The Obligation of an Arbitrator to Give Reasons for a Decision

Introduction:

1. By now, most arbitrations being conducted in Hong Kong, and all arbitrations conducted in the future, will be conducted under the provisions of the Arbitration Ordinance Cap 609, (HKAO)\(^1\). There is now a specific requirement that the award shall state reasons. The HKAO imports into Hong Kong law the provisions of the UNCITRAL Model Law. The relevant provision is s 67, [Article 31(2) of the Model Law]:

   “The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30\(^2\).”

2. The introduction into the arbitration process, in Hong Kong, of a formal requirement for reasons makes it timely to consider the extent of the requirement for arbitrators to give reasons. Useful guidance on what is required may be found in the decision of the High Court of Australia in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37, in which the court had to deal with a conflict between competing decisions of the Victorian and New South Wales Courts of Appeal.

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\(^1\) HKAO commenced on 1 June 2011.

\(^2\) Article 30, (HKAO s 66), provides that if, during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate proceedings and, if requested by the parties and not objected to by the arbitral tribunal, called the settlement in the form of an arbitral award on agreed terms. Such an award has the same status and effect as any other award on the merits of the case. This, of course, is to enable an agreed or settled award to be enforced under the legislation.
The requirement for reasons in an arbitration award:

3. Prior to 1996 in the UK, and in Hong Kong, under the Arbitration Ordinance Cap 314, now repealed, there was no requirement to give reasons in an arbitration award. It may well be that the reason for this is historical. In many arbitrations the arbitrator was not a lawyer, but an expert in the field. Consequently arbitrators were reluctant to embark upon an open process of reasoning which they would find difficult without professional assistance. Instead a stylized practice of dividing and awarding four parts; preamble, findings of facts, submissions of the parties and conclusions, was usually adopted.

4. Pursuant to the provisions of the old Arbitration Ordinance there was no obligation on an arbitrator to give reasons for his award. By 1986 in Hong Kong however, it was considered to be a good practice for an arbitrator to always give reasons for the award. In 1986, Hunter J. as then was, said:

   “…..now that the deterrence to the giving of reasons have been removed, a Hong Kong arbitrator, who is the judge of fact, and either the or nearly the judge of law, would be failing in his duty if he could not and did not set out his reasons in the award.”

5. Notwithstanding this statement, it is interesting to note that in 1996, in the introductory paragraph of Chapter 4 of Hong Kong Arbitration Cases and Materials, the editors say this:

   “Arbitrators should resist any temptation to emulate a High Court judgment when writing their award. There is still no duty to give reasons for an award unless the parties have given notice

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3 See Donaldson LJ in Bremer Handelgesellschaft GmbH v Westzucker GmbH (No 2) [1981] 2 Lloyd’s Rep 130
before the award is made that they require reasons, or unless the submission to arbitration expressly provides for a reason award.”

6. The absence of a formal requirement for reasons, and the fact there was no provision in the old Arbitration Ordinance requiring reasons, renders it not surprising, notwithstanding Hunter J’s statement, that the extent to which an arbitrator must give reasons for an award is a topic which has not been the subject of judicial decision in Hong Kong.

7. Prior to the passing of the Arbitration Act 1996 (UK), it was a common practice for an arbitrator to provide reasons separately from the award itself, and even at times to state expressly that the reasons do not form part of the award itself. Some arbitrators even went to the extent of imposing a restriction on the use of the reasons, for example, that they may not be used in connection with the award or without the arbitral tribunal’s consent.

8. It was thought that by not having the reasons forming part of the award an appeal would be hindered⁶. It is my observation from the awards I have seen in the Construction Court that it is still the practice of some Hong Kong arbitrators to separate the award and the reasons, but there seems no purpose for this.

