1 Introduction

From: Legal Reasoning Across Commercial Disputes: Comparing Judicial and Arbitral Analyses
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1 Introduction

I. Introduction

Legal reasoning is central to the resolution of legal disputes, and, as such, has been subjected to a wide range of scholarly studies. Theorists have debated the essential nature and purpose of legal reasoning, while behavioural scientists have considered how informational deficiencies and unconscious biases affect rational decision-making. Other strands of commentary focus on the practical nature of legal reasoning to promote best practices in the field. As useful as these works may be, some gaps remain. In particular, it appears that many of the fundamental principles on which scholarship regarding legal reasoning is based have not been empirically tested.

While studies in this field can be challenging, this book undertakes the first-ever multi-faceted empirical study on legal reasoning in commercial disputes. The project not only provides novel insights into general practices, it also analyses potential differences along the judicial-arbitral divide, the domestic-international divide, and the common law-civil law divide.

The study is also distinct in that it focuses on first-instance rather than appellate decision makers. This particular methodology was adopted in order to delve more deeply into the important but often overlooked role that factual determinations play in legal reasoning and to create more suitable comparisons across the judicial-arbitral divide. In so doing, the discussion not only provides scholars with a new understanding of the reasoning process but also provides practitioners and policy makers with rigorous, fact-based analyses that can improve how justice is delivered on a systemic and individual level.

Because decision makers may approach legal reasoning differently depending on the subject matter at issue, this project focused exclusively on commercial disputes, defined throughout the study as business-to-business or commercial state entity-to-business disputes. To avoid confusion, research subjects were explicitly advised that the definition of commercial disputes did not include investor-state arbitration, since that procedure is considered quasi-public in nature. This is not to say that some of the information gleaned from this study may not be applicable to investment arbitration or indeed to other fields of law, but more research would be needed before any firm conclusions could be drawn.

Empirical studies are only as good as the research questions they seek to answer, and this project focuses on three interrelated issues. The first involves the longstanding assumption that legal reasoning in judicial settings is not only different than that used in arbitral settings but is somehow superior to arbitral reasoning. However, some forms of arbitration are extremely sophisticated, suggesting that conventional wisdom about the ‘second-class’ nature of arbitral justice may be the result of error or unconscious cognitive distortions. For example, one non-governmental organization that recently filed an amicus curiae brief in the United States Supreme Court case of GE Energy Power Conversion France SAS Corp v Outokumpo Stainless USA LLC claimed that it was acting to ‘defend[] access to justice for workers, consumers, and others harmed by corporate wrongdoing’ pursuant to its mission to ‘fight[] abuse of mandatory arbitration’, even though the dispute did not involve these categories of individuals but instead reflected a relatively standard dispute between international commercial actors.
Although a handful of empiricists have conducted independent analyses of judicial or arbitral decision making, relatively few scholars have sought to compare legal reasoning across the judicial-arbitral divide, and those studies that do exist are not in the commercial realm. Therefore, the first research question, presented as a null hypothesis to be disproven, is that no differences exist between legal reasoning in commercial litigation and legal reasoning in commercial arbitration.

As important and innovative as that issue is, the study does not stop there. The second line of inquiry focuses on actual or purported differences across the domestic-international divide.

Recent research in the area of international commercial arbitration suggests that the procedure is becoming increasingly legalistic, which affects the way in which arbitral awards are reasoned and written. Questions therefore arise as to whether domestic forms of commercial arbitration can or should be distinguished from international commercial arbitration.

Similar inquiries arise in judicial settings, although the analysis is slightly different. At this point, there is no truly international court, similar to the International Court of Justice, that addresses cross-border commercial disputes. While several countries have developed so-called international commercial courts within their own national legal systems, it is too early to analyse decisions arising out of those tribunals. Instead, international commercial litigation is best understood in its traditional sense as involving cross-border disputes seated in national courts that are not entirely dedicated to international commercial matters.

As a result, the second research question in this study, presented as a null hypothesis to be disproven, is that no difference exists between legal reasoning in domestic and international commercial matters, including disputes that arise in both litigation and arbitration. For purposes of this research, an international dispute is defined as a matter where at least two parties came from different countries; where the property at issue was located in a country different than that of the disputants; or where performance or enforcement was anticipated in a country different than that of the disputants.

The third and final issue considered in this book involves longstanding assumptions about the nature of legal reasoning in the common law and civil law legal traditions. The conventional view is that the common law relies primarily on case law and uses an inductive approach to legal reasoning while the civil law emphasizes the primacy of statutory law and adopts a deductive approach to legal reasoning. However, recent scholarship has begun to challenge this dichotomy, suggesting that the two legal traditions are becoming more similar. Therefore, the third research question, presented as a null hypothesis to be disproven, is that no difference exists between legal reasoning in common law and civil law legal systems, at least in the commercial context.

The three research questions are analysed through a multi-faceted empirical study that triangulates individual results across different research components so as to confirm the validity of the results. Detailed discussions of the individual methodologies are provided elsewhere, but it is useful to describe how the various pieces fit together within the overall research strategy.

The first element of the study, which is discussed in Chapter 2, involved a large-scale international survey addressed exclusively to judges and arbitrators with experience in commercial dispute resolution. The survey generated responses from 465 individuals from 41 different countries and included 73 different questions regarding the use of legal authorities, the use of factual authorities (evidence), the reasoning process, the drafting process, and judicial and arbitration education regarding these concerns. The survey was designed not only to test the validity of longstanding theoretical assumptions about legal reasoning across the judicial-arbitral, domestic-international, and common law-civil
law divides but also to generate new insights into the reasoning process in those contexts. Survey responses were subjected to statistical analysis to determine whether any relevant differences arose across the three axes of comparison.

The second element of the study, which is discussed in Chapter 3, involved a series of hour-long, semi-structured interviews of 20 judges and arbitrators from around the world. The interview protocol consisted of 27 different questions (not including sub-parts) covering the same issues addressed by the survey (i.e. the use of legal authorities, the use of factual authorities (evidence), the reasoning process, the drafting process, and judicial and arbitration education regarding these concerns). Interviewees were chosen to represent a wide variety of demographic attributes, including those that are central to the current study (e.g. those relating to potential differences across the judicial-arbitral, domestic-international, and common law-civil law divides) as well as those that reflect best practices in representative sampling (i.e. age, gender, seniority, etc.).

The interview protocol was purposely designed to use questions that were the same or similar to those used in the survey so as to allow comparisons between interview and survey responses and overcome limitations inherent in each of the different methodologies. For example, the survey was able to collect data from a larger and more diverse group of individuals than was possible with the interviews, although the interviews allowed participants to go into more depth in their responses and answer questions in their own words. This latter feature was particularly useful in minimizing any unconscious biases that might have been incorporated into the design of the survey and interview instruments.

The third and final element of the study, which is discussed in Chapter 4, involved a quantitative analysis of original judicial decisions and arbitral awards. These materials were coded across 76 different data points and subjected to several statistical analyses. The coding exercise not only compiled demographic information about the parties and neutrals hearing the dispute, it also generated information about the types of disputes heard in different fora and the nature of legal and factual reasoning used in the various matters. While it was impossible to duplicate all of the questions reflected in the survey and interviews in the coding exercise, the coding analysis nevertheless tested the validity of some of the results generated by the other two studies as well as certain theoretical assumptions regarding legal reasoning across the judicial-arbitral, domestic-international and common law-civil law divides.

Although it would have been interesting to link coded material to individual survey respondents or interviewees, that approach was considered undesirable, both because it might have reduced the candour of survey or interview responses and because it (p. 7) would have severely limited the scope of the study. The project therefore focused on a wider range of decisions and awards.

