Differences between a Judgment and a Reasoned Award

by the Rt Hon. LORD JUSTICE BINGHAM

In opening the first in this series of lectures, on 'Differences between a Judgment and a Reasoned Award', I must confess to a certain wistful regret at not having been asked to give the last, on 'The Perfect Judge and the Perfect Arbitrator'. It would of course be too much to hope, with such a title, that one could achieve the alliterative immortality enjoyed by the late Mr Justice Byles. But who could contemplate without emotion the prospect that in the law library catalogues of the world there would appear the entry 'JUDGES, Perfect: see Bingham L.J.'? And in moments of melancholy one could seek consolation by tapping out 'Perfect Judge' on the computer terminal which every modern lawyer has at his bedside and await with expectancy the appearance on the screen of one's own familiar name. When, however, one looks at the name of the chairman and the speaker entrusted with this last, precious topic it is plain that they were carefully and judiciously selected as shining examples of their respective species. So I must abandon my grandiose delusions and turn to my more mundane task.

I begin by asking why it is customary for judges to give judgments at all. A judgment is not, after all, a necessary feature of formal dispute resolution. It played a small part in trial by battle or ordeal. And it might well be thought that parties who have endured the tedium and anguish of legal proceedings would wish to be spared yet another journey through country made distasteful by gross over-familiarity. No doubt many are. But there are, I think, four – or perhaps four and a half – good reasons why the giving of reasoned judgments has become a standard feature of ordinary judicial proceedings.

The first reason is that, as the Court of Appeal said (with reference to an industrial tribunal decision) in *Meek v. City of Birmingham District Council* [1987] 1RLR 250 at 251,

> "The parties are entitled to be told why they have won or lost. And if, as so often happens, the winner has recovered less than he claimed, he is entitled to be told which parts of his claim have been held ill-founded or exaggerated."

This reason calls for little discussion. But I seek support in the sense of dissatisfaction which many must have felt when, after a trial before lay justices in

which there has been a lively conflict of evidence and a vigorous tussle on issues of law, and perhaps after a lengthy recess for consideration, the chairman returns and simply says "We find the case proved. Anything known?" I would add, lest I be thought unfairly to criticise the most junior members of the judicial hierarchy, that a somewhat similar sense may be felt when a petition for leave to appeal to the Judicial Committee of the House of Lords is dismissed with no reasons given, a feeling not mitigated when the decision which it is unsuccessfully sought to challenge is shortly thereafter held by the House, in another appeal, to have been wrongly decided. I personally regret that commercial judges, when refusing applications for leave to appeal against arbitration awards, should have been enjoined against giving reasons, however briefly (*Antaios Compansa Naviera S.A. v. Salen Raderierna A.B., The Antaios* [1985] A.C.191).

The second (closely related) ground for giving reasoned judgments is as a safeguard against arbitrariness, private judgment or an irrational splitting of the difference between what one party claims and the other admits. Since earliest times judges have forsaken judgments reflecting their own personal view of the justice of the case (a role reserved, probably quite unfairly, for the cadi under his palm tree) in favour of the rational application of principle and authority. The giving of a reasoned judgment is the litigant's guarantee. As it was put by the late Professor Harold Potter *The Quest of Justice*, 1951, p.13)

> "If there is any truth in the aphorism that justice must not only be done but seen to be done, then a decision without reason given must always be regarded as undesirable, because it must be suspect since it may be arbitrary."

The third reason, only applicable in cases of a kind where conduct may be repeated, is to guide parties and others interested in their future conduct. Thus in Meek's case, already referred to, the Court of Appeal described it as

> "highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted".

In many other fields traders and professional practitioners will be alerted to pitfalls and encouraged to review their practices by learning of the forensic experience of others.

Fourthly, the giving of a reasoned judgment enables any appellate court to review the decision and decide whether it is subject to reversible error. It is notorious that the worst judgments, namely those in which the findings of fact are most skimpy and the legal rulings most deficient, are often the hardest to challenge. How can the advocate challenge findings of fact when there are none or pinpoint errors of legal reasoning when the Judge has eschewed any discussion of legal principle or authority? But the litigant has in the ordinary way a right to appeal or seek leave to appeal and a judge can have no legitimate reason for

making the basis of his decision other than clear. So the Judge should provide what the prescribed process of appellate review properly requires. But – and this qualification is one to which I must return – the reasons which for this purpose any tribunal may reasonably be expected or required to give must be related to the scope or review which is available.

