ARBITRATION

The International Journal of Arbitration, Mediation and Dispute Management

Volume 85 Issue 2 May 2019

ISSN: 0003–7877

The Need For Reasons—O, Reason Not The Need

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Abstract

The article examines the need to give reasons in an Award and when a challenge under Arbitration Act 1996 (AA 1996) s 68 can be made in the event that there is a failure to give reasons. A reasoned award is one that allows the reader to understand how the tribunal arrived at its conclusion. It should set out what happened, having regard to the evidence, and should explain succinctly why, in the light of what happened, the tribunal reached its decision and what that decision is. A failure by an arbitrator to provide a reason or sufficient reasons for its award may make the award susceptible to challenge. However, a failure to consider evidence or an award which is manifestly wrong or irrational may not be open to challenge under AA 1996 s 68.

1. The requirement for reasons

> *"Consider what you think justice requires and decide accordingly. But never give your reasons; for your judgement will probably be right but your reasons will certainly be wrong."*[1] *Lord Mansfield*

The above advice was supposedly given by Lord Mansfield to a newly appointed colonial governor who had no experience of the law. Over 200 years later the giving of reasons is seen as a basic rule of justice. Under the Arbitration Act 1996 (AA 1996), arbitrators are required to give their reasons "unless it is an agreed award or the parties have agreed to dispense with reasons".[2]

Thirty years ago Lord Bingham explained why judges and arbitrators should give reasons.[3] His lordship stated that there might be about "four and a half" good reasons for giving a reasoned judgment. He stated that:

- the parties are entitled to know why they have won or lost[4];
- it is a "safeguard against arbitrariness". Lord Bingham stated that a judge is required to apply principle and authority and that therefore a reasoned award allows justice to be seen to be done[5];
- it can guide the parties in respect of future commercial conduct between one another;
- it enables an appellate court to review the decision and decide whether it is subject to reversible error; and
- the process of making a reasoned judgment is a valuable intellectual discipline for the decision maker.[6]

[1] Ernest B Lowrie, *Lord Chief Justice Mansfield: Dark Horse of the American Revolution* (Archway Publishing 2016).

[2] AA 1996 s 52(4). This requirement followed the UNCITRAL Model Law art 31(2)—see the Departmental Advisory Committee Report on the Arbitration Bill para 246.

[3] Lord Bingham, "Reasons and reasons for reasons: differences between a court judgment and an arbitration award" (1988) 4 *Arbitration International* 441.

[4] Lord Bingham referred to his own judgment in *Meek v Birmingham DC* [1987] EWCA Civ 9.

[5] Lord Bingham referred to Professor H Potter, *The Quest for Justice* (1951) 13.

[6] Lord Bingham described this as a half reason.

Lord Bingham stated that these grounds, which he considered applied to judgments, would "generally apply" to arbitrations as well.

The opposing argument is that the constraints of making a reasoned award restrict the arbitrator's ability to avoid a decision he would prefer not to make. As Rau[7] argues, making an unreasoned award gives a "freedom that makes possible an arbitrator's flexibility in decision-making and a maximum attention to context".

The problem with Rau's argument is that it fails to appreciate one of the standard requirements of arbitration—namely that an arbitrator must decide in accordance with the law chosen by the parties as applicable to the substance of the dispute.[8] Only if parties agree, may an arbitrator make a decision in accordance with other considerations; such as acting *ex aequo et bono* or as an amiable compositeur.[9]

2. A reasoned award

An award which sets out the reasons is known as a "reasoned award". A number of cases have sought to analyse precisely what a reasoned award means. However, there can be no precise definition because each case will turn on its own facts. In *Bremer Handelgessellschaft v Westzucker (No 2)*,[10] Donaldson LJ stated that:

> "All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. That is all that is meant by a reasoned award."

Megaw J in *Re Poyser & Mills' Arbitration*[11] also set out what he considered to be sufficient reasons in an award. His lordship stated:

> "… reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised. In my view, it is right to consider that statutory provision as being a provision as to the form which the arbitration award shall take."