The coding analysis experienced a number of unanticipated difficulties associated with obtaining commercial decisions and awards suitable for the current study, but the exercise nevertheless considered 28 decisions from first-instance courts in Quebec, Canada; 92 decisions from the English Commercial Court; 7 trial-level decisions from US state and federal courts; 22 reasoned awards rendered in domestic commercial arbitrations seated in the United States; 32 reasoned arbitration awards rendered in international commercial arbitrations seated in 8 different countries; 12 unreasoned (standard) awards rendered in domestic commercial arbitrations seated in the United States; and 4 unreasoned (standard) awards rendered in international commercial arbitrations seated in the United States.
Together, the three strands of inquiry, combined with the three methodological approaches, create an extremely wide-ranging research project. Various cross-references between the different segments of the study are found in the substantive chapters (i.e. Chapters 2, 3, and 4, discussing the survey, the interviews, and the coding exercise, respectively). However, a number of overarching considerations can be found in Chapter 5, which also pulls together the various strands of research and offers a number of proposals on how to move forward in this area of law.

As broad as this study may be, some limitations do apply. Most notably, this study does not seek to determine whether litigation or arbitration is somehow better than the other, either in domestic or international disputes or in common law or civil law traditions. Instead, the discussion simply seeks to identify primarily whether and to what extent any differences in legal reasoning arise across the three comparative axes and, secondarily, whether and to what extent actual practice reflects theoretical models and assumptions involving legal reasoning.

In order to achieve that second goal, it is necessary to appreciate current theoretical views on legal reasoning across the judicial-arbitral, domestic-international and common law-civil law divides. Although considerations of space make it impossible to engage fully with the debates reflected in each of these areas of study, this chapter provides an overview of the basic principles as well as extensive references to resource material to assist individuals who are interested in learning more about the various concerns.35

Before undertaking that discussion, it is necessary to consider whether and to what extent the overarching methodology adopted in this book conforms to best practices in social science research. The following section therefore describes empirical issues taken into consideration during the design of this project. Specific matters relating to individual empirical elements are considered in the relevant chapter.36

II. Best Practices in Empirical Legal Studies

The standard means of evaluating the validity of social science research is by considering the propriety of the study’s methodology.37 This is particularly true when the project seeks to break new empirical ground, since the findings have not yet been replicated by other scholars.38

The first step in designing a new empirical study involves determining whether and to what extent the research questions are amenable to empirical analysis.39 In this case, the current topic appeared eminently suitable. Not only has legal reasoning itself been subjected to numerous empirical studies over the years in both the judicial and arbitral contexts,40 but so, too, have dispute resolution processes themselves, including (p. 9) adjudicative mechanisms such as litigation41 and arbitration42 as well as consensual mechanisms such as mediation.43

As important as it is to gauge the amenability of a particular subject matter to empirical research, scholars need not be tied to the same methodology used in the past. In fact, developing new methodological approaches is critical to generating new data, since different research techniques test different assumptions and practices.44 However, it is also important not to stray too far from the established research norms, lest the findings be considered unreliable.

The current study sought to chart a middle path between novelty and orthodoxy.45 For example, numerous studies of judicial and arbitral decision making seek to gain insight through detailed outcome analyses that consider whether legal reasoning is (p. 10) affected by extra-legal considerations.46 This strand of scholarship typically adopts the perspective of the Legal Realists47 and considers whether and to what extent the presumed ideology of the decision maker, as determined by the political affiliation of the entity that appointed a judge48 or arbitrator,49 and can be used to predict the outcome or the dispute. As useful as
these types of studies may be, they would be largely if not wholly inappropriate in the current context, both because the judicial decisions discussed herein come from a range of jurisdictions, thereby making it difficult or impossible to devise reliable methods of identifying ideological patterns of judicial appointment across jurisdictional lines, and because the commercial nature of the arbitral awards makes it difficult or impossible to attribute any ideological perspectives to the parties appointing the arbitrators.\(^{50}\)

Another type of quantitative empirical study involves citation counts of legal authorities found in publicly available decisions and awards.\(^{51}\) This particular methodology is not only suitable in the current study but also extremely useful, since it promotes a certain amount of comparative analysis by building upon earlier, analogous research. However, the research conducted herein introduces several innovative elements, including the expansion of citation count studies from legal authorities to factual (evidentiary) authorities and the creation of a new paragraph-by-paragraph analysis that calculates the amount of time decisions and awards spend on legal, factual, and other issues.\(^{52}\)

(p. 11) Existing empirical studies also make frequent use of surveys and semi-structured interviews, particularly in research involving alternative dispute resolution.\(^{53}\) Although similar investigations would be equally useful in the judicial context, it has traditionally been difficult to obtain unfiltered access to judges.\(^{54}\) However, the ever-increasing number of judges who have retired and taken up work as arbitrators has not only helped scholars understand the judicial mindset but has also facilitated comparisons of judicial and arbitral reasoning, since judge-arbitrators can be asked directly whether they change their approach to legal reasoning depending on the context in which they are working.

Another reason why surveys and interviews are seldom used in judicial settings involves concerns about whether judges can or will be fully candid about their actions and motivations, an issue that has as much to do with standard issues regarding self-awareness (i.e. whether the subject of a research study can or will ever be truly honest about his/her beliefs and behaviours) as it does with the judicial desire to protect the sanctity of the deliberation process.\(^{55}\) However, scholars have successfully conducted surveys and interviews of neutrals in arbitration and mediation, suggesting that there is nothing inherently problematic with these particular methodologies so long as the researcher incorporates sufficient safeguards into the process.\(^{56}\) Therefore, this study uses surveys as well as semi-structured interviews to investigate the beliefs and behaviours of judges, arbitrators, and judge-arbitrators.\(^{57}\)

The next step in designing an empirical research study involves ensuring that the chosen methodology is appropriately tied to the underlying research question(s).\(^{58}\) This project uses a mixed qualitative-quantitative approach to investigate legal reasoning in commercial disputes, focusing on potential differences across the judicial-arbitral, domestic-international, and common law-civil law divides. The mixed approach is both necessary and appropriate, not only because the study seeks to determine what judges and arbitrators do and why they do it,\(^{59}\) but also because a mixed approach allows the ‘triangulation’ of individual research streams within the study, thereby creating an internal confirmation mechanism to test the validity of the results.\(^{60}\)

(p. 12) Triangulation arose in two different ways. First, the project asked very similar questions in the survey and the semi-structured interviews, thereby providing an immediate check for information discrepancies, including those that might have arisen as a result of interviewees’ desire to ‘look good’ to the interviewer.\(^{61}\) Second, the project correlated data generated by the survey and interviews against information produced from the coding exercise.\(^{62}\) While these techniques were not entirely aligned—for example, there was no way to check whether an interviewee who had completed the survey had answered both sets of questions similarly, since the survey was entirely anonymous, and no efforts were made to conduct a coding analysis of particular decisions or awards written by interviewees
— the cross-referencing of data nevertheless allowed comparisons to be conducted on a general basis.

Innovation was not limited to methodological considerations. The research also broke new ground with respect to substantive concerns, particularly with respect to the understanding of the concept of ‘legal reasoning’. Traditionally, scholarship on legal reasoning has focused nearly exclusively on judicial and arbitral treatment of legal authorities and argumentation, using citation counts or computer-assisted linguistic analyses to measure the frequency with which certain legal materials or words were used. However, similar studies have not been conducted with respect to factual authorities (evidence), even though a growing amount of research suggests that factual issues are more important than legal issues in many commercial disputes. Furthermore, experts from both common law and civil law jurisdictions agree that finding ‘the appropriate methodology for distinguishing questions of fact from questions of law [is], to say the least, elusive’, and note that ‘the practical truth [is] that the decision to label an issue a “question of law”, a “question of fact”, or a “mixed question of law and fact” is sometimes as much a matter of allocation as it is of analysis’.

