THE PROBLEM OF *UN*REASONED REASONED AWARDS AND THE JUDICIAL FAILURE TO REMEDY IT: STATUTORY AND RULE SOLUTIONS

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Much of the substance of this article is taken from his book on reasoned arbitration awards, cited in note 1 *infra*. This article proposes amendments to the FAA and state statutes, or to provider rules, that could cure at least most of the problems described in this article, a topic addressed for a different audience in his article John Burritt McArthur, *But Is It Reasoned? When it Comes to Finding Reasons in Arbitration Awards, Some Courts Are Being, Well, Unreasoned,* 108 JUDICATURE 2, 21 (2024), https://judicature.duke.edu/articles/but-is-it-reasoned/.

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American arbitrators have long been choosing between two common forms of awards: "reasoned awards" and "standard awards" with no reasons enumerated. Yet neither arbitration rules nor statutes define "reasoned award." This lack of guidance has gotten arbitration in trouble and threatens its ability to satisfy users' needs.

Not tied to any definition of "reasoned awards," some arbitrators tilt toward minimalist reasons even when they agree they are obligated to explain their thinking. They fear that providing a full explanation gives losing parties material to challenge the award.[1] Other arbitrators think parties will not want the added costs of writing out reasons and therefore skimp on providing full explanations.[2]

One would think that when the agreement or applicable arbitration rules require reasons, yet the arbitrators produce an award that is just conclusory, courts would vacate the award, or at least remand it for explanation. One would be mistaken. Courts usually confirm such awards.[3]

A little more than a decade ago, the Eleventh Circuit, in *Cat Charter, LLC v. Schurtenberger*,[4] adopted a definition of reasoned awards that rests on the assumption that a reasoned award is anything more than a silent "standard award."[5] This unjustified standard took root in the federal courts and quickly spread to state courts. Today, it is the dominant test courts apply to awards challenged for lacking reasons. Yet the standard is contrary to the plain meaning of the term "reasoned award." It has spread damage to arbitration across the nation.

Opinions adopting *Cat Charter*'s reasoning discredit the courts that issue them and damage judicial legitimacy. These opinions also discredit arbitration because they spread the myth that arbitrators do not really have to explain themselves; they make arbitration look like a process that accepts arbitrary decisions.

Because courts have failed to find an effective definition for reasoned awards, Congress and state legislatures should consider adopting a workable definition of "reasoned award." Arbitration needs a definition that ensures

1. The idea that reasoned awards create vulnerability to vacatur is an old theme. *See* JOHN BURRITT MCARTHUR, THE REASONED ARBITRATION AWARD IN THE UNITED STATES: ITS PROMISE, PROBLEMS, PREPARATION, AND PRESERVATION 6–7 to 6–9 nn.19–21 (2022) [hereinafter MCARTHUR, REASONED AWARD].

2. On the cost criticism generally and reasons to doubt its viability, *see id.* at ch. 8.

3. On a related judicial bias toward skimping reasons in all but a small minority of judicial opinions, *see infra* note 105 and accompanying text.

4. 646 F.3d 836 (11th Cir. 2011).

5. *Id.* at 844.

that those who seek reasons will get them. Arbitration providers should consider adding a clear definition of "reasoned award" to their rules. Part II below suggests just such a definition. But first, the problem.

I. THE JUDICIAL MISUNDERSTANDING OF THE TERM "REASONED AWARD" AS USED IN ARBITRATION

The *Cat Charter* opinion has had one salutary effect: it took the issue of what a "reasoned award" means seriously. The opinion discussed, in an accessible way, why a failure to give reasons can lead to vacatur under the exceeded powers provision of the Federal Arbitration Act (FAA).[6] The opinion taught many other courts *and lawyers* that awards lacking reasons can be vacated. *Cat Charter*'s broad influence is due, in part, to the Fifth Circuit adopting its test just a year later in *Rain CII Carbon, LLC v. ConocoPhillips*[7] ("*Rain*"), and the Second Circuit following it twice not long thereafter, once in 2016 in *Leeward Construction Co. v. American University of Antigua — College of Medicine*,[8] and again in 2017 in *Tully Construction Co., Inc. v. Canam Steel Corp.*[9] ("*Tully*").

The unfortunate part of *Cat Charter*'s influence is that its test for reasons is so porous that courts using it will almost always confirm any award as reasoned, be it truly reasoned or not.

A. The Three Unreasoned Awards Underpinning the Poorly Reasoned Cat Charter *Opinion and Its Most Important Followers*

Cat Charter arose from a not-uncommon commercial dispute with claims that included breach of contract and fraud. The claimants, the Ryans, were a Massachusetts couple who retired to South Florida and hired a local boatbuilder, Walter Schurtenberger, and his company to build them a catamaran.[10] They intended to use the boat for recreation and to run a part-time charter business.[11] The Ryans trusted Schurtenberger and told him how much money they had.[12] He allegedly showed he understood their financial

6. *See* 9 U.S.C. § 10(a)(4).

7. 674 F.3d 469 (5th Cir. 2012).

8. 826 F.3d 634 (2d Cir. 2016). This article does not analyze the *Leeward* award because it requires book-length space to display the serious problems with that award; for an analysis, *see* MCARTHUR, REASONED AWARD, *supra* note 1, at ch. 4, sec. C.1.

9. 684 F. App'x 24 (2d Cir. 2017).

10. Cat Charter, LLC v. Schurtenberger, 691 F. Supp. 2d 1339, 1341–42 (S.D. Fla. 2010), *rev'd*, 646 F.3d 836 (11th Cir. 2011).

11. *Id.*

12. *Id.*

limits by agreeing to build the boat for $1.2 million.[13] But he far outran that budget.[14] Even after Schurtenberger had collected $2 million from the Ryans, they claimed that the boat was not finished (it did not even have an engine) and that his latest "estimate" was $2.6 million.[15] The Ryans, not surprisingly, filed for arbitration.[16] When they did, Schurtenberger's main defense was that costs had risen because the Ryans kept changing their plans and that they had in fact approved the increases.[17]

The Ryans' demand had six claims, including breach of contract and fraud.[18] The parties requested a reasoned award.[19] A panel found for the Ryans on two claims and rejected four, along with Schurtenberger's affirmative defenses and counterclaim.[20] It awarded the Ryans $1,934,555 in actual damages, plus interest and fees.[21]

The award did not discuss *any* details of the Ryans' claims. It did not mention their belief that they were defrauded. The entire substantive discussion stated, in two one-sentence paragraphs, that the Ryans won on each of two claims "by the greater weight of the evidence."[22] On other claims and defenses, all the award said was that "[a]ll other claims of the [Ryans] are hereby denied. All counterclaims of [Schurtenberger] . . . are denied."[23]

Losing their fraud claim was fatal to the Ryans. Schurtenberger filed for bankruptcy, and the bankruptcy court held that because the Ryans had lost on their fraud claim, they could not use the fraud exception to prevent the

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13. *Id.*

14. *Id.*

15. Motion to Confirm Arbitration Award and for Entry of Judgment for Plaintiffs Pursuant to Arbitration Award, Ex. B Amended Statement of Claim at 3–6, §§ 11–12, 18 (Apr. 15, 2009), Cat Charter, LLC v. Schurtenberger (S.D. Fla. 2008) (No. 08-10104).

