CATEGORIES OF ARBITRATION AWARDS

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ABSTRACT: *The arbitration award is the act by which the arbitration procedure ends, having a double nature, contractual and jurisdictional. Defining the arbitration award is difficult as the international instruments and most regulations issued by the arbitral institutions do not contain such a definition. This study aims to examine the concept of award and to highlight the main categories of arbitration awards by considering the views expressed in the Romanian and foreign legal literature and also the provisions found within the international conventions, within the main regulations issued by the arbitral institutions and within the domestic law.*

KEY WORDS: *arbitration award, arbitration, final judgment, partial award, award as a result of a settlement between the parties, award in the absence of one of the parties.*
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Arbitral proceedings terminate with an arbitration award which is the most important act of the procedure as it achieves the very purpose of arbitration, which is to settle the dispute[1].

The arbitration award is the act that concludes the arbitration proceedings[2], the ultimate purpose of the arbitration activity[3] carrying a dual nature, a contractual and a jurisdictional nature[4].

The jurisdictional nature of the arbitration award derives from the unilateral feature of the legal act that completes the arbitration procedure, with respect to the parties, having the effect of a judgment by which the law is remarked and by which the necessary

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[1] See Cristina Cucu, Cătălin Bădoiu, Cristian Haraga, *Dicţionar de drept comercial,* C.H. Beck Publishing House, Bucharest, 2011, p. 294.
[2] See Gheorghe Beleiu, *Hotărârea arbitrală şi desfiinţarea ei*, in the Journal of Commercial Law, 1993, no. 6, p. 14.
[3] See Tudor R. Popescu, Corneliu Bîrsan, *Dreptul comerţului internaţional. Vol. IV. Arbitrajul comercial internaţional*, Editura Didactic & Pedagogic Publishing House, Bucharest, 1983, p. 166.
[4] See Mircea N. Costin, Sergiu Deleanu, *Dreptul comerţului internaţional. II. Partea specială*, Lumina Lex Publishing House, Bucharest, 1997, p. 214.

measures are taken, while its contractual nature has in view the compromise made by the parties by which the parties entrust the arbitrators with the task of settling the dispute[5].

The doctrine held that the following attributes renders the arbitration award a jurisdictional nature[6]: the arbitral tribunal resolves a dispute; the arbitral proceedings terminated with an award is based on the adversarial principle; the award must be preceded by deliberation and it must be substantiated; the award is taken by an arbitral tribunal composed of people who work under the rule of independence and impartiality, which may be revoked for the same reasons as those set for the challenge of judges; the award communicated to the parties has the effect of a final decision, the arbitration award is revocable through the action for annulment submitted to the court, action conceived as a means of appeal; the arbitration award is binding, invested with an enforceable title which enforces execution just like a decision.

Regarding the contractual arbitration component, this explains the particularities of the arbitration award which do not allow its qualification as a judicial act: the parties determine the content and form of the arbitration award, they decide if the reasoning of the award is made at law or in equity, and the binding force of the arbitration award has its direct source in the arbitration agreement[7].

Contractual nature of the award justifies the judgment of inadmissibility regarding the review on the merits of the arbitral proceedings[8].

Defining the concept of arbitration award is difficult as most international instruments and most regulations issued by arbitration institutions do not contain such a definition. The word "award" has the meaning of an act by which a court resolves the dispute that was brought to trial[9].

The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards provides in Article 1.2 that "the term *arbitral awards* shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted". One cannot say that the text contains a definition of the concept arbitral award.

The UNCITRAL Model Law, in turn, does not contain a definition of arbitration award. During the development phase of the law, the following definition of the arbitration award was suggested: final judgment ordering on all matters subject to the arbitral tribunal and any other decisions of the arbitral tribunal which ultimately resolve any matter on the merits or jurisdiction or any other procedural matter which, in the latter case, were called awards by the arbitral tribunal"[10].

On the occasion of the debates carried on the drafting of the law, the first part of the definition up to the word "on the merits" has enjoyed a broad support, while the second

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[5] See Ioan Macovei, *Dreptul comerţului internaţional*, C.H. Beck Publishing House, Bucharest, 2009, p. 303.
[6] See Ion Deleanu, Sergiu Deleanu, *Arbitrajul intern şi internaţional*, Lumina Lex Publishing House, Bucharest, 1997, p. 245.
[7] See Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale*, Lumina Lex Publishing House, Bucharest, 2005, p. 21.
[8] See Ioan Macovei, *op.cit.*, p. 304; Viorel Roş, *Arbitrajul comercial internaţional*, „Monitorul Oficial" Publishing House, Bucharest, 2000,
p. 419.
[9] See Vladimir Hanga, *Mic dicţionar juridic,* Lumina Lex Publishing House, Bucharest, 2005.
[10] See A/CN.9/260 - Report of the Working Group on International Contract practices on the work of its eighth session published on www.uncitral.org.

part has given rise to serious concerns. Therefore, it was decided that no definition regarding arbitration award should be included in the content of the model Law rating that there was not enough time to debate upon an issue so complex and so important.

