ORAL AWARDS

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Oral arbitral awards are rare but they exist. They are prohibited or made inapplicable by most arbitral institutions yet they remain lawful under the national laws of some highly reputable jurisdictions. In what limited contexts are oral awards issued and why would parties, in the first place, accept and later comply with an oral award? With documentary support and without the pretention of exhaustiveness, the author identifies two main distinct factual settings where oral awards are issued, explores the underlying justifications for each, and argues that the expected court enforcement difficulties – in these specific settings – are exaggerated, if not irrelevant, when parties cannot and do not want to enforce the decision in court. For the most part, however, oral awards will continue to be rare and inadvisable.

Keywords: *Oral And Speaking Awards; Risks And Advantages Of Orality; Diamond Business Arbitration; Indian Domestic Cases.*

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I. INTRODUCTION

Oral arbitral awards have been issued and continue to be issued today, doubtlessly in a small number of cases, but they exist nonetheless. The lack of either clear statistical evidence or interest shown by the lawyers towards a specific institution (oral awards in this case) does not necessarily indicate its inexistence.[1]

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[1] On this idea, see René David, *L'arbitrage dans le commerce international* (Ed. Economica, Paris1982,) 48: 'Les arbitrages de qualité, faits par les soins d'associations professionnelles, paraissent donner lieu à peu de difficultés, le prononcé de l'arbitre étant très généralement accepté en ce cas par les intéressés. L'arbitrage de qualité, malgré l'importance de premier plan qu'il a dans le commerce, n'a que très peu retenu l'attention des juristes; il n'est pas de plus sûr indice pour penser qu'il a réussi". Free translation: "Quality arbitrations, carried out by professional associations, appear to give rise to few difficulties, the decision of the arbitrator being very generally accepted, in

The lack of studies on oral arbitral awards encouraged the present writing. The exploratory nature of the exercise was almost as certain as the risk of rehashing was low. However, the lack of written documentation on a practice which, by definition, is unwritten, clearly presents difficulties. Another concern is that the subject might be seen as purely academic in the negative sense of the word, and of no practical value or interest to participants in international arbitration. The findings reveal, it is hoped, a more nuanced conclusion, especially in the light of reported Indian *domestic* awards and studies on the secretive diamond business industry.

Just as an array of reasons explain why parties will rightly request or expect, in most cases, a written final award, some parties operating in a specific *trade* (namely, the diamond industry) or under certain *domestic* circumstances (namely, family and employment-related disagreements), will see their disputes settled by way of a final oral award, for an array of reasons too. Those were the only factual settings in which the author found disputes ending or resolved with a final oral award.

The first and initial objective of this article was to identify the rare factual settings where oral awards are issued, and propose possible justifications. The second objective – more practical and contestable – is to draw lessons (positive or negative) for the more mainstream world of international arbitration.

II. THE CONFUSING TERMINOLOGY: ORAL AWARDS, SPEAKING AWARDS, AND HYBRID AWARDS

Oral awards form the subject matter of this article. At the outset, however, the expression "oral award" or "parole award"[2] should be defined and distinguished from related (and not necessarily immediately clear) expressions.

An oral award refers here to the final decision by the arbitrator(s) which puts (or is meant to put) an end to the parties' dispute. It is not meant to refer to various procedural decisions or orders which may, less rarely, be issued orally during any arbitration. Article 23(2) of the Town Elder Arbitration Rules provides a recent explicit example of the latter.[3]

At least several English-speaking jurisdictions (England, India) continue to refer occasionally to "speaking" and "non-speaking" awards. Mention can be made, for instance, of the 2001 Indian Supreme Court decision in *Bharat Coking Coal Ltd v M/S LK Ahuja & Company*[4] and

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these cases, by those concerned. Quality arbitration, despite its prominent importance in commerce, has received very little attention from lawyers; there is no surer sign to think it has succeeded'.

[2] The expression 'parole award' is even rarer. The Rajasthan High Court used it interchangeably with the expression 'oral award' see *OP Verma v Lala Gehrilal And Anr* [1960] AIR 1962 Raj 231 para 43. For clarity and consistency purposes, reference shall only be made to 'oral award' in the present article.

[3] Article 23(2) reads as follows: 'A Step Decision may be in writing or delivered orally to the parties, as appropriate for the issue or for the case. If in writing, the arbitral tribunal, after consultation with the parties, shall determine whether the decision should be issued as a partial award'. The rules are available at < https://www.debevoise.com/news/2021/11/debevoise-partner-david-w-rivkin-discusses> accessed 29 December 2021. A concise analysis of the rules is also found at Alison Ross, 'Rivkin unveils Town Elder rules' (*Global Arbitration Review* 13 December 2021)<https://globalarbitrationreview.com/rivkin-unveils-town-elder-rules accessed 29 December 2021.

[4] *Bharat Coking Coal Ltd v M/S LK Ahuja & Company,* [1995] Appeal (civil) No. 5489-5490.

the recent 2020 English High Court decision in *Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA & Anor*.[5] In the Indian context, the term "hybrid award" is also used to refer to "partly speaking" and "partly non-speaking" awards.[6] However, the terms are not always expressly defined in the case law of each country. The terms are not referred to in either of the two countries' national arbitration statutes.[7]

A speaking award is *not* an oral award in which the arbitrator "speaks" out the final decision orally. It simply means a *reasoned* written award, in which the grounds for arriving at the conclusions and the decision are set out.[8] In French, it would be called a decision "motivée". A non-speaking award is thus simply a written but unreasoned award (i.e. an award that does not state the reasons upon which it is based), issued by an arbitrator or umpire, with all the risks it carries or is thought to carry.

As with written awards, oral awards may be either reasoned or un-reasoned.[9] Based partly on a review of Indian case laws and a recent anthropological study of the New-York diamond industry and its dispute resolution system[10], oral arbitral awards seem to be, more often than not un-reasoned and unrecorded for both practical reasons and considerations of secrecy (see *infra);* this contrasts to oral judgments – at least in the English court context –which will be reasoned and

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[5] *Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA & Anor,* EWHC 1584 (Comm) para.93 (citing the English Court of Appeal case of *Soleimany v Soleimany* [1999] QB 785).

[6] See *Bharat Coking Coal Ltd v M/S LK Ahuja& Company* [2001], *Appeal (civil) 5489-5490 of 1995.* Although the term is not used, see also *Chowgule Brothers And Ors v Rashtriya Chemicals* [2006] (3) ARBLR 457 Bom, 2006 (4) BomCR 78, at para. 8: 'It is, we think, necessary first, to clear some cobwebs. A speaking or reasoned award is one which discusses or sets out the reasons which led the arbitrator to make the award. Setting out the conclusions upon the questions or issues that arise in the arbitration proceedings without discussing the reasons for coming to these conclusions does not make an award a reasoned or speaking award. The arbitrator has in the award before us only answered the issues that were framed. He has not discussed or set out the reasons for the answers. The award is, therefore, not a speaking or reasoned award'.