Heeding the concerns of scholars who believe that existing studies are too narrow, this study therefore expanded the concept of ‘legal reasoning’ to include evidentiary authorities and arguments. In so doing, this research not only amplified the understanding of how commercial disputes are resolved but also addressed the longstanding assumption that arbitration focuses primarily on facts while litigation focuses primarily on law.

Another substantive innovation involved the scope of analysis, which was both more detailed and more comparative than analogous studies. For example, rather than relying on generalized citation counts, this project distinguished between different categories of legal and factual authorities to determine which materials are most persuasive to judges and arbitrators. The research also considered whether judges and arbitrators approach authorities differently depending on whether the issue was procedural or substantive in nature and investigated a number of related issues, such as the extent to which judges and arbitrators conducted independent legal and factual research.

Another substantive innovation involved attempts to identify the extent to which legal reasoning was affected by factors such as policy and equity. The research was also unusual in that it distinguished between the reasoning process and the drafting process, and asked a separate series of questions about how judges and arbitrators approached the actual writing of decisions and awards. In so doing, the project tested the often-repeated notion that the mere act of writing a decision or award improves the reasoning process.

The final major innovation involved the series of questions in both the survey and the interviews regarding judicial and arbitral education. While these inquiries do not address legal reasoning per se, they can help educational providers develop courses on legal reasoning that more accurately reflect the needs of the participants. At this point, there is a dearth of scholarship—particularly empirical scholarship—about judicial and arbitral education, largely as a result of the assumption in many jurisdictions that new judges and arbitrators simply step into their roles with a minimum of effort. Other difficulties have stemmed from the outmoded belief that judicial and arbitral education focuses primarily if not exclusively on current developments in the law. Problems have also arisen as a result of the ‘bias blind spot’, a type of unconscious cognitive distortion that leads individuals—including both judges and arbitrators—to fail to see shortcomings in themselves even while they identify similar shortcomings in others. These factors strongly suggest the need to
undertake additional research, including empirical research, into matters relating to judicial and arbitral education.

III. Existing Scholarship on Legal Reasoning

The best empirical studies do not exist in a vacuum but are instead appropriately situated within existing substantive scholarship. As a result, this project not only sought to take previous studies of legal reasoning into account during the design phase but also conscientiously aimed to test some of the theories reflected in the legal literature. While space restrictions make it impossible to engage with the ongoing theoretical debates in detail, the relevant concepts are introduced in the following subsections along with extensive references to resource material for those who want to read more about the various ideas. The discussion is organized along the three comparative axes (judicial-arbitral, domestic-international and common law-civil law), although some issues are equally relevant to more than one line of inquiry.

A. Comparing Judicial and Arbitral Practice

The primary focus of this research project involved a desire to determine whether judges and arbitrators differed in their approaches to legal reasoning and legal process. Although relatively few studies specifically seek to compare the two processes directly, a considerable body of empirical research strongly refutes longstanding assumptions about arbitral reasoning, including the notion that arbitrators simply ‘split the baby’ or unfairly benefit ‘repeat players’ to an extent not seen in litigation. Despite these findings, arbitration is nevertheless routinely considered ‘lesser’ than litigation, particularly in the domestic realm, where arbitration is frequently characterized as ‘second class justice’. While most of the concerns about the quality of arbitral justice refer to consumer or employment arbitration rather than commercial arbitration, many individuals within both the lay and legal communities fail to distinguish between the various processes, which can lead to commercial arbitration being damned simply by association.

Although empirical scholarship is not always successful in overcoming pervasive misperceptions, this study nevertheless seeks to put an end to some of the more enduring myths about legal reasoning in judicial and arbitral proceedings. For example, one issue that is tested herein involves conventional wisdom suggesting that arbitrators in commercial disputes rely on legal authority less frequently than judges and on facts and/or equitable arguments more frequently than judges. Indeed, some people appear to believe that arbitrators are not bound by precedent and instead rely solely on equitable principles to decide dispute, even though most commercial arbitrations are governed by the law of a particular jurisdiction named by the parties, and the ability to rely on equitable principles (as when the arbitral tribunal decides *ex aequo et bono* or as an *amiable compositeur*) is only possible with the express consent of the parties. This project tests that assumption by studying the frequency with which judges and arbitrators rely on both law and facts in resolving commercial disputes, an issue that has seldom been considered. The study even goes a step further and considers whether any difference in practice exists across the substantive-procedural divide.

As important as it is to understand the role that different types of legal and factual authorities play in judicial and arbitral proceedings, the process of legal reasoning involves much more than consideration of binding and persuasive authorities. For example, legal decision makers are often influenced by conscious and unconscious beliefs about what constitutes the proper role of a judge or arbitrator. Views about what constitutes the ‘ideal’ judge or arbitrator can have ramifications on everything from the use of law clerks or assistants to help research or draft decisions or awards to whether a judge or arbitrator conducts independent legal or factual research. Many of these ancillary beliefs and behaviours are understudied and undertheorized. As a result, this project...
included a number of questions, both general and specific, about these additional practices and principles so as to gain a greater understanding of legal reasoning as a whole.

Another area that has proven problematic in the past involves the distinction between legal reasoning and legal drafting. Although most commentators appear to conflate (p. 18) the two processes, reasoning is in fact quite different from drafting, which is why this study separates the two elements. Thus, questions on the reasoning side break down the constituent elements of judicial and arbitral decision making, such as the interaction between facts, law, equity, and policy, while drafting-oriented inquiries focus on how and why judges and arbitrators reflect their reasoning in written decision and awards. This latter category of questions provides insights into a number of previously unstudied issues, such as the scope and nature of legal and factual materials considered by judges and arbitrators and the extent to which those items are ultimately reflected in the final decision or award.

Analysis of drafting considerations necessarily implicates the concept of what constitutes a reasoned decision or award. Questions about the nature of reasoned rulings have been discussed to a limited degree in the arbitral context by commentators and judges considering the difference between reasoned awards and unreasoned (standard) awards. However, such matters are not frequently discussed with respect to judicial decisions themselves, since the standard mechanism for addressing problematic decisions (i.e. an appeal) typically focuses on the correctness of the reasoning and the outcome rather than the nature of the reasoning itself. However, Gary Born has noted that being correct as a matter of law is ‘not a requirement for a well-reasoned award: bad or unpersuasive reasons are still reasons, and satisfy statutory requirements for reasoned awards’. This suggests that judges and arbitrators would both benefit from a better understanding of what constitutes a well-reasoned ruling as opposed to a ruling that is legally correct.

Interestingly, the connection between law and fact is often made obvious in definitions of reasoned rulings, thus justifying the inclusion of inquiries relating to the consideration of factual authorities (evidence) in the current study. For example, one definition of a reasoned ruling states:

> [A]ll findings of fact shall be based upon sufficient competent evidence to justify same. All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The ... judge shall specify the evidence upon which the ... judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the ... judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the ... judge must identify that evidence and explain adequately the reasons for its rejection.