Lastly, but if a reason at all I think this is only entitled to be regarded as half a reason, the giving of a reasoned judgment is in my view a valuable intellectual discipline for the decision maker. I cannot, I hope, be the only person who has sat down to write a judgment, having formed the view that A must win, only to find in the course of composition that there are no sustainable grounds for that conclusion and that on any rational analysis B must succeed. This is, I think, why, save in very clear cases, judges are generally reluctant to announce an immediate result with reasons to be given later.

I do not think one can make any generally valid statement about the form of the English first instance judgment, which is naturally influenced by the nature of the case in question and also (often unmistakably) by the style and personality of the Judge in question. But I do think it is possible to identify the ingredients which will usually be found in a competent and well-constructed first instance judgment. First, it is usual to find near the outset of the judgment a succinct indication of what the case is about.

Nothing elaborate is called for: simply "In this action A claims damages from B for personal injuries which A suffered when..." or "This case raises an important question on the meaning and effect of...". Some cases are too complex to permit a useful encapsulation of the point in this summary way; but it helps to identify the ball early on so that the reader coming to the judgment fresh can follow the play in an intelligent manner.

Next, it is usual for a Judge to summarise the uncontentious background events leading up to the dispute. This sounds like an easy and straightforward task, and if the Judge does his job well this is the part of the judgment to which least attention is paid on any later review of it. But I do not myself regard this task, in a case of any complexity, as being at all easy or straightforward or unimportant. The Judge must try and create a coherent and intelligible narrative, even though there may be several relevant sub-plots taking place at the same time as the main plot. He must try to avoid unnecessary quotation and at the same time ensure that his summaries do not distort. He must not avoid mention of events to which any party reasonably attaches significance even if the significance is not in his view very great. He must remain objective, not slanting the facts to suit his eventual conclusion. And, above all, he must be scrupulously accurate, which can only be achieved by a meticulous verifying of references. This is not a distinctively judicial skill, as any historian would reasonably point out. But it is a necessary skill, since in my view nothing

more quickly undermines confidence in a judgment than a sloppy, incoherent, inaccurate and partial account of events which are not even in issue.

The Judge must then identify the crucial factual issues which do arise between the parties, assuming (as is usually the case) that there are some. Taking the issues in turn, the Judge will usually summarize the evidence given on behalf of the respective parties bearing on the point. I emphasise the word 'summarise' because of course the Judge cannot and should not attempt to set out all the evidence *in extenso*. But where the issue is one of primary fact (what was said or done? What happened?) it is generally desirable to mention the witnesses who testified on the point and summarise their evidence if at all significant, and if the issue arises from a conflict of expert evidence it is necessary, however briefly, to summarise the effect or the competing opinions.

The Judge must then say which evidence he prefers and why and state his conclusion on the factual issue. I have elsewhere considered at some length the problems which confront the judge when trying factual questions (*The Judge as Juror: The Judicial Determination of Factual Questions. 1985 Current Legal Problems* p.1) and I shall not repeat myself save to re-assert my view that these are very often the most difficult and most anxious of judicial tasks. But the judge of fact must say why he finds the evidence of A reliable and B unreliable, why he accepts the opinions of experts C and D in preference to those of E, F and G, and in some cases the basis of his decision cannot be fairly understood unless he makes plain that he simply cannot accept the evidence of H. Whether he goes further than that and makes an express finding of dishonesty is a question for him, no doubt depending in part on the certainty with which he has reached his conclusion. If reaching a decision on issues of fact, particularly primary fact, is often hard enough, giving reasons to justify that decision is scarcely less so. The demeanour of the witness is now, I think, less highly regarded as an indicator of the truth than it once was (op.cit at p.6 *et passim*. That is why judges, in my view rightly, rely so far as they can on such matters as inherent probability, inconsistency with other uncontentious evidence, proven inaccuracy and material self contradiction. But the giving of reasons for preferring one factual witness to another remains difficult. It is not in itself very helpful, as judges sometimes do, to describe a witness as 'impressive'. Both a drill sergeant from the Brigade of Guards and a regius professor may well be impressive. But they are likely to impress in somewhat different ways, and what matters is the particular qualities of the witness which were found to be impressive. Again, I have never been very happy with a formula much used by some County Court Judges in days past: "On every point on which the evidence of A and B is in conflict I prefer the evidence of A". No doubt this was thought to render the judgment proof against appeal. And no doubt cases arise in which B pulls off the considerable feat of being quite wrong (whether through unreliability

or dishonesty) on every single disputed point. But I think such cases are much rarer than the use of the formula might suggest. My own experience has usually been that the truth lies somewhere between the two competing accounts: A may have captured the lion's share of the truth, but it is unusual for B to have been so neglectful or so villainous as to have captured no part or to have eschewed it altogether.