16. For the Ryans' side of the story, one not even hinted at in the award or in any of the *Cat Charter* judicial opinions, *see generally* Motion to Confirm Arbitration Award and for Entry of Judgment for Plaintiffs Pursuant to Arbitration Award, *Cat Charter*, 691 F. Supp. 2d 1339 (S.D. Fla. 2010) (No. 08-10104-Civ), 2009 WL 6364281. The Ryans alleged that Schurtenberger misused their money by trying to build two catamarans with it. For a brief summary, *see* MCARTHUR, REASONED AWARD, *supra* note 1, at 4–4. n.6.

17. Motion to Vacate Arbitration Award and Supporting Memorandum of Law, Ex. B Respondents' First Amended Answering Statement at 3–9 (Apr. 30, 2009), Cat Charter, LLC v. Schurtenberger (S.D. Fla. 2008) (No. 08-10104).

18. Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 840–41 (11th Cir. 2011).

19. *Id.*

20. *Id.* at 844–45.

21. The award's key findings are quoted verbatim. *Id.* at 840–41.

22. *Id.*

23. *Cat Charter*, 646 F.3d at 840–41.

discharge of the debt.[24] Yet the award did not even specifically mention the fraud claim or the other three claims that were denied.

A different kind of gap in reasoning marred the *Rain* award. Rain CII Carbon ("Rain") supplied a chemical product called green anode coke to ConocoPhillips ("Conoco").[25] Conoco argued that the contract price was too high.[26] It began paying for the coke at a lower price, claiming that this price reflected market value.[27] The arbitration was a baseball arbitration.[28] Rain won: the arbitrator left the existing contract formula in effect, thus rejecting Conoco's position.[29] He awarded Rain $17,702,585.33 in past damages; his ruling will force Conoco to pay millions more to Rain in the future.[30]

All the *Rain* award offered as a "reason" was a short, single-paragraph summary of each side's position and a third paragraph saying the formula price stayed in effect.[31] It did not say *why* Rain won. The hearing was a battle of experts, but the award did not mention them.[32]

The *Tully* dispute was over the supply of steel on a bridge construction project in New York City.[33] The parties requested a reasoned award.[34] Yet neither the first *Tully* award nor second, which the arbitrator issued after remand, was reasoned.[35]

Tully Construction Company was refurbishing the Whitestone Bridge in New York City.[36] It had various disagreements over steel supplied by

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24. The bankruptcy court opinion refusing to let the Ryans raise a fraud exception to discharge is *In re* Schurtenberger, No. 12-17246-BKC-AJC, 2014 WL 92828, at *3 (Bankr. S.D. Fla. Jan. 9, 2014).

25. Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 471 (5th Cir. 2012).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 474.

30. ConocoPhillips Co.'s Memorandum in Support of Motion to Vacate Arbitration, Ex. 10 Award of Arbitrator, *Rain CII Carbon, LLC*, 2011 WL 2565345 (E.D. La. 2011) (No. 09-4169) [hereinafter *Rain CII Carbon,* Award of Arbitrator].

31. For the sole sentence on the arbitrator's view on the dispute, giving only his conclusion and not his reasoning, *see infra* text accompanying note 81.

32. For a flavor of the detailed dispute over market price that was the real focus of the *Rain* dispute, a flavor impossible to taste by reading the opinion or for that matter the award, *see Rain CII Carbon,* Award of Arbitrator, *supra* note 30, Ex. 3 (Rain's proposed Reasoned Award). For details, *see* MCARTHUR, REASONED AWARD, *supra* note 1, at 4–22 n.81. For problems at the expert level, *see id.* at 4–23 n.83.

33. Tully Constr. Co. v. Canam Steel Corp., 684 F. App'x 24, 25 (2d Cir. 2015).

34. *Id.* at 28.

35. *Id.*

36. *Id.* at 25.

subcontractor Canam Steel Corporation.[37] Tully pled nine claims; Canam Steel filed seven counterclaims.[38] A sole arbitrator heard the arbitration over seventeen days in an almost three-month period.[39] The parties filed over 800 exhibits.[40]

The first award was merely a "list" award.[41] Each claim was on one line that merely registered if the party moving on that claim won or lost. For victories, it listed a damage amount, for defeats, "0.00."[42] The award contained no fact section, no legal analysis, and no reasons on liability or damages.

The list award did not end the arbitrator's resistance to explaining himself. Canam Steel, unhappy to find itself ordered to pay roughly $6.5 million, wrote the arbitrator challenging the award's total lack of reasons.[43] The arbitrator responded that his award *was* reasoned.[44] Among his excuses for not saying more was that his award "sufficiently and specially incorporate[d] all credible evidence adduced during the hearings, detailing the liability for each item of claim and counterclaim, and, as such, [was] a 'reasoned award.'"[45]

This dismissive language made no sense. The award mentioned neither evidence nor liability.

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37. *Id.*

38. *Tully Constr. Co.*, 684 F. App'x at 25.

39. *Id.*

40. Letter from Timothy Corey, Tully Constr. Counsel, to Brenda Mojica, Case Manager, Second Circuit Court of Appeals, Ex. 2 Final Enlarged, Reasoned Award of Arbitrator at 1–2, Tully Constr. Co. v. Canam Steel Corp., 684 F. App'x 24 (2d Cir. 2015) (No. 15-848) [hereinafter *Tully Constr. Co.*, Final Enlarged, Reasoned Award of Arbitrator].

41. For the list award, *see* Declaration of Michael T. Rogers (i) in Support of Canam's Cross-Petition to Vacate Arbitration Award; and (ii) in Opposition to Tully's Petition to Confirm the Award, Ex. 1 Final Award of Arbitrator, Tully Constr. Co. v. Canam Steel Corp., No. 13-civ.-3037, 2013 WL 7203733 (S.D.N.Y. May 28, 2013) (No. 13-3037).

42. *Id.*

43. Declaration of Michael T. Rogers (i) in Support of Canam's Cross-Petition to Vacate Arbitration Award; and (ii) in Opposition to Tully's Petition to Confirm the Award, Ex. 30 Email from Arbitrator, *Tully Constr. Co*, 2013 WL 7203733 (No.13-3037).

44. *Id.*

45. *Id.*

The *Tully* arbitrator also raised the excuse that the parties should have asked for findings of fact and conclusions of law if they really wanted more reasoning.[46]

The trial court remanded the award back to the arbitrator, requiring him to give reasons on the sixteen claims and counterclaims.[47] The judge correctly held that a mere list award does not explain anything. While a reasoned award need not discuss all facts, the court held that it does have to "set[] out the arbitrator's key findings and, where necessary, the reasons for those findings."[48] The court found the *Tully* list award unreasoned because it contained "no explanation whatsoever for [the arbitrator's] rulings on Tully's claims and Canam's counterclaims."[49] It was not possible "from the award to determine the reason or rationale for the arbitrator's liability and damages determinations."[50] The arbitrator exceeded his authority by issuing an award not in the form mandated by the agreement.[51]

The arbitrator thereupon expanded the list award into an eleven-page award.[52] But he still failed to explain his thinking. All he added was a page and a half of undisputed background near the start of the award; then, on each claim and counterclaim, a short one-sentence boilerplate attestation that he reviewed the "relevant, related, or both, information" and that this "information" justified the resolution that followed; followed next by a one-sentence paragraph of great generality listing a few exhibit numbers or record pages cited by the moving party on the claim or counterclaim; then, a similarly cursory sentence on the other side's position; and finally, a boilerplate conclusion that the "credible preponderance" of "testimonial" and "documentary evidence" did, or did not, establish the claim or counterclaim.[53] On seven claims it did, on nine it did not. But the revised award did not explain these outcomes.