9. The traditional view of the extent of the reasons required was set out in The Law & Practice of Commercial Arbitration in England, Mustill & Boyd, 2nd Edn, 1989, in the following terms⁷:

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⁶ If finality is desired, and both sides wish to avoid the courts, and have appropriate confidence in the arbitrator, the best way to avoid an appeal that might have reference to reasons was, and still is, for the parties to agree that no reasons are to be given.
⁷ At p 377.
Since the purpose of the reasons contemplated by the 1979 Act is not to inform the parties of the grounds upon which they have won and lost, but to place the court in a position to decide an appeal, the arbitrator is not obliged (unless an agreement to give reasons is part of his mandate) to give reasons for –
1 his findings of fact;
2 his decision on any issue which is not to be the subject of an appeal.”

10. In England, under the Arbitration Act 1996, the position changed. Now, an arbitrator was not required to, but could state his reasons. His “reasons” was interpreted as his “reasons”, but not to include his “reasoning”, that is the process of logical thinking that is usually found in a judgment whereby a judge reaches a conclusion.

11. An award which stated the reasons was called a “reasoned award”. The court had jurisdiction to order the arbitrator to state his reasons if he had not set out in the reasons for his award, or where it was of the view that he had not sufficiently set out the reasons for his award. The power of the court to order reasons meant that, notwithstanding there was no requirement for reasons, giving reasons within the award became the norm.

12. By 2001, when Mustill & Boyd published the Companion to The Law and Practice of Commercial Arbitration in England, the position had changed. Now, as a result of an amendment to the Arbitration Act 1996, an arbitrator’s award was required to contain reasons unless it was either an agreed award or the parties had agreed to dispense with reasons. The development of the requirement for reasons is a reflection of modern human rights jurisprudence. The learned editors now said:
13. Notwithstanding the requirement for reasons in the UK legislation, no requirement for reasons was imported into the then current Hong Kong legislation. However, a Hong Kong arbitrator could, if he wished, (and he was encouraged to do so by the view of Hunter J), or if he was required by the parties, give reasons for his award.

14. In 1997, the extent of the obligation to give reasons was set out in Russell on Arbitration, 21st Edn, at 6-30, in these terms:

“No particular form is required for a reasoned award. When giving a reasoned award the tribunal need only set out what, on its view of the evidence, did or did not happen, and explain succinctly why, in the light of what happened, the tribunal has reached its decision and what that decision is. It should set out the facts and general reasoning so as to enable the parties to understand them and why a particular points were decisive. It should also indicate the tribunal’s findings and reasoning on issues argued before it though not considered decisive, so as to enable the parties and the Court to consider the position with respect to appeal on all issues before the tribunal. When dealing with controversial matters, it is helpful for the tribunal to set out not only its view of what occurred, but also to make clear that it has considered any alternative version and has rejected it. Even if several reasons lead to the same result, the tribunal should still set them out. The tribunal is not expected to recite at great length communications exchanged or submissions made by the parties, nor to analyze the law and the authorities. It is sufficient that the tribunal should explain what it’s findings are and how it reached its conclusions.”

15. It has generally been the view that this description of the “reasons” that are required constitutes something less than the reasons that
are expected of a judge in a judgment. The crucial difference appears to be that in a judgment a judge will carry out and explain the process of logical reasoning by which he reaches a conclusion, both as to the facts and the law.

16. In a judgment of a court, in respect of facts, the judge will set out the facts that are not in dispute, he will then resolve differences in respect of the facts that are in dispute, and then, by a process of logical deduction, draw inferences of fact, from the facts that he has determined. By this process he demonstrates his reasoning for finding the facts. In the process of setting out the facts, the judge will usually be careful to ensure that all relevant facts for the purposes of the decision are set out, for a failure to record that relevant facts have been taken into account may lead to a submission on appeal that a different conclusion might have been reached had those un-recited facts been brought into the consideration.

17. As to an issue of law that is not the subject of binding authority, the judge will usually set out the competing propositions, analyze the relevant authorities, and, again, by a process of logic, determine which of the competing propositions are justified by the authorities. This will usually involve reference to the relevant passages in the authorities, an analysis of the competing submissions of counsel, and an explanation as to why one submission is preferred to another. By this process of logical reasoning the judge will decide the relevant law.

