

# Exploring the concept of arbitral awards under the New York Convention

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## Abstract

Despite its importance, the arbitral award was left undefined by the New York Convention and most other major international arbitration laws. This has inevitably led to varying opinions regarding its nature and confusion regarding the thresholds that differentiate arbitral awards from other tribunal decisions. Partly in response to the above, there has been discussion to initiate the revising process of the Convention. Responses have been divided. In this paper, the author finds that revision will not bring the desired results, while the Convention itself has equipped international arbitration practice with tools to overcome obscure legal concepts such as the arbitral award.

## Keywords

dispute resolution, commercial contracting, arbitration award.

## Introduction

The arbitral award is undisputedly the most powerful legal document today, considering that no court may review it on its merits and is enforceable almost anywhere in the world through the streamlined system of the New York Convention on Recognition and Enforcement of Foreign Awards (1958) (hereafter New York Convention) (Hill, 2018; Kirby, 2014). Despite its importance and power, or because of it, the arbitral award is not defined expressly in either the New York Convention or in the United Nations Commission on International Trade Law Model Law (2006), which cumulatively reflect a significant part of contemporary arbitration legislation. Most national arbitration laws also leave the concept undefined; the Arbitration Act 1996 of England and Wales and the Arbitration (Scotland) Act 2020 do not include a definition of the arbitral award.

The absence of a fixed definition has considerable perils. The concept becomes unpredictable and confusing, primarily when distinguishing awards and procedural orders, and legal nuance

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occurs as the nomenclature is used inconsistently. Because of the unpredictability, confusion and inconsistency surrounding the concept, tactical challenges of arbitral awards are not uncommon, causing the perpetuation of the issue and unnecessary expenditure at the enforcement stage. Even though a clear-cut definition does not exist, what is reasonably certain is the contextual make-up of arbitral awards, their characteristics and function, which subtly but arguably clearly indicate the differences between arbitral awards and other documents. According to this author, amending an international instrument that is as widespread as the New York Convention assumes more risks than benefits. In the particular context, the clear taxonomy of types of awards and arbitral decisions other than awards can be as efficacious as a definition. In that regard, 'The core elements of arbitral awards: a suggested taxonomy' section of this article reviews leading case law on the matter, drawing conclusions from various jurisdictions and providing a suggested taxonomy of arbitral awards and other tribunal decisions.

### **The perils of the undefined arbitral award**

Legal practice demands certainty and predictability; the fact that there is no 'mainstream view' when distinguishing awards from other tribunal decisions has caused concern (Hill, 2018). International arbitration is a relatively new discipline that has grown into being the predominant choice when adjudicating cross-border issues. According to a joint report of the School of International Arbitration and the Queen Mary University, international arbitration alone or combined with other alternative dispute resolution methods was the preferred choice of 97% of participants (Friedland and Brekoulakis, 2018). In turn, what convinced 64% of market actors participating in the study to select international arbitration over litigation was, by and large, the enforceability of arbitral awards (Friedland and Brekoulakis, 2018). It is evident that international arbitration is more than an area of law; it is intertwined with the industry and a product of its need to resolve disputes efficiently and with certainty. Consequently, in the context of international arbitration, legal certainty has an entirely different weight than the axiomatic nature it holds with regards to other areas of law (Wallis, 2016). Therefore, the severity of inconsistency should not be discounted, especially when it concerns what parties hold most dear: the arbitral award and its enforcement.

Turning to the particular issues arising from the lacking definition, while in most cases, problems invariably arise from treating some arbitral awards as 'non-final' when their effect was intended to be final and binding, these are mostly concerned with the inconsistent use of terminology. The absence of clear distinctions in international instruments of what constitutes an award and its differentiators from other tribunal decisions has inevitably resulted in scholars and national courts contributing their own *lex ferenda*, while what constitutes an award remains inconclusive (Hill, 2018).<sup>1</sup> The courts' interpretations of the concept of the award will be discussed later. At the present stage, it is crucial to note that the perplexity of the issue has an added linguistic strand that is impossible to ignore: inherently, the terms describing specific awards conflict with their 'final and binding' nature. According to the Cambridge Dictionary, 'interim' is a synonym for 'temporary', but an antonym to 'final' (McIntosh, 2013). Considering the irreconcilable terms, it is perhaps a futile task to request a universal definition of the arbitral award instead of focusing on delineating the current legal terms. The linguistic paradox has led to various other inconsistencies in institutional arbitration rules and consequently in arbitration practice, ultimately leading to inconsistent treatment by courts and uncertainty.