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46. The *Tully* arbitrator added that "at no junction during the arbitration were findings of fact and conclusions of law ever mentioned." *Id.* But so what? It is absurd to tell a party that if it asks for a reasoned award, it will only get it if it later tells the arbitrator that what it really wants are findings and conclusions. Even old forms of pleading prior to adoption of the Federal Rules of Civil Procedure were not as myopic as this!

47. Tully Constr. Co. v. Canam Steel Corp., No. 13-CV-3037, 2015 WL 906128 (S.D.N.Y. Mar. 2, 2015).

48. *Id*. at *14. The award does not have to discuss every piece of evidence or derive each conclusion "from first principles." *Id.* (citations omitted).

49. *Id.* at *15.

50. *Id.*

51. *Id.* at *17–20.

52. *Tully Constr. Co.*, Final Enlarged, Reasoned Award of Arbitrator*, supra* note 40.

53. On a few claims the award may have given a partially decipherable reason in spite of its lack of detail. On Claimant's second claim, for instance, the award asserted

The three federal appellate courts reviewing the respective awards were happy to guess at reasons, supply their own reasons, and confuse contentions or vague conclusions about meeting burdens of proof with reasons — in short, do everything possible to confirm the unreasoned awards. The mystery of why these courts accepted unexplained awards as reasoned is discussed next.

B. Erroneous Confirmations in Three Federal Courts of Appeals

The Eleventh Circuit's opinion in *Cat Charter*, to that circuit's credit, is the most serious attempt in U.S. law to define "reasoned award." Yet the standard the court developed, and hence its opinion's outcome, is horribly flawed. The *Cat Charter* test will confirm almost all awards regardless of whether they contain comprehensible reasoning or not. Predictably, using the test led the Eleventh Circuit to confirm the *Cat Charter* award, the Fifth Circuit the *Rain* award, and the Second Circuit the final *Tully* award. In spite of its gaping flaws, the *Cat Charter* test has become the dominant judicial approach to testing whether awards have true reasons.

The *Cat Charter* trial judge vacated the uninformative award for failure to provide reasons.[54] To the court, this award, which merely announced the claimants won on two claims by the weight of the evidence and denied all else "without offering any reasons for the result," was one that "merely announced the winners and losers" and was not reasoned.[55] That was no

that Claimant "asserted no monetary amount," citing a specific row in one exhibit. *Id.* at 3. But there was no discussion of what the exhibit is, whether somewhere else (for instance, in briefing) Claimant asserted a damage amount, or even how much Claimant sought on this claim.

54. Cat Charter, LLC v. Schurtenberger, 691 F. Supp. 2d 1339, 1344 (S.D. Fla. 2010).

55. *Id*. The trial court added that even were it to have conceded — and it wisely did not — that an announcement that a party prevailed by the "greater weight of the evidence" is a meaningful "reason," the award still would not be reasoned because "the Panel's denial of all other claims was simply announced as a bare result," one that "merely announced the winners and losers." *Id.* This is why the award had to be vacated.

The court concluded it could not remand the award for clarification even though FAA section 11 permits the court at least to issue an order to "modify and correct" the award under certain situations, including under section 11(c) for imperfections in award form. The court held that because the omission of reasons is not a "clerical or mathematical" error under the FAA, this language did not apply and that under the common-law doctrine *functus officio* the award had become final and the arbitrators could not revisit it, so it could not remand to them. *Id.* at 1345. The Eleventh Circuit mooted that issue when it implausibly found the award reasoned, but it hinted, without deciding, that it would have allowed remand to the arbitrators in spite of the *functus officio* doctrine, had it found the award unreasoned and vacatur proper. Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 842 n.9 (11th Cir. 2011) ("[W]e need not reach the

surprise; the award truly had no reasons. But the Eleventh Circuit disagreed and remanded for the trial court to reinstate the award.[56] The higher court relied on four unpersuasive arguments when doing so.

First, the judicial panel defined "reasoned award" by envisioning all awards as along a "spectrum of increasingly reasoned awards."[57] A standard award is at one end of the spectrum, with no reasoning. Findings of fact and conclusions of law are at the other end.[58] This supposedly highest form contains the most explanation. According to *Cat Charter*, *anything* in between is more than a "simple result" and is reasoned: "A reasoned award is something short of findings and conclusions but more than a simple result."[59] The standard ensures that even awards that merely contain truisms that apply to all winning parties, like the *Cat Charter* panel's "Party A wins by the greater weight of the evidence," are accepted as reasoned.

The problem with such spectrum analysis is that it accepts the vaguest conclusions as "reasoned." In fact, reasoned awards and findings and conclusions both need to explain clearly how the arbitrators reached the decisions they contain. Where they differ is in their form, not in whether they contain adequate reasoning. But *Cat Charter* lets reasoned awards off the hook, even if they are only halfheartedly, even infinitesimally, reasoned and merely contain conclusions that apply to every winning party.

Reasoned awards do usually look different than findings and conclusions. A reasoned award is usually a narrative award. It often addresses a full set

question of whether *functus officio* would bar remand to the original arbitrators. Nevertheless, we note approvingly that a sister circuit . . . deemed the doctrine inapplicable and remand to the original arbitrators appropriate.") (citing Green v. Ameritech Corp., 200 F.3d 967, 976–78 (6th Cir. 2000)). *Functus officio* is the doctrine that "once arbitrators render a final decision, their power or jurisdiction over the parties and their dispute ends." John K. Boyce III et al., *Postaward Matters*, *in* COLLEGE OF COMMERCIAL ARBITRATORS (CCA) GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 323 (4th ed. 2017). The doctrine protects the strong interest in finality.

56. *Cat Charter*, 646 F.3d at 845.

57. *Id.* at 844 (quoting ARCH Dev. Corp. v. Biomet, Inc., No. 02 C 9013, 2003 WL 21697742, at *4 (N.D. Ill. July 30, 2003)). The Eleventh Circuit cited two cases, *ARCH Dev. Corp.*, 2003 WL 21697742, at *4, and Sarofim v. Trust Co. of the W., 440 F.3d. 213, 215 n.1 (5th Cir. 2006), for the spectrum standard. *Cat Charter*, 646 F.3d at 844. *Sarofim* grew out of *ARCH Development Corp.* through another Illinois case, Holden v. Deloitte & Touche LLP, 390 F. Supp. 2d 752, 780 (N.D. Ill. 2005), which *Sarofim* cited, *see* 440 F.3d at 215 n.1. For discussion of this tenuous chain of weak authorities, *see* MCARTHUR, REASONED AWARD, *supra* note 1, at 4–7 n.20. All this for a "test" that treats words that say *anything* more than just who won and by how much as proof of being "reasoned."

58. *Cat Charter*, 646 F.3d at 844 (citing *ARCH Dev. Corp.*, 2003 WL 21697742, at *4).