[7]Interestingly, the Arbitration (Orissa Third Amendment) Act, 1991 contained specific provisions regarding non-speaking awards. It provided that such awards cannot be issued by either an arbitrator or umpire for cases above a certain monetary threshold, failing which the award would be invalid.

[8] See *M/S Anand Brothers P Ltd Tr MD v Union Of India & Ors* [2014] Civil Appeal No. 76 of 2009 para 5.

[9]Adam Taylor, 'District Judge Adam Taylor examines how judges can recall and replace their judgments and orders' (*The Law Society Gazette* 1 April 2005) <https://www.lawgazette.co.uk/law/making-your-mind-up/3645.article> accessed 11 December 2021, 'Visiting European judges are often surprised to hear their English and Welsh counterparts deliver an oral judgment at the end of a trial. Oral, or extempore, judgments have several advantages over written: they involve no delay; they ensure that witnesses' evidence and demeanour remain fresh in the judge's mind; and they allow judges more time in which to hear cases. Occasionally, though, an oral judgment may betray signs of haste that a written judgment would have avoided'; On the interesting link between the giving of reasons and the gradual abandonment of the jury system, see Michael Kirby, 'Ex Tempore Judgments – Reasons on the Run' [1995] 25 Western Australian Law Review218; For the link between the decline of the jury trial and increase in reserved written judgments (in the Australian context), see also John Dyson Heydon, '*Varieties of Judicial Method in the Late 20th Century*' [2012] 34 Sydney Law Review 224.

[10] The Indian court judgments (see *infra*) which refer to Indian domestic oral awards leave no clear indication that these awards were either reasoned or recorded, though in some cases the oral award was followed by a formal written award (see, for example, *Amitabh Bachchan v Deputy Commissioner of Income Tax* [2005] 97 TTJ Mum 516 – Income Tax Appellate Tribunal, Mumbai); Regarding the diamond industry and community, see Renée Rose Shield, *Diamond stories: Enduring Change on 47th Street*(Cornell University Press, New York 2002) esp ch 8.

audio recorded.[11] The presence or absence of reasoning does not, therefore, appear to be a defining trait of oral decisions as such.

What appears characteristic or recurrent with oral decisions – both in the arbitral and court contexts –is their spontaneity and 'extempore' nature. In practice, a physical oral hearing will precede the oral decision which will be often immediately issued *in person.* The importance of the latter element must not be ignored or underestimated; it may in fact constitute one important factor (among others) in encouraging compliance with the decision.

The oral, public *pronouncement* of highly publicised written awards is different. One famous case that comes to mind was the publicly pronounced award by the presiding arbitrator (in a five-member tribunal) in the Abyei arbitration in July 2009 between the Government of Sudan and the Sudan People's Liberation Movement. The public declaration was made several months after the closure of submissions, and it was followed by the issuance of a long-written award.[12] This should not be confused and assimilated with the type of pure oral awards examined in the present article, nor with the type of "hybrid awards" mentioned earlier which refer to awards containing reasons on certain issues only.

A purely oral award - defined as a final oral award (with or without reasons) that settles a dispute *without* the issuance of a subsequent evidencing or completing written document –is unsurprisingly extremely rare in international arbitration, and for good reasons. That reason primarily is evidentiary in nature.[13] However, the multi-dimensional complexity of the cases also plays a role herein.

A written final award has been the expected norm since at least the early part of the 20th century, by explicitly requiring the award to be signed and dated, or by explicitly stating that the award must be in writing.[14]Yet a number of national arbitration statutes continue *not* to prohibit oral awards. At the multilateral treaty level, the 1958 New York Convention does not explicitly require an award to be in writing. And oral awards continue to be issued in certain specific contexts where the New York Convention – applicable or not – will not even be at the back of the minds of the participants. Each of these points is addressed below.

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[11] In the Canadian court context, see JE Côté, 'The Oral Judgment Practice in the Canadian Appellate Courts' 5(2) The Journal of Appellate Practice and Process442-443. Appellate courts that have a practice of giving some oral judgments usually create some kind of record of the reasons. This can be done with a digital sound recording system, a tape recorder, or a court reporter with a stenotype (shorthand) machine. The Supreme Court of Canada has all of its oral judgments transcribed and released to the parties and the public'.

[12] Final Award of 22 July 2019 on Delimiting Abyei Area under the Permanent Court of Arbitration Permanent Rules, see esp paras 87-94 <https://pcacases.com/web/sendAttach/18820>accessed 11 December 2021.

[13] The evidentiary difficulties and arguments can turn not only on the precise content of the award but on its very existence, as shown in *Satya Pal v Ved Prakash* [1979] AIR 1980 All 268 para 4; More generally, see Philippe Fouchard and others *Traité de l'arbitrage commercial international* (Litec, 1996) para 1389.

[14] See, for instance, the successive versions of the ICC Rules since 1922 which show that a written final award was the expected norm; the ICC Court's scrutiny of the awards since 1927 requires perforce a written award. In passing, the author found authority for the view that U.S. 'common law awards' in the in the 1930s could be oral. See Ernest G Lorenzen, 'Commercial Arbitration – Enforcement of Foreign Awards' [1935] 45 Yale Law Journal39. However, E. Lorenzen points out later, in the same article of 1935, that 'Austria will not enforce oral awards of foreign countries even if the necessary reciprocity exists'.

III. THE DIVERSITY OF RULES

Some major 'arbitration-friendly' jurisdictions (including England & Wales, France, Switzerland) allow oral awards, though the latter two in international arbitration only.[15] This contrasts with many leading arbitral institutions (ICC, LCIA, SCAI) which take a more prescriptive approach, here and elsewhere, in prohibiting oral awards.[16] To the author's knowledge, oral awards are extremely rare in maritime arbitration too, but not entirely unheard of either by their most experienced practitioners.[17]

The 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended) provides in its Article 31(1) that the award "shall be made in writing" without a specification that the parties can agree otherwise, by contrast for example with the duty to give reasons in Article 31(2) for which the parties can clearly agree otherwise.