The Judge will then identify the legal issues which arise on the facts as he has found them. In resolving these he will summarise the parties' respective contentions, make reference to the relevant legal principles and analyse the relevant authorities. It is often said that counsel in argument cite too many cases of peripheral relevance. I sometimes wonder if this disease, like gaol-fever, may not have been communicated to the bench. If, of course, a party founds his case on an authority which the court considers irrelevant it will probably be necessary to examine the case in detail to demonstrate that it is irrelevant and why. But it is in my view symptomatic of the tendency towards over-elaboration to which we are all prone that authorities which could without disadvantage have been left out of the argument nonetheless find a place in the judgment. Where, however, a party advances a number of different arguments it is usually necessary to rehearse and express an opinion on each, even if the first is accepted.

It is sometimes of value if a Judge says what his decision would have been had he reached a different conclusion of fact or law, or how, in such different circumstances, he would have exercised his discretion (if any). But the extent to which this is desirable or useful or even feasible depends very much on the nature of the particular case.

By the end of the judgment the whole of the Judge's thinking on the facts and the law should have been laid bare, that all who run may read. It should be fair to assume that he has not been led to his decision by matters he has not mentioned. No cards regarded by him as significant should remain face downwards or in the pack. His decision may later be held to have been right or wrong, but at least there should be no real doubt what he decided or why.

I now turn, not before time perhaps, to arbitration awards. There are some arbitrations, those of the 'look-sniff' variety in particular, where there is really no room for the giving of reasons: tapioca pellets either are, in the experienced judgment of a trade arbitrator, of fair average quality or they are not; whichever way his opinion goes there is probably not much that he can usefully add by way of exegesis. But to most arbitrations not of this kind the grounds I have advanced in favour of giving reasons generally apply. It is not therefore surprising to find a strong balance of international opinion in favour of the giving of reasons by arbitrators. Thus the European Convention of 1961 provided that

"The parties shall be presumed to have agreed that reasons shall be given for the award

unless they:

(a) either expressly declare that reasons shall not be given or

(b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given" (Article VIII).

Similarly, the UNCITRAL Model Law provides (in Article 312) that

"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."

Mustill & Boyd well summarise the traditional arguments in favour of unreasoned awards and the objections to them (*Commercial Arbitration*, 1982, pp.541-2).

"First, there was the peculiarly English practice of making awards without reasons. Where the dispute turned on a single short issue of fact, this did no harm. Very often, the arbitrator was chosen for his prestige and experience in a particular trade. His decision was intended to result from a swift and authoritative appreciation of the data placed before him, rather than from a consciously reasoned analysis of the evidence and arguments. Decisions of this kind are not readily explained in writing, particularly by persons whose skills lie in the field of commerce, not language; and the labour required to formulate an explanation would compromise the speed which is essential to this type of arbitration. What the parties wanted was the answer, not the arbitrator's account of how he arrived at it. In more complex cases, however, the practice of publishing un-reasoned awards was objectionable. The parties had spent time and money in adducing evidence and argument. The losing party had a right to know why he had lost, and the winner to know why (as might often happen) the amount awarded was less than he had claimed. Moreover, if no explanations were given, and the award lay between the two extremes for which the parties had contended, it might be suspected that there had been an exercise in rough justice by the umpire, or some kind of bargaining between the arbitrators, rather than proper analysis of the evidence at issue. This defect was keenly felt by foreign parties, accustomed to systems where reasons were given as a matter of course, or were required by law. Furthermore, an un-reasoned award might well be useless to the successful claimant, since in certain jurisdictions such an award is not capable of enforcement."

Even before the *Arbitration Act 1979* it was the practice of many arbitrators, particularly (and to the credit of the London Maritime Arbitrators' Association) in the maritime field, to give reasons as part of the award or on a privileged basis, even in the absence of any request for an award in the form of a special case. But it was the policy of the 1979 Act to encourage reasoned awards. In *The Oinoussian Virtue (Schiffartsagentur Hamburg Middle East Line G.m.b.H. v. Virtue Shipping Corporation* [1981] 1 Ll.533 at 537) Mr Justice Robert Goff (as he then was) said:

"It is widely believed that one of the chief benefits of the Act is that reasoned awards will be readily given; it is, I believe, the general practice of maritime arbitrators to give reasoned awards as a matter of course, and I trust that it either has, or will, become the general practice of all English arbitrators to do so."