This study sought to increase the understanding of these issues by asking judges and arbitrators to identify the hallmarks of reasoned decision or award. Answers to these and other questions may help providers of judicial and arbitral education develop curricula that more closely meets the needs of the target populations.
B. Comparing Domestic and International Practice

The majority of issues discussed in the preceding subsection are equally applicable to questions involving domestic and international practice. However, comparisons across the domestic-international divide raise a number of additional and unique concerns. Perhaps the most notable of these involves the way in which many members of the lay and legal communities routinely conflate domestic and international forms of arbitration, often to the detriment of international arbitration. While it can be difficult to compare ‘domestic’ arbitral practices in various jurisdictions to ‘international’ arbitral practices, empiricists have begun to study those differences, and this project seeks to contribute to the continuing developments in this field.

While it would be useful to compare domestic and international judicial practices, there were no true ‘international commercial courts’ at the time the study was conducted, although recent developments in this regard would support future analyses of this type. However, many judges who hear commercial disputes in existing national courts currently handle both domestic and international disputes, and this study sought to determine whether and to what extent judges adapted their approaches depending on the nature of the dispute.

C. Comparing Common Law and Civil Law Practice

The third major area of inquiry in this study involved purported differences between legal reasoning in common law and civil law countries. Again, many of the issues raised across the judicial-arbitral and domestic-international divides applied to the comparison of common law and civil law jurisdictions in equal measure. However, the common law-civil law dichotomy gave rise to a number of unique considerations that were important not only from a scholarly perspective but also from a practical one, since one of the primary means of resolving international commercial disputes—i.e. international commercial arbitration—consciously blends elements of the common and civil law. International commercial arbitration’s unique combination of common law and civil law elements is evident both in its approach to both reasoning and drafting.

The legal literature has identified numerous differences between legal reasoning in common law and civil law jurisdictions. For example, the common law has traditionally been said to rely on inductive, analogical reasoning, whereas the civil law is considered to be more deductive and rules-based. Similarly, the common law tradition has long been considered to rely heavily on oral testimony as an evidentiary matter, whereas the civil law tradition relies more on documentary evidence. Furthermore, civil law jurisdictions tend to prohibit or severely discredit testimony from party witnesses, whereas common law jurisdictions routinely hear such evidence. These and other differences are believed to affect not only the nature of legal reasoning but also the conduct of judicial and arbitral proceedings as well as the manner in which reasoned decisions and awards are drafted.

The situation is further exacerbated by suggestions that longstanding differences are no longer as pronounced, signalling a possible convergence between the two systems. Indeed, while reasoned rulings may at one time have been said to be associated primarily with the common law legal tradition, civil law jurisdictions also consider fully reasoned legal decisions to be essential to procedural justice.

Interestingly, a reasoned decision from a civil law nation can not only look very different from a reasoned decision from a common law country, it can also vary significantly in comparison to other civil law decisions. At one end of the spectrum lie French judgments, which are usually ‘formulated in a single sentence, including several “whereases” (attendus)’. Although some common law commentators appear to believe that French practice belies the notion that well-reasoned [apparently meaning fully reasoned]
opinions are in some sense necessary’.\(^{122}\) French decisions have been described as being ‘consistent with—and probably produced by—the primacy of text, conceptualism, and deduction, as well as the post-revolutionary caution on the part of judges not to exceed their limited powers’.\(^{123}\)

As well-known as the French style may be, it is by no means standard within the civil law legal tradition. For example, it has been said that

> [w]hoever compares the arguments of a decision of a German Landgericht with those of a Dutch rechtbank will be impressed by the length and thoroughness of the German argument on the one hand, the straightforward, paper-saving decision of the Dutch court on the other. In appeal courts and before the highest courts the differences in elaborateness are even more apparent. German legal style is much more differentiated, scholarly worded; the style of Dutch courts is pragmatic . . .\(^{124}\)

Similar distinctions also appear to exist within the common law world.\(^{125}\) While there is no known commentary comparing legal reasoning within the common law tradition, scholarship on comparative common law procedures identifies a number of clear differences between leading jurisdictions, particularly with respect to the taking of evidence during the pre-trial period.\(^{126}\) While procedures relating to the taking of evidence are not directly related to legal reasoning, there is an indirect connection in that the amount and type of evidence that can be collected will affect the amount and type of evidence that is subsequently introduced at trial and considered by the judge.

The variations within both the common law and civil law traditions suggest that it may be difficult or even impossible to identify differences based solely on legal families. Instead, it may be that it is only possible to discuss the extent to which a particular jurisdiction reflects standard assumptions about common law and civil law techniques. Nevertheless, this project tests both the standard understanding of common law and civil law attributes as well as allegations about a potential convergence between the two legal traditions.

### D. Background and Demographic Considerations

Traditional analyses of legal reasoning assume that the reasoning process is relatively standard within a particular country or legal community. However, experts in feminist and critical race theory have challenged the concept of a unitary norm involving legal reasoning,\(^{127}\) raising questions as to whether legal reasoning in commercial disputes varies as a result of demographic considerations involving gender, age, seniority, or race.\(^{128}\)

Empirical studies relating to judicial and arbitral appointment rates suggest that bias relating to certain demographic attributes does in fact exist. For example, numerous studies have shown that women have been appointed as judges and arbitrators far less frequently than men,\(^{129}\) which suggests a conscious or unconscious assumption that women approach legal reasoning differently than men.\(^{130}\) Other studies have suggested that parties prefer to appoint older and/or more ‘experienced’ arbitrators or former judges to arbitral tribunals,\(^{131}\) presumably based on the belief that older individuals (p. 25) and former judges have superior legal reasoning skills. However, there is no known research indicating that judges and arbitrators change their approach to legal reasoning, for better or worse, as a result of the passage of time or that former judges provide a different or better quality of justice than arbitrators. Indeed, many judges appear unaware of arbitral norms before entering the field, suggesting that they may not function as well as individuals who have specialized in arbitration throughout their careers.\(^{132}\)
While this project did not consider these types of issues in detail, some of the material collected in this project will be used to support future studies involving the role that demographic considerations such as gender, age, and level of experience play on legal reasoning. Some of the background and demographic information reported here may also prove useful to other scholars working in this area of law, both as theoreticians and empiricists.

Having established the scholarly foundations for the current project, it is time to move to a detailed analysis of the international survey, which was the first element of the empirical study. That discussion is found in the next chapter.

Footnotes:


Ibid; Lucy (n 1) 310–11.


Richard Michael Fischl, ‘It’s Conflict All the Way Down’, (2001) 22 Cardozo L Rev 773, 786 (suggesting rule application is understudied); Michael S Pardo, ‘Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism’, (2000) 95 Northwest. U L Rev 399, 401 (noting that the role of facts and evidence in legal determination is ‘undertheorized’). In the United States, this lacuna may arise because fact-finding is generally associated with juries rather than judges, although that hypothesis does not explain why analysis of the role that facts play in legal reasoning is largely unstudied in other jurisdictions. Michael J Saks, ‘What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?’, (1997) 6 So Cal Interdisciplinary LJ 1, 42. In the United Kingdom and Commonwealth, this gap may be due to the contention ‘that decisions on questions of law are generally required to be supported by public justifications, whereas there is no such general requirement for determinations of fact’. William Twining and David Miers, How to Do Things with Rules (5th edn, Cambridge University Press 2010) 126; Robin Creyke and others, Laying Down the Law (10th edn, LexisNexis Butterworths 2018) 249. In any case, the scholarly emphasis on the finding of facts, as opposed to the use of facts in the determination of the legal dispute, creates a false dichotomy between law and facts in judicial and arbitral reasoning. Boonin, Theoretical and Practical (n 3) 436–37.