It may therefore not come as a surprise that India – whose law is largely based on the UNCITRAL Model Law – has the identical rule in Section 31(1) of its Arbitration and Conciliation Act, 1996.[18]India is also the country where the author found the highest number of oral awards,

[15] Arbitration and Conciliation Act 1996 s 52(1), 'The parties are free to agree on the form of an award'); Article 1506(4) and 1513 of the French Décret No. 2011-48 of 13 January 2011 (though Article 1513 is not free of ambiguity); Swiss Federal Statute on Private International Law art 189(1).

[16] ICC Rules art 34 ('Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form'); LCIA Rules 2020 art 26.2 ('The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based'); SCAI Rules 2012 art 32 ('The award shall be made in writing and shall be final and binding on the parties'. To the author's knowledge, there is also clear institutional coherence at the national level inasmuch as the (reviewed) Indian arbitral institutions neither contemplate nor authorise oral awards: either the wording of their rules necessitate the submission of a 'draft award' and/or do not allow the parties (or tribunal) to agree on the form of the award. See, for example, Rules of Arbitration of the Bengal Chamber of Commerce 2010 rule 35; Arbitration Rules of the Mumbai Centre for International Arbitration 2016 rule 30.2; Delhi International Arbitration Centre 2018 rule 32.

[17] The author is grateful to the current President of the London Maritime Arbitrators Association ("LMAA") Mr. Bruce Harris and its Honorary Secretary Ms. Daniella Horton for sharing their personal experiences and insights. With permission, the author reproduces here an extract of Mr. Harris's response (which he emphasises is purely his own and not that of the Association): 'There is nothing in the Act [Arbitration Act, 1996] to prohibit oral awards, so if the parties agree to one I can see no objection, and I think the same must apply under our Terms. My dim recollection is that during the discussions in the DAC [Departmental Advisory Committee on Arbitration Law] we did think about this, although nothing appears in the reports. I believe that we probably concluded that the question was likely to arise, if at all, so rarely that it should be left to be dealt with as and when. My own experience […] is that I have never come across an oral award or been asked to make one. But I do remember Cedric Barclay [President of the LMAA 1975-1977] saying that he once went round a ship under construction resolving disputes between the builder and the buyer one by one, orally, as he went. Whether he then put those decisions into an award or series of written awards I do not know, but my recollection, again vague, is that the parties accepted his decisions as they proceeded, thus only oral awards'.

[18]Arbitration and Conciliation Act 1996 s 31(1) concerns the form and content of the award. It reads as follows: "An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal".

albeit pre-1996, every time in the domestic context, by sole arbitrators[19] or tribunals consisting of several arbitrators.[20]

The New York Convention does not mention explicitly that the foreign or non-domestic awards must be in writing, but it is an implicit requirement without which some of its key provisions would be unworkable or inapplicable, such as the requirement to supply a duly authenticated original award or duly certified copy in order to obtain the recognition and enforcement of the foreign award pursuant to Section IV(1)(a) of the New York Convention.[21] By contrast, the ICSID Convention is explicit and so were all its earlier drafts.[22] More generally, the written form of an award is said to be a "standard requirement in international arbitration"[23] which very few practitioners would deny, even if the requirement is not always expressly written.

And on the rare occasion when authors mention (directly or indirectly) that oral awards are permissible under such or such statute, they add almost invariably that an award of this form would

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[19]*Amitabh Bachchan v Deputy Commissioner of Income Tax* [2005] 97 TTJ Mum 516 – Income Tax Appellate Tribunal, Mumbai, (tax dispute); *Jitender Kumar Aggarwal v Usha Aggarwal &Ors.* [2011] MCA No.07/11 (property/family dispute); *Kamini Kumar Basu Thakur and Ors v Birendra Nath Basu Thakur And Anr* [1930], Privy Council Appeal No. 17 of 1928, (land/family dispute with criminal law elements); *Mohinder Singh v State* [1971] ILR 1972 Delhi 788 and Criminal Appeal No. 117 of 1972 (employment dispute turned into murder – see *infra*); *O.P. Verma v Lala Gehrilal And Anr.*[1960] AIR 1962 Raj 231 (business/family dispute). On a separate note, the accepted familial nature of the relationship between the sole arbitrator and one or both of the parties, in some of these oral award cases, is interesting to observe: in *Kamini v. Birendra,* the sole arbitrator was "a relation of the parties" (para. 3 of the judgment) and in *O.P. Verma v Lala* the sole arbitrator was the brother of the plaintiff (para. 2 of the judgment), without this raising any apparent issue.

[20]*Amir Bi Bi v Arokiam and Ors* [1917] 45 IndCas 813, (1918) 34 MLJ 184 (family/property dispute – unspecified number of arbitrators); *Najmuddin And Ors v Bibi Nafirunnisa And Ors* on 3 May, 1990 (property/family dispute); *Satya Pal vs Ved Prakash* [1979], AIR 1980 All 268 (business family dispute); *Tarlok Chand v Vijay Kumar* [1992], 102 PLR 357 (property/family dispute). In all of these cases, the tribunals consisted of several arbitrators; however, the judgments left the precise number(s) unspecified. It should *not* be assumed that the number of arbitrators was three. In fact, it would be justified to assume that the number was *not* three, in light of Section 10(1) of the then applicable 1940 Arbitration Act which reads as follows: 'Where an arbitration agreement provides that a reference shall be to three Arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties'. On the subject of even-numbered arbitral tribunals, see Régis Bonnan, 'Even-Numbered Arbitral Tribunals' [2019] Indian Journal of Arbitration Law 8(1).

[21] Gary Born, *International Commercial Arbitration*, (Kluwer Law International 2nd edn 2014) 3031: 'In contrast to their treatment of arbitration agreements, international arbitration conventions do not generally impose form requirements with respect to arbitral awards. As discussed above, it is implicit in most arbitration conventions that an award will be a written instrument made by the arbitrators: in particular, Article IV(1)(a) of the New York Convention requires presentation of a "duly authenticated original award or a duly certificated copy thereof" as a condition of recognition, presupposing the existence of a written instrument. This provision would presumably allow a Contracting State to deny recognition to a foreign "award" that was not in writing, although oral awards are virtually never made in international arbitration practice'.

[22] Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2nd edn 2009) 813-814;The rule that an award must be in writing is a standard requirement in international arbitration. It was contained in all drafts leading up to the Convention (History, Vol. I, p. 209) and was never seriously debated. At one point, it was suggested that the phrase stating that the award had to be in writing should be eliminated as superfluous. The suggestion was defeated (History, Vol. II, p. 816). Arbitration Rule 47(1) reiterates that the award must be in written form […]. There is no requirement that the award must be delivered orally at a sitting of the tribunal (see Art. 49, para. 4). This is to avoid the inconvenience and expense that might be caused by a need to reconvene the tribunal merely to read the award. The purely written form of the award is in contrast to procedural requirements for certain other forms of international adjudication'.