In *The Ninemia (Trave Schiffartsgesellschaft m.b.H. & Co. K.G. v. Ninemia Maritime Corporation* [1986] QB.802) Sir John Donaldson, MR. defined a reasoned award (at 807D) as

> "one which states the reasons for the award in sufficient detail – for the Court to consider any question of law arising therefrom",

and observed (at 808B):

> "The giving of reasoned awards is to be encouraged, for, as was said at para.26 of the *Commercial Court Report on Arbitration* (1978) (Cmnd.7284):
>
> 'The making of an award is, or should be, a rational process. Formulating and recording the reasons tends to accentuate its rationality'
>
> Whilst the parties could execute an exclusion agreement and so prevent any appeal, it would be unfortunate if arbitrators were to come to regard the making of a reasoned award, in the absence of a request so to do, as giving hostages to fortune. The importance of this factor will vary in differing circumstances, as (it) is always the case with matters going to the exercise of a discretion."

The Master of the Rolls' reference to hostages to fortune may nonetheless strike a chord in many an arbitral breast, and such arbitrators may ruefully recall the advice which Lord Mansfield is reputed (as I think implausibly: but see Potter, op.cit. at p.42) to have given to the Judges of the Court of King's Bench:

> "Consider what you consider justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong."

If I am right as to the general bias, here and abroad, in favour of reasoned awards, one might have expected to find some explicit endorsement of the practice in the 1979 Act. As it is, the Act approaches the matter in what seems to me rather an oblique manner. The relevant provisions are sub-sections (5) and (6) of section 1, which provide:

> "(5) Subject to subsection (6) below, if an award is made and, on an application made by any of the parties to the reference –
>
> (a) with the consent of all the other parties to the reference, or
>
> (b) subject to section 3 below, with the leave of the court,
>
> it appears to the High Court that the award does not or does not sufficiently set out the reasons for the award, the Court may order the arbitrator or umpire concerned to state the reasons for his award in sufficient detail to enable the Court, should an appeal be brought under this section, to consider any question of law arising out of the award.
>
> (6) In any case where an award is made without any reason being given, the High Court shall not make an order under subsection (5) above unless it is satisfied –
>
> (a) that before the award was made one of the parties to the reference gave notice to the arbitrator or umpire concerned that a reasoned award would be required; or
>
> (b) that there is some special reason why such a notice was not given."

(Section 3 of the Act of course contains the limited power conferred on parties to agree that any right of appeal under the Act shall be excluded). So whereas a Judge is ordinarily obliged, with very few exceptions, to give reasons for every decision he makes, an arbitrator is not, at any rate unless asked. Even if asked he is not bound to comply. He may then be ordered by the Court to give reasons under section 1(5).

But such an order is by no means automatic. In considering whether to exercise its discretion to make such an order the Court will be much influenced by the prospect of leave to appeal being given if an order were made and full or fuller reasons given. Another obvious difference between the position of the Judge and the arbitrator may be noticed here.

A Judge whose reasoning is deficient may be criticised and may be reversed, but he cannot be ordered to supplement or elaborate his defective offering. What he has not written he has not written. A re-trial may of course be ordered, but it would always or almost always) be by a different Judge. To some of these points I must return.

How, then, should an arbitrator approach the question whether to give reasons or not? *Mustill & Boyd* consider this question (op.cit., at 332-3):

> "In contrast to the position before the 1979 Act, when the arbitrator had, within limits, a discretion as to whether a point of law should be raised for the decision of the Court, the arbitrator no longer has any part to play in deciding whether a question of law should or should not be the subject of an appeal. It is for the party who wishes to preserve his right to apply for leave to appeal to give notice to the arbitrator before the award is made that a reasoned award is required: if he receives such notice the arbitrator should incorporate his reasons into the award. Even if he does not receive such notice the arbitrator may, if he thinks fit, publish an award which sets out his reasons on its face. But an award in this form may be the subject of an appeal even though the reasons are set out spontaneously and not in response to a notice that a reasoned award was required. An arbitrator who volunteers an award in this form is, in effect, inviting the losing party to appeal. Unless this is what the arbitrator really intends, he should avoid the possibility of the losing party having second thoughts about a decision not to appeal, by delivering his reasons as a separate document stated not to form part of his award".

In *Warde v. Feedex International Inc.* [1984] L1.310 at 315 Mr Justice Staughton also considered the question. He said this:

> "However, I would respectfully agree with the proposition, which I take to be inherent in the judgment of Mr Justice Robert Goff (in *The Oinoussian Virtue*) that parties to an arbitration other than one which raises only a simple question of fact are entitled, if they wish, to be told the reasons for the arbitrator's conclusion.
>
> I would suggest that the practice should be as follows:
>
> (a) If one party requests a reasoned award, the arbitrator should make a reasoned award, save in very exceptional cases.
>
> (b) If both parties ask that there should not be a reasoned award, the arbitrator should respect their wish: but he should also, if asked, provide reasons in a separate

document which is not incorporated in the award and does not form part of it.