As a theoretical matter, authorities are unclear as to whether arbitration constitutes a substitute for, an alternative to, or a supplement to litigation. Larry E Edmonson, Domke on Commercial Arbitration s 1:1, at 1–3 (3d edn, Thomson Reuters 2010) (noting arbitration coexists with litigation as ‘part of the American system of administering justice’); Pierre Mayer, ‘Comparative Analysis of Power of Arbitrators to Determine Procedures in Civil and Common Law Systems’, (1996) 7 ICCA Congress Series 24, 25 (noting arbitration is sometimes considered ‘a substitute for State justice, albeit of a private nature, but nevertheless pursuing the same ends’); Jeffrey W Stempel, ‘Keeping Arbitrations from Becoming Kangaroo Courts’, (2007) 8 Nevada LJ 251, 260 (noting ‘arbitration is a substitute for adjudication by litigation’). Some variation may also exist according to the type of arbitration in question. Edmonson (n 8) s 1:3, at 1–8 to 1–9 (noting that early precedent distinguished between commercial arbitration as a substitute for litigation and labour arbitration as a substitute for avoiding industrial strife, but suggesting that these
distinctions may no longer apply). In any event, regardless of how arbitration is characterized, arbitral awards are more properly considered the functional equivalents of decisions from first-instance courts than of appellate opinions, since appellate judges focus primarily on questions of law rather than questions of law and fact.


11 Those who are interested in pursuing similar lines of inquiry might want to consider adopting the methodology used herein so as to allow cross-study comparisons. Chs. 2.II, 3.II, 4.II; Appx. I, II, III.

12 Anselm Strauss and Juliet Corbin, Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory (Sage Publishing 1998) 41 (discussing the need for precisely formulated research questions).

13 Ch 1.III.A.


17 Robert W Frick, ‘The Appropriate Use of Null Hypothesis Testing’, (1996) 1 Psych Methods 379–90 (discussing the appropriate use and function of null hypothesis testing); Mike Townsend and Thomas Richardson, ‘Probability and Statistics in the Legal

18 Ch. 1.III.B.


20 Calls have been made for the development of an international court of civil justice that would have jurisdiction over certain commercial matters. Maya Steinitz, The Case for an International Court of Civil Justice (Cambridge University Press 2018).

21 These courts can vary significantly in how they are structured. Xandra E Kramer and John Sorabji (eds), International Business Courts: A European and Global Perspective (Eleven International Publishing 2019).


23 Ch 1.III.C.


25 Ch 1.III.C.

26 The study also included data from jurisdictions outside the common law and civil law legal traditions, although those jurisdictions were not subjected to individual analysis.


28 Chs. 1.II (concerning overarching methodological concerns), 2.II (concerning survey), 3.II (concerning semi-structured interviews), 4.II (concerning coding of decisions and awards).

Saks (n 7) 5 (noting every empirical technique has its own distinct advantages and disadvantages).

The survey was intentionally made anonymous to increase the candour of the responses.

Ch. 4.II.A (discussing how decisions and awards were selected).

Ch. 4.II.A.

Quebec is often characterized as a civil law system with respect to private law concerns despite being considered a mixed legal system as a general matter. William Tetley, ‘Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodified)’, (2000) 60 Louisiana L Rev 677, 684, 695 (discussing how principles of English and commercial law were combined with principles of French law in the Civil Code of Lower Canada of 1866, which was in place when Quebec became part of the Dominion of Canada). However, some scholars question whether legal reasoning in Quebec is as civil law-oriented in practice as it is said to be as a formal matter. Catherine Valcke, ‘Quebec Civil Law and Canadian Federalism’, (1996) 21 Yale J Intl L 67, 114

Ch. 1.III.

Chs. 2.II (concerning the survey), 3.II (concerning the semi-structured interviews), 4.II (concerning the coding exercise).


Replicability is another major means of validating social science research. Saks (n 7) 5.

Epstein and King, Rules (n 29) 54; Franck, Empiricism (n 37) 790 (noting ‘not all research questions are well-suited to empirical methodologies’); Matthias Schonlau, Ronald D Fricker and Marc N Elliott, Conducting Research Surveys via E-Mail and the Web (RAND Corporation 2002) 5–18 (discussing studies on research methodology conducted by the RAND Corporation).


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www.arbitration.qmul.ac.uk/research/index.html> accessed 11 April 2020 (containing details regarding nine different empirical studies concerning international arbitration).


46 Outcome studies often involve reversal rates. Knight (n 4) 1552. Some empirical studies have shown no discernible difference in outcome between judicial decisions and arbitral awards. Chew (n 16) 185 (considering civil rights disputes).


48 Numerous studies consider whether outcomes can be anticipated on the basis of the political affiliation of the individual who appointed the judge in question. E.g. CK Rowland and Robert A Carp, *Politics and Judgment in Federal District Courts* (University Press of Kansas 1996) 24–57; Sisk and Heise (n 40) 743.


50 However, some scholars have suggested empirical research based on systemic considerations in international commercial arbitration. Stavros Brekoulakis, ‘Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making’, (2013) 4 J Intl Disp Settlement 553. Theorists have argued that arbitrators may be prone to bias because of reputational or financial benefits associated with serving as an arbitrator, but empirical research suggests that concern is unfounded. Susan D Franck and others, ‘International Arbitration: Demographics, Precision and Justice’, in Albert Jan van den Berg (ed), *International Council of Commercial Arbitrators Series Number 18*.
Legitimacy: Myths, Realities, Challenges (ICCA 2015) 33, 85–91 (Franck and others, Demographics).


52 Sisk (n 40) 885 (noting the need to ‘examin[e] and classify[] the content of judicial opinions rather than merely counting outcomes in cases’).


54 Many studies of judicial conduct are conducted by ‘insiders’, meaning those who work at judicial research centres and who thus are unlikely to publish anything that might prove embarrassing to the judges in question. E.g. Cantone (n 41) (conducting a survey for the US Federal Judicial Center); James B Eaglin and Matthew Alex Ward, ‘Enhancing the Administration of Justice and Strengthening Judicial Independence Through Independent, Judicial-Based Applied Research Centers’, (2014) 7 J L Tech Risk Mgmt 77. One judge who has sought to pull back the veil on judicial reasoning is Judge Richard Posner, formerly of the US Federal Court of Appeals for the Seventh Circuit. E.g. Posner, Think (n 40).


57 Chs. 4, 5.

58 Strauss and Corbin (n 12) 41.

59 The motivation assessed herein focuses more on justificatory practices rather than extra-legal influences, which are often found to have relatively little effect on legal reasoning. Knight (n 4) 1553; Sisk (n 40) 888.

60 Saks (n 7) 5; Timans, Wouters, and Heilbron (n 27) 193.

61 Anonymous online surveys, such as the one conducted here, are often considered more accurate than interviews because respondents typically feel free to be entirely candid. Interviewees, on the other hand, can consciously or unconsciously seek to please the interviewee by providing what is perceived as the ‘right’ answer or can avoid divulging information that the interviewee perceives as shameful or embarrassing. Olena Kaminska and Tom Foulsham, Understanding Sources of Social Desirability Bias in Different Modes: Evidence from Eye-Tracking (Institute for Social and Economic Research 2013) 1.

62 One problem of non-directed interviews is that the results can devolve into mere anecdotal evidence if the study is not properly constructed. Neumann and Krieger (n 44) 380; see also Deborah L Rhode, ‘Legal Scholarship’, (2002) 115 Harv L Rev 1327, 1343.
Those issues can be resolved by testing the results of the semi-structured interviews against survey data.

63 Choi and Gulati, Bias (n 51) 87; Choi and Gulati, Trading Votes (n 51) 735; Commission (n 51) 129; Fischman and Law (n 51) 167; Weidemaier, Judging-Lite (n 40) 1105–06.