Illustratively, inconsistencies exist in the respective arbitration rules of international institutions. For instance, Article 2(v) of the International Chamber of Commerce (ICC) Arbitration

Rules 2020 refers to the ‘award’, including ‘*inter alia*, an interim, partial, final, or additional award’, signalling the interchangeability of the types of awards and their nature as nomenclature without any further reference to problematic instances, such as the minute and sophisticated differences between interim awards and specific interim measures (ICC, 2020). Article 26.1 of the London Court of International Arbitration (LCIA) Rules 2020 specifically mentions a tribunal’s power to ‘make separate awards on different issues at different times’ (LCIA, 2020). The first part of Article 26.1 is relatively undisputed – perhaps because of its general expression. The *proviso* mentions a relevant example of the said ‘awards’; the controversial ‘interim payments’ (LCIA, 2020). Notably, ‘interim payments’ are included in Article 26, entitled ‘Awards’ and not in Article 25, entitled ‘Interim and Conservatory Measures’, without referring to the rationale behind that categorisation (LCIA, 2020). While the instruments mentioned above are not inherently more problematic than any other available institutional arbitration rules, they demonstrate how the current terms interact inefficiently.

The inconsistency naturally extends to arbitration practitioners. As early as 1990, the ICC reported several practical difficulties related to not having a standard definition of arbitral awards (ICC, 1990). For instance, ‘interim’ and ‘partial’ awards were found to be ‘used virtually interchangeably’, ‘procedural decisions have occasionally [been] categorised as “awards”’, and rarely, ‘decisions on prejudicial issues [were] categorised as “procedural decisions”’ (ICC, 1990). Illustratively, in *Resort Condominiums International Inc. v. Bolwell (1995)*, the decision under consideration was characterised both as ‘order’ and ‘award’ (‘Interim Order and Award’) producing a confusing result as to its nature. More recent evidence has shown that the terms ‘award’, ‘order’, ‘decision’ are still being used inconsistently, creating complexity (Hill, 2018). In *Aero Club v. Solar Creations Pvt Ltd (2020)*, the Court is not distinguishing between interim and partial awards, on multiple occasions, referring to ‘partial final award[s]’ and interim awards interchangeably. Therefore, setting clear distinctions between what constitutes each term – partial, interim, etc., and insisting on their correct use, could be as efficient as explicitly defining awards. While the *status quo* might not be as severely flawed today as it was in 1990, potentially because of the effective dissemination of information and education on international arbitration practice and procedure, the inconsistencies still exist and have led to unorthodox practices. For instance, the importance of jurisdiction is indisputable, especially considering the special significance of the arbitration agreement and its vitality in safeguarding the integrity of the arbitral process. However, from a terminological point of view, it is not clear why there are ‘jurisdictional awards’. Other procedural decisions of arguably the same significance are not classed as awards. Drawing from the above example, it remains a residual thought whether negatively defining the award is far more effective than including a fixed definition. The jurisdictional award indicates that international arbitration practice is a powerful force in interpreting international arbitration legislation, for example, should tactical challenges of jurisdictional decisions not exist; today, jurisdiction awards could have been fiction.

## **Amending the New York Convention is not a viable solution**

A fixed definition of arbitral awards under the New York Convention could have uncomplicated a significant number of situations lacking clarity. However, it is highly questionable whether states can reach a consensus or whether such a definition will act for the better or worse in international arbitration practice. Arguably, a taxonomy of the current terms can be just as formidable in providing certainty and consistency.

### *Diverging idiosyncrasies*

From the outset, negotiations of the New York Convention, the ICC's Report and Preliminary Draft Convention (1953), loudly noted that while it was 'necessary to give a precise definition [of arbitral awards relating to international commercial disputes]', it was 'inadvisable to stipulate a generally applicable qualification' of the concept (ICC, 1953). The primary reason behind the ICC's suggestion was that the Convention was intended to be widely adopted, and therefore a standard definition would be a deterrent to international consensus. Consequently, the *travaux préparatoires* of the New York Convention contain elaborate discussions on the respective articles referring to arbitral awards and their characteristics but carefully avoid definitively qualifying the concept. The ICC was not wrong – even at the time, at the dawn of globalised trade, an international consensus was a target out of reach. To date, there has been no formulation of a definition to have passed the crystallisation point. The latest attempt of a definition proposed by the Model Law Working Group (330th meeting, 1985; Report of the Working Group on International Contract Practices on the Work of Its Seventh Session, 1984) is worth examining. The definition, purported to be inserted under Article 34 of the Model Law (2006), defined awards as 'disposing of all issues submitted to the tribunal' and 'any other decision of the tribunal which finally determines any question of substance' or 'any other question of procedure (...) if the tribunal terms [such a decision] an award' (330th meeting, 1985; Report of the Working Group on International Contract Practices on the Work of Its Seventh Session, 1984). The formulation was found to be both restrictive and highly unlikely to be agreed upon by the majority (Born, 2014; Gill, 2008). The issues are evident; international arbitration practice recognises types of awards that directly contrast or conflict with one or all of the qualifications proposed in the formulation. For instance, as will be discussed later, a mostly undisputed characteristic of awards is that they settle substantive issues, but the formulation directly includes procedural decisions in its scope. Interestingly, the Working Group reports that the first part, 'up to the word "substance"', 'was met with "wide support"'. However the latter part, regarding procedural decisions, divided negotiators.