[23] ibid para 813.

be extremely rare in practice.[24] One may surmise that the national legislators preserved that possibility[25] out of respect for party autonomy or tradition, without paying much regard to the potential legal and practical complications.

Even if oral awards may be more frequent than known in *ad hoc* commercial arbitrations (which are not governed by the UNCITRAL Arbitration Rules or where Article 34 thereof was agreed not to be applied), such awards – in the absence of contrary indication– likely remain very rare in standard international practice compared to the overwhelming mass of written awards.

The words "standard" and "international", however, are important, as shown by two counter-examples: (a) the diamond business industry (as confirmed by several academic studies and personal knowledge of the author) and (b) a number of pre-1996 Indian domestic arbitrations (as revealed by public court judgments issued both pre and post-1996). With the diamond business, information continues to be very difficult to obtain, though several books and articles – as well as private informal feedback – confirm that oral awards continue to be issued in the field.[26] With India, the existence of oral awards is revealed by court judgments relating to enforcement matters[27] or cases that took a criminal turn.[28] Each of these two settings is examined successively in greater

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[24] For Switzerland, see Franz Stirnimann Fuentes and others, 'Challenging and Enforcing Arbitration Awards'(Switzerland, Global Arbitration Review ('Unless the parties have agreed otherwise, article 189(2) of the PILA provides that the award 'shall be in writing, supported by reasons, dated and signed. The signature of the chairman is sufficient'. Though extremely rare in practice, the parties are therefore free to waive the written-form requirement and can agree that the award be rendered orally) <https://globalarbitrationreview.com/jurisdiction/1006431/switzerland> accessed 11 December 2021; See also Pierre Lalive and others, *Le droit de l'arbitrage interne et international en Suisse*, Payot, Lausanne (1989) p. 410: '[…] les parties peuvent, par exemple, dispenser l'arbitre de l'obligation de motiver sa sentence […], prévoir qu'il la rendra oralement ex tempore, immédiatement après la clôture des débats ou encore que la sentence sera rendue à l'unanimité ou avec une majorité qualifiée…'translation: 'the parties may, for example, exempt the arbitrator from the obligation to provide reasons in his award […], provide that he will render it orally ex tempore, immediately after the closure of the proceedings or that the award will be rendered unanimously or with a qualified majority'. In relation to Articles 1481 and 1482 of the French aforementioned Décret – 'It is implicit from these formal requirements that the award must be in writing. In international arbitration, the parties may depart from the rules described above, though there would be very few reasons to do so in practice. By contrast, in domestic arbitration, the formal requirements are mandatory' – Rubins N./Rivoire M., *France - Challenging and Enforcing Arbitration Awards,* 2019, Global Arbitration Review; For historical information on oral awards in the Islamic context and oral awards more generally, see respectively Samir Saleh, *Commercial Arbitration in the Arab Middle East, A Study in Shari'a and Statute Law* (Graham & Trotman, London 1984) 73-74, and R David, *l'Arbitrage dans le commerce international* (1982) 437.

[25]See P Lalive and others *Le droit de l'arbitrage interne et international en Suisse,* Payot, Lausanne (1989), 410.

[26] The author is grateful to Prof. Barak D. Richman of Duke University for confirming his understanding, in August 2020 and later correspondence, that oral awards continue to be issued in diamond-related disputes. Prof. Richman has studied the diamond industry for more than two decades. See, in particular, Barak Richman, 'How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York' [2006] 31(2) Law & Social Inquiry; and his recently-published book in 2017: *Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange* (Harvard University Press 2017) esp ch 3.

[27] For example, see *Amir Bi Bi v Arokiam and Ors* [1917] 45 IndCas 813, (1918) 34 MLJ 184; *Satya Pal v Ved Prakash* [1979] AIR 1980 All 268.

[28] See *Asharfi Lall Dass v Ram Prasad Jha And Ors* [1959] AIR 1960 Pat 52; *Kamini Kumar Basu Thakur and Ors v Birendra Nath Basu Thakur And Anr* [1930] (Privy Council Appeal No. 17 of 1928); *Mohinder Singh v State* [1971] ILR 1972 Delhi 788 and Criminal Appeal No. 117 of 1972; *Munna Lal v SurajBhan* [1975] (para. 6 in particular), as reported in *Najmuddin And Ors v Bibi Nafirunnisa and Ors* [1990] AIR 1991 Pat 239, at para 46-49;*OP Verma v LalaGehrilal And Anr.* [1960] AIR 1962 Raj 231; *Subbaraya Pillai v Pichaipillai Udayan And Anr* [1936] AIR 1937 Mad 148.

detail *infra*. To be as complete as possible, the author identified two other circumstances where oral awards were issued.

The first one is the *Prud'homie de pêche*, a private order that managed the fishery of Marseilles for the past six centuries, a detailed study of which was very recently published.[29] The second one is a U.S. domestic and contemporary employment-related case where an oral award was issued.[30] This point is emphasized for two reasons: first, because it may be hypothesized that such awards exist in other domestic contexts across the world, including some employment disputes. Second, because the oral award in the above case was followed by a written award, as was required under the applicable arbitration and mediation rules. The *combination* of orality and writing – as with witness statements – may thus also apply at the final award level, though the 'final' stage is divided into two separate but temporally close steps.

IV. POLICY JUSTIFICATIONS AGAINST ORAL AWARDS

In a commercial world in which businessmen and companies routinely provide for arbitration (with a final written award marking in principle the end of the arbitration), it is difficult to understand why both parties would specifically request or expect the award to be issued orally.

Dispensing with reasons in the award is a separate issue, because there the award-creditor will at least have the operative part to enforce in one or several jurisdictions. Agreeing on a ceremony during which an oral pronouncement is made is also something else, provided a written award is issued too.

Many factors justify a written award, with or without reasoning. These include evidentiary difficulties (what did the tribunal precisely state and decide in the oral award?) and the highly uncertain legal regime which would apply in enforcement actions (is an oral award valid in the first place and under what law(s)?). Other factors include the impermanence of the arbitral

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[29] Florian Grisel, 'Managing the Fishery Commons at Marseille: How a Medieval Institution Failed to Accommodate Change in an Age of Globalization' [2018] 20(3) Fish and Fisheries 421 '[…] the *Prud' homie* was also directly involved in their application by adjudicating disputes and enforcing its judgements. The *Prud'homie* performed the first task every Sunday after mass, and its jurisdiction extended to any fishing dispute that occurred over its territory. The procedure was as follows: the plaintiff would place two coins in a special box to summon the defendant to appear before the *Prud'homie* the following Sunday. Both parties would then present their respective arguments before the *Prud'hommes*, who would render their decisions immediately after the hearing. The process was entirely self-contained as decisions could not be appealed by the losing party before French state courts. The procedure was oral, the judgement was swift, and its enforcement was immediate: most parties complied voluntarily with the judgements of the *Prud'homie* to avoid ostracism and the loss of social status (AD 250E1, 8 January 1512). However, losing parties did not always comply, and in such cases, a non- complying member could be excluded from the community, stripped of his voting rights and/or exposed to public criticism […]'. The same author examines the subject at greater length in Grisel F., *The Limits of Private Governance: Norms and Rules in a Mediterranean Fishery,* Oxford Hart Publishing, 2021).