This issue was again considered in *English v Emery Reimbold & Strick Ltd*.[12] The case was analysed by Mr D Crowley in his article in Arbitration[13] where he stated that: "Proper reasons should ensure that the decision is understandable (if not acceptable) to the party who lost".[14] Mr Crowley also suggested that the guidance given by the Court of Appeal in this case about a reasoned court judgment applied equally to arbitration awards. *English v Emery*[15] has been followed and approved by the courts of England for the last 15 years. Recently in *Smith v Molyneaux (British Virgin Islands)*[16] the Privy Council, referring to *English v Emery*, stated that for there to be a reasoned judgment a court had to give at least one adequate reason for its conclusion. An adequate reason would be one which was in sufficient detail to allow the party that had lost and an appellate court to know why that party had lost and the other party had succeeded. The Privy Council emphasised that a judge

[7] Rau, "On Integrity in Private Judging" (1998) 14 Arb Int'l 115, 148.
[8] AA 1996 s 46(1)(a).
[9] AA 1996 s 46(1)(b).
[10] *Bremer Handelgessellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130, [1981] 4 WLUK 200.
[11] *Re Poyser & Mills' Arbitration* [1964] 2 QB 467, [1963] 2 WLR 1309.
[12] *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 3 All ER 385.
[13] D Crowley, "The duty to give reasons: English v Emery Reimbold & Strick Ltd" (2002) 68 *Arbitration* 68(3), 321.
[14] D Crowley, "The duty to give reasons: English v Emery Reimbold & Strick Ltd" (2002) 68 *Arbitration* 68(3), 324.
[15] *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 3 All ER 385.
[16] *Smith v Molyneaux (British Virgin Islands)* [2016] UKPC 35 at [36]–[37], [2016] 11 WLUK 548.

does not have to set out every reason that weighed with him, especially if the reason for his conclusion was his evaluation of the oral evidence.

The Hong Kong case of *Arima Photovoltaic & Optical Corp v Flextronics Computing Sales and Marketing (L) Ltd*[17] provides an interesting example of where no reasons were provided but the court decided that having regard to the factual matrix the parties would be aware of why the decision was made. In this case, the arbitrator simply awarded the quantum that had been claimed without further explanation. This was challenged on the basis that there were no reasons. The court held that this was sufficient because of the context of the arbitration. The various items of loss making up the claim had been provided in the defendant's pleading and were attested to by witness statements. The defendants elected not to advance any positive case that the losses were different, did not challenge the witness evidence, and did not put forward any evidence of its own to suggest that the losses were different or overstated. In the circumstances, the court found that the decision was understandable by the parties.

3. A failure to give any reasons

The entitlement of a party to know why it has won or lost a case has been said to form part of a party's right to a fair hearing.[18] As long as the reader can understand how the tribunal moved from one point to another and to its conclusion then it is a reasoned award. It may not matter if the arbitrator was right in fact or in law.[19] Recently Lord Neuberger stated that an award without reasons "may be a violation of public policy"[20] and in the case of *Benaim (UK) Ltd v Davies Middleton & Davies Ltd (No 2)*,[21] HH Judge Coulson QC, referred to the failure to give reasons as amounting to a substantial injustice.

Under the UNCITRAL Model Law as well as other laws and rules, the obligation to give reasons is mandatory.[22] In India, the Supreme Court has held that a failure to provide reasons, where such an obligation is mandatory, may amount to patent illegality, which would be a ground for setting aside the award.[23] In Canada, an award was refused recognition and enforcement where no reasons were contained and the Court of Appeal held that the failure to provide reasons was contrary to public order.[24] However, in a few countries, including the United States,[25] it is unnecessary to give reasons unless specifically requested.

4. Review by an Appellate Court

A party's right to challenge an award under the Arbitration Act 1996 (AA 1996) is limited.