From the New York Convention negotiating parties to the Model Law Working Group and most modern national Arbitration Acts, a definition of the arbitral award was consistently excluded. The phenomenon is not because of capricious behaviour by the respective groups; instead, it reflects a bitter truth: legal unification is impossible at the transnational level. Although the New York Convention is a manifestation of states willing to recognise documents as powerful as the awards, it remains considerably different from what should constitute an award for each state. The existing areas of disagreement, their nature and root, and whether these are irreconcilable is worth understanding. While reaching consensus is not a challenge specifically tied to arbitral awards or the New York Convention, it results from the opposite theoretical foundations underlying the different interpretations, making the task of reaching a consensus impossible.<sup>2</sup> Accordingly, national courts of states tending to the delocalised or a-national theories of arbitration, such as France, have developed a mutually exclusive concept of awards from states abiding by the localised theory. These differences are rooted in policy, and it is very doubtful that they will ever converge in a streamlined, global definition of the arbitral award (Hill, 2018). The divergent idiosyncrasies around international arbitration became more prominent since the development and popularisation of investor-state arbitration, where states frequently found themselves in the defendant's shoes, many times required to enforce awards contra to their interests, which arguably caused resistance to enforcing and recognising awards more broadly (Gaillard, 2009; Garcia et al., 2015; Montanaro and Violi, 2020). Illustrative to the above point is the expansionist outlook many

national courts take on Article V(1)(e) of the Convention, the public policy ground for non-enforcement (Hill, 2018). Such an expansionist view was that of Lee J in *Resort Condominiums International Inc. v Bolwell* (1995), who found that Article V(1)(e) – allowed ‘residual discretion’ to national courts to refuse recognition and enforcement of awards. This view is rejected by the legal theory of arbitration perpetrated by Gaillard (2013), the transnational legal theory of arbitration.

It is accepted that when drafting international instruments, reaching consensus is inherently difficult. However, it is essential to note the shifted socioeconomic landscape between the drafting of the New York Convention and the present time, which makes reaching consensus unattainable. Arguably, the chasm between national policy was significantly smaller in the dawn of the New York Convention, allowing for relative consensus to be achieved in its text, while irreconcilable points, such as the definition of arbitral awards, were left untouched (Gaillard, 2009). Further, the decade of the drafting of the Convention was marked by states’ collective efforts and to reinforce trade in light of ceasing and preventing the reignition of war (Krpec and Hodulak, 2019; McDonald, 2004; Sutton, 1967). Having experienced the consequences of World War II (WWII) on national economies, political leaders could have been relatively flexible with concessions at the drafting stage of the New York Convention, which was marked by an era of multi-state cooperation on numerous international trade law conventions (Garcia et al., 2015). Montanaro and Violi (2020) now paint a profoundly shifted landscape, distinctively characterised by the ‘disintegration of international economic integration’, upon which international trade law is contingent. The significant change of attitude is evidenced in legal, social and political reality. In the past few years, the world witnessed the World Trade Organization’s demise and several denunciations of the International Centre for Settlement of Investment Disputes Convention. Even at the European Union (EU) level, a prime example of economic integration and legal harmonisation suffers from ‘nationalist responses’ to such unification (Montanaro and Violi, 2020). Besides the prominent example of Brexit, several EU states saw nationalist parties on the rise, including France and Greece – both at some point considering an exit from the EU. Consequently, the political, socioeconomic and legal panorama is significantly different – and more averse to transnationality than it was at the drafting stage of the New York Convention.

Divergence is further observed intrinsically to international arbitration practice; as arbitration is growing in popularity, it is natural for its concepts, including the arbitral award, to evolve. However, the development is not symmetrical, and the parameters influencing both legislative action and international arbitration practice fluctuate significantly according to state, resulting in inhomogeneity and divergent interpretations (Hill, 2018). Of course, inhomogeneity becomes an issue only if homogeneity is desirable in the context of international arbitration, and while market actors would undoubtedly root for a streamlined homogeneous system, governments are becoming increasingly averse to it (Montanaro and Violi, 2020). Accordingly, a reconsideration of its clauses or concepts bears the danger of destroying what is otherwise one of the most popular Conventions to date.

### *A fixed definition of arbitral awards is likely to introduce further inconsistency*

Although in a different context, Schwenzer and Hachem (2009) explained that definitions could do more harm than good in international instruments that are not uniformly interpreted by a higher international court, which produces authoritative precedent.<sup>3</sup> Even if enacting a streamlined definition under the New York Convention was an achievable reality, the divergence in idiosyncrasies

would result in an asymmetrical application, further perplexing the situation. It is realistic that uniform international laws 'must rely on a certain degree of imprecision' to preserve their flexibility and adaptability to change (Schwenzer and Hachem, 2009). Unlike national laws, which are subject to change at parliamentary motion, international treaties such as the New York Convention would require significantly greater effort to be amended in case an addition later proved problematic. Therefore, including a definition could prove a rigidity unable of improvement or adaptation to modern international practices for an extended period of time. Being one of the most popular international instruments today, the New York Convention is no exception; defining arbitral awards could alter the status quo for the worse, halting any meaningful progress of the past 50 years.

