cassazione, Italy, *SpA Abati Legnam (Italy) v Fritz Häupl* (1992), XVII YBCA 529. In the Swiss domestic context, see Swiss Federal Court, 5 August 2013, 4A-214/2013 at para 5.2.5. Albeit on the basis of a more exacting reasoning standard and a stand-alone ground for annulment, ICSID ad hoc committees have also annulled awards because of a lack of coherence or intelligibility: see e.g. *Maritime International Nominees Establishment v Republic of Guinea*, ICSID Case No ARB/84/4, Decision on Annulment of the Award, at paras 6.98–6.107 (January 6, 1988); *Mr. Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on Annulment of the Award, at paras 34–41 (November 1, 2006); *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision on Annulment of the Award, at paras 89–100 (September 25, 2007). Born submits that the ability to interfere with an award for incoherence should be interpreted narrowly, not leading to an award being interfered with unless the relief granted is irreconcilable with itself, and that courts should assume that tribunals meant to render a coherent decision: see *supra* note 35 at 3360. In Italy, the irreconcilability analysis is limited to the dispositive portion of the award: see Corte di Appello, Milan, 29 April 2009, *CG Impianti SpA v BMAAB and Sons International Contracting Company WLL*, XXXV YB Comm Arb 415. See also Dalhuisen, *supra* note 82 at 32, 36. It has also been held that reasoning so incorrect that it constitutes a failure to explain the award may serve as a basis for interfering with an award: see e.g. Hoge Raad, Netherlands, 8 January 2010, BK 6056, Hoge Raad, 08/02129. There is also a question here as to whether frivolous reasons, which are manifestly irrelevant and knowingly so, might also constitute a ground for interfering with an award. This has been found to be the case in ICSID investment arbitration: see e.g. *Caratube International Oil Company LLP v The Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision on Annulment of the Award, para 102 (21 February 2014).

[151] In the Indian context, see *Gora*, *supra* note 78.

As with other jurisdictions,[152] however, procedural defects must ultimately impact the integrity of the arbitration to justify interference with an award by Canadian courts on procedural grounds.[153] Limiting which procedural defects give rise to interference with an award can be explained either in terms of the ground's narrow interpretation or in terms of the courts' openness to using their residual discretion to refuse to interfere with awards,[154] discussed further in Part III(2). As such, it would seem that a want of reasons only constitutes a sufficiently serious procedural defect if this affects the outcome in the award or inhibits the ability to ascertain said outcome.[155] If the

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[152] In the UK, see e.g. *Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS*, [2011] EWHC 3383 (Comm). Therein, the court refused to set aside an award on the basis that a witness misled the tribunal because even truthful testimony would probably not have affected the outcome of the arbitration. For a decision out of Hong Kong, see e.g. *Wuzhou Port Foreign Trade Development Corporation v New Chemic Ltd* [2000] HKCFI 1143 at para 18: the court refuses to set aside an award for a procedural breach of a "technical" nature.

[153] See Bachand & Gélinas, *supra* note 54 at 475–76. The authors note that this standard could require either a violation that affects the integrity of the process as a whole or a breach procedural fairness, and that, while also requiring a violation of public policy in the latter situation might be going too far, "[r]equiring something more than a minor or formal breach of the applicable procedure ... is clearly appropriate."

[154] See *ibid*.

[155] This would align somewhat with the UK standard. Authorities have held that defective reasoning is not a serious irregularity, so as to serve as a basis for setting aside an award, unless this constitutes a failure to deal with a claim or a defence thereto altogether: see e.g. *Margulead*, *supra* note 82 at paras 41–43. See also *Compton Beauchamp Estates*, *supra* note 74 at paras 41–56 (the court finds that only a failure to provide adequate explanations for decisions on non-inconsequential issues may result in a substantial injustice so as to provide grounds for setting aside an award). See also *Broadsheet*, *supra* note 62 at paras 54–62. Duly note that, unlike in Canadian legislation, the *UK Act* provides for a specific basis for resisting awards for want of reasons: see *supra* note 82, s 68(2)(d). In Sweden, see *Soyak*, *supra* note 142 (noting that only a total lack of reasons or reasons that are so deficient that they equate to a total lack of reasons may constitute a procedural error.).