If a party considers that the arbitrator's reasons show that he has misunderstood a question of law then it may attempt to challenge the award under AA 1996 s 69. However, there are a number of hurdles that the applicant must overcome. First, it can only make an AA 1996 s 69 challenge with the agreement of the other party or with the leave of the court. Secondly, the applicant must comply with AA 1996 s 50(2) and (3), which require the applicant exhausts any available arbitral process of appeal, review or correction. The applicant must

[17] *Arima Photovoltaic & Optical Corp v Flextronics Computing Sales and Marketing (L) Ltd* CACV 194/2012.

[18] *Meek v Birmingham DC* [1987] EWCA Civ 9, and *North Range Shipping v Seatrans Shipping Corp (The Western Triumph)* [2002] EWCA Civ 405, [2002] 2 Lloyd's Rep 1.

[19] *Industria Nacional de Aliementos SA (Lucchetti) v The Republic of Peru* Decision on Annulment, 5 September 2007 per Sir Frank Berman.

[20] Lord Neuberger, "Arbitration and the Rule of Law" (20 March 2015) at [26] <*https://www.supremecourt.uk/docs/speech-150320.pdf*> accessed 30 January 2019.

[21] *Benaim (UK) Ltd v Davies Middleton & Davies Ltd (No 2)* [2005] EWHC 1370 (TCC), (2005) 102 Cons LR 1.

[22] See eg the French New Code of Civil Procedure art 1471(2); the AAA International Rules art 27(2); LCIA Arbitration Rules art 26.2; and the ICC Arbitration Rules 2017 art 32(2).

[23] *Supreme Court of India, Associate Builders v Delhi Development Authority* (2014) (4) ARBLR 307(SC).

[24] *Smart System Technologies Inc v Domotique Secant Inc* Court of Appeal of Quebec, 11 March 2008.

[25] See Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn, 2015) 761.

also comply with a 28 day time limit for making the challenge from the date of the award or the notification of the result of the appeal or review process.

If leave to appeal is required, which will be the case in most circumstances, the applicant must show that the determination of the question of law will substantially affect the rights of one or more of the parties, that the question was one which the arbitral tribunal was asked to decide and, on the basis of the findings of fact, the decision of the tribunal was obviously wrong or the question is one of general public importance.

Furthermore, if an arbitrator fails to give reasons, the court may order the tribunal to provide reasons for its award under AA 1996 s 70(4)(a).[26]

Reasons are therefore essential if a challenge under AA 1996 s 69 is to be made. However, the parties are free to agree to dispense with reasons or where the award is agreed then no reasons are required.[27] An agreement to dispense with reasons is considered to amount to an agreement to exclude the court's jurisdiction to determine a point of law under AA 1996 s 45(1) and s 69(1).

As a general rule "The arbitrators are the masters of the facts".[28] There have been numerous occasions where parties have sought to evade this rule by arguing that a mistake of fact could amount to misconduct: *Moran v Lloyd's*[29] and *K/S A/S Bill Biakh v Hyundai Corp*[30] or an excess of jurisdiction: *Bank Mellat v GAA Development and Construction Co*.[31] Attempts have also made to evade this rule by arguing that whether there is evidence to support the arbitrators' findings of fact is itself a question of law. As Steyn LJ stated in *The Baleares*[32]:

> "The historical origin of the rule was the need to control the decisions of illiterate juries in the 19th century. It never made great sense in the field of consensual arbitration. It is now a redundant piece of baggage from an era when the statutory regime governing arbitration, and the judicial philosophy towards arbitration, was far more interventionist than it is today."

Steyn LJ then went on to state that:

> "The only inferences which a Court might arguably be able to draw from arbitrators' findings of fact are those which are *truly beyond rational argument*. It is, however, by no means clear that it is permissible even in such a seemingly clear case for a Court to draw inferences of fact from the facts set out in the award. See *Mustill and Boyd*, o cit. 600."

