The Reasoned Award in International Arbitration.

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The Award is the final product of a great deal of work both by the arbitrators and by the parties and their legal teams.

Before the Award can be drafted, the arbitrators have to decide upon what may be a number of important issues, the issues in the reference. They will make their decisions with care, based upon what they have learned from the parties and upon the application of the applicable law, which may have been researched by the parties or by the arbitrators themselves, but which will have been canvassed either at a hearing or in memorials of some kind. Those decisions, together with the reasons for them, are set out in the Award, which may be declaratory, (i.e. a statement by the tribunal that such-and-such is so) but is more commonly mandatory, that is to say a direction that one or the other party do certain things, usually pay money in respect of the substantive issues decided and usually also pay money in respect of the costs of the arbitration process.

An International Arbitration, even one concerning relatively small issues, will have been a considerable intellectual exercise, involving many skills and much effort on the part of all concerned. It is likely to have cost a considerable amount of money. The Award is not merely the final product, it is the instrument by which the object of the Arbitration, the proper decision of the Tribunal as between the parties, is to be given effect. The importance of the Award is self-evident.

What can be inferred from the foregoing paragraphs is that the parties are entitled to an Award of good quality and that they are entitled to an Award, which achieves its purpose i.e. an Award which works.

In general, that does not require an Award to be made in some particular form or style (although it does perhaps call for a good standard of presentation). The matter came under review in the English jurisdiction following the Arbitration Act of 1979. The English jurisdiction is given to formality, but Lord Justice Donaldson, as he then was, gave useful guidance to practising arbitrators when he said

> "No particular form of award is required .... all that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen, and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is.*1"

To repeat the close of my previous paragraph, an Award that works. An Award which works must be capable of giving effect to the Arbitral decision in the jurisdictions in which it may have to be enforced.

A general paper is no place to discuss either the idiosyncrasies of the World's multifarious jurisdictions or the proposition that an Award may deal with matters that are inherently unenforceable in some jurisdictions. An Award which is intended, and declared, to be binding in honour only is likely to arise rarely, and then only between sophisticated parties who have agreed not to have recourse to *exequatur*.*2 This paper does not consider such topics, interesting though they may be. I am concerned with more common situations, where the parties reuire an award which is binding and enforceable at law.

To examine the enforceability of awards one needs to analyse the requirements of relevant jurisdictions. In that context, it is at least arguable that the New York Convention of 1958 is so widely espoused, throughout the World, as to form a sound basis for the analysis of Arbitral Awards, whether or not the country in which enforcement is sought is a signatory to the Convention. (A copy of the English text of the NYC is available on this site.)

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I do not mean that an Award which would satisfy the NYC criteria necessarily will satisfy the authorities in any other country. The inverse is probably correct, that an Award which does not meet the NYC criteria will not satisfy the authorities of a non-signatory even if there is some direct treaty. In the discussion which follows, I will set out the basic necessities of a practical Award and develop the aspects which require especial attention in the light of the NYC. An arbitral award is a document having direct legal force for the parties to the reference. If, in the event, a party does not comply with it of his or her own free will, then it is not the subject of voluntary compliance, then it will have to be enforced.

For that purpose, it must be clear what is the legal standing of the document, who are the parties, what they are required to do, what is the legal basis for that requirement and why that legal basis applies to the matter. Let me break that down a little, to explain what is meant:

- **what is the legal standing of the document:** It is trite to say that an arbitral award is made in the context of an arbitration, but that is the source of its standing. The authority of the award is the authority of the Arbitrator (or Arbitrators) and that authority is the authority granted by the Parties by their arbitration agreement and whatever appointment mechanism that agreement creates (or adopts). The award should state that there was an arbitration agreement. In most jurisdictions that would have to be an agreement in writing. To satisfy the New York Convention it must be in writing. The award should identify the agreement, whether it was a separate agreement or part of some other agreement. If the agreement provided for conditions precedent to arbitration, the award should say how they were met or if they were waived by agreement of the parties. The fact of an arbitration hearing and of any other material procedural steps should be recorded if they remain relevant to the decision and its enforcement; one must bear in mind the necessity of demonstrating that the tribunal was properly constituted and that each party was given an adequate opportunity to state his case. That probably means that decisions on material objections should be recorded, if only to demonstrate that they were correctly made.
- **who are the parties:** In some jurisdictions, for an order of the Court to have effect against a corporate body may require some formalities, such as the identification of that body by name, registered address and company reference number. There is a danger, in arbitral hearings, that the precise identity of one or other party will become obscured, particularly when various subsidiary companies or government agencies have been involved together. Now is not the time to explore the doctrines of "piercing the corporate veil" and the like, save to say that an award must be clear and certain as to the parties upon whom it is to be binding. In the rare event that they are not the parties to the original arbitration agreement, the award must set out the legal basis of any substitution.
- **what they are required to do:** The section presenting the Tribunal's final directions to the parties, the dispositive section of the award, usually comes at its conclusion and is best separated from the remainder by some clear form of words which makes it clear that what follows is what is the binding decision of the tribunal. In one sense, the dispositive section is the only true award, the remainder being its justification. That is why some English awards open the dispositive section with words such as ".. and I hereby award and direct as follows ...". Each direction in the award must be specific, unambiguous and capable of performance by the party against whom it is directed. They should not be conditional save in exceptional circumstances where the possibility of a conditional element in the award has been canvassed and agreed by the parties. A tribunal should avoid any direction, for example, that some thing be done "to the satisfaction of the Tribunal (or of the Tribunal's expert)" for two reasons: one that such an arrangement places the Tribunal (or the expert) in an invidious position which is no longer one of making a judgement between parties; the other that the subjective implication makes the award itself impracticable of enforcement

- **what is the legal basis for that requirement and why that legal basis applies to the matter:** This is the analysis of law and fact that founds the award. The best view as to content is that it should be confined to such findings of fact as are necessary, without detailed reasoning leading to those findings of fact. That is because, in most jurisdictions, findings of fact are not appealable and so the discussion which precedes such findings is of little value to the Court. Similarly, such details are not helpful to the Court from whom exequatur is sought. Nevertheless, where complex technical issues are involved, the parties may be glad of a more complete set of reasons. In some circumstances, that more complete set of reasons may be provided as an annexe with a clear statement that they do not form part of the award. Care has to be taken, however, that the parties are content about this approach, because the mere declaration that the additional reasons are separate may not mean, of itself, that they are not admissible as evidence if some dispute arises as to the award.

Form

Having said that no particular form is required, it may be as well to offer first a frame work and then a checklist of features which may be present in a typical award. There is little jurisprudential basis for this, but it may be helpful. It is fairly natural for individuals to adopt a visual style close to that of the Court practice with which they are familiar. What follows is to a limited extent English, and may be more formal than is always necessary. The so-called recitals, for example, are only provided to make the award stand on its own and to facilitate enforcement.

What follows is divided (like Gaul?) into three parts:

- The recitals - the creation of the Tribunal and the preparation of the reference
- The reasons - the circumstances of the dispute, the choice of evidence and the decisions of the Tribunal
- The disposition - the Tribunal's directions which give effect to the award

Please bear in mind what the award is for. It has three purposes.

One is to tell the Parties what they must do. No details or explanations are needed for that.

The second is to explain why the decision has been made. The Parties will not need much more than a simple explanation, because each of them knows the circumstances of the matter, probably only too well.

It is the third purpose, that of consideration by an enforcing body or a Court of appeal, which demands, not formality, but sufficient information to enable the award to stand on its own.

There follows a non-exhaustive checklist which might also serve as a framework for a practical award:

Front or Cover page - not always needed on a brief award but a helpful guide to a number of incidental matters