[30]See the Connecticut's State Board of Mediation and Arbitration Regulations in the employment context, which explicitly allows oral awards provided they are followed by a written award (Section 31-91-45(b): 'Oral awards may be rendered upon mutual request of the parties. Whether or not an oral award has been rendered, an award shall be reduced to writing and signed by the members of the panel'; See also Local 134 *IfpteAfl-Cio v Stratford* [2000] Ct. Sup11775 (Conn Super Ct 2000, Decided 12 September 2000) in which the 'award' – comprising both the oral and subsequent written awards – was vacated for procedural reasons.

tribunals and the complexity of many modern disputes which are brought to arbitration (and the corresponding need for precision in the final decision, including on costs issues).

The above is well-known. Perhaps less easily acknowledged is the fact or idea that, *from the perspective of the arbitrator,* a number of secondary reasons encourage him or her not to promote oral awards.

First, the financial element: a significant amount of the arbitrator's work – not major but significant nonetheless – consists in award drafting. Dispensing with this will cut into his fees, compel him to work much faster and possibly force him to take a hasty decision immediately after a hearing, assuming one is even possible in light of the complexity of the case or the need to reach a majority decision with the other arbitrators.

Second, the reality of the partisan or 'advocate-arbitrator' is not a marginal phenomenon, if it ever was. Neither is award non-compliance. The real or suspected presence of this type of arbitrator presents difficulties, substantive and practical, of a different order to what may happen in a court context. In addition, the related and no-longer rare phenomenon of dissenting opinions[31] would likely trigger opposition from many arbitrators – of the partisan type or not – who may legitimately wish to retain the right to issue a dissenting opinion, presumably written.[32]

Third, the vast majority of international arbitrators do not have the experience and special skill of rendering an award immediately after an evidentiary hearing, especially if the language of the arbitration is not their natural mother tongue or 'legal' mother tongue.

Accounts of common law judges who are familiar with oral judgments reveal the risks of and skills for delivering ex tempore judgments.[33] By training, experience and command of language, former judges or practising barristers might well be the most competent lawyers to issue

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[31] See Albert Jan Van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, 2011, *in* Mahnoush Arsanjani and others (eds), 'Looking to the Future: Essays on International Law in Honor of W. Michael Reisman'<https://www.arbitration-icca.org/media/4/83547731316157/media012970228026720van_den_berg--dissenting_opinions.pdf> accessed 11 December 2021; See also L Lévy, 'Dissenting Opinions in International Arbitration in Switzerland' [1989] 5(1) 39: Swiss law has no express rule relating to dissenting opinions. *Ideally, nevertheless, dissenting opinions should be written* so that the arbitrators may speedily render a valid and enforceable award' (italics added).The subject of dissenting opinions (and their form) is distinct and will not be examined further here. One point only will be mentioned: the oral form of the award presents enforceability issues which are absent with dissenting opinions to the extent that the latter cannot (and are not meant to) be enforced, even if they may negatively and voluntarily impact the award's enforceability.

[32] The possibility to render an oral dissent should not be discarded as such. In the admittedly very different judicial context (and even more so at the appellate level), see J Côté 'The Oral Judgment Practice in the Canadian Appellate Courts' [2003] 5(2) The Journal of Appellate Practice and Process, 442: 'If one of the judges does not completely agree with the proposed oral judgment, she can either ask to have judgment deferred until it can be put in writing, or she can prepare an immediate oral dissent or concurrence based upon other grounds. If she chooses the latter, she will then read her minority judgment orally, in open court, immediately after the majority judgment'.

[33] Lord Neuberger, 2014, *Sausages and the Judicial Process: the Limits of Transparency*, in Annual Conference of the Supreme Court of New South Wales, Sydney, at para 22;See also M Kirby (n 9), , 216: '[s]ome judges have a marked skill in the delivery of ex tempore reasons which are at once accurate, graceful and elegant […] Other judges, of like intellectual gifts, may prefer the quiet of their chambers to assemble their thoughts or to explore a fascinating corner of the law which, during argument, has captured their interest'.

ex tempore arbitral awards which are allowed under the English Arbitration Act 1996[34], but of course this does not meet that there is any significant need or demand for such awards.

And yet the world of international arbitration does not encapsulate the whole world of arbitration, and internationality, regardless of its definition, does not necessarily imply complexity requiring, in turn, a long-written decision.

One risk is to make a series of apparently uncontroversial assumptions which in reality are not always applicable (when oral awards are issued) or are at least debatable. The key assumptions are as follows: parties are counselled by their in-house lawyers and/or represented by lawyers in arbitral proceedings; arbitrators are lawyers and paid to render their services; the winning party needs or wishes to be in a position to enforce the award in court, locally or abroad; an oral award will be unreasoned and highly subjective, if not outright lawless; even if possible, an oral award will not (or tend not) to be complied with; a written award provides an accurate, if not comprehensive, record of the case and is to be commended for reasons of quality, transparency, and control; an oral award projects an image of clandestinity though its secrecy and proximity to illegality.

As seen below, many of these assumptions may not always prove correct or be applicable.

V. ORAL AWARDS IN PRACTICE

A. *THE DIAMOND BUSINESS INDUSTRY*

Lawyers and anthropologists have written books and articles on the alluring diamond business industry, including its unique arbitration system[35] which, in the author's mind, is at the moving frontier between arbitration and conciliation. Reference is made to these works for readers who are unfamiliar with the industry, or who may wish to know more about it.

Many diamond bourses have their own arbitration rules and practices for which it is extremely difficult (the word is not an exaggeration) to obtain information. One (if not the only one) major exception is the (2016) By-laws and Inner Rules of the World Federation of Diamond Bourses (WFDB), a document available online whose arbitration-related provisions– in relation to disputes between members of different bourses and insofar as the form of the award (written and

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[34] English Arbitration Act 1996 s 52(1) 'The parties are free to agree on the form of an award'.