Neither in the content of the Rules of the Arbitral procedures of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania can we find a definition of the arbitration award.

In terms of terminology, in accordance with the provisions of international conventions, the Rules of Arbitral procedures of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania provide in Article 66, paragraph 1 that the arbitration proceedings terminates by issuing arbitral award called arbitral order. Unlike these provisions, the regulations of the Romanian Civil Procedure Code of 2010 republished use the term arbitration decision[11].

Most of the rules issued by the arbitral institutions, although they do not contain a definition of the concept arbitral award, it refers to the concepts of partial and provisional judgment, which is likely to further contribute to an increased confusion regarding these concepts[12]. For example, Article 2 item (v) of the Rules of the International Court of Arbitration in Paris provides that the term *award* includes in its content the concepts of provisional, partial and final judgment.

In the Romanian legal literature, the award has been defined as the act by which, pursuant to the powers conferred, the arbitrators decide on their contentious disputes submitted by the parties to be resolved[13].

The English doctrine concluded that three basic conditions are necessary for us to face an arbitration award[14]: the award must be the result of an arbitration agreement, the award must meet certain formal features that are inherent to the concept of judgment; the award must resolve the merits of the case and not a matter of procedure.

Another opinion shows that the arbitration award is the final award made by the arbitrators regarding a part or the whole dispute submitted for settlement inferred to whether the merits of the case or a matter of procedure that leads to the termination of the dispute[15]. According to the same author, the conditions necessary for the existence of an arbitration award are:

First, the award must be rendered by the arbitrators. The award issued by an arbitral institution, such as a request for challenge can not be considered an arbitration award.

Secondly, the award aims to resolve a dispute. The measures taken by the arbitrators which do not resolve the dispute in whole or in part is not considered arbitration award.

Thirdly, an arbitration award is a binding award. The decisions becoming mandatory on the condition that the parties accept them are not considered arbitration awards.

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[11] See Ioan Macovei, *op.cit.*, p. 303.
[12] See Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press Publishing House, United States of America, p. 181.
[13] See Ioan Macovei, *op.cit.*, p. 303.
[14] See Gary B. Born, *International Commercial Arbitration*, Kluwer Law International Publishing House, the Netherlands, 2009, p. 2350.
[15] See Emmanuel Gaillard, John Savage, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*, Kluwer Law International Publishing House, 1999, p. 737.

Fourth, according to this point of view, an arbitration award may be partial. In this regard it was noted that the decisions of the arbitrators on issues such as jurisdiction, applicable law or the validity of an agreement are real arbitration awards.

In its turn, the French doctrine has shown that arbitration awards are the arbitrators' decisions which settle in a definitive manner, in whole or in part, the litigation submitted for settlement either on the merits or on the authority or means of procedure that can eventually lead the litigation to the court[16].

The arbitral procedure rules of the arbitral institutions mention different categories of awards, such as: final awards, partial awards, awards pronounced as a result of an agreement between the parties and award issued in the absence of a party, without being precisely defined[17].

1. FINAL AWARDS

The concept of final award is used in several ways, which is likely to cause confusion[18].

In the first sense, it is considered that it is the decision that includes the solution regarding all disputable issues of the case[19] and therefore terminates the mission of the arbitrators. Consequently, if the award left unresolved an issue, then it wouldn't be considered a final award[20].

In a second sense, the concept "*final award*" is used to describe a decision that resolves at least one aspect of the litigation between the parties[21]. For this purpose it appears in Article 1699 of the Belgian Judicial Code of 19 May 1998, in Article 1049 of the Dutch Code of Civil Procedure of 1 December 1986 and in Article 58, paragraph 1 of the English Arbitration Act of 1996.

The latter meaning was appreciated as being consistent with the contractual practice as it reflects the significance of the final and binding feature of the arbitral awards that are used in the arbitration settlements to describe any judgment issued by the arbitral tribunal[22].

As a matter of fact, most rules issued by the arbitral institutions contain provisions which provide this significance regarding the concept *final award*.