essential elements of an award can instead be gleaned from the record, defective reasons are unlikely to constitute an adequate basis for resisting the award.[156]

b. Procedural fairness[157]

Related to the argument that an award can be resisted for want of reasons because it fails to heed applicable arbitral procedure is the argument that an award can be resisted for want of reasons because this breaches the parties' right to procedural fairness. Parties have argued with some frequency that a want of reasons on an issue violates the right to be heard and natural justice rights more broadly.[158] This is distinguishable from instances where a tribunal adequately discussed an issue but failed to give a party an opportunity to be heard on said issue.

In Canada, courts have found that procedural fairness in international arbitration includes the right to notice, to be heard, and to fair and equal treatment.[159] While there is longstanding authority in the administrative law space for the proposition that a failure to provide reasons where required does violate the duty of fairness,[160] some courts have taken the view that a failure to provide reasons does not fall within the

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[156] See Part III(2).

[157] See *Model Law*, *supra* note 6, arts 34(2)(a)(ii), 36(1)(a)(ii); *New York Convention*, *supra* note 13, art V(1)(b).

[158] See e.g. *Consolidated Contractors*, *supra* note 81 at paras 59–61; *Schreter*, *supra* note 140 at 376; *Coderre*, *supra* note 76 at paras 119–136; *Canadian Royalties*, *supra* note 74 at paras 110–17.

[159] See e.g. *Schreter*, *supra* note 140 at 376; *Depo Traffic*, *supra* note 81 at para 40; *Bayview Irrigation*, *supra* note 39 para 14; *Corporacion Transnacional*, *supra* note 144 at paras 31–33. For further discussion, see Andrea Bjorklund & Benjamin Jarvis, "Country Report: Canada" in Franco Ferrari et al, eds, *Due Process as a Limit to Arbitral Discretion in International Commercial Arbitration* (Wolters Kluwer, 2020).

[160] See *Baker*, *supra* note 11 at para 43.

duty's ambit in international arbitration. In *Schreter v Gasmac Inc*,[161] for instance, Feldman J, then of the Ontario Superior Court of Justice, presided over an application to recognize and enforce a US award that was resisted *inter alia* on the basis that its lack of reasons breached the respondent's natural justice rights. In rejecting that argument, Feldman J stated the following:

> The components of natural justice referred to are notice and the ability of the respondent to present its case. There is no issue on these two matters raised in this case. The respondent had adequate notice of the arbitration and full opportunity to present its case through counsel with presentation of evidence and legal briefs. … The [*Model Law* duty] does not refer to the lack of reasons for an award, nor to error of law on the face of the record.[162]

Due process infractions have been found to serve as a basis for resisting an award only in the gravest of breaches. In the leading case of *Corporacion Transnacional de Inversiones, SA de CV v STET International, SpA*,[163] Lax J of the Ontario Superior Court of Justice found that judicial intervention in these cases is warranted only when a tribunal's conduct is so serious that "it cannot be condoned under the law of the enforcing state," mentioning circumstances like bribery, corruption, and the like.[164] More recently, in *Consolidated v Ambatovy*, Penny J cited with approval the notion that transgressions of this nature

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[161] *Supra* note 140.

[162] *Ibid* at 376.

[163] *Supra* note 144.

[164] *Ibid* at para 34.

occur where there is "such a mishandling of the arbitration as to likely amount to some substantial miscarriage of justice."[165]

A failure to provide adequate reasons would not appear to fall within the ambit of those definitions in and of itself.[166] Indeed, to date, successful due process-related challenges to arbitral awards in Canada have been largely related to failures to provide notice of a hearing or the opportunity to make submissions on an issue.[167] The Supreme Court of Canada's *Nurses* decision also buttresses the notion that poor reasons do not constitute a procedural fairness violation:

> It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach.[168]

Though decided in the labour arbitration context, *Nurses* supports the view that inadequate reasons do not serve as a basis for a challenge to an award for procedural fairness.

It should also be noted, however, that certain foreign courts have viewed disposing of the claims or issues submitted as being a component of due process in international arbitration.[169]

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[165] *Supra* note 137 at para 63.