As Schwenzer and Hachem (2009) noted, international law has natural mechanisms of achieving the desired degree of harmonisation; notably, the principles of autonomous interpretation and 'having regard to [their] international character'. Further, Article VII of the New York Convention has provided for the 'evolution of arbitration law' by prescribing the 'minimum standard' (Gaillard, 2009). While signatories are allowed to be more liberal regarding the recognition of arbitral awards under the New York Convention, they are not allowed to be more restrictive (Gaillard, 2009). Accordingly, any confusion arising from inconsistent national interpretations could be avoided if the definition of awards is interpreted considering the broader context and function of the New York Convention and international arbitration in general. Specifically, inconsistent interpretations would be reduced if national courts treated them as obsolete and instead giving effect to interpretations that are in line with the Convention's spirit. Although such observations of national courts could not constitute a *stare decisis*, they could reduce the adverse effects of not having a definition under the Convention. Today, there seems to be no opposition to a method of interpretation of arbitral awards close to that proposed by Schwenzer and Hachem (2009). Fortunately, interpretation, according to national law, was rejected from its outset (Born, 2014; Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards, 1956). The International Council for Commercial Arbitration (ICCA) Guide to the Interpretation of the New York Convention (2011) expressly states that national courts interpreting the Convention must strive towards uniformity, while there have been several instances where national courts produced dicta explicitly prioritising uniformity. For example, *Merck v. Tecnoquimicas (1999)* held that the definition of arbitral awards should be interpreted according to the 'spirit of the Convention'.

Formulating a definition might be uncritical, in view of inconsistencies not being fundamentally unsound, while idiosyncratic interpretations are generally regarded as 'not authoritative' by international arbitration practice (Born, 2014). While it is challenging to determine the authoritativeness of a court decision referring to arbitral awards under the New York Convention and therefore, understand whether international arbitration practice tends to uniformity, the existence of international dialogue, at judicial and non-judicial level, is proof that the New York Convention's internal mechanism for development and adaptation to modernity is effective. In this author's opinion, this is partly due to the increasing institutionalisation of international arbitration, it is cementing as an international dispute resolution mechanism, and the thoughtful dialogue this development has instigated. Simultaneously, it has become increasingly popular for states interested in arbitration to adopt a pro-arbitration attitude and endorse an interpretation of the New York Convention that is as independent as possible from national law principle. For instance, states such as the Philippines, which have recently entered the international dispute resolution market as arbitration-friendly states, have produced verdicts that align with the popular view when it comes to the interpretation of the New York Convention (*Mabuhay Holdings Corporation v. Sembcorp Logistics*

*Limited, 2018*). It is unquestionable that international dialogue at a judicial level, in addition to scholarly work and practice, are elements that ensure the development of the regulatory scene of the New York Convention in particular and international arbitration in general. There is ample evidence to suggest that if required, the international arbitration community will engage in international dialogue regarding the nature of arbitral awards and thus, facilitate adaptation to the most suitable concept. Although a fixed definition could harmonise to a degree what is the arbitral award, it is – to an extent, futile to dedicate substantial effort in finding its exact definition, considering it is not uncommon for fairly detailed legal definitions to be interpreted significantly differently by courts.

## **The core elements of arbitral awards: A suggested taxonomy**

In sections ‘The perils of the undefined arbitral award’ and ‘Amending the New York Convention is not a viable solution’, it was examined why it is crucial to have a clear-cut definition of the arbitral award and how that would help avoid costly proceedings at the recognition and enforcement stage. Further, it was suggested that defining the arbitral award negatively by creating a taxonomy of the different types of awards and drawing clear distinctions from other tribunal decisions could be just as efficient as having a formal definition. In this section, the author considers the fragments indicative of the concept of arbitral awards critically and analyses the core elements of arbitral awards, which effectively separate awards from other tribunal decisions.

### ***An exercise of the tribunal's authority***

As observed by Born, the award must be the product of ‘the implementation of an agreement to arbitrate’, which serves as the initial point for the ‘making’ award (Born, 2014). A valid arbitration agreement confers jurisdiction to the tribunal to deal with the specific dispute and produce an award (Born, 2014).<sup>4</sup> In contrast to the arbitral award, arbitration agreements are well defined, both contractually, by the respective parties in an arbitration, and theoretically, by Article II New York Convention, Chapter II of the Model Law and most national arbitration legislation. In that regard, the detailed understanding of arbitration agreements seems to counterbalance the need for a fixed definition of arbitral awards. This is a compelling dynamic, considering that the tribunal is entitled to exercise its authority over the dispute and produce a final and binding award if a valid arbitration agreement exists. Accordingly, the award produced by the tribunal must necessarily be an exercise of its authority.