Article 2, item (v) of the Rules of the International Court of Arbitration in Paris, shows that by an award we understand a partial, provisional or final award and in accordance with Article 34, paragraph 6 of the same rules, all the awards issued by the arbitral tribunal shall be binding for the parties.

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[16] See Jacques Béguin, Michel Menjucq, *Droit du commerce international*, Litec Publishing House, Paris, 2005, p. 1036.
[17] See Margaret L. Moses, *op.cit.*, pp. 180-183.
[18] See Gary B. Born, *op.cit.*, p. 2428.
[19] See Julian D. M. Lew, Lokas A. Mistelis, Stefan Kroll, *Pervasive problems in international arbitration*, Kluwer Law International Publishing House, the Netherlands, 2006, p. 432; Emmanuel Gaillard, John Savage, *op.cit.*, p. 740.
[20] See Andrew Tweeddale, Keren Tweeddale, *Arbiration of commercial disputes. International and English Law and Practice*, Oxford University Press Publishing House, 2007, p. 333.
[21] See Emmanuel Gaillard, John Savage, *op.cit.*, p. 741.
[22] *Idem*, p. 741.

Furthermore Article 26.7 of the Rules of the International Court of Arbitration in London provides that the arbitral tribunal may issue separate awards on different issues at different times. These awards shall have the same status and effect as any other award issued by the arbitral tribunal.

2. PARTIAL AWARDS

Partial award is a judgment ordering on some of the claims of the parties within the arbitral proceedings, leaving other claims to be resolved in the future proceedings[23].

The rules of arbitral institutions also contain provisions regarding the possibility of the arbitrators to issue partial awards[24] and others even encourage the arbitrators to render in certain situations, partial awards[25].

The content of the Article 66, paragraph 2 of the Rules of Arbitral procedures of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania provides the possibility of rendering a partial award, but only at the request of the applicant, if the defendant acknowledges some of the applicant's claims.

Certain types of legislation in different States expressly provide that the arbitral tribunal has jurisdiction upon issuing partial awards. Thus, Article 1049 of the Dutch Code of Civil Procedure and Article 12.2. of the Scottish Arbitration Code states that the tribunal may render a partial award. Furthermore, Article 47, paragraph 2 letter b) of the English Arbitration Act of 1996 provides that, unless the parties have decided otherwise, the court may decide on some of the claims drafted in the request for arbitration or the counterclaim.

The freedom of the arbitrators to determine whether it is appropriate or not to order a partial award can only be exercised within the limits set by the parties[26]. Therefore, if the parties agree in the content of their arbitration agreement to exclude the partial awards and decide upon a single award about the whole dispute, this shall be taken into consideration[27].

Rendering a partial award is considered to offer a great advantage to the arbitral tribunal, especially in cases where it faces a complex litigation concurrently leading to saving money resources and time[28].

3. AWARDS ISSUED AS A RESULT OF A SETTLEMENT BETWEEN THE PARTIES

If the parties reach an understanding of the nature to settle the conflict that divides them, one of the possibilities is to terminate the arbitral proceedings and to include their settlement in a written award.

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[23] See Gary B. Born, *op.cit.*, p. 2431.
[24] As an example, Article 26, paragraph 7 from the Rules of the International Court of Arbitration in London of 1 January 1998.
[25] See Article 23.3. of UNICTRAL Arbitration Rules of 2010.
[26] See Emmanuel Gaillard, John Savage, *op.cit.*, p. 742.
[27] See Gary B. Born, *op.cit.*, p. 2432.
[28] See Andrew Tweeddale, Keren Tweeddale, *op.cit.*, p. 334.

Most often, however, the parties wish the arbitral tribunal to incorporate their settlement in an award so that the settlement to be accomplished by forced execution in case one of the parties fails to fulfill its obligations. In addition, the award rendered, offers the parties' settlement a high degree of formality[29]. It should be noted that in certain systems of law, a transaction of the parties is considered as *res judicata* in all cases so that its inclusion in a judgment does not provide anything extra[30].

The possibility of the arbitral tribunal to render an award encompassing the settlement of the parties is recognized by Article 30, paragraph 1 of the UNCITRAL Model Law which provides that in cases where during the arbitral proceedings the parties reach an agreement, the arbitral tribunal shall terminate the proceedings and, at the request of the parties, if there is no objection from the arbitral tribunal, it shall record the settlement in the form of an arbitral award on agreed terms.

The award thus rendered has the same statute and effect as any other judgment which ordered on the merits, as provided by the Article 30, paragraph 2 of the UNCITRAL Model Law.