18. Having determined the facts, and found what the law is, the judge will apply the law to the facts, and determine the ultimate outcome of the case.
19. An arbitrator on the other hand has a less onerous task. It is described by Russell on Arbitration in §14 above, but it is perhaps better encapsulated by the words of Donaldson LJ in *Bremer Handelegesellschaft GmbH v Westzucker GmbH* (No 2) [1981] 2 Lloyd’s Rep 130, at 132-133:

“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. This is all that is meant by a reasoned award in [the UK Act].”

20. The demonstration of the process of logical deduction required of a judge, in respect of drawing inferences of fact, and the determination of the law is not, on this description of the arbitrator’s task, required to be demonstrated in the reasons for the award.

*The Australian statutory regime:*

21. The decision in *Gordian Runoff* is a decision under the provisions of the Commercial Arbitration Act 1984 (NSW), [CAA(NSW)], which is in similar terms to Hong Kong’s old Arbitration Ordinance, but like the English legislation, included a requirement for reasons. Under Australia’s federal system, the states are able to legislate in respect of matters they wish to make provision for in a particular state; in addition there may be a Commonwealth legislation on the same topic. The applicability of state or federal legislation in a particular circumstance is a conflict of laws issue well beyond the scope of this paper.

22. The Commonwealth, or federal government, has passed the International Arbitration Act 1974, which, by reason of recent amendment,
essentially applies the Model Law for Commonwealth purposes. The provision in that legislation as to reasons is identical to that in the HKAO. The majority decision in *Gordian Runoff*, in the High Court was careful to note that the decision was a decision on the state legislation only. At §23 the court said:

“Article 31(2) of the Model Law requires that an award ‘shall state the reasons upon which it is based’. However, the Solicitor-General submitted that this appears in a context where Article 5 provides that ‘no court shall intervene except where so provided in this Law’, and there is no provision for an appeal on a question of law. An award may be set aside only under Article 34 and relevantly only on the ground for breach of the rules of natural justice. The Solicitor-General contended that here these rules require no more than a statement of reasons to demonstrate whether the arbitrators have addressed the dispute referred for determination. Whether this is the proper construction of the federal Act and the Model Law may be left for determination on another occasion.”

However, it is submitted, and that there is so little difference between the respective expressions requiring reasons: “*state the reasons upon which it is based*”, [HKAO], and “*include in the award of statement of the reasons for making the award*”, [CAA(NSW)], that notwithstanding the cautious approach of the High Court, some good guidance as to interpretation of the requirement for reasons may be obtained from *Gordian Runoff*.

**The background to Gordian Runoff:**

24. The dispute between the parties that resulted in the decision from High Court of Australia in *Gordian Runoff* arose in this way.

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8 Article 5 is incorporated in the Hong Kong legislation by HKAO s 12.
Gordian Runoff was an underwriter in respect of a portfolio of professional indemnity insurance and directors and officers liability insurance.

25. Prior to December 1998 the portfolio had been partially reinsured under a treaty for reinsurance whereby it was agreed that risks underwritten by Gordian Runoff with respect to those classes of insurance would be the subject of excess of loss reinsurance. The reinsurers included Westport. The particular issue in the dispute turned upon whether or not the reinsurance policies were issued for periods of three or seven years. The determination of this issue turned upon an interpretation of s 18B of the Insurance Act 1902 (NSW). That is not an issue which concerns us as arbitrators.

26. Under the policies, the dispute was to be referred to arbitration with the law of New South Wales as the proper law. The issues were complex and were determined by a panel of three arbitrators upon a set of detailed pleadings which ran to more than 60 pages. The hearing took some seven days with representation by senior counsel. Witnesses were sworn and cross examined on their written statements. There were many documents in evidence and a full transcript was provided.

27. As the High Court noted, in many respects the arbitration proceeded along the lines of conduct of a commercial cause in a superior court. The arbitrators found in favor of the reinsurers, Westport, and the reinsurance policies were limited to three years.
28. The relevant provision as to reasons in the NSW legislation was s 29(1) CAANSW, which required the arbitrators to:

“(a) make the award in writing,
(b) sign the award, and
(c) include in the award a statement of the reasons for making the award.”