66 ‘The Legal Concept of Evidence’, 

67 Benjamin N Cardozo, The Nature of the Judicial Process (Yale University Press 1949) 164–65 (discussing three types of judicial writings); Knight (n 4) 1554. Those involved in legal education have also recognized the need to expand the conception of ‘legal reasoning’, as taught in law schools, to include factual considerations. American Bar Association Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development: An Education Continuum (American Bar Association 1992) 40, 53, 138–39 151–57, 163–72 (MacCrate Report).

68 Miller v Fenton, 474 US 104, 113–14 (1985) (citations omitted); see also Collector of Customs v Agfa-Gevaert Ltd, (1996) 186 CLR 389, 384 (Australia) (‘The distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by many distinguished judges and juries to formulate tests for finding the line between the two questions, no satisfactory test of universal application has
yet been formulated.’); Ruddock v Taylor, (2005) 222 CLR 612, 627 (Australia) (noting there are ‘many cases ... in which a distinction between mistake of law and mistake of fact could not readily be drawn, if drawn at all’); Creyke and others (n 7) 250–51 (discussing the test in Collector of Customs v Pozzolanic, (1993) 43 FCR 280, for distinguishing facts and law and subsequent cases); SI Strong, ‘Legal Reasoning in International Commercial Disputes: Empirically Testing the Common Law-Civil Law Divide’, in Mélida N Hodgson and Antonio Crivellaro (eds), Dossier XVII: Reasoning in Arbitration (ICC Institute of World Business Law 2020) 41 (Strong, Legal Reasoning).

69 Knight (n 4) 1539–40 (discussing criticisms of the inappropriate narrowness of previous studies on judicial decision making).

70 Ch. 1.III.A.

71 Previous studies often made no distinctions between the types of authorities cited. Weidemaier, Judging Lite (n 40) 1105–06.


73 Strong, Reasoned Awards (n 19) 19–20; SI Strong, ‘Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced and Foreign Judges’, 2015 J Disp Res 93, 104 (Strong, Reasoned Decisions). Other rationales exist for reasoned decisions and awards. Strong, Reasoned Awards (n 19) 15–20 (identifying both structural and process-oriented rationales for such awards, such as making sure the parties feel heard and protecting the award from subsequent review or annulment); ibid at 31–33 (discussing the audience for reasoned awards); Strong, Reasoned Decisions (n 73) 101–05 (identifying both structural and process-oriented rationales for such decisions, such as making sure the parties feel heard); ibid 116–17 (discussing the audience for reasoned decisions).

74 Recent years have seen a significant increase in interest in matters relating to judicial and arbitral education. Livingston Armytage, Educating Judges: Towards Improving Justice (Brill 2015); SI Strong, ‘Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?’ 2015 J Disp Res 1, 1–18 (Strong, Judicial Education); Strong, Reasoned Awards (n 19) 5–8; Strong, Reasoned Decisions (n 73) 95–96; Chartered Institute of Arbitrators, Training at Ciarb, <https://www.ciarb.org/training/> accessed 11 April 2020 (discussing pathway programme of advanced education); Professor Cheryl Thomas QC (Hon) Appointed the First Ever Dean of Education at Inner Temple, UCL Faculty of Laws, <https://www.ucl.ac.uk/laws/news/2019/jul/professor-cheryl-thomas-qc-hon-appointed-first-ever-dean-education-inner-temple> accessed 11 April 2020.

75 Strong, Reasoned Awards (n 19) 5–8; Strong, Judicial Education (n 74) 1–18; see also Emily Kadens, ‘The Puzzle of Judicial Education: The Case of Chief Justice William de Grey’, (2009) 75 Brooklyn L Rev 143, 146–47 (noting that many believe judges learn their new roles ‘by doing’ or through socialization (acculturation)).

76 In fact, leaders in judicial and arbitral education focus primarily on programming involving professional skills. Strong, Judicial Education (n 74) 20 (discussing courses on ‘judge-craft’); Strong, Reasoned Awards (n 19) 43 (discussing courses on ‘arbitrator-craft’).

77 Strong, Status Quo Bias (n 14) 553. Judges and arbitrators can also be prone to overconfidence. Franck and others, Arbitrator’s Mind (n 2) 1163 (discussing empirical research on egocentrism, also known as self-serving bias, in both judges and arbitrators); Strong, Judicial Education (n 74) 14 (discussing judicial hubris).
One common method of comparing judicial and arbitral beliefs and behaviours involves taking a research technique that was previously used in the judicial realm, applying it to the arbitral realm, then analysing whether any differences arise. E.g. Franck and others, Arbitrator’s Mind (n 2) 1166; Helm, Wistrich, and Rachlinski (n 40) 667 n 3.


Chandrasekher and Horton (n 49) 1 (discussing the repeat player phenomenon in litigation); Lee Epstein, ‘Some Thoughts on the Study of Judicial Behavior’, (2016) 57 Wm & Mary L Rev 2017, 2066 (noting studies on litigation from around the world show that courts tend to favour repeat players). Most studies of the repeat player phenomenon appear in consumer, employment, and investment arbitration rather than commercial arbitration, which tends to reflect ‘one shot’ players and customized, rather than standardized, arbitration agreements. E.g. Sarah Rudolph Cole, ‘The Lost Promise of Arbitration’, (2017) 17 SMU L Rev 849, 858–61 (distinguishing commercial arbitration from other mechanisms); Drahozal, Private Judging (n 79) 127–28 (citing studies and noting evidence of a repeat player bias is ‘inconclusive’); Franck, Empirically Evaluating (n 42) 80; Franck and Wylie (n 49) 501; Catherine A Rogers, ‘The Arrival of the “Have Nots” in International Arbitration’, (2007) 8 Nevada LJ 341, 343–44 (discussing traditional nature of international commercial arbitration).

E.g. Cellinfo, LLC v American Tower Corp, 352 F Supp 3d 127, 135–38 (D Mass 2018) (providing empirically faulty data on arbitration and one-sided policy analyses); Strong, Status Quo Bias (n 14) 562. Notably, a number of former judges who subsequently became arbitrators have remarked on the quality of justice in arbitration, with one highly esteemed US magistrate judge—Wayne Brazil—going so far as to claim that arbitration was in many ways better than litigation. Wayne D Brazil, ‘When “Getting it Right” is What Matters Most, Arbitrations are Better Than Trials’, (2017) 18 Cardozo J Conflict Res 277, 277–78 (‘[I]n many circumstances and for certain kinds of cases, arbitrations conducted by conscientious arbitrators are likely to yield higher quality decisions than trials conducted by conscientious judges.’).

In the United States, this criticism is most frequently aimed at consumer, employment, and labour arbitration, which are relatively informal processes. SI Strong, ‘The Special Nature of International Insurance and Reinsurance Arbitration’, 2015 J Disp Res 283, 287–89 (citing sources). International commercial arbitration, on the other hand, is frequently considered to reflect ‘Rolls Royce justice’ because of its complexity and sophistication. Russell J Weintraub, International Litigation and Arbitration: Practice and Planning (Carolina Academic Publishers 1994) 455; see also Born (n 14) 2129.


Some studies outside the commercial setting have addressed this issue. Chew (n 16) 205–06 (noting arbitrators in civil rights cases cited legal principles and interpreted legal principles in much the same manner as judges); Andrew J Wistrich, Jeffrey J Rachlinski, and Chris Guthrie, ‘Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?’,
(2015) 93 Texas L Rev 855, 912 (noting that judges are affected by emotional or equitable concerns).