[166] But see Hanseatisches Oberlandesgericht Hamburg, Germany, 8 June 2001, 11 Sch 01/01 (wherein the court suggests that poor reasoning amounting to a lack of reasoning may violate the parties' right to be heard).

[167] See e.g. *Rusk Renovations Inc v Dunsworth*, 2013 NSSC 179 at paras 19–32; *Louis Dreyfus*, *supra* note 144 at paras 71–105; *Universal Settlements International Inc v Duscio*, 2012 ONCA 215 at paras 31–42, 349 DLR (4th) 181. See also Bjorklund & Jarvis, *supra* note 159 at 99–101.

[168] See *supra* note 112 at para 22 [emphasis original]. But see *Blanchard*, *supra* note 139 at 500–01.

[169] See e.g. Swiss Fed Trib, Lausanne, 26 May 2010 (2010), at para 2.1, 4A-433/2009 (Switzerland): "the right to be heard in contradictory proceedings does not require an international arbitral award to be reasoned. However, a

Schreter was issued before these later authorities, and a deciding factor in that case was that the essential elements of the award were clear despite the lack of reasons.[170] As such, local courts may yet be receptive to the argument that a complete failure to dispose of an issue or claim in an award constitutes a violation of procedural fairness. It stands to reason that an award that does not provide reasons and fails to deal with an issue or claim altogether could prove to be a more promising basis for a challenge on this ground.[171] Given the seeming immateriality of the duty to provide reasons to this exercise, however, it does not appear that this violation of procedural fairness would be directly related to a breach of a duty to provide reasons. This is because it is the lack of conclusions on the claims submitted and therefore the failure to be heard on said claims, rather than the existence and quality of the reasons for said conclusions, that are under examination.

c. *Public policy*[172]

The public policy ground for resisting awards has been construed narrowly in Canada. Professors Frédéric Bachand, as

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minimum duty for the authority to examine and deal with pertinent issues has also been deducted from the right to be heard. … there is a violation of the right to be heard only to the extent that the authority does not comply with its minimum duty to examine pertinent issues." See also Swiss Fed Trib, Lausanne, 22 March 2007, *Cañas v ATP Tour* (2007) at para 5.2, 4P 172/2006 (Switzerland); Fabricio Fortese & Lotta Hemmi, "Procedural Fairness and Efficiency in International Arbitration" (2015) 3:1 Groningen J Int'l L 110 at 112.

[170] *Supra* note 140 at 376–77.

[171] However, Born submits that a challenge to an award of this nature is better approached under the rubric of unreasoned awards rather than as a denial of the opportunity to be heard: see *supra* note 35 at 3254. See also *Consolidated v Ambatovy*, *supra* note 137 at para 50 (wherein the court notes that there is a distinction between the failure to deal with a claim and the failure to provide reasons for a conclusion on a claim).

[172] See *Model Law*, *supra* note 6, arts 34(2)(b)(ii), 36(1)(b)(ii); *New York Convention*, *supra* note 13, art V(2)(b).

he was formerly, and Fabien Gélinas remark that public policy violations have been variously described by the courts as occurring only where an award "offends local principles of justice and fairness in a fundamental way ... fundamentally offends the most basic and explicit principles of justice and fairness; or if [an award] is contrary to the essential morality."[173] Chiappetta J of the Ontario Superior Court of Justice has also expressed approval of the notion that public policy may only be successfully invoked if the award "involves an act that is illegal in the forum or if the action involves acts repugnant to the orderly functioning of the social or commercial life of the forum."[174] It should also be noted that, in Quebec, *ordre public*—the civilian equivalent to public policy—is defined not through domestic notions of the concept but rather as it is understood in international relations.[175] An award can therefore transgress local public policy but still be valid.[176]

Despite its narrow interpretation, public policy has been endorsed as a means of resisting an award for reasons-related issues.[177] In *Domotique Secant inc v Smart Systems Technologies*

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[173] See *supra* note 54 at 478.