29. Consequently, there were two issues before the High Court. First there was the question of the statutory interpretation. Second, was the question of the nature and extent of the reasons for award required by the CAANSW. Under the provisions of the CAANSW, leave to appeal, on a question of law, against an award could be granted on the following grounds:

“(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement, and
(b) there is:
(i) a manifest error of law on the face of the award, or
(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or maybe likely to add, substantially to the certainty of commercial law.”

30. The existence of an “error of law” ground of challenge meant that the arbitrator’s reasons would always be looked at in an effort to see whether or not there was an error of law.

A conflict between State Courts:

31. Prior to the decision in Gordian Runoff a conflict had arisen in the Australian state courts as to the extent of the reasons that were required by an arbitrator.
32. In *Oil Basins Ltd v BHP Billiton Ltd* [2007] 18 VR 346 (CA), the Victorian Court of Appeal had upheld a decision at first instance in relation to a challenge to an award. In the course of its decision made four statements:

“The in order to enable the court to see whether there has been an error of law, s 29 provides that the award must be in writing and that the arbitrator must include a statement of reasons. And in order to be utile, the requirement is for reasons sufficient to indicate to the parties why the arbitrator has reached the conclusion to which he or she has come. *To that extent, the requirement is no different to that which applies to a judge.*

“The arbitrators’ decision in the present case called for reasons of a judicial standard. As with reasons which a judge is required to give, the extent to which an arbitrator needs to go in explaining his or her decision depends on the nature of the decision.”

“Plainly, a judge is bound to refer to the relevant evidence and, where there is a conflict of a significant nature, to provide reasons for choosing one side over the other. A judge is also bound to deal with central contentions, even if sometimes only briefly, and at least to the extent of explaining in general terms why he or she has rejected. Accordingly, where evidence and contentions combine as they are prone to do in the form of expert evidence, and dispute involves ‘something in the nature of an intellectual exchange with reasons and analysis advanced on either side’, it is plain that the judge is bound to enter into the issues canvassed before the court and to provide an intelligible explanation as to why the judge prefers one case over the other. *In our view, an arbitrator is subject to similar obligations.*”

“So, in arbitration, the requirement is that parties not be left in doubt as to the basis on which an award has been given. *To that
extent, the scope of an arbitrator’s obligation to give reasons is logically the same as that of the judge.”\textsuperscript{12}

33. The explanation for the finding that reasons should be of a judicial standard is found in the following paragraph from \textit{Oil Basins}:\textsuperscript{13}

“Admittedly, as McHugh JA pointed out in \textit{Soulezmenis v Dudley (Holdings) Pty Ltd} (1987) 10 NSWLR 247, it is only in relatively recent times that judges have been required to give reasons of (the kind set out above). The obligation to do so will evolve over the last century after the creation of rights of appeal by statute, the enactment of stated case and review procedures, and the transfer to judges of the function of deciding questions of fact. It must be acknowledged that, in a number of cases concerning the scope of the judicial obligation to give reasons, a principal consideration has been that reasons should be sufficient to enable courts of appeal to see if there has been any error in the process of fact-finding. There is no right of appeal on questions of fact from the decision of an arbitrator. But the judicial obligation to give reasons is not based solely on rights of appeal. Ultimately, it is grounded in the notion that justice should not only be done but be seen to be done. And in point of principle, there is not a great deal of difference between the idea and the imperative that those who make binding decisions affecting the rights and obligations of others should explain their reasons. Each derives from the fundamental conception of fairness that a party should not be bound by the determination without being appraised of the basis on which it is made. So, in arbitration, the requirement is that parties not be left in doubt as to the basis on which an award has been given. To that extent, the scope of an arbitrator’s obligation to give reasons is logically the same as that of the judge.”

34. In \textit{Gordian Runoff}, in the New South Wales Court of Appeal\textsuperscript{14}, the court had preferred the lesser task imposed upon an arbitrator as described by Donaldson LJ in \textit{Bremer}, see §19 above.