Citation	in the matter of the Federal Arbitration Act of the United States of America	Directs the enforcing Court to the procedural basis of the Arbitration
Case Title	and in the matter of an Arbitration [under the UNCITRAL Arbitration Rules] between	Identify that it is an arbitration - mention rules only if rules were adopted.
	XYZ Co. Inc of [221 Front Street,] Chicago, Illinois (formerly Ucantbendit. Co. Inc.) and	Short formal identification of the Parties. Usually appropriate to refer to former names, so that anyone reading the award and the contract correspondence can see the continuity of identity.
	Deuterium Hybrids Pty. of [762 Witwatersrand Rd,] Bloemfontein, South Africa	Addresses enable enforcing Court to see immediately the nationalities involved
Award Title	[ARBITRATOR'S][FIRST/SECOND/THIRD....] [INTERIM][FINAL][PROVISIONAL][PARTIAL] AWARD [on a preliminary application] [reserved as to costs]	Describe the award as accurately and succinctly as possible
Title Date	19 September 1996	Care needs to be taken to be sure that the title date is in line with the date of making the award. Some arbitrators do not date the title at all.
Arbitrators name and profession	Norman Biffing, an Architect	Not always needed on a title page but helpful to the enforcing Court if it has to appreciate the background of the matter.
Locus	New York	Asserts the locus of the forum. Should correspond with other references to the locus and may not be necessary in the title at all

Main text The first page of the award will normally commence with a repetition of some, but not all of the information presented on the Cover Sheet. Generally, the other information will be seen in the so-called recitals.

Heading:

Citation	in the matter of the Federal Arbitration Act of the USA	See notes for title page above.
Case Title	and in the matter of an Arbitration [under the UNCITRAL Arbitration Rules] between XYZ Co. Inc of [221 Front Street,] Chicago, Illinois (formerly Ucantbendit. Co. Inc.) and Deuterium Hybrids Pty. of [762 Witwatersrand Rd,] Bloemfontein, South Africa	See notes for title page above.
Award Title	[ARBITRATOR'S][FIRST/SECOND/THIRD....] [INTERIM][FINAL][PROVISIONAL][PARTIAL] AWARD [on a preliminary application] [reserved as to costs]	See notes for title page above, but it would be permissible to have a longer version of the title if appropriate.

Note that it is not essential to commence the text with recitals in the suggested, or indeed any form, or at all. Narrative reasoned awards are very common and may well suffice. In most jurisdictions there is no set format for an award. These suggestions are advanced as one way of ensuring that an enforcing court will have sufficient information for its decision.

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Recitals - First Part:		The recitals normally would be so set out as to make a continuous flowing text. These notes are set out to demonstrate the essential features.
Award Status	This is the [first/ second/ third....] [Interim] [final] [provisional] [partial] award	Identify the nature of the award.
Award Locus*3	made in New York	The place of the award should be included for the avoidance of doubt, but some leave it until the final signature.
Arbitrator	by me, Norman Biffing,	In the case of a Tribunal of, say, three arbitrators, the names and occupations of all three should be given.
Occupation	an Architect, as Arbitrator in a reference between	Be precise as to the Arbitrator's occupation, particularly if it is in some way related to the circumstances of the arbitration and a fortiori if a specific qualification was stipulated by the Parties in their agreement. Whether or not the place of business of the arbitrator(s) should be given is a matter of taste.
Claimant	XYZ Co. Inc, (formerly Ucantbendit Co. Inc.)	Identify the Parties fully. If (and only if) relevant, refer also to Parent company.
Status*4 (i.e Company, Firm, etc if not a natural person)	a company	In the case of companies whose domicile provides for registration with a registered number, include the number for the avoidance of doubt.
Address	whose registered address is 221 Front Street, Chicago, Illinois, [and who also trade at 67 Embargo Street, Johannesburg, South Africa]	The head office or registered office. Include a local trading base only if directly relevant and referred to in the arbitration.
Short Name (for the purposes of the reasoned award)	to whom I shall refer as XYZ, and	Short names are to be preferred to the use of generic terms such as "Claimant" or "Plaintiff" etc. for two reasons. One is the avoidance of confusion, the other that the generic words then remain available for any legal discussion within the text.
Respondent	Deuterium Hybrids Pty.	As for Claimant.
Status	a company	
Address	whose registered address is 762 Witwatersrand Rd., Bloemfontein, South Africa,	
Short Name	to whom I shall refer as Hybrids	
Recitals - Second Part:		