59. *Id.* at 844 (internal quotation omitted) (quoting *Sarofim*, 440 F.3d at 215 n.1).

of facts or a broad legal point in a single paragraph. Findings and conclusions, in contrast, typically place the fact and legal sections into separate and brief numbered paragraphs, each discussing one small piece of evidence or law. What a reasoned award covers in a dozen narrative paragraphs, findings and conclusions may cover (usually, but not always) in more detail, sometimes in a hundred or more very short paragraphs. Findings and conclusions naturally take more time to write, cost more, often read awkwardly, and are rarely requested in domestic arbitration.[60]

Cat Charter and its followers encourage courts to substitute a common judicial form of opinion, findings and conclusions, for the category actually at issue, reasoned awards. By making findings and conclusions the sole guardian of truly reasoned awards, courts break institutional boundaries and colonize arbitration practices with a form of judicial opinions.

Consider the arbitration rules that applied in *Cat Charter.* They were a prior version of today's Rule R-48 on "Form of Award" in the American Arbitration Association (AAA) Commercial Arbitration Rules.[61] The only form that Rule mentions is a "reasoned award," which is precisely what the parties chose in *Cat Charter*. In an earlier era, the AAA discouraged reasoned awards.[62] Today, most AAA arbitrators in practice give at least brief reasons unless the parties ask for a standard award. The AAA's commercial rules do not even mention findings and conclusions.[63]

Both Article 27.2 of the 2010 version of the AAA-generated international arbitration rules that applied to *Rain* and its current international rules in Article 33.1 state that "[t]he Tribunal shall state the reasons upon which an

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60. For discussions of the differences between reasoned awards and findings and conclusions, *see* MCARTHUR, REASONED AWARDS, *supra* note 1, at ch. 16.

61. COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, AM. ARB. ASS'N 31 (2022), https://www.adr.org/sites/default/files/CommercialRules_Web_1.pdf [hereinafter AAA ARBITRATION RULES].

62. The current AAA *Guide to Commercial Arbitration* still contains this recommendation to arbitrators:

> Commercial arbitrators are not required to explain the reasons for their decisions. As a general rule, the award consists of a brief direction to the parties on a single sheet of paper. One reason for brevity is that written opinions might open avenues for attack on the award by the losing party.

A GUIDE FOR COMMERCIAL ARBITRATORS 14, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/A%20Guide%20for%20Commercial%20Arbitrators.pdf (last visited Feb. 13, 2024).

The three major U.S. arbitration treatises contain outdated language taking the same position. For a demonstration *see* MCARTHUR, REASONED AWARDS, *supra* note 1, at 6–7 to 6–9 & nn.19–21.

63. *See generally* AAA ARBITRATION RULES, *supra* note 61.

award is based," unless the parties ask for a different form.[64] This is a reasoned award.

The widespread, consistent practice to use the term "reasoned," or the International Centre for Dispute Resolution's (ICDR's) "state the reasons" for awards that must be explained, is not limited to AAA rules. There are two other major bodies of domestic commercial arbitration rules in the United States. The International Institute for Conflict Prevention & Resolution's (CPR's) Non-Administered Arbitration Rules provide in Rule 15.2 that "[t]he award shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise," as does Rule 15.2 of CPR's later-developed Administered Arbitration Rules.[65] Rule 24 of JAMS Comprehensive Arbitration Rules and Procedures similarly states, "[u]nless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award."[66] None of these rules suggest that parties are not entitled to full reasons unless they ask for findings and conclusions.

The *Cat Charter* court did not stop with its unfortunate spectrum analysis. As a second argument, the court crafted a definition of "reasoned" by combining dictionary definitions into the following test:

> A "reasoned award" [is] an award that is provided with or marked by the detailed listing or mention of expressions or statements offered as a justification of an act — the "act" here being, of course, the decision of the Panel.[67]

Unfortunately, this test is so all-encompassing that the slightest statements will satisfy it. A "mention" of an "expression" offered as "justification"? That easily shelters any "you win on the weight of the evidence" holding. The definition requires nothing specific about the evidence, the legal principles involved, or any part of the parties' arguments.

64. Current version accessed at INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, INT'L CTR. DISP. RESOL. (2021), https://www.adr.org/sites/default/files/ICDR_Rules_1.pdf (prior 2010 version at INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, INT'L CTR. DISP. RESOL. (2009), https://www.adr.org/sites/default/files/International%20Dispute%20Resolution%20Procedures%20Jan%2001%2C%202010.pdf.)

65. For CPR's Non-Administered Arbitration Rules, *see* CPR NON-ADMINISTERED ARBITRATION RULES, CPR DISP. RESOL. (2018) https://drs.cpradr.org/rules/arbitration/non-administered/2018-cpr-non-administered-arbitration-rules; for CPR's Administered Rules, *see* 2019 ADMINISTERED ARBITRATION RULES, CPR DISP. RESOL. (2019), https://drs.cpradr.org/rules/arbitration/administered-arbitration-rules-2019.

66. For JAMS Comprehensive Arbitration Rules and Procedures, *see* COMPREHENSIVE ARBITRATION RULES & PROCEDURES, JAMS (2021), https://www.jamsadr.com/rules-comprehensive-arbitration/.

67. Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 844 (11th Cir. 2011) (emphasis omitted).

Third, the court made up an entirely speculative credibility argument: "Put simply," the court boldly wrote, albeit without a shred of supporting proof, "the controversy here turned primarily upon credibility determinations made by the Panel."[68] Or, as it later embellished, "[i]n essence, this dispute was a swearing match, and its resolution necessarily depended on credibility determinations made by the arbitrators."[69] But how can the court know that? The *Cat Charter* award says *nothing* about credibility. Neither "credible," "credibility," "swearing march," nor any synonyms appear in the award. The award does not discuss witnesses or testimony. There is no basis for the court's divination that the arbitrators made a global credibility judgment.

One fears that perhaps the judges knew and respected the arbitrators and, believing them to be skilled, sophisticated, and acting professionally and neutrally, gave them a pass even though they did not explain their award. But this would be a rule of men and women, not of law. A court should never affirm a decision of a lower court just because it trusts the judge or arbitrator without any regard to the merits of a challenge to an opinion or award. The only competent evidence of the motive for this decision is the award, and it does not contain any reasons.

Finally, even though the parties had requested *reasons*, the court blamed them for not asking for *findings and conclusions*: "[H]ad the parties wished for a greater explanation, they could have requested that the Panel provide findings of fact and conclusions of law."[70] This was spectrum analysis with a vengeance, an incorrect analysis that entitles only a few disputes to a fully reasoned award! The parties had agreed on a reasoned award, the form used in the AAA rules that governed in *Cat Charter*. *There is nothing ambiguous about the word "reasoned."*

The Fifth Circuit followed *Cat Charter* and applied its approach to confirm the *Rain* award.[71] Unlike in *Cat Charter*, here the trial court confirmed the award. It decided that, given the two paragraphs summarizing the parties' arguments followed by the one-sentence finding for Rain, "one could certainly distill some level of reasoning" from the award.[72] But "distillation" is an excuse for judicial guesswork, not arbitrator articulation.

68. *Id.*

69. *Id.* at 840 n.4.

70. *Id.* at 845 (footnote omitted).

71. Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 473–74 (5th Cir. 2012).

72. Rain CII Carbon, LLC v. ConocoPhillips Co., No. 09-CV-4169, 2011 WL 2565345, at *6 (E.D. La. June 27, 2011).

The Fifth Circuit, affirming, similarly fixated on the fact that the award listed contentions before announcing the winner, complaining that Conoco did not acknowledge the contentions:

> Conoco ignores that the preceding paragraph thoroughly delineates Rain's contention that Conoco had failed to show that the initial formula failed to yield market price, a contention that the arbitrator obviously accepted. Conoco would have this court vacate the arbitration award merely because the arbitrator did not reiterate this reason in the following paragraph.[73]

Yet the contentions described in the award are so vague that they do not explain why the arbitrator chose one outcome and not the other.[74]

The Fifth Circuit said the arbitrator must have agreed that Conoco lost because it "failed to show that the initial formula failed to yield market price."[75] However, that is a recital of the award's ultimate conclusion, not the reasons for it. A reasoned award would have explained *why* the arbitrator rejected Conoco's "show[ing]" and accepted Rain's. The parties' briefs list multiple arguments on why the contract formula did, or did not, generate a market price.[76] Those underlying disputes required three days of evidence.[77] What did the arbitrator find persuasive in them, and why?

Rain argued that Conoco's novice expert did not know what he was doing.[78] Did the arbitrator agree? Did he find Conoco's expert generally competent but the substance of his work unconvincing? Or could the arbitrator not decide between experts, but nonetheless found Rain's position overall more credible for other reasons? Or did the arbitrator simply believe that Conoco failed to sufficiently respond to Rain's detailed criticisms of its expert?

The court wrote as if the contention paragraphs contained the *arbitrator's* thinking and reasoning, characterizing Conoco's complaint as being that the arbitrator "did not reiterate this reason [implicitly, the *arbitrator's* reason] in the following paragraph."[79] But the court was flat wrong. The arbitrator did not write the contentions himself. He lifted them from one side's proposed

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73. *Rain,* 674 F.3d at 474.

74. The *Rain* court also imitated *Cat Charter* in blaming the parties for not asking for findings and conclusions, too. *See id.*; *see also Cat Charter*, 646 F.3d at 844–45.

75. *Rain,* 674 F.3d at 474.

76. For a summary of the level of detail in which the case was fought and the type of expert evidence the parties used, *see* MCARTHUR, REASONED AWARD, *supra* note 1, at 4–22 to 4–23 nn. 80–83 and accompanying text.

77. *Id.*

78. *Id*. at 4–23 n.83.

79. *Rain*, 674 F.3d at 474.

award.[80] Moreover, he plucked the language *from the draft of the losing party, Conoco*! If he agreed with Conoco's phrasing, indeed, on almost all of the award, why did he declare Rain the winner?

In asking for a reasoned award, the parties told the arbitrator to decide which side prevailed *and explain why*. They did not ask him to repeat party positions they surely knew better than he did (because the parties had completed discovery, they had far more information into each other's positions than any arbitrator). Yet this was all the "explanation" they got:

> Based on the testimony, evidence, exhibits, arguments, and submissions presented to me in this matter, I find that the price formula . . . shall remain in effect for the balance of the term as stated in the contract.[81]

A self-attestation by an arbitrator, or a judge, that they did their job thoroughly in picking a winner is not a reason. "Trust me" is not a reason in a principled system of law.

To its credit, the *Tully* trial court vacated the first award after noting its total absence of reasons.[82] But when that skimpy, barely page-and-a-half award returned after remand as an eleven-page award, the judge confirmed it.[83] And, predictably, the Second Circuit affirmed. Yet all the arbitrator had

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80. MCARTHUR, REASONED AWARD, *supra* note 1, at 4–20 nn.67–72.

81. *Rain CII Carbon,* Award of Arbitrator, *supra* note 30, at 4.

82. Tully Constr. Co. v. Canam Steel Corp., No. 13-CV-3037, 2015 WL 906128, at *15 (S.D.N.Y. Mar. 2, 2015) ("The arbitrator here did not discuss the relevant facts or set forth the parties' contentions. Nor is it possible, from the award, to determine the reason or rationale for the arbitrator's liability and damages determinations.").

In *Cat Charter* the trial court did not remand the award because it held that the *functus officio* doctrine barred the arbitrators from revisiting the award. *See* Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 842–43 (11th Cir. 2011). In the first trial court decision in *Tully Construction Co. v. Canam Steel Corp.*, in contrast, the trial court remanded the case after concluding that the *functus officio* doctrine of award finality did not prevent a remand for the arbitrator to clarify his reasons. *Tully Constr.*, 2015 WL 906128, at *19–20. The arbitrator issued a the *Tully Constr. Co.*, Final Enlarged, Reasoned Award of Arbitrator cited in note 40 *supra,* and the court confirmed it. Tully Constr. Co. v. Canam Steel Corp., 2016 WL 8943164 (S.D.N.Y. Mar. 29, 2016), *aff'd*, 684 F. App'x 24 (2d Cir. 2017) (summary order; not precedential). The first *Tully* opinion cited four circuits holding that courts have the power to remand for clarifying reasons in spite of the *functus officio* doctrine. *Tully Constr.*, 2015 WL 906128, at *19 (citing, in order, what *Tully* called dictum in Green v. Ameritech Corp., 200 F.3d 967, 976–78 (6th Cir. 2000) and *Cat Charter*, as well as Office & Prof. Emps. Int'l Union Local No. 471 v. Brownsville Gen. Hosp., 186 F.3d 326, 331–32 (3d Cir. 1999) and Galt v. Libby-Owens-Ford Glass Co., 397 F.2d 439, 442 (7th Cir. 1968)).

83. For an illustration that the trial judge in confirming the second *Tully* award made five mistakes by accepting (1) attestation language, (2) burden-meeting language, and (3) volumetric logic (crediting the award because it was longer than a standard award) as reasoned, (4) by confusing describing the parties' contentions with actually giving

done on remand was insert an initial sentence on each claim attesting that he had done his job, two one-sentence paragraphs each vaguely summarizing one party's position in terms too broad for anyone to make a fair decision on that claim, and then conclude with a boilerplate conclusion that the claimant did, or did not, meet its burden on the particular claim.

The Second Circuit held that the new award contained "key factual findings" and explained "why Tully was entitled to damages on some claims and not others."[84] But where?

Stunningly, the *Cat Charter* test is *the* leading test for reasoned awards in U.S. law.[85] There was not a large body of law on reasoned awards before *Cat Charter*.[86] Since then, many federal and state courts have adopted its standard.

Despite *Cat Charter*'s failure to require reasoned awards, it has encouraged losing parties to challenge awards for lacking reasons. Perhaps lawyers previously assumed courts would be so deferential to arbitrators that appeal was futile. Even though the opinion did not devise a good test for reasoned awards, *Cat Charter* did publicize that a failure to provide reasons, when they are requested, exceeds arbitral powers under FAA section 10(a)(4) and thus provides a basis for losing parties to seek vacatur.[87] In that way, the opinion has helped advance the law by publicizing the *right* to reasons, even though its ineffective test has failed again and again to realize

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reasons, and (5) by employing erroneous evidentiary-list logic as signs of reasons, *see* MCARTHUR, REASONED AWARD, *supra* note 1, at 4–38 to 4–39 nn.150–57.