[35] In particular: Lisa Bernstein, *The Choice Between Public and Private Law: The Diamond Industry's Preference for Extra-Legal Contracts and a Private Law System of Dispute Resolution*, 1992, Discussion Paper No. 72 6/90, Program in Law and Economics, Harvard Law School; Manuel A. Gomez, *Precious Resolution: The use of intra-Community Arbitration by Jain Diamond Merchants*, 2013, b-Arbitra, Bruylant, 2/2013; Jacques Gutwirth, *Le judaïsme anversois aujourd'hui*, 1966, Revue des Etudes Juives - Historia Judaica, Tome CXXV Fascicule 4, <https://halshs.archives-ouvertes.fr/halshs-00505511/document> (and the English version of the same article, referred to *infra*)accessed 11 December 2021; Barak Richman, 'How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York' [2006] 31(2) Law & Social Inquiry; and from the same author in describing the more recent deterioration in the diamond business practices, including its dispute resolution system: Barak Richman, 'An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange'[2017] 9(2) Journal of Legal Analysis. Renée Rose Shield, 'Diamond stories: Enduring Change on 47th Street' [2002] Cornell University Press, New York.

reasoned) is concerned[36] – contrast with the more oral practice of local bourses (or at least some of them), based on what was privately disclosed to the author.

The world of international arbitration has not shown much interest for the diamond industry and its arbitration system. The reason for this today lies probably less in the diamond industry's 'closed door' policy than its lack of lucrative opportunities for prospective lawyers and arbitrators alike.

Diamond arbitral bourses shun publicity.[37] Even just finding their arbitration rules is a struggle, which presents a total contrast to most arbitration institutions today which compete for visibility. On the lucrative element, it is interesting to note that the presence of lawyers is not encouraged in the process, even if the situation has gradually changed over time and effectively deteriorated. The absence of lawyers[38], including at the hearing, likely increases conciliatory decisions or outcomes, but the process is not lawless.

At the heart of the subject – oral decisions and their enforcement– Renée Rose Shield described the end process as follows:

> *A small part of the process is public. Names of litigants in upcoming arbitrations are posted in the club and the judgments are announced there, but the reasoning behind decisions is not included, and the arbitration proceedings themselves are secret. No notes are made, and no audio or video recordings are permitted […] If a judgment has not been complied with and an appeal has not been filed after eleven working days, the award and a picture of the noncompliant member is posted on the bulletin board of the DDC. Though decisions do not rely on precedent and are not written down, individual arbitrators tend to remember their decisions even though the members of the arbitration board change. In this way a considerable legacy of oral history builds up, and members share and draw upon it. Part of this legacy is lost when a member dies.*[39]

It is tempting to dismiss oral awards as unrealistic (presumably because non-existent) and dangerous (presumably because unenforceable). However, the diamond business industry – unique as it is – reveals that such awards exist and that a combination of factors explains why they exist and may be preferred to written awards.

Not having a written award will be less of an issue for an award creditor operating in a system where resort to the courts – even in case of unjustifiable non-compliance by the award-debtor – is not allowed, absent exceptional circumstances and even there only with internal 'club' approval.[40] Award enforcement *in court* is here largely irrelevant, though enforcement as such is not: drastic and immediate sanctions exist and are applied, some of which would clearly be impermissible in

[36] See especially the WFDB Inner Rules (as amended in Dubai in May 2016)38-39 paras 10-15.
[37] Personal experience confirms this: the author contacted around a dozen diamond bourses across the world. None responded. The author's experience with arbitral institutions was markedly different.
[38] Bernstein (n 35) 51; Shield (n 10) 187-188.
[39] Shield (n 10) 192-193.
[40] Jacques Gutwirth (n 35) 133-134.

international arbitration (including professional 'excommunication' or exclusion, and punitive damages or fines, payable – at the arbitrator's discretion – to charities, for example).[41]

The arbitrator too may prefer the system of oral unrecorded[42] awards: unremunerated and unassisted, he will be unenthused at the thought of embarking on a long drafting exercise; untrained in law, he will have little inclination for airing out the reasoning behind a decision which is intended to be at least partly grounded in law; un-nominated by a party but rather by the diamond institution, he will likely remain cooperative with the other arbitrators until the very end of the case.

The underlying business transactions[43] also impact the form of the award: many diamond business contracts are concluded orally,[44] as a result of which the arbitrator will not need to interpret contractual documents. Instead, he will rely substantially on witness evidence – especially character and 'demeanour evidence' – elements which may be difficult to write down, even more so in a closed society where the arbitrator knows the parties and witnesses and where allegations of fraud – facilitated by the ease of theft or deceit with objects of such type[45]– seem to be quite common. In the words of an unnamed arbitrator (quoted in R. Shield's book):

> *"[….] it's always the same thing: it's one word against the other, very often with no evidence, and we have to rule by hearing the arguments on both sides and judging with our gut feeling – who's lying, who do we think is lying, or who is lying more, or, you know. It's very difficult…. We judge a person's character, we investigate the evidence, and we hear the story. We have already decided many cases against people that we like, for instance, and found for people that we don't like. This is the essence of justice …. I've made plenty of enemies in time".*[46]

The oral form of the decision is also linked with speed considerations: here, parties do not and cannot wait several years until a final decision is issued. Tight cash flow margins could put here many parties out of business:

> *"That the arbitration panel can make a judgment in a brief time alone compensates the victim far better than if he or she had sought relief in the courts, which can take years. Most diamond dealers do not have ready access to credit or cash to make up for lost profits during the period of the unresolved dispute. They can go out of business waiting for a judgment,*

[41] Shield (n 10) 194 ('Punitive damages or fines are often assessed against the person who has been judged to have behaved unethically or unprofessionally. Here, too, the type of penalty is unpredictable and varies greatly. A person can be required to pay a certain amount to a charity'); See also Bernstein (n 35) p. 19 and 50.
[42] Shield (n 10) 203.
[43] The following passage from Renée Rose Shield's book gives a concrete idea of the type of deals and disputes that arise in practice: 'In all contract disputes without written contracts, opportunities for dispute are ubiquitous. The terms of a deal are disputed. A trader changes her mind about the deal and attempts to back out. Payment wasn't made. Conflict involves whether payment was made or whether a stone was returned. The wrong stone was returned. The terms of a partnership are disputed. The deal is off, but the broker claims he should be paid. A partner did not properly protect the stone while under his care. Was a partnership in effect when the deal was made? Was the partner probably consulted when the deal was made? Whose responsibility is it that the stone was lost or stolen? How can creditors be made whole after a bankruptcy? What responsibility does the broker bear for a lost or stolen diamond? […]'.
[44] Bernstein (n 35) 11.
[45] Gutwirth (n 35) 137.
[46] Shield (n 10) 189.

given the tight cash-flow margins under which they operate. Furthermore, were the dispute to be addressed in the courts, other dealers would view the litigant as a higher risk and might avoid dealing with him or her or might charge him or her steeper credit terms".[47]

True, the decision may well be unwritten and unreasoned,[48] but the parties will have a decision quickly, allowing them to plan and carry on business with less uncertainty.