Contract or other Arbitration provision.*5	XYZ and Hybrids entered into an agreement, dated 18 January 1991, whereby XYZ were to build a factory in Jamaica for Hybrids. That agreement contained an Arbitration Clause in these terms: [actual words of the clause].	Cite the Arbitration agreement or clause and place it in context by reference to the subject matter. It may be trite to point out that the Arbitrator can only set out, in his recitals, matters of which he has direct knowledge or which have been proved to him.
Prerequisites of Arbitration	Differences having arisen between XYZ and Hybrids,	The purpose of this and the following items is to show that the Arbitrator's appointment was in accordance with the Arbitration Agreement. For jurisdictions where an agreement to arbitrate must follow a compromise upon an existing dispute, it may be desirable to set out the sequence of events leading to the appointment is some detail. For disputes which require some form of notice (e.g. Engineer's decisions in some forms of construction contract), one should show that the notice was either given or waived.
Appointer	the President of the Architectural Association	
Appointment	appointed me as sole Arbitrator on 25 May 1992, in response to an application by XYZ .	
Acceptance and notification	I accepted that appointment and wrote to XYZ and also to Hybrids on 15 June 1992 advising them that I had done so.	
Locus and Arbitration rules if any	In accordance with the Arbitration Clause in the agreement between the parties, this Arbitration has been conducted in New York under the UNCITRAL Arbitration Rules 19XX. Some evidence and argument was received in other locations.	
Procedural meetings Claim, Counterclaim and Defence submissions	At a procedural meeting in London on [date] XYZ were represented by Mr. Artemus Jones of Messrs. Jones, Nojes and Sejon, Attorneys of New York and Hybrid were represented by Miss Graciella Martingale of English Counsel, instructed by Messrs. Costegon Frice, Solicitors of Capetown. Following that meeting, XYZ supplied their Statement of Claim [date if you wish] to which Hybrid responded on [date].	It is probably unnecessary to set out all the details of procedural meetings unless something exceptional has arisen. In those jurisdictions where the Arbitrator(s) are not accustomed to dealing with the assessment of costs, some detail will be needed by the assessment authorities, but that is not the general practice in international matters. Note particularly that any determination of jurisdiction ought to be recorded. If that was the subject of an interim award or merely the subject of a letter or some other intimation, to record it will suffice. The courtesy of mentioning names of Counsel - and those who instruct and assist them, if appropriate, serves an additional purpose, namely to note the level of representation as a reminder when costs are considered. Note also any orders made or directions given, but only if they have a bearing on the decisions in the award or special relevance as to costs.

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Broad statement of the dispute (Terms of reference if used)	XYZ sought [whatever they sought.]. Hybrid denied [whatever] and sought [whatever Hybrid sought].	This is a simplified statement of the salient points claimed or counter claimed. There is some debate as to whether every contention of each Party should be set out in detail in an award. Current thinking is that it need not. In an ICC Arbitration or any other where terms of reference were prepared, it may be as well to set out those terms of reference.
Documents Hearings Closure of reference	I have considered detailed memorials provided on [date] by XYZ and on [date] by Hybrid and I heard evidence and argument presented by Mr. Artemus Jones and by Miss Graciella Martingale in Kingston, Jamaica on [date and date] in Singapore on [date] and in Acapulco on [date]. Final submissions were made orally in Lausanne, Switzerland on [date and date] and I closed the reference on [date.]	Again, the recitals need not give excessive detail but this paragraph will highlight the essentials of the procedure. It is particularly helpful to note the date of closure of the reference, because that may have relevance if some late evidence or argument is offered.
Announcement of award	AND I now make and publish this, my AWARD, with reasons as follows:	Perhaps not necessary an a little formal, but serves to bring the recitals to an end and to enable the Arbitrator to deal with the reasons for the award.

Reasons:

Preamble	An outline of the background to the dispute, relying generally upon the common ground between the Parties, but limited to what is necessary to explain the dispute. To detail all the common ground is probably otiose, as i) if a matter is not in dispute it is not a matter for the arbitrator ii) an arbitrator may have the matter right, but be wrong in describing it as common ground.
Review of contentions	An outline of the contentions of the Parties. It is partly a matter of style to decide whether to deal with the Parties' cases issue by issue or to consider each Party's case as a whole. Where the issues are set out in schedules, as is done in some complex cases, it is as well to use that framework for the discussion of reasons.
Evidence	The best practice in the present day is probably not to analyze and discuss the evidence in detail but to indicate, where a choice has to be made, what that choice has been. Few jurisdictions provide for the Court to "second-guess" an arbitrator on matters of fact, so detailed thinking on matters of fact is not useful to the Court, although it may be of value to the parties, particularly in a complex technical arbitration. Gratuitous insults to witnesses whose evidence is not preferred are unhelpful and may well give grounds for an accusation of bias. Most witnesses believe what they say, even when they are, in fact, wrong. The mental process of "rationalisation" may well lead to a witness being thoroughly convinced on his own view of event, although there may be no objective basis for his views.
Decisions of fact	The basis of the award. Record a decision in respect of each factual issue in clear and unequivocal terms. Traditional English practice is to use the words "I find" when stating decisions of fact.
Application and decisions of law	The award need not discuss the law in the detail normally adopted, for example, in a common-law judgement or an academic analysis. What is necessary is the reason for each decision of law in sufficient detail for the Court, usually the Court of the place where the award was made, to consider any application for suspension or setting aside. Traditional English practice is to use the words "I hold" when stating decisions of Law. That may be archaic, but some non-lawyer expert arbitrators adopt the practice to remind themselves of the distinction.

Advice	If the arbitrator has sought advice, whether legal or other, either with the support of the Parties or otherwise, he should say so. He probably need not, however, record the scrutiny of, for example, the ICC Court of Arbitration, because that scrutiny, though technically explicable as advice to the Arbitrator, is a known part of the procedure. Bear in mind that advice is only advice - the arbitral tribunal must make its own decisions; *delegatus non potest delegare*.
Costs	If the Award is to deal with costs at this stage, any reasons for the award of costs should be set out to show that the matter has been dealt with, and any discretion exercised, judicially. Regrettable though it may be, in many modern references, the costs may approach or exceed the substantive amounts awarded. It follows that this is a subject to be approached with care and precision.

Dispositions:		In this section are recorded the decisions of the tribunal and the directions for disposing of the reference.
Announcement	AND I now AWARD [and DECLARE] that:	Words like these are not essential but make a convenient opening to a dispositive section.
Declaration	1. XYZ Co. Inc. are entitled to an extension of time for the completion of the works to 13 January 1992	If there is no declaration then this group can be skipped; declarations are not common. Sometimes the reasoned section of the award will end with a summary of fndings leading directly to the substantive dispositions of the award.
	2. XYZ Co. Inc. are entitled to payment in respect of additional works as set out in the reasons for this Award	
Directions	AND I DIRECT that	
Disposition - Substantive	1. Deuterium Hybrids Pty Pay to XYZ Co. Inc, within fourteen days of this my award, the sum of $140.000 in respect of the said extension of time	Use the full name. Identify the issue in respect of which the payment is made or say that the payment is in respect of all the issues Putting a term to the direction facilitates later enforcement.
	2. Deuterium Hybrids Pty Pay to XYZ Co. Inc, within fourteen days of this my award, the sum of $50.000 in respect of the alterations to the building	
Disposition - Interest	3. Deuterium Hybrids Pty Pay to XYZ Co. Inc, within fourteen days of this my award, the sum of $55.000 in respect of Interest on the amounts awarded in 1 and 2 above to the date of this my award, to bear interest at the rate of 5% per annum thereafter.	Interest is a peculiarly difficult topic and attention must be paid to the practice of the place of the Arbitration and the place where the award is made. That is because some jurisdictions treat interest as a procedural matter and some as a substantive matter. For some jurisdictions, the notion of interest is anathema and an award may be contrary to public policy as endorsing usury. Now is not the time to do more than sound a warning.

		The bracketed words are but one way in which to keep open the possibility that the decision on costs will have to take account of offers not known to the Arbitrator. There are others.
Arbitrator's costs	4. [subject to such further information as I may be given within fourteen days of this, my Award,] Deuterium Hybrids Pty pay, within fourteen days of this my award, my fees and expenses in this reference to the date of this my award, which I assess and settle in the sum of $17,000 [on which VAT is payable at the rate of 17«%]	Quite common is for the Award to be reserved as to costs and so noted in the title. This topic is closely tied to the jurisdiction in which the Arbitration takes place and to the culture of the Arbitrators. The so-called "sealed offer" practice of certain trades, notably in England, calls for a degree of discipline on the part of the arbitrator and cannot be checked by the parties. It is unlikely to be used in International matters without safeguards. Note also the question of revenue tax, which may require a little care.
Party's costs	5. [subject to such further information as I may be given within fourteen days of this, my Award,] Deuterium Hybrids Pty Pay to XYZ Co. Inc, within fourteen days of this my award, two-thirds of their reasonable costs in the reference, reasonably incurred, the same to be determined by me on application if not agreed and I reserve the reference for that purpose.	

