

ABSTRACT

A creeping tension exists within international commercial arbitration (“ICA”). Since the effectiveness of arbitral decisions depends on the possibility of enforcing them, one can observe a tendency to place the label of award on heterogeneous types of decisions with a view to ensuring their enforcement. This is so because, contrary to the decisions rendered by state courts whose enforcement can be guaranteed regardless of the form that they take (be it an order, an injunction, or a final judgment), arbitral decisions will be enforced by states only if they amount to awards.

This article analyzes the concept of arbitral award by focusing on two radically different positions: a unitary conception championed by French law, and a non-unitary one, endorsed by English law and the Uncitral Model law. The author’s goal is twofold. First, to clarify that the definition of award is contingent to a given legal tradition; second, to demonstrate that the scope of the notion regulates the interactions between international commercial arbitration and state courts, reducing or decreasing the adjudicative power of the arbitrators.

Descriptively, it will be argued that arbitral awards are conceived differently in French law (focusing on the finality of the decision itself) and English law (which focuses on the adjudicative procedure that led the arbitrators to render the decision). As a result, French law has more difficulty enforcing consent awards, interim measures, and emergency arbitrator decisions. Normatively, it will be suggested that the English approach is preferable given that ICA is thoroughly embedded in an adjudicative setting nowadays, especially given the rise of institutional arbitration.

INTRODUCTION

Devoting an entire article to the notion of arbitral award in international commercial arbitration (“ICA”) may come across as an otiose exercise. Some may think—what is it that we don’t know about awards yet? As a matter of fact, we know very little.¹ Even the most venerated arbitration treatises take dogmatic positions, often providing a mere overview of the concept.²

This apparent lack of interest can be seen as a consequence of the (sometimes excessive) emphasis on the contractual aspects of ICA, to the detriment of its procedural components.³ The neglect of the procedural dimension of ICA took place despite the occurrence of significant developments leading to an increasingly sophisticated arbitral procedure. The flourishing of emergency arbitration is perhaps one of the most striking examples of this process. Despite the importance of emergency arbitration, it is unclear whether emergency decisions could be enforced as awards before state courts.⁴

1. Few contributions have been published on this topic: Jennifer Kirby, “What is an Award, Anyway?” (2014) 31:4 JOIA 457; Philipp Peters & Christian Koller, “The Award and the Courts—The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion” in Christian Klausegger, Peter Klein *et al.*, eds., *Austrian Yearbook on International Arbitration* (Vienna: Manz’sche Verlags, 2010) 137; Christopher Liebscher, *The Healthy Award* (The Hague: Kluwer, 2003).
2. See Gary Born, *International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law, 2014) 3012 and ff. See also: Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer, 1999) 735 and 737 [Gaillard & Savage] (After noting the lack of consensus on this notion, the authors dogmatically conclude that an award is “a final decision by the arbitrators on all or part of the dispute submitted to them, whether it concerns the merits ... , jurisdiction, or a procedural issue leading them to end proceedings”); Alan Redfern *et al.*, *Redfern & Hunter on International Commercial Arbitration* (Oxford: Oxford University Press, 2015) at para. 9.08 [Redfern & Hunter] (the authors endorse a stricter definition, according to which “the term ‘award’ should generally be reserved for decisions that finally determine the substantive issues with which they deal.”).
3. See generally Fabien Gélinas, “Arbitration as Transnational Governance by Contract” (2016) *Transnational Legal Theory* 1 at 10 and ff.
4. Amir Ghaffari and Emmylou Walters, “The Emergency Arbitrator: The Dawn of a New Age?” (2014) 30:1 *Arb. Int.* 153 at 157 and ff. See also: Chester Brown, “The

Yet even more “classic” arbitral decisions, such as consent awards (i.e. awards that record a settlement agreement reached by the parties during the arbitration), might not necessarily find a uniform treatment before state courts. In 2014, the Cour de Cassation of France held, albeit only with regard to domestic awards, that consent awards are not adjudicative decisions, and, as such, cannot be enforced before state courts like ordinary arbitral awards.⁵

In general, a creeping tension exists within ICA. Since the effectiveness of arbitral decisions depends on the possibility of enforcing them, one can observe a tendency to place the label of award on heterogeneous types of decisions with a view to ensuring their enforcement. This is so because, contrary to the decisions rendered by state courts whose enforcement can be guaranteed regardless of the form that they take (be it an order, an injunction, or a final judgment), arbitral decisions will be enforced by states only if they amount to awards. Yet this situation should not be seen as an inconsistency—it is a natural evolution stimulated by the development of arbitral justice and is in conformity with the 1958 *UN Convention* on the recognition and enforcement of foreign arbitral awards (“the *New York Convention*”),⁶ which has preserved the conception according to which only arbitral awards can be enforced by state courts.

These difficulties are exacerbated by a further element: international and domestic instruments fail to provide a definition of arbitral award.⁷ The *New York Convention* is an eloquent example of this omission.⁸

Enforcement of Interim Measures Ordered by Tribunals and Emergency Arbitrators in International Arbitration” in Albert van den Berg, ed., *International Arbitration: The Coming of a New Age?* (Alphen aan den Rijn: Kluwer Law, 2013) 279 at 287.

5. Cass. civ. 1^{re}, 14 November 2012, *M.A. c Société B-C*, (2013) Rev. Arb. 138 (note Jean Billefont).
6. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38, 21 UST 2571 [*New York Convention*]. For a commentary, see: Herbert Kronke, Patricia Nacimiento *et al.*, eds., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (The Hague: Kluwer Law International, 2010).
7. *Redfern & Hunter*, *supra* note 2 at para. 9.05 (“There is no internationally accepted definition of the term ‘award’. Indeed, no definition is to be found in the main international conventions dealing with arbitration, including the Geneva treaties, the *New York Convention*, and the Model Law”).
8. Sébastien Besson, *Arbitrage international et mesures provisoires* (Zurich: Schulthess, 1998) 326 (“Le silence de la *Convention de New York* n’est pas la marque d’une omission qui aurait pu être évitée, mais bien le reflet de la difficulté réelle que l’on rencontre à dégager une définition unique de la sentence arbitrale”).