Since the introduction of the AA 1996 parties have attempted to argue that the failure to give sufficient reasons would amount to a serious irregularity under AA 1996 s 68. The rationale for this argument is that if a failure to give any reasons is a serious irregularity then the failure to give sufficient reasons or irrational or illogical reasons must equally be a serious irregularity.

This article considers the various challenges that parties have made to awards in an attempt to undermine the factual conclusions of the arbitrator and the court's response to such applications. This article will therefore consider challenges based on a failure to give sufficient reasons, a failure to consider evidence or where the reasons are illogical or manifestly wrong.

[26] The court made such an order in *Petroships pte of Singapore v Petec Trading and Investment Corp of Vietnam (The Petro Ranger)* [2001] 2 Lloyd's Rep 348, [2001] 5 WLUK 562.
[27] AA 1996 s 52(4).
[28] *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215 at 228 per Steyn LJ; [1992] 11 WLUK 78.
[29] *Moran v Lloyd's* [1983] QB 542, [1983] 1 Lloyd's Rep 472.
[30] *K/S A/S Bill Biakh v Hyundai Corp* [1988] 1 Lloyd's Rep 187, [1987] 10 WLUK 24.
[31] *Bank Mellat v GAA Development and Construction Co* [1988] 2 Lloyd's Rep 44, [1988] 1 WLUK 712.
[32] *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215 at 228, [1992] 11 WLUK 78.

5. Failure to give sufficient reasons

In *Margulead Ltd v Exide Technologies*,[33] Colman J, as he then was, in the commercial court stated that:

> "A deficiency of reasons in a reasoned award is not capable of amounting to a serious irregularity within the meaning of Section 68 of 1996 Act unless it amounts to a 'failure by the tribunal to deal with all the issues that were put to it' within Section 68(2)(d)."

The following year, in the case of *Benaim (UK) Ltd v Davies Middleton*,[34] HH Judge Coulson QC, as he then was, took a different approach and stated that:

> "At para 21.16 of Arbitration Law (December 2004 update), by Professor Robert Merkin the learned editors say that, 'It is strongly arguable that unless a party knows the reasons for an award there is automatically substantial injustice to him', and the relevant footnote suggests that, 'This is indeed the very rationale of the requirement that arbitrators are to give reasons'. I respectfully agree with those comments … If there were no *or insufficient reasons* the substantial injustice would, in my judgment, be automatic." (emphasis added)

In *Schwebel v Schwebel*,[35] Akenhead J reaffirmed that awards could not be criticised simply because they do not address each and every item of contentious or even non-contentious evidence. He then cautioned that courts would rarely become involved if an arbitrator reached wrong findings of fact or should have given greater weight to some evidence or failed to explain why weight or importance was not given to some evidence. The issue was again considered in *Compton Beauchamp Estates Ltd v Spence*.[36] The court found that the obligation to provide a reasoned award meant that an arbitral tribunal should explain why it has decided the essential issues in the way in which it has. The court held that an award which did not contain such reasoning would not comply with AA 1996 s 52(4) and that would give rise to an irregularity within s 68(2)(h) of the 1996 Act.[37] The decisions in *Benaim*, *Schwebel* and *Compton Beauchamp* therefore left the door ajar for challenges under AA 1996 s 68 in exceptional cases where insufficient reasons had been given.

In *Cukurova Holding AS v Sonera Holding BV (British Virgin Islands)*,[38] the Privy Council made a comparison between litigation and arbitration and the need to give reasons. Lord Clarke stated at [35] that there was an obligation on judges to give reasons[39] and arbitrators.[40] Lord Clarke emphasised that this did not mean that an arbitrator had "to address every point in a case". Lord Clarke then referred to the Swiss Federal Supreme Court case of *Ferrotitanium*[41] at [3.3] where it was held that: "It does not mean that the arbitral tribunal must expressly examine every argument the parties present". His Lordship also referred to the *IPCO* case[42] where Gross J stated: "No arbitration tribunal should be criticised for succinctness; nor is a tribunal required to set out every point raised before it, still less at length".