[174] See *Depo Traffic*, *supra* note 81 at para. 47*.* See also *1552955 Ontario Inc v Lakeside Produce Inc*, 2017 ONSC 4933 at paras 82–83. For a further discussion of the nature of the public policy ground in Canada, see Casey, *supra* note 2 at 442–48.

[175] See art 3155(5) CCQ; *Domotique Secant inc v Smart Systems Technologies Inc*, 2008 QCCA 444 at paras 16–19 [*Smart Systems Technologies*].

[176] See *Smart Systems Technologies*, *supra* note 175 at para 19.

[177] This diverges from a consistent line of Swiss decisions: see e.g. Swiss Fed Trib, Lausanne, 12 December 1975, *Provenda SA v Alimenta SA* (1975), at s 527 (Switzerland) (the court finds that the duty to give reasons is not part of public policy, noting that the duty can be waived, a default can be cured in subsequent proceedings, and that a default is not an obstacle to enforceability in certain circumstances); Swiss Fed Trib, 21 August 1990, BGE 116 II 373 at 375; Swiss Fed Trib, 9 December 2003, BGE 130 III 125 at 130; Swiss Fed Trib, 15 March 2011, 4A-481/2010 at para 4.

Inc,[178] the Quebec Court of Appeal stated in *obiter* that an award would be null if it did not contain reasons where these were required by law. Such an occurrence was said to be against public order and violate subparagraphs 4 and 5 of article 950 (now article 653) CCP. The court noted that, where an award did not contain reasons despite their having been required, "[w]hat most offends the sense of fairness, order as between the litigants, and consequently public order, is not that an award is rendered without reasons, but that it is rendered without reasons contrary to the wishes of the parties."[179] The court cautioned, however, that a lack of reasons could be an insufficient basis for annulment if the essential elements of the award are nevertheless clear.[180] Similarly, Gonthier J's decision in *Navigation Sonamar* notes that reasons that are present but lacking do not breach public policy in and of themselves. It is rather the impact or materiality of the breach that dictates whether an award is contrary to public policy.[181]

[178] *Supra* note 175.

[179] *Ibid* at para 25.

[180] *Ibid* at paras 21–23. For a US authority on this point, see *Metropolitan Dist Com'n v AFSCME, Council 4, Local 184*, 89 Conn App 680 at 686 (Conn App Ct 2005).

[181] *Supra* note 63 at 10. This of course begs the question: what poor reasoning constitutes a material breach sufficient to succeed in a challenge to an award on public policy grounds? For an Austrian decision on the interaction between poor reasoning and public order, see Austria Supreme Court, 28 September 2016, No 18 OCg 3/16i. In the US context, see *Jamaica Commodity Trading Co Ltd v Connell Rice & Sugar Co, Inc*, 1991 WL 123962 at 5 (NY Dis Ct) (where an award was challenged for ambiguity on public policy grounds). A challenge for poor reasons on this ground being possible raises the question of whether reasoning that is contrary to public policy is the same as inadequate reasoning on procedural grounds.

d. Jurisdiction[182]

In addition to procedural and public policy grounds, courts in some fora have found that awards may be resisted for want of reasons on the basis that these are outside an arbitrator's jurisdiction.[183] Here, the theory is that, in failing to provide adequate reasons, the tribunal fails to arbitrate the dispute in accordance with the parties' agreement and therefore exceeds its jurisdiction.[184] This basis seems to be outside the ambit of what is understood to be captured by this ground in international arbitration in Canada, however. An oft-cited Ontario Court of Appeal decision titled *United Mexican States v Cargill Inc* holds that this ground is only concerned with 'true' questions of jurisdiction, i.e., "whether the tribunal dealt with a matter beyond the submission to arbitration, [and] not how the tribunal decided issues within its jurisdiction."[185] A want of reasons would seem to fall quite clearly into the latter category.

While Canadian courts have stopped short of determining whether a want of reasons constitutes a jurisdictional error in international arbitration,[186] the US case of *Caja Nacional de Ahorro Y Seguros in Liquidation v Deutsche Ruckversicherung AG*[187] aptly demonstrates the interaction between reasons

[182] See *Model Law*, *supra* note 6, arts 34(2)(a)(iii), 36(1)(a)(iii); *New York Convention*, *supra* note 13, art V(1)(c).