\textsuperscript{12} \textit{Oil Basins} at [55].

\textsuperscript{13} \textit{Oil Basins} at 366 [56].

\textsuperscript{14} [2010] NSWCA 57.
The High Court decision in Gordian Runoff:

35. Three judgments were delivered in the High Court. French CJ, Gummow J, Crennan J and Bell J delivered a joint majority judgment dealing with the adequacy of reasons issue and the statutory interpretation issue.

36. The majority in the High Court was plainly not comfortable with the approach of the Victorian Court of Appeal in *Oil Basins*. They said\(^\text{15}\):

“The reference in *Oil Basins* to the giving by the arbitrators in that dispute of reasons to a “judicial standard” and cognate expressions\(^\text{16}\) placed an unfortunate gloss upon the terms of s 29(1)(c). More to the point were the observations in *Oil Basins* to the effect that what is required to satisfy that provision will depend upon the nature of the dispute and the particular circumstances of the case. Their Honours illustrated the point by saying\(^\text{17}\):

“If a dispute turns on a single short issue of fact, and it is apparent that the arbitrator has been chosen for his or her expertise in the trade or calling with which the dispute is concerned, a court might well not expect anything more than rudimentary identification of the issues, evidence and reasoning from the evidence to the facts and from the facts to the conclusion\(^\text{18}\).”

37. Heydon J did not deal directly with the issue of the extent of reasons to be given by an arbitrator, preferring simply to say that the arbitrators did not sufficiently explained why they had preferred the case of Gordian over that of Westport. In so doing he, like the majority,
apparently took the view that the circumstances of the case and the nature of the dispute required more extensive reasons from the arbitrators than had been given.

38. Keifel J went further. She said:\footnote{At §168-9.}

“The Commercial Arbitration Act does not bind the parties to an arbitration to the outcome of the arbitration they have agreed will take place. It allows for an appeal, albeit one limited to a question of law and one subject to conditions for the grant of leave to appeal. The (Commercial Arbitration) Act therefore comprehends something of a public, as well as a private, element in the making of an award of arbitration. It is in this context that an arbitrator’s “reasons for making the award” are required, by s 29(1)(c).

There is nothing in the Commercial Arbitration Act, specifically in the language of s 29(1)(c), on the nature of arbitrations subject to the Act, which suggests it is necessary that those reasons be to a judicial standard. But the requirement in s 29(1)(c) cannot be devoid of content, particularly given the context for it. Allsop P considered\footnote{In Gordian Runoff in the NSW CA; (2010) 267 ALR 74 at 114 [220].}, correctly in my view, that a statement in Bremer is apt to apply to s 29(1)(c). There Donaldson LJ said that a “reasoned award” requires the arbitrators to “explain succinctly why, in the light of what happened, they have reached their decision and what that decision is”.

She went on to agree with the majority that what was required by reasons in a given case would depend upon the circumstances of that case.

\textit{Discussion:}

39. It is plain that an important feature of the reasoning of the judges was that the legislation controlling the arbitration allowed for a
challenge based upon an error of law. In order to determine whether an error had been made there must be sufficient reasons. Those reasons must be directed at the central issues of the case because an error on an irrelevant or subsidiary matter would not be sufficient to give a basis to invoke the jurisdiction to set aside.

40. Although the decision in *Gordian Runoff* is, in its terms, a decision on specific legislation, and although the High Court deliberately excluded the federal legislation, and consequently the provisions of the Model Law from its consideration, it is submitted that good guidance to the obligation of an arbitrator under s 67 HKAO, (Article 31(2) of the Model Law), may be found in the decision. The extent of the reasons will depend upon the nature of the dispute and the particular circumstances of the case.