[33] *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm), [2004] 2 All ER (Comm) 727.
[34] *Benaim (UK) Ltd v Davies Middleton & Davies Ltd (No 2)* [2005] EWHC 1370 (TCC), (2005) 102 Cons LR 1 at [95].
[35] *Schwebel v Schwebel* [2010] EWHC 3280 (TCC), [2011] 2 All ER (Comm) 1048 at [23].
[36] *Compton Beauchamp Estates Ltd v Spence* [2013] EWHC 1101 (Ch), [2013] 5 WLUK 34.
[37] Morgan J, in *Compton Beauchamp Estates Ltd v Spence* [2013] EWHC 1101 (Ch) at [34]–[37] sets out in detail when a serious irregularity will arise.
[38] *Cukurova Holding AS v Sonera Holding BV (British Virgin Islands)* [2014] UKPC 15, [2015] 2 All ER 1061.
[39] Referring to *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409.
[40] *Irvani v Irvani* [2000] 1 Lloyd's Rep 412 per Buxton LJ at 426, [1999] 12 WLUK 238.
[41] *Ferrotitanium* 4A 452/2007 29 February 2008.
[42] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm) at [49], [2005] 2 Lloyd's Rep 326.

In *Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd*,[43] the Privy Council referred to the test of Donaldson LJ in *Bremer Handelgessellschaft v Westzucker (No 2)*[44] and concluded that the test had not been met. The court also stated that in this case the Award would have failed to meet the superficially attractive but perhaps simplistic test that the loser should be told not only that he has lost but also why he has lost. The Privy Council held that the test which had to be applied to whether sufficient reasons had been given was a question of fact, having regard to trade usage and custom. A lean and unembellished award may still be a reasoned award.

The issue of what constituted sufficient reasons was recently considered in the case of *UMS Holding Ltd v Great Station Properties SA*.[45] Teare J re-stated the now established position[46]:

> "that an arbitration tribunal does not have to refer to the competing evidence and arguments in its award. What it must do is decide the essential issues in the case and, pursuant to the Arbitration Act 1996 s 52(4), give the reasons for the award."

Teare J then proceeded to state that it was neither unfair nor unjust if the arbitrator deals concisely with the essential issues and to express his reasons with reference to evidence which he considers is key.[47] The arbitrator is not required to deal with the objections to that evidence or to the evidence that one party considers is key. The arbitrator, as Teare J emphasised, is simply required by the language of s 52(4), to set out "the reasons for the award".

A failure to give sufficient reasons may, in an exceptional case, amount to a serious irregularity because there is a failure in the form of the award.[48] In the event that there are insufficient reasons the court may order the tribunal to state the reasons for its award in sufficient detail: AA 1996 s 70(4). Although AA 1996 s 70(4) gives a specific remedy to a specific problem[49] the courts have stated that it is a power which should be exercised very sparingly given that applications for reasons are costly and incur delays.[50]

6. A failure to consider evidence

A reasoned award does not have to list all the items of evidence or set out all the arguments but should state what happened. In the last 15 years dissatisfied parties have attempted to overturn findings of fact on the basis that the arbitral tribunal has either failed to consider evidence or given inappropriate weight to other evidence.

In *Arduina Holdings BV v Celtic Resources Holdings Plc*,[51] an award was challenged on the basis that there was a total lack of evidential support for the conclusions reached by the arbitrator. This, it was argued, amounted to a serious irregularity in the award. On the facts, the court disagreed and Toulson J stated[52] that there was no basis for challenging an award where an arbitrator reached factual conclusions on the evidence. However, Toulson J also stated that he did acknowledge that there could be exceptional cases where "an arbitrator genuinely overlooked evidence that really mattered, or got the wrong end of the stick in misunderstanding it".