[183] In the US, see e.g. *Western Employers Ins Co v Jefferies & Co, Inc*, 958 F 2d 258 at 262 (9th Cir 1992) [*Western Employers*]; *Cat Charter*, *supra* note 141 at 843. In Egypt, see Cairo Court of Appeal, Egypt, 2 December 2008, case No 114/124.

[184] See e.g. *Western Employers*, *supra* note 183 at 262.

[185] *United Mexican States v Cargill Inc*, 2011 ONCA 622 at para 66 [*Cargill*], leave ref'd [2011] SCCA No 528. See also Casey, *supra* note 2 at 417–18: the author defines an excess of jurisdiction as being where "the award deals with a dispute that the agreement did not cover, or contains a decision on a matter that is beyond the scope of the agreement."

[186] See e.g. *Consolidated Contractors*, *supra* note 81 at paras 56–62.

[187] 2007 WL 2219421 at 4 (NY Dis Ct), 2007 US Dist Lexis 56197.

adequacy and the conception of jurisdiction in *Cargill*. In the former decision, the Southern District Court of New York rejected a set-aside application alleging that, in failing to provide certain findings of fact and conclusions of law, the tribunal exceeded its jurisdiction. The court found that an excess of jurisdiction occurs only where arbitrators disregard the provisions of the arbitration agreement and do not have the power, based on the parties' submissions or the arbitration agreement, to decide an issue. This is regardless of whether the arbitrators appropriately went about deciding that issue.[188] As such, the decision demonstrates that reasons-related challenges are unlikely to constitute *bona fide* jurisdictional claims under the restrictive notion of the concept adopted in fora like Ontario.

2. Residual discretion

Even where grounds for resisting recognition and enforcement or for setting aside an award for reasons-related issues are successfully made out, courts nonetheless retain the discretion to uphold the award pursuant to applicable legislation.[189] In exercising that discretion, courts will be mindful of the seriousness of the breach of the provision in question.[190] In particular, breaches of arbitral procedure may only lead to a refusal to recognize and enforce an award where the breach exceeds a minor, 'formal', or technical transgression.[191] In *Rhéaume c Société d'investissements l'Excellence inc*, the Quebec Court of Appeal noted the following in a case where recognition and enforcement of an award was being resisted on procedural grounds related to a violation of deliberative secrecy:

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[188] *Ibid*. But see *contra* conflicting US decisions: n 183.

[189] The language used in applicable legislation is permissive, not mandatory: see e.g. *Ontario Act*, *supra* note 21 at sched 2, ss 34(2), 36(1). See also *Schreter*, *supra* note 140 at 370–71.

[190] See e.g. *Metalclad*, *supra* note 39 at para 129.

[191] See Bachand & Gélinas, *supra* note 54 at 475–76.

> It would be wholly inconsistent with the intention of the legislature and the current jurisprudential trend to treat every breach of the applicable procedure, however minor and however inconsequential, as requiring a court to refuse to homologate an award or to annul it if so requested. A court called upon to adjudicate such a proceeding must balance the nature of the breach in the context of the arbitral process that was engaged, determine whether the breach is of such a nature to undermine the integrity of the process, and assess the extent to which the breach had any bearing on the award itself.[192]

Elsewhere, while an award rendered without reasons contrary to the agreement or applicable legislation may be contrary to public policy, the Quebec Court of Appeal in *Smart Systems Technologies* noted the possibility that such an award could still be recognized and enforced. Beauregard J, writing for the court, stated that this might be the case, for example, where "everything is clearly black or white, and where it depends primarily on the credibility of two witnesses and the unreasoned award tacitly [indicates] that the [tribunal] believes one witness rather than the other."[193]

In a similar vein, the court in *Schreter* held that the lack of reasons in the circumstances did not amount to a basis upon which the court could refuse to enforce the arbitral award in part because the essential elements of the award were still sufficiently clear.[194] This was also the position adopted in *Activ Financial Systems Inc v Orbixa Management Services Inc*,[195] where Perrell J found that reasons need not be present as long

[192] *Supra* note 60 at para 61.