41. Under the HKAO, there are two circumstances in which an award will come before the court for consideration. The most common is an application by the successful party for enforcement pursuant to s 84 HKAO. The other, far less common in Hong Kong, is an application to set aside an award under Article 34 of the Model Law, [see s 81 HKAO]. There is no material difference between the basis for setting aside, under Article 34 of the Model Law and refusal of enforcement under Article 36 of the Model Law.\(^{22}\)

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\(^{21}\) Note that Articles 35 & 36 of the Model Law do not have effect.

42. Whether the court is an “enforcing” court, or a court asked to set aside an award, it is well-established that the court will not consider the substantive merits of the dispute, or the correctness of the award, whether concerning errors of fact and law. The court is now only concerned with the structural integrity of the arbitration proceedings. There is no doubt that the attitude of the court is to support an award if it can. That is plain from the decision in *Pacific China Holdings Ltd. (In Liquidation) v Grand Pacific Holdings Ltd*, (Unreported CACV 136/2011, 9 May 2012), (*PCH v GPH*), where Tang VP, in a judgment with which Kwan and Fok JJA agreed said:

“The court’s approach to (an application to set aside an award) is not controversial. The court is concerned with the ‘structural integrity of the arbitration proceedings’. The remedy of setting aside is not an appeal, and the court will not address itself to the substantive merits of the dispute, or to the correctness or otherwise of the award, whether concerning errors of fact or law.”

43. *PCH v GPH* has been the subject of international comment as a case demonstrating the likely integrity of an award in Hong Kong. The following statement has been made:

“The strong indication that the Hong Kong courts will not readily review procedural decisions made by the tribunal is a welcome sign of the strong support of the judiciary for arbitration. The judgment leaves the law on setting aside in Hong Kong in line with international standards, and is likely in time to contribute to the jurisprudence in this area in other UNCITRAL Model Law jurisdictions. As such, this is a welcome and well reasoned judgment that underlines Hong Kong’s status as an arbitration-friendly jurisdiction and

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24 At § 7.
25 Herbert Smith, Arbitration e-bulletin, 11 May 2012, Hong Kong
illustrates the principle that arbitral awards should be set aside in only the rarest of circumstances, where the tribunal’s conduct has been egregious.”

44. Logically, if there can be no challenge to the substantive merits of an award or the correctness or otherwise of an award whether concerning errors of fact or law, it must be all the more so that the extent of the reasons in an arbitrators award need not meet the standard of a judicial decision. The reasons must simply be sufficient to appraise the parties of the basis upon which the decision has been reached.

Conclusion:

45. Thus, if the issue is a purely factual issue, particularly one within the sphere of expertise of a single arbitrator, the barest of reasons may be sufficient. If the issue is technical, for example, the interpretation of a technical document within the sphere of expertise of a single arbitrator, a clear explanation of the basis for the interpretation chosen will be required. If the issue is a legal issue, and the arbitrator is legally qualified then again a clear explanation of the basis for the resolution of the legal issue will be appropriate.

46. The important step for the arbitrator to take is to carefully identify the issues that he is required to deal with in order to make his award. By concentrating on the issues and staying away from peripheral matters, and arbitrator is more likely to give an award that will be free from challenge.
47. It is accordingly submitted that the addition of a formal requirement on an arbitrator to give reasons for his decision by s 67 HKAO does not require the arbitrator to go beyond the duties set out by Donaldson LJ in *Bremer*. The reasons do not need to be to a “judicial standard”.

*Finally:*

48. It may be worthwhile to note that Heydon J, in *Gordian Runoff*, concluded his judgment with the following comment in a passage which he entitled; “The merits of arbitration”:

“The arbitration proceedings began on 15 October 2004 when Gordian served points of claim. This appeal comes to a close seven years later. The attractions of arbitration are said to lie in speed, and cheapness, expertise and secrecy. It is not intended to make any criticisms in these respects of the arbitrators, of Einstein J., or of the Court of Appeal, for on the material in the appeal books none are fairly open. But it must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater relevant experience than a commercial trial judge. Secrecy was lost once the reinsurers exercise their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three. Comment on these melancholy facts would be superfluous.”

49. Equally, no comment is required from me on those circumstances.

26 *Gordian Runoff* at §111.
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