In *Schwebel v Schwebel*[53] Akenhead J acknowledged that:

[43] *Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd* [2001] UKPC 34, [2001] 7 WLUK 385.
[44] *Bremer Handelgessellschaft v Westzucker (No 2)* [1981] 2 Lloyd's Rep 130.
[45] *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm), [2018] 1 All ER (Comm) 856.
[46] *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm) at [12].
[47] *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm) at [134].
[48] See AA 1996 s 68(2)(h).
[49] *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm) at [42], [2004] 2 All ER (Comm) 727.
[50] *Navios International Inc v Sangamon Transportation Group* [2012] EWHC 166 (Comm) at [26], [2012] 1 Lloyd's Rep 493.
[51] *Arduina Holdings BV v Celtic Resources Holdings Plc* [2006] EWHC 3155 (Comm), [2006] 10 WLUK 298.
[52] *Arduina Holdings BV v Celtic Resources Holdings Plc* [2006] EWHC 3155 (Comm) at [46].
[53] *Schwebel v Schwebel* [2010] EWHC 3280 (TCC), [2011] 2 All ER (Comm) 1048 at [23].

> "It will be a very rare and exceptional case for the court to interfere pursuant to s 68 on the grounds that the arbitrator reached the wrong findings of fact, should have reached different factual conclusions, given greater weight to some evidence or failed to explain why weight or importance was not given to some evidence."

More recent cases have tried to restrict when a challenge can be made. In *Petrochemical Industries v Dow Chemical* ,[54] Andrew Smith J said that his own view was that an award could not be challenged on the grounds that the tribunal had overlooked evidence but felt that he was constrained to follow the approach of Toulson J in the *Arduina* case and Akenhead J in the *Schwebel* case. In *Brockton Capital LLP v Atlantic-Pacific Capital Inc*,[55] the court stated that it will only be in the most exceptional case, if ever, that a failure to refer to a particular part of the evidence will constitute a serious irregularity within AA 1996 s 68.

The approach of Toulson J and Akenhead J was distinguished in the case of *Sonotrach v Statoil*.[56] Flaux J did not feel he was constrained to follow either judge and stated that it would be wrong for the court to review evidence and that the only circumstance he could think of where a challenge might exist is where the Tribunal ignored or overlooked an agreed or admitted piece of evidence. A similar approach was taken in *New Age Alzarooni 2 Ltd v Range Energy Natural Resources Inc*[57] where the court's opinion was that no review of the evidence could take place and the only exception might be where the tribunal admitted that it had overlooked a matter.

The issue was recently considered again in *UMS Holding Ltd v Great Station Properties SA*.[58] In this case, the respondent argued that there had been a "wholesale failure" of the Tribunal to consider "large chunks of crucial evidence on central points of the case" and therefore there had been a failure to act fairly as the Tribunal was required to do pursuant to AA 1996 s 33. In considering this argument Teare J held that[59]:

> "I do not consider that there can be such an exceptional case where the allegation of exceptionality involves the court in assessing the evidence before the tribunal in order to decide whether it has been overlooked. In this regard I respectfully differ from Toulson J and Akenhead J both of whom suggested that there might be exceptional cases where a failure to refer evidence might found a challenge under section 68."

Recent cases have therefore shown a reluctance by the courts to consider challenges where there has been a failure by the arbitrator to have regard to evidence. The rationale for this is summarised below[60]:

- The tribunal's duty is to give a reasoned award on the essential issues. It does not have to deal with each point made by a party in relation to those essential issues or refer to all the relevant evidence.
- The assessment and evaluation of such evidence is a matter exclusively for the tribunal. The court has no role in considering the factual evidence.
- If a piece of evidence has not been referred to, which one party says is crucial, the tribunal may, amongst other reasons, have:
  - — considered it, but regarded it as not determinative;
  - — considered it, but assessed it as coming from an unreliable source;
  - — considered it, but misunderstood it; or

[54] *Petrochemical Industries v Dow Chemical* [2012] EWHC 2739 (Comm), [2012] 2 Lloyd's Rep 691 at [36].
[55] *Brockton Capital LLP v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm), [2015] 2 All ER (Comm) 350.
[56] *Sonotrach v Statoil* [2014] 2 Lloyd's Rep 252.
[57] *New Age Alzarooni 2 Ltd v Range Energy Natural Resources Inc* [2014] EWHC 4358 (Comm) at [62], [2014] 12 WLUK 773.
[58] *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm), [2018] 1 All ER (Comm) 856.
[59] *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm) at [31].
[60] *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm) at [28].