[193] *Supra* note 175 at para 22.

[194] See *supra* note 140 at 376–77.

[195] *Supra* note 137.

as essential elements can be made out. In that case, the parties had agreed that reasons were not required. Relying on *Schreter*, the court noted that a lack of reasons can indeed leave the parties without means of determining whether an award is against public policy or deals with a dispute outside of the tribunal's jurisdiction.[196] The court also found the following, however, in light of applicable law:

> [F]irst, the absence of reasons for an arbitration award is not categorically a reason not to enforce the award under the *International Commercial Arbitration Act*. Second, the absence of reasons will not be grounds for refusing to enforce the award when the court can fairly determine on the record before the court that the arbitration award did not deal with a dispute beyond the terms of the submission and that the award was not contrary to the public policy of Ontario.[197]

The court held that the record demonstrated that the award in question accorded with jurisdictional requirements and was not contrary to public policy.[198]

Collectively, these decisions suggest that even violations of the reasons requirement that constitute a basis for resisting an award will not lead to an award being set aside or refused recognition and enforcement unless that defect in reasoning impairs the award's conclusions on the claims submitted or the ability to ascertain those conclusions.[199] This analysis occurs not only in light of the reasons provided but also the wider record before the court.

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[196] *Ibid* at para 48.

[197] *Ibid* at para 51.

[198] *Ibid* at para 52.

[199] See also n 155.

3. Alternative Relief

Finding that a want of reasons amounts to grounds for interfering with an international award does not necessarily require that such an award be set aside. In jurisdictions that have adopted article 34(4) of the *Model Law*, courts may instead suspend proceedings "where appropriate" to give the tribunal an opportunity to correct grounds raised for setting aside its award.[200] This provision offers courts a middle-ground relief option in what would otherwise be an all-or-nothing proceeding.[201] In exercising their discretion to grant this relief, Canadian courts have viewed the stage of any ongoing arbitral proceedings and whether there is a real chance that the grounds can be corrected as relevant factors to consider.[202] They have also held that the evidentiary basis for remission cannot have been present but not raised during the arbitral proceedings leading to the impugned award.[203] The ongoing independence and impartiality of the tribunal has also been considered.[204]

In Quebec, article 648 of the CCP provides courts with a similar latitude in annulment (set-aside) proceedings.[205] As with these arbitration provisions generally, article 648 reflects the Quebec legislature's desire to encourage and facilitate arbitrations as well as keep court intervention in arbitral

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[200] See e.g. *Ontario Act*, *supra* note 21, Sched 2, s 34(4). Practically speaking, however, if a final award is seriously defective, there may be little appetite for such a recourse.

[201] See Blackaby, *supra* note 100 at 582–83.

[202] See generally *Clayton v Canada (Attorney General)*, 2018 FCA 1.

[203] See *Corporacion Transnacional*, *supra* note 144 at para 66.

[204] See *Balian c Morneau*, 2006 QCCS 6249 at para 20 [*Balian*], leave ref'd 2007 QCCA 315.

[205] See *supra* note 27.

awards to a minimum.[206] The Quebec Court of Appeal has described this as a "broad discretionary power" permitting the tribunal to cure defects that would otherwise present obstacles to having an award recognized and enforced.[207] Court proceedings may be suspended in order to allow the arbitral tribunal to correct, complete, or interpret the award.[208] An award has been returned, for instance, where the tribunal used a method of calculating damages upon which the parties did not have the opportunity to make submissions.[209]

IV. CONCLUSION

The foregoing review reveals that, while the reasons requirement applicable to international arbitration awards in Canada is well-entrenched, some of its particulars are still emerging. As it stands, Canadian courts have found that the duty to provide reasons contains the following components: the tribunal must give reasons absent an agreement to the contrary, deal fully with the issues or claims submitted, explain why the tribunal decided as it did, and permit for effective judicial review. This entails outlining central findings of fact grounded on key evidence that support the conclusions reached on the issues or claims submitted. However, dealing fully with the issues can also be accomplished by disposing of certain facets of a dispute implicitly or in effect. It would also seem that legal reasoning need not be lengthy, if present at all—depending on the basis for the appointment of the arbitrators.