84. Tully Constr. Co. v. Canam Steel Corp., 684 F. App'x 24, 28 (2d Cir. 2015) (citing Leeward Constr. Co. v. Am. Univ. of Antigua-Coll. of Med., 826 F.3d 634, 640 (2d Cir. 2016)).

85. For *Cat Charter's* influence in roughly the first decade after its appearance, *see* MCARTHUR, REASONED AWARD, *supra* note 1, ch. 4, 4–45 to 4–46 nn. 194–210 and accompanying text. The other Second Circuit opinion is the *Leeward* opinion. *See Leeward*, 826 F.3d at 634.

86. For pre-*Cat Charter* vacaturs of awards for lacking reasons, *see* MCARTHUR, REASONED AWARD, *supra* note 1, at ch. 1, sec. B.

87. *Cat Charter*, 646 F.3d at 842. Another much less used but seemingly even more natural ground for vacating, or at least remanding for true reasons can be found in the second clause of FAA section 10(a)(4), which permits vacatur "where arbitrators . . . so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). The submission when a reasoned award applies is to have the particular disputes resolved with reasons that explain the decision, and a "definite award upon the subject matter submitted" is not made when the award does not explain the decision. *Id.* A Texas Court of Appeals recommended using the imperfect execution clause in provisions like FAA section 10(A)(4) for failures of reasoning*, see* Stage Stores, Inc. v. Gunnerson, 477 S.W.3d 848, 854 n.1 (Tex. Ct. App. 2015).

that right. The arbitration profession still needs a viable standard for "reasoned awards."

C. Common Forms of Un*Reasoned Awards*

It is fortunate that there are certain common forms of unreasoned awards.[88] That unreasoned awards fall into patterns makes it easier to draft remedial language for statutes, arbitration rules, and contract clauses.

The simplest unreasoned award form is an "announcement award," which merely announces the winner. It is a true standard award. It may have some introductory language or background, but it explains neither the decision on liability nor on remedies. A "construction list award," like the first *Tully* award, is an announcement award, albeit one that separates damages by claim rather than simply providing a net lump-sum amount that goes to the winner.

An "attestation award" includes an assertion by the arbitrator of having heard and reviewed the evidence, and may list the items reviewed, including pleadings like the statement of claim and the answer to it and pre- and post-hearing briefs, as well as specific exhibits and contract clauses. The sole liability sentence in the *Rain* award, which the arbitrator began by claiming that "[b]ased on the testimony, evidence, exhibits, arguments, and submissions presented to me in this matter, I find" the existing price stays in effect, is an attestation sentence.[89] It does not explain anything; it just asserts that the arbitrator has done a thorough job. Without seeing the arbitrator's reasoning, however, the parties have no way to judge if that is true.

A related cluster of awards just state the winner has met its evidentiary hurdle, something true of every winner and thus no kind of explanation at all. This form can appear as a "burden of proof award"; a "weight of the evidence award," as it did in the *Cat Charter* award's sole rationale that the Ryans won on two claims "by the greater weight of the evidence";[90] or a "credibility award," in which the arbitrator writes that one side's case is more credible than another, a basis that the Eleventh Circuit improperly read into the unexplained *Cat Charter* award.[91]

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88. The forms of unreasoned awards discussed in text are based upon Mr. McArthur's review of all Westlaw vacatur opinions for the years 2010–2017 and reflect the cases analyzed to prepare Chapters Six and Seven of MCARTHUR, REASONED AWARD. The patterns themselves are discussed in Chapter Five. *See* MCARTHUR, REASONED AWARD, *supra* note 1, at chs. 5–7.

89. *See supra* text accompanying note 81.

90. Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 844 (11th Cir. 2011); *see supra* text accompanying note 22.

91. On the Eleventh Circuit's treating a simple conclusion that one side was more credible as if it could be a full "reason," *see supra* text accompanying notes 68–69.

"Contention awards" and "issue-spotting awards" can sound reasoned if read quickly because they list each side's reasons, but when as in *Rain* they simply list arguments without the arbitrator providing an explained resolution, they are not reasoned. One telltale sign of an unreasoned award that lists party positions is that the listing, like that in *Rain*, is conclusory and does not contain enough detail to reveal the facts actually in dispute — the true fulcrum of the dispute and why the parties could not resolve it themselves. The parties know each side's arguments even before they file for arbitration. What they need is a decision maker to decide who is right and, in a reasoned award, to explain why. It is the explanation that tells the parties they have been heard and, if their position is rejected, why. It is vital to arbitration's legitimacy, and to the losing party's acceptance of the result, that the award shows that the arbitrator truly understood the losing party's position.

"Evidentiary list awards" may include pages of exhibit numbers and transcript cites, and may even provide quotes from both sources, but, again, do not explain what the arbitrator thinks about all this evidence but, instead, as in the second *Tully* award, merely conclude "I pick party A" or "I pick party B," and the like. Such awards lack reasons. "Volumetric awards" often take this form and persuade courts that there must be a reason somewhere because they are so much longer than a standard award. One suspects a major reason the trial court remanded the first *Tully* list award but confirmed the second award is that the latter was eleven pages long, not just one, and so clearly was "something more" than a standard award. That, of course, is the fallacy of spectrum analysis.

II. LANGUAGE TO FIX THE "UNREASONED" PROBLEM

The language used to build a statutory amendment or additional arbitration rule can be considered in varying levels of detail. Such provisions could be added to a new subsection of FAA section 10(a)(1)–(4) or similar portions of state arbitration statutes. The simplest kind of reform could state the following in substance:

> A reasoned award will clearly explain *why* the arbitrator ruled for one side and rejected the other's position on each claim, counterclaim, defense, and remedy that, if granted, would have altered all or part of the outcome. Conclusory statements that apply to all winning parties, for instance that they prevailed on the weight of the evidence, met their burden, or had more credibility, are not reasoned because these conclusions apply to the winning party in all arbitrations. An award required to be reasoned that does not explain the decision on all material disputed matters should be remanded to the arbitrators for them to provide a final, definite award with such reasons. The functus officio doctrine shall not prevent such remands.

> The fact that the parties did not ask for findings of fact and conclusions of law does not justify courts excusing an award for lacking reasons.

This definition overcomes several problems that can derail courts faced with deciding whether an award is reasoned. It establishes that the court must consider whether the arbitrator explained each claim, counterclaim, defense, and remedy that could affect the outcome. It thus discourages awards that just explain a first prevailing claim and ignore alternative claims, as well as the losing party's claims or defenses that, had they prevailed, would have changed the outcome. It is not uncommon to see awards that deal with all ungranted claims, as the *Cat Charter* arbitrators did with four rejected claims, merely by saying that "all other claims, counterclaims, and defenses are denied."[92]

Second, the definition makes clear that many of the most common conclusory statements are not reasons. Drafters may want to add that neither "merely listing contentions" nor "the mere length of an award or citing the record without analysis and explanation of the arbitrator's analysis" does not mean an award is reasoned.