— overlooked it.

It is not the court's role to look into why the tribunal had not referred to certain evidence because that would involve a consideration of the entirety of the evidence which was before the tribunal and which was relevant to the decision under challenge. This would be impermissible because it is the tribunal, not the court, that assesses the evidence adduced by the parties.

- The court could only guess at why the tribunal had not referred to some specific piece of evidence. It may be that the tribunal overlooked it but it may equally be that that the tribunal had a different view of the importance, relevance or reliability of the evidence.
- A challenge under AA 1996 s 68 is not concerned with whether the tribunal has made the "right" finding of fact, any more than it is concerned with whether the tribunal has made the "right" decision in law. The suggestion that it is a serious irregularity to fail to deal with certain evidence ignores that principle. By choosing to resolve disputes by arbitration the parties clothe the tribunal with jurisdiction to make a "wrong" finding of fact.

7. Manifestly wrong or illogical reasons

The fact that the reasons are manifestly wrong or illogical is not a ground for challenge of the award under AA 1996 s 68. As stated above, in *UMS Holding Ltd v Great Station Properties SA*[61] Teare J held that it was implicit in the choice to resolve a dispute by arbitration that the parties clothed the tribunal with jurisdiction to make a wrong finding of fact. This approach follows Akenhead J's judgment in *Secretary of State for the Home Department v Raytheon Systems Ltd*[62] where it was stated that if the tribunal has dealt with an issue in any way that is an end to the matter. It is immaterial whether the tribunal has dealt with the issue well, badly or indifferently. He further noted (at sub-para ix) that there was no failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences.

Being wrong or illogical is immaterial to the question of whether reasons have been given. A tribunal's reasons may be unsatisfactory but that is not a serious irregularity within AA 1996 s 68.

8. Conclusion

An arbitral tribunal is required to give reasons when making its decision except in a few limited cases. A reasoned award is one that allows the reader to understand how the tribunal arrived at its conclusion. It should set out what happened, having regard to the evidence, and should explain succinctly why, in the light of what happened, the tribunal reached its decision and what that decision is. An award that does this should not be susceptible to challenge under AA 1996 s 68.

Challenges to an award may arise where the tribunal does not do this. However, an arbitral tribunal does not have to set out every reason for its decision and in *Smith v Molyneaux (British Virgin Islands)*,[63] the Privy Council stated that it would be sufficient if one reason was given which led the arbitral tribunal to its decision. Where no reasons are provided or insufficient reasons are provided then this may amount to a serious irregularity in regard to the form of the award. However, it is not enough to show that there was a

[61] *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm) at [28].

[62] *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) at [33], [2014] 12 WLUK 774.

[63] *Smith v Molyneaux (British Virgin Islands)* [2016] UKPC 35], [2016] 11 WLUK 548.

serious irregularity. An applicant must also show that this would have caused it a substantial injustice.[64]

A party will generally not be able to challenge an award where the arbitral tribunal fails to consider material evidence or its decision is irrational or manifestly wrong. Recent authority has indicated that a court will not assess the evidence before the tribunal in order to decide whether it has been overlooked or has been wrongly interpreted. Although the requirement to give reasons is considered as a basic rule of justice the rationality or quality of the reasoning is not something that the courts will consider.

A modern arbitrator therefore meeting Lord Mansfield might now be told:

> "Consider what you think justice requires and decide accordingly. Give your reasons in your award. They will probably not be right but a failure to give any reasons will certainly be wrong."

[64] AA 1996 s 68(2).