Notwithstanding, there are several associated rules, which international arbitration practice has developed regarding arbitral awards and the adjudicating powers conferred to the tribunal by the parties. It is well established that tribunals cannot rubber-stamp decisions (Blackaby et al., 2015). It does not suffice that an agreement has been reached between the parties through alternative methods. Even if an arbitration agreement exists, a panel of arbitrators must deliberate the dispute for an award to be produced. In *Perusahaan Gas Negara v CRW Joint Operation (2015)*, Sundaresh J was categorical that it was impossible to ‘convert’ a mediation agreement into an award, as that would require the reconsideration of the parties’ dispute by the tribunal. Similarly, when tribunals face single-party arbitrations, the tribunal will not ‘rubber-stamp claims presented to it’. Instead, it will make a ‘determination of the party’s claims’, on which the default award will be based (Blackaby et al., 2015).

Arguably, consent awards do not satisfy the tribunal deliberation criterion, as they are designed only to record the parties' settlement. However, the arbitrators' signatures 'indicate a measure of approval by the arbitral tribunal to the parties' agreement', and therefore, deliberation exists (Blackaby et al., 2015). The arbitrators' signatures 'indicate a measure of approval by the arbitral tribunal to the parties' agreement', and therefore, that should be adequate deliberation (Blackaby et al., 2015). The fact that there is no reported case law with disputed consent awards confirms that parties choosing to record their settlement in an award instead of, for example, a mediation agreement, intend to be legally bound by it (UNCITRAL Secretariat Guide, 2016).

### *Awards must dispose wholly or partially of a dispute*

As Jaramillo (2011) observed, it was contested whether awards are exclusively decisions dealing with all matters of the dispute, thus rendering the tribunal entirely *functus officio* or any decision settling substantive issues. Today, the popular opinion is that awards need not deal with the entirety of the dispute; it suffices that they finally settle at least one substantive issue, 'leading to the end of the arbitral proceedings' (Gaillard and Savage, 1999). The shifting towards an extended scope of the notion of the award is observed in the reserved position adopted in an older edition of Blackaby et al. (2009) contrasted to the definition in the latest one. Whereas the older definition held that awards must render the tribunal *functus officio* (Blackaby et al., 2009), the latter edition recognises as awards 'any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure' (Blackaby et al., 2015). Therefore, a tribunal can be rendered *functus officio* regarding a particular claim to produce a final and binding, partial award without being fully discharged of its duty to arbitrate the entirety of the dispute.

### *The dispute must be substantive and be resolved in a final manner*

*Substantiality of the dispute and form requirements.* As was put in *Inforica Inc. v. CGI Information* (2009), arbitral awards deal with substantive rights, whereas procedural decisions 'serve to ensure that the parties would be governed by the rules of the game' (Born, 2014). As Born (2014) confirmed, 'a procedural order is aimed at the conduct of the arbitration' while an arbitral award strictly resolves substantive issues in a final manner. In practice, the line between substantive issues and procedural orders is often far from clear.

It has prevailed that a decision's label is not always indicative of its nature (Born, 2014). In *Brasoil v. Authority of the Great Man-Made River Project* (1999), it was confirmed that an award could be disguised as an 'order' (Blackaby et al., 2015). In the circumstances, it sufficed that a decision is an award, notwithstanding its terminology, if it is reasoned and is the product of the tribunal's exercise of authority (Gill, 2008; Blackaby et al., 2015). These criteria were later reaffirmed in *Groupe Antoine v. Republic of Congo* (2006). Similarly, in *Publicis Communications v. True North Communications* (2000), the U.S. Federal Court stated 'it would be an "extreme and untenable formalism"' to not recognise and enforce awards disguised as other tribunal decisions. Considering that the New York Convention 'does not bestow transcendental definition on the term', it is the 'content of a decision, not its nomenclature, that determines finality' (Gill, 2008). In *Asurasu Jasa Indonesia v. Dexia Bank* (2006), Chan Sek Keong CJ found that 'the mere titling of a document as an award does not make it one' and that 'it is the substance and not the form that determines the true nature of the ruling'.



In *ZCCM Investment Holdings v Kansanshi Holding* (2019), Cockerill J distinguished between the substantive and procedural issues, finding that substantive matters ‘are likely to be dealt with in the form of an award’ (*ZCCM Investment Holdings v. Kansanshi Holding*, 2019). Indeed, the matters dealt with in an award are significant in that decisions about them substantially alter the parties’ rights and liabilities in the arbitration. This power of influence is observed in decisions about substantive matters, as opposed to decisions of a procedural nature, which aim at regulating the process rather than the parties and their actions.