Third, even when one claim provides all the relief alleged and none of the many affirmative defenses are valid, parties often feel that they were not heard if the award does not address all claims and explain why each defense was rejected, too. Addressing alternative claims or defenses provides a broader basis for an award that, if only a single claim or defense is decided, might have to be re-tried if that sole basis was vacated. On the losing side, a party that loses but only sees why it lost on major claims or defenses in the award may feel strongly that it still has other valid positions that the arbitrator never considered.

Fourth, parties often devote substantial time and effort (and money) to arguments that do not prevail. Sometimes the points may appear so frivolous to an arbitrator that these losing propositions end up not being discussed in the award. This follows judicial practices that can lead judges to focus only on the strongest arguments. Such an approach leads to the following kind of judicial statement by a very sophisticated judge who nonetheless used language that would absolve arbitrators from not discussing what could be major points that matter a lot to the parties. This judge claimed that awards need not automatically explain arguments or claims that are

92. The *Cat Charter* award denied all other claims and counterclaims, not even describing them. *See* text accompanying *supra* notes 22–23. It ignored the Respondents' affirmative defenses and did not even mention them, as can be seen in the omission of defenses in the language, *see supra* note 13.

> unclear, frivolous, their rejection . . . so conceptually straightforward that the justification for rejecting them is implied or is unnecessary, or the rejection of the contention [is] implicit in other portions of the award.[93]

The proposed definition would preclude ignoring *potentially* dispositive matters on these bases. If a party introduces no evidence on a point, there is a fatal legal flaw in an argument, or it claims facts that contradict its own admissions, the award should cite those as reasons to deny the points rather than just ignore it because it seems to the arbitrator too weak to deserve mention.

Fifth, the amendment should remove a confusion over when, if ever, the *functus officio* doctrine, which dictates that once arbitrators issue a final award they cannot make adjustments to it, bars changes to insert reasons and remove ambiguities without alternating the intended outcome. Courts have taken various positions on whether arbitrators can add reasons to an award after they issue it;[94] the proposed definition removes this barrier to parties receiving full reasons.

Finally, the proposed language removes the argument, one all too attractive to judges, that reasons are not really required because the parties did not request findings of fact and conclusions of law.

An accompanying legislative history or set of comments could note that arbitrators often skimp in the areas like damages, attorneys' fees, interest, and costs, and thereby expose their awards. It might note as well that many respondents plead a laundry list of pro forma affirmative defenses but frequently do not devote time and evidence to arguing their defenses in the hearing. Many arbitrators ignore such defenses, but a well-reasoned award will discuss them enough to explain why they are rejected. If the parties submit no evidence or argument on them, the discussion can be very brief and just say the proponent offered no evidence on point. Arbitrators are free when they require pre- and post-hearing briefs to tell any party that pled affirmative defenses that they must indicate the basis for those they continue to sponsor in post-hearing briefs. The best and safest practice is for a reasoned award to address, even if briefly, the major party arguments on the issues above and to explain the resolution of cumulative alternative claims and defenses.

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93. Stage Stores, Inc. v. Gunnerson, 477 S.W.3d 848, 854 n.1 (Tex. Ct. App. 2015) (Brown, J., concurring).

94. *Compare Cat Charter*, 646 F.3d at 842 (describing the judge's belief that the award had become *functus officio* and that he therefore could not remand it), *with id.* at 842 n.9 (stating the Eleventh Circuit's contrary view that the judge could have remanded the award had the award needed more reasoning), *and supra* text accompanying notes 47–51 (giving reasons initial list award was not reasoned and remanding award).

III. THE DAMAGE DONE TO ARBITRATION WHEN PARTIES DO NOT GET A REQUIRED "REASONED" AWARD

At the end of the day, do the mistakes of form in the three awards that led to today's leading cases on what reasoned awards mean, and the three federal circuit courts' regrettable confirmation of those awards, matter? Yes, without a doubt: reasons are the essence of justice. There is a large literature on the importance of reasons, of a true explanation, in judicial opinions.[95]

The first and primary reason to make sure parties get reasons in an arbitration award when they ask for them, or when the rules they choose require reasons, is that the parties deserve them. Arbitration is a dispute resolution process devoted to satisfying the parties' stated needs and expectations. With but one or two conspicuous exceptions, the Supreme Court has consistently stressed arbitration as a process that enhances party freedom by carrying out the parties' wishes.[96]

Explanations build legitimacy. Arbitration is a consensual process. It is brought into being by the parties' agreement to arbitrate, and the parties' needs must come first. Reasons assure parties that they received a fair process, at least, as long as the reasons display a real effort to analyze the parties' arguments and reach the right outcome. Reasons reveal whether the award rests upon the evidence, the law, the contract, and the arbitrators' judgment in interpreting the law, reading the evidence, putting it into legal categories, and coming up with neutral, fair answers to the questions the arbitration poses. Reasoned awards can prove that the parties received thoughtful consideration.

The idea that reasons confer legitimacy is a staple of the legal process, or reasoned decision-making, approach to jurisprudence.[97] It is a belief in

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95. For a more detailed discussion of nine benefits of reasoned awards, *see* MCARTHUR, REASONED AWARD, *supra* note 1, at ch. 3.

96. In one of the more recent examples of the Court's emphasis on the parties' choices above all *see* Lamps Plus, Inc. v. Varela, 587 U.S. 176, 183–84 (2019) (string cites by Supreme Court omitted), in which the Court penned a virtual paean to arbitration as a creature and embodiment of the parties' intent:

> "The first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly a matter of consent." . . . We have emphasized that "foundational FAA principle" many times. . . .

Id. Consent is essential because under the FAA because arbitrators wield only the authority they are given. *Id.*

97. In discussing the legitimacy of outcomes in our civil justice system, one well-known student of our courts summed up one of the key conclusions of the school of "procedural justice" scholars as being that "[t]hey consistently found that the degree of satisfaction with the legal process is a function of an individual's perception of the fairness of both the process and the outcome." Deborah R. Hensler, *Judging Arbitration: The Findings of Procedural Justice Research*, *in* AAA, HANDBOOK ON COMMERCIAL

reasoning that explains why the "written word thus strikes us as integral to the process" of judging.[98] As CPR has described this function of reasoned awards, "[m]ost parties engaging in arbitration want to know the basis on which the arbitrator(s) reached their decision."[99] Parties want explanations, not just results.

The importance of legitimacy is not just a matter of concern to parties. The duty to serve the parties is the arbitrators' ethical obligation. The American Bar Association (ABA)/AAA Code of Ethics for Arbitrators in Commercial Disputes (the "Code"), Canon I.E, provides:

> When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures and rules . . . .[100]

It should not take the Code to make that duty clear. Arbitrators serve the parties when they sit in arbitration. The parties have a right to structure the arbitration they want, including to require a reasoned award, and arbitrators are bound to comply.

ARBITRATION ch. 1.III, at 43 (Thomas Carbonneau et al. eds., 1st ed. 2006). Hensler read this body of research and some of her own work as suggesting that participants in arbitration would assess the process on its "procedural features, rather than on whether they win or lose," with heavy emphasis on whether "they think the process is fair" and that they "will be dissatisfied if they think the process is unfair." *Id.* at 48. Indeed, "[d]efendants were pleased to have an opportunity to vindicate themselves publicly at trial even when they lost." *Id.* at 47. Being heard is vitally important.