87 Knight (n 4) 1555.


91 Most authorities suggest that judges can conduct such research, although judges vary considerably as to whether they do in fact undertake such efforts. Robert Barnes, ‘Should Supreme Court Justices Google?’ Wash Post (8 July 2012), <https://www.washingtonpost.com/politics/should-supreme-court-justices-google/2012/07/08/gjQAMC9kWW_story.html> accessed 11 April 2020; Robert Barnes, ‘Supreme Court Rule: (Other) Justices Shouldn’t Conduct Independent Research’, Wash Post (25 March 2018), <https://www.washingtonpost.com/politics/courts_law/supreme-court-rule-other-justices-shouldnt-conduct-independent-research/2018/03/25/7a4f790a-2ebd-11e8-b0b0-f706877db618_story.html> accessed 11 April 2020; Strong, Reasoned Decisions (n 73) 126-27 (citing authorities); SI Strong, ‘Richard A. Posner, Divergent Paths: The Academy and the Judiciary – How Legal Academics Can Participate in Judicial Education: A How-To Guide by Richard Posner’, (2017) 66 J L Ed 421, 430 (suggesting judges should conduct independent legal and factual research). However, the same degree of consensus does not appear to exist with respect to independent legal research by arbitrators, since the process is private,
rather than public, and awards do not carry the same type of precedential value as judicial decisions. Jennifer Kirby, ‘How Far Should an Arbitrator Go to Get it Right?’, in Patricia Shaughnessy and Sherlin Tung (eds), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer (Wolters Kluwer 2017) 193; Strong, Reasoned Awards (n 19) 25-27 (citing authorities).

Significant doubts exist about whether judges and arbitrators should engage in independent factual research. Strong, Reasoned Awards (n 19) 25-27 (citing authorities); Strong, Reasoned Decisions (n 73) 126-27 (citing authorities); see also American Bar Association, Formal Opinion 478, Independent Factual Research by Judges Via the Internet (8 December 2017), <https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_478.pdf> accessed 11 April 2020.

For example, one issue of interest involved whether and to what extent judges and arbitrators provide parties with feedback about the parties’ arguments or provide insight into any legal or factual research conducted by the decision maker. Sussman, Survey (n 66) 524. Not only was it important to consider whether such discussions took place, it was also important to appreciate why, when, and how those conversations took place. Geoffrey M Beresford Hartwell, ‘Assessing Evidence, Constructive Mistrust and the Loneliness of Decision-Making: “There’s Not Art to Find the Mind’s Construction in the Face”’, in Tony Cole (ed), The Roles of Psychology in International Arbitration (Wolters Kluwer 2017) 299, 311.


However, relatively few studies integrate theoretical and empirical analysis, which underscores the usefulness of the current research. Knight (n 4) 1546; Sisk (n 40) 897. For example, questions exist as to whether arbitrators write awards for the review of third parties interested in the outcome of the dispute and whether arbitrators write reasoned awards, at least in part, for their own edification. Sussman, Survey (n 66) 534.

A few exceptions exist. Knight (n 4) 1542-43; Posner, Think (n 40) 110-11; Strong, Reasoned Awards (n 19) 21-54; Strong, Reasoned Decisions (n 73) 106-27.

Sussman, Survey (n 66) 519, 531.

Knight (n 4) 1542 (discussing factual determinations); ibid 1548-49 (discussing legal determinations); Sussman, Survey (n 66) 528.

Thomas Bingham, ‘Reasons and Reasons and Reasons: Differences Between a Court Judgment and an Arbitral Award’, (1988) 4 Arb Intl 1 (presenting the views of a former Lord Chief Justice of England). For example, the English Court of Appeal (Civil Division) described the duty to give reasons in a judicial decision as follows:

(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties—especially the losing party—should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know ... whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.

(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation whereas here there is disputed expert evidence; but it is not necessarily limited to such cases.

(4) This is not to suggest that there is one rule for cases concerning the witnesses’ truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.

Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377, 381 (England); cf Schwebel v Schwebel [2011] 2 AER (Comm) 1048 at [23] (England) (holding a reasoned award does not have to list all the argument or pieces of evidence that are accepted or rejected but should typically identify the primary evidence which is found compelling, if the case depends upon factual findings, since that will be part of the reasoning). Other countries have formulated similar but jurisdictionally unique standards for both judicial decisions and arbitral awards. E.g. Westport Insurance Corporation v Gordian Runoff Ltd [2011] HCA 37 (Australia) (concerning the Australian Commercial Arbitration Act 1984); Court of Appeal Brussels, 6 December 2011, Management Service bvba v Vlaamse Media Maatschappij (Belgium), published in (2014) 1 b-Arbitra, pp 215–219 (suggesting that an award will be considered reasoned if the arbitrator has addressed all the arguments raised, even if s/he does not go into the details of each argument); Court of First Instance of Liege, 6 March 1984, Q v C, published in Jurisprudence de Liege, 1984, pp 197–200 (Belgium) (holding that the reasoning in an arbitral award shall meet the same quality standards as those required for judicial decisions); Federal Supreme Court, 14.05.1992, File Number III ZR 169/90
(Germany), published in 1992 Neue Juristische Wochenschrift (NJW), p 2299 (holding an arbitral tribunal is not obligated to address every assertion of the parties in an award, but only to consider those assertions); Higher Regional Court Munich, 29.10.2009, File Number 34 Sch 15/09 (Germany), published in BeckRS 2009, p 86918 (noting that parties in arbitration must be able to comment on all the facts and evidence on which the award was based but noting that principle did not impose a general duty on the arbitral tribunal to clarify or ask questions if the parties nor a general right of the parties to a legal discussion); Svea Court of Appeal, 20 June 2013, Case No T 10913-11 (Sweden) (noting a tribunal’s lack of reasoning can be a ground for setting aside an award only if there is essentially a complete lack of reasoning, which is a very high standard); Svea Court of Appeal, 7 December 2006, Case No T 5044 (Sweden) (noting the Swedish Arbitration Act does not require reasoned awards); Svea Court of Appeal, 29 March 2001, Case No T 5781-00 (Sweden) (denying the party’s claim that award lacked reasoning and that the arbitral tribunal had not addressed each argument raised); Swiss Federal Tribunal, First Civil Law Court, 29 January 2010, A GmbH v B SA, No 4A_550/2009, para 5 (Switzerland) (noting the right to be heard does not include the right to a reasoned decision, and that although arbitral tribunals have an obligation to hear and consider those allegations that are legally relevant, this does not require tribunals to expressly address every argument advanced by the parties in the award); Swiss Federal Tribunal, First Civil Law Court, 30 September 2003, A v B Ltd, C GmbH, D Ltd and E Ltd, No 4P100/2003, paras 5–6 (Tvornica decision) (Switzerland) (annulling an award that relied on a provision that neither of the parties had considered to be central to the matter and that had generated legal reasoning that was very different from the positions advanced by the parties); High Court of the Basque Country 14/2015, 2 December (Spain), published in Id Cendoj 480203100120151000030 (noting a failure to address all the claims submitted to arbitration implied a lack of defence of the counterclaimants and a violation of the procedural public policy (orden público procesal), which requires awards to be logical, well-reasoned and consistent with the parties’ petitions); Cat Charter LLC v Schurtenberger, 646 F 3d 836, 844 (11th Cir 2011) (US); Rain CII Carbon, LLC v ConocoPhillips Co., 674 F 3d 469, 473–74 (5th Cir 2012) (US) (distinguishing a reasoned award from an award with findings of fact and conclusions of law); Leeward Construction Co v American University of Antigua-College of Medicine, 826 F 3d, 634, 640 (2d Cir 2016) (US); Hart v Massanari, 266 F 3d 1155, 1176–77 (9th Cir 2001) (US) (discussing and reflecting on the qualities of a reasoned judicial ruling); Smarter Tools Inc v Chongqing Senci Import & Export Trade Co, Civ 18-cv-2714 (AJN), 2019 WL 1349527 at 6 (SDNY 26 March 2019) (US); see also Exemplary Legal Writing, The Green Bag Almanac and Reader, <http://www.greenbag.org/green_bag_press/almanacs/almanacs.html> accessed 11 April 2020 (listing well-written judicial rulings on an annual basis); International Bar Association, Annulment of Arbitral Awards by State Court: Review of National Case Law With Respect to the Conduct of the Arbital Process (October 2018), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=b4b532bb-90e1-40ab-ab3d-f730c19984fb> accessed 11 April 2020.