(c) If one party asks that there should not a reasoned award and the other says nothing, the arbitrator should not make a reasoned award. But if he is doubtful whether the other party is aware of his rights, the arbitrator should consider whether it would be right to ask him.

(d) The difficult case is where nothing is said by either party. In those circumstances the arbitrator should again consider whether it would be right to ask the parties what form of award they want. But there will be some arbitrations where the parties are represented by sophisticated advocates who are as familiar with arbitral law as the arbitrator. It would be an impertinence to ask them if they were aware of their rights. In such a case the arbitrator would be justified in assuming that both parties wanted an award that would be final."

The giving of privileged reasons, that is reasons for the information of the parties but not forming part of the judgment and not available for consideration by any reviewing court, is a luxury denied to judges. They are reduced to the expedient, which often proves vain, of describing a decision as closely based on the peculiar facts of the case and so unsuitable to form any kind of precedent. I should, however, emphasise that where an arbitrator makes plain his intention that reasons are not to form part of his award the Court will respect that intention: an appeal to the Court under section 1(2) of the 1979 Act only lies on a question of law arising out of an award, and a question arising out of privileged reasons not forming part of the award would not therefore fall within the sub-section. Furthermore, in considering whether to grant leave to appeal the Court will not consider material extrinsic to the award itself, and will not therefore look at privileged reasons which are *ex hypothesi* extrinsic. These points were recently made very plain by the Court of Appeal in *Universal Petroleum Co. Ltd. (in Liq.) v. Handels und Transportgesellschaft m.b.H* [1987] 2 All E.R. 737.

The crucial question for any arbitrator about to make a reasoned award is of course what should it contain? The first ingredient is one which will never appear in any judgment, a recital of certain formal and not so formal matters. I gratefully adopt what *Mustill & Boyd* (op.cit. at 553) say on this subject:

"It must, however, be borne in mind that although the shape and mode of expression of a reasoned award under the new system may be different, the content of a reasoned award will not differ substantially from that of a special case. For example, although the award may no longer have a separate section headed 'Recitals', the material which was formerly grouped under this title ought nevertheless to be set out. Thus, the award ought to give particulars of the contract from which the dispute arose; of the arbitration agreement; of the arising of a dispute which fell within the agreement; of the manner in which the arbitrators were appointed, or (if the award is made by an umpire) of the fact that the arbitrators have disagreed and the umpire has entered on the reference; of the proceedings in the reference, whether they were written or oral, whether oral evidence was given, and so on. If the award may have to be enforced abroad, the inclusion of some at least of these particulars may be essential. Even if not, they ought to be included in

order to foreclose disputes about jurisdiction, and to give the Court an immediate picture of the type of dispute in respect of which leave to appeal is being sought."

I also adopt their footnote:

"So, for example, if the reference is conducted hastily, with a view to a quick award, the arbitrator should place the fact on record. So also with any other aspects of the arbitration, which the Court may wish to consider, when deciding whether to grant leave to appeal. The inclusion of introductory material is more, not less, important under the new and less rigid system, for the general shape of the reference may have a powerful influence on the exercise of the much wider jurisdiction to withhold leave to appeal."

It is not suggested that a statement of these matters is essential to the validity of the award. But the reasons for including them are persuasive, and it is conventional to do so; thus an award prefaced in this way has an air of competent professionalism about it.

But of course it is the substance of the award which really matters. Here my task is easy and the demands on my creativity slight, because in *Bremer Handelgesellschaft m.b.H. v. Westzucker G.m.b.H.* (No. 2) [1981] 2 L1.130 at 132-3 Lord Justice Donaldson (as he then was) summarised the requirements of a reasoned award under the 1979 Act in a passage which later judges have done little more than annotate. Despite the length of the passage I think I should, because of its importance, quote it in full:

"It is of the greatest importance that trade arbitrators working under the 1979 Act should realize that their whole approach should now be different. At the end of the hearing they will be in a position to give a decision and the reasons for that decision. They should do so at the earliest possible moment. The parties will have made their submissions as to what actually happened and what is the result in terms of their respective rights and liabilities. All this will be fresh in the arbitrators' minds and there will be no need for further written submissions by the parties. No particular form of award is required. Certainly no one wants a formal 'Special Case'. 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'.