Cockerill J also confirmed that weight should be given to the substance over the form, stating that ‘the Court will certainly give real weight to the question of substance and not merely to form’. However, the Court steered clear from adopting a side in the substance over form debate by stating that ‘the arbitral tribunal’s own description of the decision is relevant’ and adding the further criterion of how ‘a reasonable recipient of the tribunal’s decision would have viewed [the award]’ (*ZCCM Investment Holdings v. Kansanshi Holding*, 2019). While maintaining a typical balance between substance and form, the listed elements in the Court’s reasoning are likely to be attached to different weights in future cases, functioning as a guide rather than fixed rules. The approach mentioned above was confirmed in *K v. S* (2019), where Cooke J found the decision not to be an award because it has not ‘determined any matter of substance’ and not referring to its form throughout the judgement. It is yet inconclusive if and how the reasonable party test will be put at use; the standard could serve as a fair and equitable solution if the decision in question does not deal squarely with a substantive matter but fulfils other relevant criteria.

*Finality as a prerequisite in arbitral awards.* *Res judicata* is the rule according to which a matter that has already been decided upon cannot be decided again in fresh proceedings (in any adjudication method), and that the parties bound by a decision having acquired *res judicata* must, in good faith, fulfil their obligations (Jaramillo, 2011). The ‘final’ effect of awards is reflected in the narrow, exhaustive grounds the New York Convention prescribes for the non-recognition of awards (Born, 2014). For a decision to acquire *res judicata*, and effectively, be an award, it must ‘finally resolve essentially substantive issues’ of the arbitration (Born, 2014). The element of finality should be the most decisive distinguishing factor between an award and other tribunal decisions, as it affords the beneficiary the utmost protection of their right.

It is safe to conclude that finality is a requirement that the majority agrees upon (Hill, 2018). The gravity of finality is stressed in numerous cases. In *ZCCM Investment Holdings v. Kansanshi Holding* (2019), a pivotal factor was whether the decision renders the tribunal *functus officio* for at least one matter in dispute. Accordingly, the French Supreme Court in *Groupe Antoine v. Republic of Congo* (2006) added to the grounds earlier laid by *Brasoil v. Authority of the Great Man-Made River Project* (1999) that the distinguishing factor between awards and other decisions is that awards ‘resolve in a definitive manner (...) the dispute or lead to put an end in the proceedings’ (Blackaby et al., 2015). For the Swiss Federal Tribunal in *X v. Y* (2010), the differentiating point between awards and orders was not their content but whether they bear finality (Born, 2014). In *Diag Human Se v The Czech Republic* (2014), the High Court of England and Wales refused recognition because the award was under review and, therefore, its finality was compromised. According to Elder J, the deficiency the award was being reviewed for ‘can be cured retrospectively and is ultimately a matter for the review tribunal’ (*Diag Human Se v. The Czech Republic*, 2014).

*Interim awards and the interrelationship of substantiality and finality.* The requirements of substantiality and finality are not interdependent. As observed above, finality plays a more significant role in elevating a tribunal decision into an award. Therefore, decisions not purely of substantive nature may be awards if they are final, whereas decisions of substantive nature cannot be awards unless they are also final.

Decisions, either of substantive or procedural nature which ‘put an end to the arbitral proceedings’, relating to one or more substantive issues of the claim, are different from ‘mere procedural orders that can be modified or set aside during the arbitration’ (Born, 2014; *X v. Y, 2010*). Whereas the first can effectively be recognised as an award, the latter cannot. The Zambian Arbitration Act (2001, s. 2(1)) also adopts a broad view of awards, to explicitly include any ‘decision of an arbitral tribunal on the substance of a dispute and includes any interim, interlocutory or partial award and on any procedural or substantive issue’ (Hill, 2018). Blackaby et al. (2015) also include procedural decisions in the definition of awards if these are termed as such by the tribunal. However, national courts and some commentators seem to agree that the absence of finality generally deprives a decision from the award status, even if the matter is partly substantive (Hill, 2018). This is demonstrated in the fierce debate around interim orders and their status as awards. By definition, the interim award has an ‘expiration date’ and is only valid until revoked or reversed by an award that is final. The characteristic of the temporariness of interim awards has provoked criticism that they should not be classified as such because they lack finality (Hill, 2018). As Lee J explained in *Resort Condominiums International Inc. v Bolwell (1995)*, the decision was not an award because it was ‘provisional only’ and ‘liable to be rescinded, suspended, varied, or reopened by the tribunal which pronounced [it]’.