102 Born (n 14) 3044.

103 Indeed, commentators have specifically indicated that judges need to receive more feedback on their reasoning skills. Rachlinski and Wistrich (n 103) 223 (noting that appeals are not an appropriate means of providing useful feedback).
Although this definition arises in the context of the statutory duties of a workers’ compensation board, the principles appear to apply equally in other situations, including arbitration. Jennifer Kirby, ‘What Is An Award, Anyway?’, (2014) 31 J Intl Arb 475, 476; see also Born (n 14) 3040–41, 3043–44.

Views on this issue can vary considerably between different individuals. Cross (n 55) 1465–66; SI Strong and Jeremy Fogel, ‘Judicial Education, Dispute Resolution and the Life of a Judge: A Conversation with Judge Jeremy Fogel, Director of the Federal Judicial Center’, 2016 J Disp Res 259, 276 (noting that individuals’ ‘judicial philosophy is very important, and it affects every facet of the litigation process’ and recognizing that judicial philosophy varies significantly between individuals as a matter of institutional design and judicial independence); Sussman, Survey (n 66) 519 (discussing the ‘applied legal storytelling movement’).

For example, significant debate exists regarding whether and to what extent programming regarding unconscious bias should be mandated within the judicial community. E.g. Kathleen Mahoney, ‘Judicial Bias: The Ongoing Challenge’, 2015 J Disp Res 43, 43; Elizabeth Thornberg, ‘(Un)Conscious Judging’, (2019) 76 Wash & Lee L Rev 1567, 1569–70 (noting how unconscious biases affect factual inferences); ibid at 1644–46 (noting need for training on unconscious bias).

Strong, Status Quo Bias (n 14) 538.


International Business Courts: A European and Global Perspective (n 21) (discussing developments in various jurisdictions).


Some questions exist as to how the two traditions are balanced as a matter of arbitral procedure and reasoning. For example, the French approach to legal reasoning does not appear to be widely adopted in international commercial arbitration, despite the esteem with which France is held in the field. Marcel Fontaine, ‘Drafting the Award: A Perspective From a Civil Law Jurist’, (1994) 5 ICC Court Bulletin 30, 36; James M Gaitis, ‘International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards’, (2004) 15 Am Rev Intl Arb 9, 17. Instead, reasoned awards in international commercial arbitration have more frequently resembled judicial decisions generated by courts in common law countries and in civil law jurisdictions like Germany, although a shift toward civil law techniques may currently be underway, given increasing concerns within the international arbitral community about excess cost and formality of procedures. Klaus Peter Berger, ‘Common Law vs. Civil Law in International Arbitration: The Beginning or the End?’ 36 J Intl Arb 296, 299–300 (2019) (questioning whether the adoption of the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) reflected a movement away from the traditional view of international arbitration proceedings as a blend of common law and civil law procedures); Fontaine (n 111) 36 (noting that French-style ‘whereas’ clauses (attendus) are generally not used in international awards, even in those countries where that style of writing is common in the judicial context). But see Interim Award in ICC Case No 4131, IX Yearbook Commercial Arbitration 131, 135 (1984) (using attendu clauses, although the
decision was translated from French and comes from an earlier era in international commercial arbitration).

For example, most awards in international commercial arbitration run dozens of pages in length. E.g. Contractor (Zambia) v Producer (Zambia), Final Award, ICC Case No 16484, 2011, XXXIX YB Comm Arb 216 (2014); Fontaine (n 111) 36; see also XXXIX YB Comm Arb 30-305 (2014) (publishing a variety of recent awards); Kai Schadbach, ‘The Benefits of Comparative Law: A Continental European View’, (1998) 16 Boston U Intl LJ 331, 343 n 63 (comparing German and Dutch legal decisions); Queen Mary, University of London, International Arbitral Award Writing, <https://www.qmul.ac.uk/law/postgraduate/courses/short/arbitration-award-writing/> accessed 11 April 2019 (offering a course in award writing and indicating that the mock award produced by students must exceed 5,000 words). A somewhat shorter example can be found at Consortium member (Italy) v Consortium leader (Netherlands), Final Award, ICC Case No 14630, XXXVII Yearbook Commercial Arbitration 90 (2012). Notably, some commentators have suggested that ‘in some instances, longer is not better’ when it comes to drafting arbitral awards. Born (n 14) 3041–42.


E.g. Marcello Gaboardi, ‘How Judges Can Think: The Use of Expert’s Knowledge as Proof in Civil Proceedings’, (2018) 18 Global Jurist 1 (discussing fact-finding processes for common and civil law judges); Pejovic (n 115) 834-35 (discussing, for example, the common law’s use of party-appointed experts versus the civil law’s use of court-appointed experts as well as the single hearing in common law courts as opposed to multiple hearings in civil law courts). Some scholars have discussed ‘the litigant-driven theory of decisionmaking’, which posits that ‘actual decisions produced by courts will be controlled largely by the strategic litigation decisions made by the parties to the action’. Cross (n 55) 1491; see also ibid 1494; Flader and Anderson (n 53) 285. This issue is particularly relevant to the extent that common law lawyers are said to favour ‘adversarial’ proceedings while civil law lawyers prefer ‘inquisitorial’ proceedings. Zweigert and Kötz (n 24) chs 7, 14, 18.

For example, it is often said that civil lawyers rely more on scholarly commentary than common law lawyers, whereas common law lawyers rely more on judicial precedent. Jan K Schäfer, ‘Focusing a Dispute on the Dispositive Legal and Factual Issues, or How German Arbitrators Think: An Introduction to a Traditional German Method’, (2013) 2 b- Arbitra 333; SI Strong, How to Write Law Essays and Exams (5th edn, Oxford University Press 2018) chs 3-6 (discussing reasoning and drafting in England); SI Strong, How to Write Law Exams: IRAC Perfected (2d edn, West Academic Publishing forthcoming 2020) chs. 3–6 (discussing reasoning and drafting in the United States); Strong, Reasoned Awards (n 19) 21–54; Strong, Reasoned Decisions (n 73) 107-27; Vranken (n 66) 57-58.


Wells (n 119) 1029.

Friesen (n 121) 8.


Strong, Fach, and Carballo (n 24) chs. 3–6 (comparing various common law countries, including Australia, Canada, England, and the United States).


Some studies do exist, but they often focus on outcome rather than on the constituent elements of legal reasoning and thus could be affected by a variety of influences. Rachlinski and Wistrich (n 103) 205–08.


For example, Lord Neuberger, former President of the Supreme Court of the United Kingdom, stated in a public address that he believed that judges who became arbitrators might be inclined not to follow the law, as they did on the bench, which suggested a lack of familiarity with the requirement, in virtually all commercial arbitrations, that arbitrators follow the law. ‘Lord Neuberger on Judge-Arbitrators, and on Brexit’, CIArb News (26 April 2019) <https://www.ciarb.org/news/london-branch-keynote-speech-lord-neuberger-on-judge-arbitrators-and-on-brexit/> accessed 11 April 2020.