In addition, diamond merchants are often unlikely to be represented by lawyers, a point that heightens here even further the relevance of Martin Domke's words, in the 1960s, that "businessmen are more concerned with results than with opinions".[49]

The crucial element of arbitrator-expertise (and the courts' ignorance of the parties' specific language and customs) is something else to keep in mind, although this appears less relevant in explaining why parties resort to oral decisions than in why the private arbitration system was set up in the first place and effectively imposed on the parties if they wish to continue trading.

The closed community and family-oriented business explain better the preference for oral decisions. These decisions are less likely to come out in the limelight than written ones. This same factor appears present in the majority of the few identified domestic cases below.

One concluding remark is necessary: the above comments were made essentially on the basis of readings and interactions with the New York and Antwerp diamond milieu. Additional information and different insights may well be found, in future studies, in the Jain diamond business world and especially on the relation (mentioned *infra*) between orality and truth.

B. INDIAN DOMESTIC ORAL AWARDS

India was the jurisdiction where the author found the highest number of reported oral awards, and where the factual circumstances of the cases were entirely unexpected or sadly interesting. One example involves a famous actor who was party to an income-distribution, tax-related dispute in which a sole arbitrator rendered an oral award in 2002 (followed several weeks later by a written award) under the Arbitration Act, 1940.[50] Other disputes where oral awards were issued related to family-related business disputes.[51] One case was ultimately appealed to the level of Judicial Committee of the Privy Council who opined – besides the troubling circumstances behind the reference to arbitration in that specific case – that the oral award in question was incomplete and

[47] Shield (n 10) 197.
[48] Bernstein (n 35) 14.
[49] Martin Domke, *Commercial Arbitration* (Foundations of Law in a Business Society Series - Prentice-Hall Inc, Englewood Cliffs New Jersey 1965) 91-92.
[50] *Amitabh Bachchan v Deputy Commissioner of Income Tax* [2005] 97 TTJ Mum 516 – Income Tax Appellate Tribunal (Mumbai); For another example of an oral award followed shortly (on the same day) by a written document, see *Tarlok Chand v Vijay Kumar* [1992] 102 PLR 357 para 16; Interestingly, the subsequent written transcription of a unanimous oral award may reveal or create dissension within the arbitral tribunal – see *Thottan Veetan Unni Muhammad v Malayilthoti Mammatheesa's Son*[1936] 71 MLJ 342 para 2: 'What the lower Courts have concurrently found is, that on the previous day the arbitrators had delivered an oral unanimous award but that on its being reduced to writing on the seventh, one of them resiling from his decision refused to sign it. On that finding, the question arises, was there a valid award to which effect could be given?'.
[51] *Amir Bi Bi v Arokiam and Ors* [1917] 45 IndCas 813, (1918) 34 MLJ 184; *Munna Lal v Suraj Bhan* [1975] (para. 6 in particular), as reported in *Najmuddin And Ors v Bibi Nafirunnisa and Ors* [1990] AIR 1991 Pat 239, at para 46-49; O.P. *Verma v LalaGehrilal And An.*[1960] AIR 1962 Raj 231.

invalid.[52]The legality of oral awards – under the then Arbitration Act, 1940 – was however expressly upheld by the Rajasthan High Court in 1960, even if the special post-award circumstances helped the court to reach this finding.[53]

In *Mohinder Singh v State*,[54] the Delhi High Court issued a decision recording the most stupefying post oral award facts in relation to a domestic arbitration which – in every regard – is miles away from the world of international commercial arbitration. The very milieu in which the events took place and the very low amount at stake (even adjusted to inflation) forces one to think differently and see that orality will, in some contexts of poverty and illiteracy, constitute the practical way of settling the dispute, without recourse to the courts.

In this entirely oral arbitration, a wage dispute had arisen between two carpenters (who were in partnership for more than 2 years in New Delhi), and their employer. Finding their working unsatisfactory, the employer asked the two carpenters to quit. The matter was referred (presumably orally) to arbitration to a Mr. Santokh Singh, the sole arbitrator. The sole arbitrator rendered an oral award against the employer, who promptly complied with the payment order in favour of the two carpenters. However, one of the carpenters, a Mr. Mohinder Singh, considered that the arbitrator had denied them a substantial part of their claim, and two days later stabbed the arbitrator repeatedly with a sword. The arbitrator died a few hours later at a hospital. Criminal proceedings ensued. Mohinder Singh was found guilty of premeditated murder and sentenced to death.

The 1996 Arbitration and Conciliation Act, 1996 repealed the Arbitration Act, 1940, and oral awards are now formally prohibited. The author is unaware of any post-1996 Indian domestic award[55]. While third-party oral decisions may (or may not) continue to be issued in practice, such decisions will not qualify as 'awards' in India. It remains, however, unclear and untested, to the

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[52] *Kamini Kumar Basu Thakur and Ors v Birendra Nath Basu Thakur And Anr* [1930] (Privy Council Appeal No. 17 of 1928).

[53]*OP Verma v Lala Gehrilal And Anr* (cited above), at paras 43-44: 'It is true that an oral award is not capable of being enforced according to the scheme and provisions of the Arbitration Act, for the said Act contemplates only a written award, and we consider it unnecessary to cite any authority for this proposition of law which flows directly from the language of Section 14 itself. We should, however, like to point out at this place that there is nothing inherently illegal about a verbal award, but for the statutory requirement that it should be made in writing, and we have not only Indian but English and American cases cited in the books where an oral or a parole award has been held to be good particularly where it has been acted upon […] Besides, where we find it difficult to agree with the learned Judge is that the present suit was brought merely to enforce an oral award as such. The correct position in point of fact seems to us to be that this suit was instituted on the basis of a promissory note which had been given by the defendants to the plaintiff and which was dishonoured by the bank on which it had been made. It is true before the cheque was given, the parties had resorted to arbitration and that arbitration had resulted in what must now be accepted as an oral award. But the matter had not stopped at that and proceeded further, and the defendants had in pursuance of this award given a cheque in favour of the plaintiff. It would be an over-simplification of the entire factual position under such circumstances to postulate of a case like the present that it was brought merely to enforce an award […]'.

[54] *Mohinder Singh v State* [1971] ILR 1972 Delhi 788.