The existing criteria for reasons adequacy leave room for uncertainty as to what is required of reasoned awards in

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[206] See *Expertises didactiques Lyons inc c Learned Entreprises International (Canada) inc*, REJB 1999-13883 at para 39 (QC SC), 1999 CarswellQue 2793. See also Barin & Gazurek, *supra* note 26 at 443.

[207] See *Morneau c Balian*, 2007 QCCA 315 at para 12.

[208] See *Carpenter c Soudure Plastique Québec inc*, 2019 QCCS 321 at para 28.

[209] See *Balian*, *supra* note 204 at para 20.

international arbitration. For example, clear guidance on the extent to which conflicting or countervailing evidence or law needs to be expounded upon, if at all, would be helpful to international arbitral tribunals. In so doing, the prevailing standard must account for the fact that courts are barred from reviewing findings of fact or law on the merits.[210] Addressing controversial issues of the above nature in an award could perhaps be seen as necessary to the extent that this is required to deal fully with the claims submitted. On the other hand, the cases discussed above demonstrate that courts are willing to find that an award's implied reasons dispose of many evidentiary questions where it is possible to ascertain that a tribunal preferred certain evidence over others. They also suggest that legal reasoning may sometimes not be required at all. Another possibility is that local courts adopt proportional or 'scalable' standards like some have in Australia and New Zealand that account for the complexity of the underlying dispute—an approach that has been endorsed in Canada in the judicial context.[211] An elastic approach of this nature would render certain judicial pronouncements unnecessary. As some UK courts have done,[212] local courts could also deem that allegedly countervailing evidence need not be addressed so long as what is relied on is sufficient to dispose of the issues or claims.

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[210] And indeed, a tribunal's reasoning on factual and legal issues, or 'substantive reasoning,' as distinguished from jurisdictional and procedural reasoning, attracts greater deference from courts across many jurisdictions: see generally Thomas H Webster, "Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication" 22:3 (2006) Arb Int'l 431.

[211] For proportional curial standards, see discussion at n 106. For a discussion of proportional standards for arbitral awards in those jurisdictions, see cases at n 107. See also Hayward & Ho, *supra* note 61 at 324. Casey has posited that a proportional standard is appropriate: see *supra* note 2 at 372.

[212] See e.g. *UMS Holding*, *supra* note 67 at para 134.

In what some have projected to be an age of increased judicial oversight in arbitration,[213] and given lingering, contemporary attitudes redolent of the historical curial unease at ceding supervisory jurisdiction, as well as the related tendency towards interventionism,[214] arbitral reasoning standards could ultimately end up being more exacting than some would hope. In Australia, for instance, there has indeed been controversy over the extent to which the reasons

[213] See e.g. Sundaresh Menon SC, "International Arbitration: The Coming of a New Age for Asia, (and Elsewhere)" ICCA Congress 2012 at 19–20: speaking of a growing hostility towards arbitration generally, the former Attorney General of Singapore stated that "[t]he trends I have thus far described have coincided with, and perhaps may even be the reason for some tentative signs suggesting a modest return to greater judicial oversight of arbitration … the courts are subjecting arbitral awards to greater scrutiny by requiring more detailed reasoning, and to ensure the integrity of the decision-making process."

[214] See e.g. *Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2 at para 24, leave ref'd [2015] SCCA No 95. The appellate court seems to take issue with the Supreme Court of Canada's finding in *Sattva* that reviewing courts owe elevated deference to the decisions of arbitrators and courts of first instance on certain questions: "In addition to defining the legal rules, and ensuring their universal application, the intermediate appellate courts have an important error correcting role. It is that role that is primarily regulated by the standard of review analysis set out in *Housen*. But while the standard of review analysis regulates that error correcting role, it does not eliminate it. Intermediate appellate courts are created by statute. Litigants are given statutory rights of appeal to those appellate courts. The error correcting role is legally legitimate, and should not be artificially restrained. The suggestion in *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53 at para 51 that litigants who exercise their statutory right to appeal are using courts of appeal as 'a new forum for parties to continue their private litigation' is unnecessarily derogatory." For discussions of the courts' historical skepticism towards arbitration and the inclination towards interventionism, see *Report on Arbitration*, Law Reform Commission of British Columbia, LRC 55, May 1982 at 85–88; *Arbitration Act: Stay and Appeal Issues*, Alberta Law Reform Institute, Report No 103, January 2014, at para 20; *Bell Canada v OPEIU, Local 131*, [1974] SCR 335 at 346–47, 37 DLR (3d) 561, Laskin J dissenting; L Yves Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: Beware My Lord, of Jealousy" (2001) 80 Can Bar R 143 at 145–46.