The national arbitration legislation and practice holding that interim awards should not have an award status are equally counterbalanced by legislations and commentators adopting a ‘sufficiently expansive approach’ to include interim awards (Born, 2014; Hill, 2018). For instance, there are several United States cases where interim measures qualified as awards. In *Pacific Reinsurance Management Corporation v Ohio Reinsurance Corporation (1991)*, Wiggins J adopted a ‘less stringent’ approach to finality, which was subsequently criticised as non-observing the majority’s strict approach (Hill, 2018). Indeed, recognising the existence of any type of interim awards and especially those of mere procedural nature could be contra to the New York Convention’s spirit. As was observed in *Resort Condominiums International Inc. v. Bolwell (1995)*, such expansionism would be against Article II of the Convention, which places the arbitration agreement at the heart of the arbitral process (Hill, 2018). As per Lee J, an award concerns ‘the subject matter of the dispute referred by the parties to arbitration for resolution, rather than to some interlocutory or procedural direction or order which does not resolve the disputes referred’ (Hill, 2018; *Resort Condominiums International Inc. v. Bolwell, 1995*).<sup>5</sup>

It is ultimately a question of whether a ‘less stringent approach to finality’ fulfils the purpose of arbitral awards to protect the rights of the beneficiary in the most effective way. The majority is reluctant to view finality in a relative context, although it has been recognised that ‘the term “final” can be understood in a number of ways’ (*Perusahaan Gas Negara v. CRW Joint Operation, 2015*). However, including specific interim awards under the New York Convention fulfils a gap. As Hill (2018) observed, often, arbitration could be ‘an exercise in futility’ without the rapid enforcement of interim measures, which in practice is as vital ‘to the parties’ rights (...) as a monetary award’. Therefore, the ad-hoc approach mentioned by Hill (2018); ‘whether an interim measure is an award depends on the precise circumstances in which the question is posed’, translates better to a unitary

approach of the concept of arbitral awards in the context of the New York Convention and the purpose of international arbitration in general. This approach is further reinforced by the unsystematic method adopted by Born (2014) in considering the definition of the award in his work and acceptance of relative finality, as it suffices that an interim measure is an award if it 'finally disposes of a request for relief' (Hill, 2018).<sup>6</sup> Born's (2014) approach was endorsed in *Perusahaan Gas Negara v. CRW Joint Operation (2015)*, where Menon CJ held that interim awards are final and binding because they settle a preliminary issue tightly connected to the substantive claims and leading to 'disposing of a portion of the parties' claims, although a final decision about them is not made'.

## Conclusion

The New York Convention is undeniably a manifestation of states willing to promote international unity and has struck an unprecedented balance between them. Although the absence of a definition of arbitral awards might be viewed as coincidental, it is not; it highlights the importance and power of this document in the modern international trade arena. While a fixed definition could provide a certain degree of harmonisation, that would not solve the underlying issue of divergent interpretations, whose root is diametrically opposed policy, translating in varying readings of the concept of the arbitral award in particular and arbitration laws in general.

According to the author of this paper, no definition of arbitral awards is required; its existence would not change the ideological differences among states nor make the situation less susceptible to divergent interpretations. Nevertheless, the New York Convention has provided tools for evolving the concept of the arbitral award and its entire text. It is up to national courts, arbitrators and scholars interpreting the New York Convention to treat peculiar dicta as obsolete, instead endorsing the popular view. While such activism by national courts would in no case constitute an international *stare decisis*, it would refine rulings interpreting the New York Convention. Further, it is positive that international arbitration practice has observed that idiosyncratic interpretations are recognised as such, while on multiple occasions, the judicial and non-judicial dialogue has swayed interpretation of the New York Convention towards the popular view. Ultimately, effective taxonomy and setting clear thresholds and criteria that constitute awards, considering those in the broader context of the Convention and the majority view, can lead to the successful and continuing development of the term and arbitration law.

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**Notes**

1. See also Hill (2018) for an explanation of the difference between *lex ferenda* and *lex nata*.
2. The same issue exists with other legal terms under the New York Convention. For instance, ‘public policy’ under Article V(1)(e) of the New York Convention has received divergent interpretations; Lee J in *Resort Condominiums International Inc. v Bolwell* (1995), who found at [44] that Article V(1)(e) – the public policy ground, allowed ‘residual discretion’ to national courts to refuse recognition and enforcement of awards *cf.* Tijam J in *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited*, (2018) who found, at [C] that:

mere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against [the Philippines’] fundamental tenets of justice and morality, or it would blatantly be injurious to the public, or the interests of the society.

3. Schwenger and Hachem advance this argument in the context of inconsistent interpretations of the CISG, in response to criticism that several legal concepts, such as good faith, are not properly defined.
4. The Italian *arbitrato irrituale* is probably an exception.
5. Lee J raises valid points; however, the dicta should be read considering the localised prism the judge made them through (Hill, 2018).
6. Taking as a premise that the arbitral award is a unitary concept in the context of the arbitral legal order, Born considers the different approaches of national courts and other commentators and concludes in a similar way to Gaillard (2013): considering rules that are ‘widely recognised’ and rules which are ‘idiosyncratic’ (containing national peculiarities), endorsing the first and rejecting the latter. This method of building legal theory is rooted in the ‘arbitral legal order’ theory of arbitration (Gaillard, 2013).