For example, it may be convenient to begin by explaining briefly how the arbitration came about – "X sold to Y 200 tons of soyabean meal on the terms of GAFTA Contract 100 at US $Z per ton c.i.f. Bremen. X claimed damages for non-delivery and we were appointed arbitrators". The award could then briefly tell the factual story as the arbitrators saw it. Much would be common ground and would need no elaboration. But when the award comes to matters in controversy, it would be helpful if the arbitrators not only gave their view of what occurred, but also made it clear that they have considered any alternative version and have rejected it, e.g., "The shippers claimed that they shipped 100 tons at the end of June. We are not satisfied that this is so", or as the case may be, "We are satisfied that this was not the case". The arbitrators should end with their conclusion as to the resulting rights and liabilities of the parties. There is nothing about this which is remotely technical, difficult or time consuming.

It is sometimes said that this involves arbitrators in delivering judgments and that this is something which requires legal skills. This is something of a half truth. Much of

the art of giving a judgment lies in telling a story logically, coherently and accurately. This is something which requires skill, but it is not a legal skill and it is not necessarily advanced by legal training. It is certainly a judicial skill, but arbitrators for this purpose are Judges and will have no difficulty in it. Where a 1979 Act award differs from a judgment is in the fact that the arbitrators will not be expected to analyse the law and the authorities. It will be quite sufficient that they should explain how they reached their conclusion, e.g., "We regarded the conduct of the buyers, as we have described it, as constituting a repudiation of their obligations under the contract and the subsequent conduct of the sellers, also as described, as amounting to an acceptance of that repudiatory conduct putting an end to the contract". It can be left to others to argue that this is wrong in law and to a professional Judge, if leave to appeal is given, to analyse the authorities. This is not to say that where arbitrators are content to set out their reasoning on questions of law in the same way as Judges, this will be unwelcome to the Courts. Far from it. The point which I am seeking to make is that a reasoned award, in accordance with the 1979 Act, is wholly different from an award in the form of a special case. It is not technical, it is not difficult to draw and above all it is something which can and should be produced promptly and quickly at the conclusion of the hearing. That is the time when it is easiest to produce an award with all the issues in mind."

It may be worth mentioning three judicial glosses on Lord Justice Donaldson's exposition. In *J.H. Rayner (Mincing Lane) Ltd., v. Shaker Trading Co.* [1982] 1 L1.632 at 636 the Judge said:

"So far as principle is concerned, it seems to me plain that under the new Act awards of arbitral tribunals should not be scrutinized with an over-critical or pedantic eye and the Court should not insist that every factual 't' is crossed and every argumentative 'i' is dotted. I would, with respect, adopt and apply to this case the observations of Lord Justice Donaldson in *Bremer Handelgesellschaft m.b.H. v. Westzucker G.m.b.H.* (No. 2) [1981] 2 Lloyd's Rep. 130 at p.132. It is nonetheless apparent from what he says there that what 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 reached their decision and what their decision is."

In *Hayn Roman & Co. S.A. v. Cominter (U.K.) Limited* [1982] 2 L1. 458 at 464 Mr Justice Robert Goff said:

"So I conclude that on all these three points the matter should go back to the Committee of Appeal [of the Coffee Trade Federation]. I reach this conclusion with much regret in view of the passage of time that has elapsed. But my attention has been drawn to the recent judgment of Lord Justice Donaldson in *Bremer Handelsgesellschaft m.b.H. v. Westzucker G.m.b.H.* (No. 2) [1981] 2 Lloyd's Rep. 130, in which the learned Lord Justice did refer in the course of his judgment to the reasons which should be given by arbitrators. I think it is clear from that account given by Lord Justice Donaldson that it is incumbent upon arbitrators, in giving their reasons, to explain on what basis they have rejected contentions that have been advanced before them. They are not being asked to go into great detail; they are simply being asked to deal with submissions which have been advanced before them because this is just the kind of matter which the parties, if their contentions are rejected, may wish to pursue on appeal. Anyway, as a matter of commonsense, they are entitled to know why their contentions have been rejected. Each of the three points on which I have decided that the matter should go back to the Committee of Appeal for further reasons are points on which contentions were advanced

by the buyers but the award, with all respect to the Committee of Appeal, does not have sufficient detail in it to explain why the contentions were rejected. I therefore order that the award be remitted to the arbitrators for these three matters to be clarified."

Finally, in the important case of *Universal Petroleum* already referred to, the Court of Appeal said (at 748j):

"A reasoned award is usually requested in order to lay the foundation for a possible application for leave to appeal. An arbitrator should therefore remember to deal in his reasoned awards with all issues which may be described as having a 'conclusive' nature, in the sense that he should give reasons for his decisions on all issues which lead to conclusions on liability or other major matters in dispute on which leave to appeal may subsequently be sought. Such issues should not be difficult to identify, and the arbitrator should if necessary be reminded about them. But all that an arbitrator has to bear in mind in that connection is effectively summarised in the judgment of Sir John Donaldson MR. in *Bremer Handelsgesellschaft m.b.H. v. Westzucker G.m.b.H.* (No. 2) [1981] 2 Lloyd's Rep. 130 at 133."