98. Chad Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1321 (2008).

99. CPR RULES FOR NON-ADMINISTERED ARBITRATION, *supra* note 65, at Rule 15, Commentary. The College of Commercial Arbitrators' *Guide to Best Practices* states that "[m]any arbitrators take the view that fairness to the prevailing and losing parties as well as to a reviewing court requires an explanation of the principal reasons for the arbitrators' decision." John Barrett et al., *Awards and Substantive Interlocutory Arbitral Decisions*, *in* COLLEGE OF COMMERCIAL ARBITRATORS (CCA) GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 303 (4th ed. 2017).

For more on the link between reasons and making awards legitimate to the parties, *see* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–34 (1995) ("In law, and often elsewhere, giving reasons is seen as a necessary condition of rationality."). Reasons can be a "sign of respect." *Id.* at 658. "[D]iscussion can be the vehicle by which the subject of the decision feels more a part of the decision, producing the possibility of compromise and the respect for a final decision that comes from inclusion." *Id.*

100. For the Code, *see* THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, AM. ARB. ASS'N (2004), https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf.

A second reason that reasoned awards benefit parties is that the process of writing out decisions can, as judges well know, change the result. Some decisions just "won't write."[101] As the Third Edition of the College of Commercial Arbitrators' *Guide to Best Practices* stated, "[s]ome arbitrators believe that the preparation of a written statement of the arbitrators' analysis in a complex case usually is essential to arrive at an analytically sound decision."[102] To CPR, a strong advocate of reasoned awards as the default form of award, the process of explanation has its own benefits: "CPR, moreover, considers it good discipline for arbitrators to require them to spell out their reasoning. Sometimes this process gives rise to second thoughts as to the soundness of the result."[103]

"Writing out" helps arbitrators spot flaws in their thinking and prevents them from deciding solely on a hunch or gut feeling that will never see the light of day. Writing out reasons should deter split-the-baby compromises that are not founded on principled analysis. Moreover, even if arbitrators do the work, the humbling fact is that the parties, particularly the losing parties, have no proof without reasons that the arbitrators really tried to find the right outcome.

A third benefit of reasons is that they improve judicial review. In the absence of reasons, a court ruling on a vacatur challenge is left to guess why the arbitrators decided as they did. A written reason removes that question and narrows the appellate question to whether the arbitrator had the power to make the decision. In almost all vacatur challenges, the answer is yes, even if the arbitrator made a serious mistake in reading a contract or piece of

101. For samples from the judicial side, *see* Ruggero Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV 1, 14 (2009) (discussing judge assigned to write opinion finding that it "won't wash" and having to report back to co-panelists that "Here is the result we want, I'm not sure that we can reach it without doing violence to highly respectable authority") (internal citations omitted); Richard Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447 (1995) (stating "the difference between thinking and writing [is that], a judge might come to a conclusion yet find the conclusion indefensible when he tries to write an opinion explaining and justifying it . . . [The decision] 'will not write' . . ."; writing a decision "forces some degree of critical detachment in the writer, . . ."); Alvin B. Rubin, Book Note, *Book Reviews*, 130 U. PA. L. REV. 220, 227 (1981) (reviewing FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH (1980), and J. WOODFORD HOWARD, JR., COURT OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981)) (discussing how an opinion that "won't write" can lead to an opposite decision).

102. Thomas Brewer et al., *Awards and Substantive Interlocutory Arbitral Decisions*, *in* CCA, GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION, ch. 11, 235 (3d ed. 2014).

103. CPR RULES FOR NON-ADMINISTERED ARBITRATION, *supra* note 65, at Rule 15.1, Commentary.

evidence.[104] But if an arbitrator does do something improper, like exceeding powers, the reasoned award should make that clear and help a court identify awards that should be overturned.

Finally, the ability to provide reasoned awards is one area in which arbitrators ought to be able to trump judges. U.S. courts are underfunded, judicial dockets in many state and federal courts are ridiculously large, and the wait to get to trial often prevents a prompt decision. Many judges have thousands of cases on their dockets. Yet even busy arbitrators tend to count their docket in the dozens, at most, and are supposed to turn away business if they cannot handle an arbitration on the schedule the parties desire.

Moreover, perhaps because of the press of cases, judges have long been trained to focus their attention and working hours on writing out the relatively small number of cases likely to be of the most precedential importance, and those judges are primed to assume that the parties usually know enough about their case that the dispute needs very little explanation.[105] Because parties pay arbitrators for their time by the hour, they should not

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104. On the deference courts extend to arbitrator judgment even on the most frequent challenge to awards, exceeding powers, *see* MCARTHUR, REASONED AWARD, *supra* note 1, at ch. 6.C.

105. Over a century ago, Benjamin Cardozo classified decisions into three categories, each with different implications for whether explanation was needed, in his *magnum opus* on the judicial process: (1) in some cases the right outcome on the facts and the law is so obvious that only a judgment order is needed; (2) some cases are clear enough on the law that it does not need exposition, even though the facts are more complex and may require detailed analysis; and, finally (3) a "not large" category of cases pose sufficient legal uncertainty that an explained decision, what this book calls a reasoned decision, would advance the law. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 163–65 (1921). Cardozo's tripartite opinion categorization was picked up in the influential book by another famous judges, RUGGERO ALDISERT, OPINION WRITING & OPINION READERS 35–36 (1990), whose book assumes avoidance of an opinion in Cardozo's category (1) cases, and limited discussion in category (2) cases to avoid a large number of extended but nonprecedential opinions.

The Federal Judicial Center's *Judicial Writing Manual* advises judges to think about the audience for court opinions. The *Judicial Writing Manual* does say that "[i]f an opinion is addressed to the parties," it needs to include "a fair and accurate statement of what was before the court for decision [which really means, it needs to show and reassure the parties that the court understand their claims, defenses, and requests for relief], what the court decided, *and what the reasons for the decision were*." FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 5 (2d ed. 2013) (emphasis added). So far, so good. But the *Judicial Writing Manual* then waffles by adding that the parties generally "will be familiar with the facts and will generally not be interested in an extensive exploration of the law, other than what is needed to give the losing party a clear explanation for the result." *Id.* Worse, it states that when opinions are "written primarily for the parties, *they will require little or no elaboration of the facts and law*." *Id.* at 5–7 (emphasis added). Where has the primacy of the "litigants and their lawyers" gone? It is hard to miss the message that decisions written primarily for the parties are not anywhere near as important as precedential decisions. "Often [such opinions] will take the form of summary orders or memorandum opinions." *Id.* at 7.

suffer from overwhelming dockets. Moreover, arbitration has no doctrine that only disputes with broad precedential application deserve full reasons. Arbitrators should have the time and, when a reasoned award is required, the desire to write out their reasons at whatever length fits the dispute and the parties' desires.

Achieving these benefits requires arbitrators to explain themselves carefully when writing a reasoned award and courts not to slough off their duty to overturn awards that are supposed to be reasoned but contain mere shadows of a reason as in the *Cat Charter*, *Rain*, and *Tully* awards. Congress and state legislatures should consider amending their respective arbitration acts to provide guidance on what a reasoned award requires. One way or the other, courts must learn to stop confirming awards as reasoned that say nothing more than, in substance, "the winner won." Arbitration providers should consider adding a definition of reasoned awards to spur arbitrators to do a better job if statutory reform is not forthcoming.