**References**

- Aero Club v Solar Creations Pvt Ltd (2020) App. No. 63/2020; Arb. Pet. No. 977/2016.
- Blackaby N, Partasides CQC, Redfern A, et al. (2009) *Redfern and Hunter on International Arbitration*. Oxford, UK: Oxford University Press.
- Blackaby N, Partasides CQC, Redfern A, et al. (2015) *Redfern and Hunter on International Arbitration*. Oxford, UK: Oxford University Press.
- Born G (2014) *International Commercial Arbitration*. Alphen aan den Rijn, Netherlands: Kluwer Law International.
- Braspetro Oil Services Co. v The Management and Implementation Authority of the Great Man-Made River Project (1999) XXIV YB Comm Arb 296.
- Diag Human Se v The Czech Republic (2014) EWHC 1639 (Comm).
- Friedland P and Brekoulakis S (2018) 2018 International Arbitration Survey: The Evolution of International Arbitration. Queen Mary University and School of International Arbitration.
- Gaillard E (2009) The urgency of Not revising the New York convention. 50 Years of the New York Convention, ICCA Congress Series 14: 689–707.

- Gaillard E (2013) Transcending national legal orders for international arbitration. *International Arbitration: The Coming of a New Age?* ICCA Congress Series 371.
- Gaillard E and Savage J (1999) *Fouchard Gaillard Goldman On International Commercial Arbitration*. Alphen aan den Rijn, Netherlands: Kluwer Law International.
- Garcia F, Ciko L, Gaurav A, et al. (2015) Reforming the international investment regime: Lessons from international trade Law. *Journal of International Economic Law* 18: 861–892.
- Gill J (2008) The definition of award under the New York convention. *Disp. Resol. Int'l* 2(1): 114–122.
- Groupe Antoine Tabet v Republique du Congo (2006) 1 Rev. Arb. 101.
- Hill J (2018) Is an interim measure of protection ordered by an arbitral tribunal an arbitral award? *Journal of International Dispute Settlement* 9(4): 590–608.
- 'ICC Rules of Arbitration' (2020) International Chamber of Commerce.
- Inforca Inc. v. CGI Information (2009) 254 O.A.C. 117.
- International Chamber of Commerce (1990) Final Report on Interim and Partial Awards.
- Jaramillo EZ (2011) The relationship between interim and final awards – Res judicata concerns. *Arbitration Advocacy in Changing Times*, ICCA Congress Series 15: 231–274.
- Kirby J (2014) What is an award anyway? *Journal of International Arbitration* 31(4): 475–84.
- Krpec O and Hodulak V (2019) War and international trade: Impact of trade disruption on international trade patterns and economic development 39(1): 152–172.
- K v. S (2019) EWHC 2386 (Comm).
- 'LCIA Arbitration Rules' (2020) The London Court of International Arbitration.
- Mabuhay Holdings Corporation v. Sembcorp Logistics Limited (2018) G.R. No. 212734.
- McDonald PJ (2004) Peace through trade or free trade? *Journal of Conflict Resolution* 48(4): 547–572.
- McIntosh C (ed) (2013) *Cambridge Advanced Learners Dictionary*. 3rd edn. Cambridge University Press.
- Merck & Co. Inc., Merck Frosst Canada Inc., Frosst Laboratories Inc. v. Tecnoquimicas S.A. (1999) Case No E-7474.
- Montanaro F and Violi F (2020) The remains of the Day: The international economic order in the Era of disintegration. *Journal of International Economic Law* 23: 299–322.
- Pacific Reinsurance Management Corporation v Ohio Reinsurance Corporation (1991) 935 F.2d 1019.
- PT Asurasu Jasa Indonesia (Persero) v Dexia Bank SA (2006) SGCA 41.
- PT Perusahaan Gas Negara (Persero) TBK [PGN] v CRW Joint Operation (2015) SGCA 30.
- Publicis Communications and Publicis SA v True North Communications Inc (2000) 206 F.3d 725.
- 'Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953' (1953) International Chamber of Commerce.
- 'Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards' (1956) United Nations Economic and Social Council.
- 'Report of the Working Group on International Contract Practices on the Work of its Seventh Session' (1984) United Nations Commission on International Trade Law.
- Resort Condominiums International Inc. v Bolwell (1995) 1 Qd R 406.
- Schwenzer I and Hachem P (2009) The CISG—successes and pitfalls. *The American Journal of Comparative Law* 57: 457–478.
- Sutton L (1967) World peace through foreign trade. *DePaul Law Review* 17(1): 38–45.
- UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016) United Nations Commission on International Trade Law.
- Wallis M (2016) Commercial certainty and constitutionalism: Are they compatible. *South African Law Journal* 133(3): 545–568.

X v. Y (2010) 28 ASA Bull 598.

ZCCM Investment Holdings plc v Kansanshi Holding plc (2019) EWHC 1285 (Comm).

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