One further point, relevant to the contents of a reasoned award, may be taken from *Mustill & Boyd* (op.cit., at 333).

"Where he has been asked for a reasoned award he should set out the facts and legal reasoning on which his decision is based. Since the Court has power on appeal to vary the award it is not necessary for the arbitrator to make his decision subject to the decision of the Court, or to make an alternative award to take effect if the Court's decision is different from his own. But there may be issues of fact or matters of discretion which, although irrelevant on the arbitrator's view of the law, may become relevant if the Court takes a different view. The arbitrator should try to anticipate this and should state in his award what his decision would have been on those issues of fact or how he would have exercised his discretion, if it had been relevant to his decision."

I am now, I hope, in a position to identify what seem to me to be the most important differences between a judgment and a reasoned award, and I do so by way of final summary.

First, even where a judge knows (as he often does) that the losing party is bound or almost bound to appeal, prospect of appeal has no effect on the contents of the judgment (save sometimes in the inclusion of alternative findings) or on the judge's duty to give reasons. Even where the right of appeal is restricted, as on questions of fact in appeals from decisions of Official Referees, it is not (I think) the practice for reasons to be given less fully. By contrast, the statutory duty of the arbitrator under the 1979 Act is not to inform the parties why they have won or lost but to place the Court in a position to decide, whether or not there is a question of law arising out of the award which merits the grant of leave to appeal and, if so, to decide the appeal. I venture to emphasise this point because the authorities do so: see, for example, *The Ninemia*, supra; *Universal Petroleum*, supra; *Mustill & Boyd*, op.cit. at 548. Whatever the general arguments in favour of telling parties why they have won or lost, this is not something which the Act fully or as

a matter of course requires of an arbitrator. There is a certain logic in this. Arbitration is a private consensual procedure for resolving disputes: why should the law insist on the observance of practices not essential to justice (at least in a narrow sense) and not related to any function which the Court has to perform?

Second, it is not necessary – and probably not even desirable – that an arbitrator should attempt, as a judge does, to summarise the evidence given by the parties on each disputed factual issue. Nor, save perhaps where the arbitrator has been asked before making his award to set out in his reasons the evidence upon which a particular finding of fact (if made) is based, should the arbitrator set out all the relevant evidence on a point. This perhaps deserves a little elaboration. As Lord Justice Kerr emphasised in *Universal Petroleum,* supra, at 744J, an arbitrator's primary findings of fact are final and intended to be immune from review by the courts in the absence of misconduct, such as breaches of the rules of natural justice. But a party who has, or fears he has, lost an arbitration on the facts understandably wishes to continue the struggle. Since an appeal only lies on a question of law, and since the question whether there is any evidence to support a finding of fact is accepted as being a question of law (*Nello Simon v. A/S M/S Strum* (1949) 83 Lloyd's Rep. 157), it does not need a very ingenious lawyer to recognise a question of law so framed as the most hopeful means of transferring the factual debate from the arbitral arena into the court. But the courts have been as discouraging as they could well be. In *Athens Cape Naviera S.A. v. Deutsche Dampfschiffartsgesellschaft 'Hansa' AG, The Barenbels* [1985] 1 Lloyd's Rep. 523 Lord Justice Robert Goff said:

> "It is conceivable that an appeal on such a question may lie under s.1 of the 1979 Act; though appeals of this kind will be at least as much discouraged under that Act, as were special cases on similar points under the old procedure (see, for example, *Mondial Trading Co. G.m.b.H. v. Gill & Duffus Zuckerhandelsgesellschaft m.b.H.* [1980] 2 Lloyd's Rep. 376). But, if such an appeal is to be brought, it must in our judgment be based on material which is contained in the award and reasons of the arbitration tribunal, and cannot be based on extraneous evidence as is done where, for example, it is sought to allege misconduct on the part of an arbitrator. If a party wishes to raise a point on an appeal to the High Court, he should invite the arbitration tribunal to make the necessary findings in the award; if no such findings are made, he can apply to the Court for an order, under s.1(5) of the Act, for further reasons to be given, though he should not expect the Court to react enthusiastically in a case of this kind."