Closure:

Signature Locus Date Name and writing	This Award is made and signed in New York this 25th day of December 1993 by me Norman Biffing, as Arbitrator [Written signature]	Check against details elsewhere in award. Signature should be in handwriting, not in a stamp or a computer printed signature image. The use of an ink different in colour from the text helps in identifying an original from a copy (but is insufficient to eliminate deliberate fraud).
Witness	in the presence of Frederick C. Bludgeons, Attorney Bludgeons, Bludgeons and Alberich 756, Fifth Avenue New York	Witnesses are necessary in many jurisdictions. It is probably desirable to have the award witnessed by an attorney, as that can simplify matters in some jurisdictions where there is a question about the competence of witnesses. There are jurisdictions in which an award may require to be notarised by a notary public. When the Award is made in the jurisdiction of certain States, such as those with planned economies, a witness in an official position, who is able to affix an official stamp, may be preferred.

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Footnotes:

1. *Bremer Handelsgesellschaft mbH v. Westzucker GmbH (No. 2); Westzucker GmbH v. Bunge GmbH* (1981) Lloyd's Rep. 130 CA.*

2. The Reader should take care to distinguish between i) an agreement that, for legal reasons or otherwise, cannot be legally binding and is said to be binding in honour only and ii) an agreement that is binding but to be interpreted honourably. There is some debate as to whether the first type - for example a gambling agreement in England and in other jurisdictions which do not enforce gambling debts - is arbitrable at all. As the agreement could not be enforced in such a jurisdiction, public policy might be a ground to deny recognition and execution. The second type, however, an agreement pointing to the use of extra-legal standards in its interpretation, has been accepted, for example, in England in *Home Insurance Co., and St. Paul Fire and Marine Insurance Co. -v- Administration Asiguricor De Stat* [1983] 2 Lloyd's Rep. 647 (Q.B.). That was a reinsurance contract with an arbitration clause in the following terms "Arbitration. .... The award of the Arbitrators or the Umpire...shall be final and binding upon all parties without appeal. This Treaty shall be interpreted as an honourable engagement rather than as a legal obligation and the award shall be made with a view of effecting the general purpose of this treaty rather than in accordance with a literal interpretation of its language ...". That Court did not accept the defendant's arguments that the language bound the Parties in honour only and not in law. The Court did decide that the Arbitrators were relieved from strict rules of interpretation. If it were not so, the whole provision would have become ineffective, defeating the rule *pacta sunt servanda*, a rule of fundamental importance in the arbitral context. (But see the procedural laws of national jurisdictions and institutional arbitration rules in respect of decisions *ex aequo et bono* and the role of *amiable compositeur*.)*

3. Because there may distinctions between the Locus of the award itself, the seat of the arbitration and the place in which some aspects of the reference occurred, each should be identified with some care. The NYC is quite clear - it applies to arbitral awards made in the territory of a State other than the State in which recognition and enforcement are sought.*

4. The NYC deals with awards arising out of differences between persons, whether physical or legal.*

5. Where the Arbitration arises from the compromise of a tort or from some other obligation, not a contract, between the Parties, that should be set out, together with the fact of an agreement to arbitration and sufficient of the terms of that agreement. If there is a complicated agreement, then it usefully may be appended as a schedule.*

6. The NYC applies to Arbitral awards "...arising out of disputes between persons, whether physical or legal"*

7. The NYC differentiates between the territory of the State where the award was made, the country where the award is made, the country where the arbitration took place and the country in which or under the law of which, the award was made. That distinction, and how it applies in multiple jurisdictions, such as the United States, Canada or the Untied Kingdom, is an interesting subject for academic debate. for the present purpose, it suffices to point out that the existence of a possible distinction makes it important for the award to be clear as to what was done where.*

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