[55] For a relatively recent judicial confirmation on this point, see the *Delhi High Court's decision in Government Of India Bharatv M/S. Acome & Ors*[2008] FAO (OS) 248/2007 at para 9: 'Section 31 of the 1996 Act which is material for our purpose requires that an arbitral award must be in writing and signed by all the arbitrators whether the award is unanimous or not. An oral award is unknown to the 1996 Act'; See also D Rautray, *Principles of Law of Arbitration in India* (Wolters Kluwer India 2018) 433 'An award must be evidenced in writing. The Act does not contemplate an oral award. An award does not come into existence unless the arbitral tribunal records its findings and conclusion in writing and authenticate the same by affixing its signature'.

author's knowledge, whether Indian courts would *automatically* invalidate or refuse to recognise and enforce a foreign oral award, a legal uncertainty which is of course not limited to India.

VI. ORALITY, DIPLOMACY AND TRUTH

It is clearly difficult to encourage the practice of pure oral awards. They are incompatible with modern institutional arbitration (save perhaps a few exceptions) and would almost always run counter to the parties' legitimate expectations, even in case of non-institutional arbitration and even where the applicable law allows such awards. In addition, the enforcement regimes which would apply to oral awards are highly uncertain, including the point on whether the same time bars would apply as those with written awards (or judgments).

This said, oral awards raise other issues than enforcement. Their specific traits and the advantages they may bring should not be entirely ignored, if anything because in certain cases a *combination* of oral and written decision-making may arguably facilitate respect of and compliance with the decision by the unsuccessful party at a time when non-compliance seems to become increasingly widespread. It may even encourage conciliation or reconciliation between the parties, which is (or should be) a key advantage of arbitration[56] but which may create tensions with the duty or key consideration to make everything possible to make the award enforceable.

Orality may be incompatible with complexity and quality: reaching a fair, correct and precise decision oftentimes passes through the act of writing, which is of course an added reason for favouring written awards.

In addition, considerations of speed, cost and confidentiality are unlikely to be determinative insofar as the form of the award is concerned. Of course, oral awards (as with unreasoned awards) – where lawful under the applicable law(s) – will be speedier and cheaper if considerably less time is spent on arbitral deliberations and drafting. But in each case, the analysis and calculations are completely distorted if award non-compliance is the result, or if evidentiary difficulties ensue where parties dispute the content of the award and parties try to revert to the tribunal, or if long, multi-jurisdictional enforcement measures become necessary.

It is difficult to believe that the content of a written arbitral award would be *effectively* identical to a hypothetical oral award. Style affects substance. The form of an award (written or oral) affects the style, which in turn affects the content. Importantly, what is not said in an award may count sometimes even more than what is said, as Pierre Lalive explained in the 1980s:[57]

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[56] "C'est une des grandes utilités de l'arbitrage - un avantage souvent sous-estimé du reste - que de permettre et favoriser la conciliation (que ce soit avec ou sans la participation des arbitres" Free translation : "It is one of the great advantages of arbitration – an advantage often underestimated - that it facilitates conciliation, with or without the arbitrators' participation". See Pierre Lalive, 1984, *Assurer l'exécution des sentences arbitrales*, in Arbitrage International, 60 ans après : regard sur l'avenir, ICC Court of Arbitration 60th Anniversary, Publication CCI n° 412, Paris, p 333 <http://www.lalive.ch/data/publications/5_-_Assurer_l'execution_des_sentences_arbitrales_60_ans_apres_CCI_1995.pdf> accessed on 14 February 2022.

[57] P Lalive, *Assurer l'exécution des sentences arbitrales*, p. 339 < http://www.lalive.ch/data/publications/5__Assurer_l'execution_des_sentences_arbitrales_60_ans_apres_CCI_1995 .pdf> «[...] il convient de signaler un aspect qui est sous-estimé par bien des commentateurs. Même lorsqu'une sentence arbitrale vient à être publiée, en totalité ou surtout en extrait, il n'est pas aisé, sur cette seule base, de se faire

> *"[…] it is worth emphasizing an aspect which is underestimated by many commentators. Even when an arbitration award is published, in whole or especially in extract, it is not easy, on this basis alone, to get a fair idea of the dispute that has just been resolved. Without knowing the whole context, and at least the parties' memorials, how can one have a correct view of an award which, in any case, will often be a work of compromise, where what is not said can sometimes count as much as what is said, and where what is said can only be judged on the basis of all the facts and the parties' arguments? Experience shows that very important arbitral awards that have been published have often given rise to misunderstandings or misinterpretations on the part of some of the most eminent jurists. On the other hand, those who really know the dispute in question, whether they are the lawyers and, above all, the arbitrators themselves, are bound by discretion and can hardly contribute, with a few exceptions, to a full understanding of the issues at stake".*

The way in which findings and ideas are expressed all form part of what has been called the "arbitral diplomacy", written and oral [58]. An oral reasoned award may, however, be too spontaneous and unpredictable, and too difficult to retract. Too narrow and at the same time too broad in other respects, an oral award (even if followed by a more complete and more precise written award) may be perceived as too personal and mention sensitive aspects– essentially of a personal nature –which would otherwise be left unsaid in a more formal written award.

There is a written and an oral truth and the possible gap between the two is not necessarily clear or predictable. The evidentiary and enforcement difficulties are, however, expected and feared (by some participants more than others). This explains why oral awards – unbeknownst to many and yet not entirely imaginary in certain trades or domestic settings - are likely to continue to be rare in the mainstream world of international arbitration.

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une idée juste du litige qui vient d'être résolu. Sans connaître tout le contexte, et au moins les mémoires des parties, comment obtenir une vue exacte d'une sentence qui, de toute façon, sera souvent une œuvre de compromis, où ce qui n'est pas dit peut compter parfois autant que ce qui est formulé, et où ce qui est dit ne peut être vraiment jugé qu'en fonction de l'ensemble des faits et de l'argumentation des parties ? L'expérience montre que des sentences arbitrales très importantes, qui ont été publiées, ont souvent donné lieu à des malentendus ou des erreurs d'interprétation de la part de juristes parmi les plus éminents. D'autre part, ceux qui connaissent vraiment le litige en question, qu'il s'agisse des avocats et, surtout des arbitres eux-mêmes, sont tenus à la discrétion et ne peuvent guère contribuer, sauf exception, à une complète compréhension des problèmes posés ».

[58] Pierre Lalive, 2008, *De la diplomatie arbitrale*, p. 398 <http://www.lalive.ch/data/publications/pla_de_la_diplomatie_arbitrale_2008.pdf> accessed on 14 February 2022.