Other, similarly discouraging, statements abound: see *Hayn Roman,* supra, at 462, *The Nimeira* [1983] 2 Lloyd's Rep. 424 at 429; *Bulk Oil (Zug) AG v. Sun International Ltd.* [1984] 1 Lloyd's Rep. 531 at 533; *Universal Petroleum,* supra, at 744-8, *Mustill & Boyd,* op.cit., at 541. Some judges have expressed the view that the Court has no power under section 2(5)(b) to order arbitrators to set out all the evidence: *The Nimeira,* supra, at 429, *Mafracht v. Parnes Shipping Co. S.A., The Appollonius* [1986] 2 Lloyd's Rep. 405 at 414. Whether that be so or not, I at least

am aware of no such order being made under the 1979 Act; any advocate who obtains such an order will, I think, have cause to feel pleased with himself.

Third, arbitrators should not ask or permit the parties to submit draft findings of fact after the conclusion of the hearing. This practice has rightly been described (by Lord Justice Donaldson, in *Westzucker,* supra, at 1323) as one of the most pernicious features of the old special case procedure. Each party submitted findings which it hoped would, if accepted, state the other party out of Court. The temptation existed for the arbitrator, having decided which party was to win, to accept that party's draft findings so as to do just that. This was, plainly, an abuse. The arbitrator's findings of fact are immune from review. But they should be his findings and not those of counsel for the winner.

Fourth, it is not incumbent on an arbitrator in stating reasons (and again, probably, not desirable) to give an assessment of the witnesses and a detailed statement of his grounds for preferring the evidence of A to B or the expert evidence of C to that of D. These are not matters subject to the review of the Court, and so reasons of this kind are not called for under the Act. The arbitrator may say as much or as little as he thinks necessary for the enlightenment of the parties. To that end it is sometimes helpful to state that the evidence of a particular witness or witnesses was not accepted. And I would endorse this observation of *Mustill & Boyd,* (op.cit., at 552):

> "Where a party has argued for a finding of fact with which the arbitrator does not agree, the award should state explicitly that the allegation has not been proved. Otherwise there may be a suggestion that the matter has been accidentally overlooked."

My fifth point of difference (like some of its predecessors) is not truly a point of difference, but I hope it is a point worth making. It is, however, a point which I make with diffidence since it rests largely on a judgment of my own which may well, for all I know, be disapproved on appeal. But it has not, so far as I know, been disapproved yet, and accordingly with all appropriate reservations I quote it

> "What documents the arbitrators choose to annexe for that purpose i.e. of giving reasons under the 1979 Act is, in my judgment, very much a matter for them. It may be useful to annexe contract documents to avoid extensive summary, or it may not. There is certainly, to my knowledge, no authority in favour of annexing telex exchanges relevant to an issue such as repudiation or renunciation and the authority of *Thomas Borthwick (Glasgow) Ltd., v. Faurse Fairclough Limited* [1968] 1 Lloyd's Rep. 16 at p.23, may be said to be plainly against it.
>
> That was a special case. But with a reasoned award under the 1979 Act it is, in my judgment, the more desirable that arbitrators should summarise the conclusions they draw from primary documents rather than merely annexing them. If material is annexed it is very hard indeed for the Court to resist the temptation to put its own construction on, and thus make its own evaluation of, such documents. That is not the Court's task. I do not think it arguable that the arbitrator's failure to annexe these telexes, despite the charterers' very explicit request, was misconduct". (*The Appollonius,* supra, at 412-413).

That case was not, I should make clear, one in which the correct legal construction of a written document was in issue. In such a case an arbitrator could not give adequate reasons without annexing the document or citing all relevant parts of it. The case concerned the effect of certain telexes which formed part of a course of conduct. I held that the arbitrators, although asked, had not misconducted themselves in not annexing them. I did, however, add (at 416):

> "Plainly the arbitrators discounted the telexes as throwing little or no light on the charterers' intentions but it would have been better if they had stated, however briefly, the view that they took..."

My sixth and last point is this. An arbitrator is not called upon to make any detailed analysis of the legal principles canvassed before him or to review in any detail the legal authorities cited. It is enough if he briefly summarises the arguments put to him and expresses his legal conclusion in a way that makes it intelligible. I have no doubt that Redfern & Hunter are right when they say (*Law and Practice of International Arbitration,* 1986, at 29.i:

> "However, it should perhaps be borne in mind by such tribunals that what the parties want is a reasoned decision, rather than a legal dissertation."

On that appropriately practical note I end. I feel sure I have exhausted my audience, if not my subject. And I do not at all costs wish to provoke Lord Hallsham, who has kindly undertaken to chair this meeting, into repeating an observation which he made on the floor of the House of Lords on the 8th February 1979 (*House of Lords Debates,* col. 867):

> "Enough is enough, in my judgment, and Bingham was enough – perhaps too much."