requirement for awards should be tantamount to that applicable to court judgments.[215] Those authorities calling for more exacting standards often come from the domestic arbitration context, however, where appeal rights create a greater need for a reviewing court to be able to determine why the arbitrator ruled as they did on the merits in order to dispose of the matter. Moreover, with few exceptions, Canadian courts have generally been properly deferential to the policy choices made in favour of arbitration in this country.[216]

If the modern, functional approach to determining reasons adequacy is indeed adopted in Canada for international arbitral awards, as it has begun to be in the domestic arbitration context, the ambiguities above will be settled according to the purposes of reasons in international arbitration. As with domestic arbitral tribunals, administrative tribunals, and the courts, these purposes include explaining why the decision-maker arrived at their decision and permitting effective judicial review. Conversely, other purposes of reasons in some fora, such as assuring the public that justice is done, would seem to be of somewhat diminished importance in a dispute resolution system that, in the commercial context, is otherwise private and autonomous. Even if public confidence-related considerations prevail, reasons may be of limited importance to the ends of this purpose. This is because curial oversight in ensuring equal treatment, procedural fairness, and, ultimately, confidence in the administration of justice can be accomplished via an examination of the record in supplement to—or in lieu of—reasons in an award.[217]

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[215] See n 94.

[216] See Fortier, *supra* note 214 at 146.

[217] See e.g. *Xerox Canada Ltd v MPI Technologies Inc*, 2006 CarswellOnt 7850, [2006] OJ No 4985 at paras 65–124 (Ont SC): in a challenge to an international award on the basis of procedural fairness, alleging a lack of opportunity to submit evidence on a key issue, the court looks beyond the tribunal's reasons and undertakes a detailed analysis of the record of

No matter the ultimate particulars of reasons adequacy, the foregoing review suggests that the reasoning standards applicable to international arbitral awards should diligently account for the nature of arbitration proceedings. This would be in keeping with the position of similar jurisdictions and ensure that Canada remains a comparably arbitration-friendly forum. Even as a matter of principle, it seems unreasonable to expect international arbitral awards—the product of a process whose organizing principles include speed and efficiency—to mirror wholesale the substantive rigour of a court judgment or even a domestic award that may be subject to an appeal on the merits.[218]

In closing, it bears reiterating that the authorities reviewed prevailingly serve as a testament to the pro-enforcement policy towards arbitration adopted in Canada and elsewhere. This disposition is an essential part of the firmament of the international dispute resolution system to which *New York Convention* and *Model Law* countries have committed themselves. The emphasis on award finality is reflected in Canadian jurisprudence, which has evidenced a curial inclination towards only the most restrained exercise of discretion to interfere with awards. To wit, a want of reasons is unlikely to attract judicial intervention unless it affects the award's outcome or inhibits the ability to ascertain whether the award has disposed of the claims submitted. This examination occurs not only in light of the reasons, where provided, but also the wider record before the court.

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proceedings in determining that the parties did in fact have the opportunity to be heard on said issue. See also *MSI Methylation Sciences, Inc v Quark Venture Inc*, 2019 BCCA 448 at paras 32–51 (wherein the court notes that, while the award was silent on issues related to the assessment of damages, the record demonstrated that the parties had made submissions in this regard, with which the tribunal engaged, and that there was therefore no violation of procedural fairness); *Telus Communications Company v Telecommunications Workers Union*, 2009 BCSC 1289 at para 51.

[218] As mentioned, this argument has found favour in many jurisdictions, including Australia, New Zealand, and the UK: see nn 89, 94.