This judgment will contain the express statement that it is an award rendered by settlement of the parties. The award shall not be substantiated. If the parties do not request an award by settlement they shall communicate a written confirmation that they have reached an agreement; the arbitral tribunal terminates its mission and arbitral proceedings end with the condition of payment by the parties of any outstanding arbitration fees.

According to Article 11, paragraph 1 of the Rules of Arbitral procedures of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, at any stage of the dispute proceedings the arbitral tribunal shall seek the settlement upon the parties' agreement. Although it does not refer expressly to the possibility of the tribunal to render a judgment containing the agreement of the parties, such provisions implicitly acknowledges such a possibility.

The rules of the International Court of Arbitration in Paris provide in Article 32 that in case the parties have reached a settlement after the case was submitted to the arbitral tribunal, this settlement would be included in an award, if the parties agree so or the arbitral tribunal agrees with this.

Article 26.8 of the Rules of the International Court of Arbitration in London contains provisions relating to the conditions under which an award may be rendered by the parties' agreement. Thus, if the parties settle the dispute, the arbitral tribunal may issue an award containing the respective agreement, if the parties request so in writing.

It may be noted that the rules issued by the arbitral institutions and the domestic laws allow the arbitral tribunal to render an award by agreement of the parties, without forcing them to do so[31].

Another issue discussed in doctrine is whether such an award rendered by the agreement of the parties may or may not form the subject of acknowledgement and forced execution under the international conventions and of domestic laws that do not expressly refer to this type of decision[32]. Of course, such a question does not regard the states that

[29] See Gary B. Born, *op.cit.*, p. 2436.
[30] See Article 2052, paragraph 1 of the French Civil Code.
[31] See Gary B. Born, *op.cit*, p. 2437.
[32] See Emmanuel Gaillard, John Savage, *op.cit.*, p. 745.

have adopted the UNCITRAL Model Law which governs this matter, but the other states also consider correct the interpretation according to which these awards should be acknowledged and enforced.

4. AWARDS RENDERED IN THE ABSENCE OF A PARTY

The absence of one of the parties at the proceedings does not prevent the rendering of an arbitral award if that party was given the opportunity to support its cause.

The rendering of an award in case of a missing party is expressly acknowledged by Article 25 of the UNCITRAL Model Law which provides that, in situations where any party is absent from the debates or does not submit documents to the file, such a circumstance does not prevent the arbitral tribunal to continue the proceedings and to render a judgment.

Most arbitral rules expressly refer to the absence of one of the parties from the arbitral proceedings, but we consider that the outcome of the case cannot be prevented even where both parties, although legally summoned, fail to be present at the proceedings. The Rules of Arbitral procedures of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania provides this case in the content of the Article 56. The rules of the main institutions of arbitration display provisions allowing the arbitral tribunal to resolve the case in the absence of a party[33].

Even in the absence of certain express regulations it was appreciated that the arbitral tribunal has an implicit jurisdiction to continue the procedures in the absence of one of the parties and to render an award[34].

Faced with an action for annulment promoted by the party missing from the proceedings, against the judgment so rendered, the Court of Appeal of Paris, considering that all documents in the case file were communicated to the missing part by two courier services, concluded that "the provisions of the rules of the International Court of Arbitration in Paris were taken into consideration by the arbitral tribunal, so any formal requirements to ensure that the procedures comply with the rules of a fair trial[35] would be unnecessary".

Another case has held that the absence of one of the parties from the proceedings can not be a reason for refusing the acknowledgement and the enforcement of the arbitral award, requiring the defendant to prove the fact that he was denied his right to be heard[36].

Provisions relating to the possibility of rendering an award in the absence of one of the parties are contained in Section 41 of the English Arbitration Act of 1996.

Therefore the parties have the freedom of deciding the powers of the arbitrators in cases where one of the parties is missing. If the parties did not settle on this point then the normative act would contain provisions applicable to this situation.

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[33] See Article 18, paragraph 3 and Article. 21, paragraph 2 from the Rules of the International Court of Arbitration in Paris, Article 15, paragraph 8 from the Rules of the International Court of Arbitration in London.
[34] See Gary B. Born, *op.cit.*, p. 2440.
[35] See the case Bin Saud Bin Abdel Aziz v. Credit Industriel et Commercial de Paris, resolved by the Court of Appeal of Paris on 24 March 1995, mentioned by Emmanuel Gaillard, John Savage, *op.cit.*, p. 744.
[36] See the case Overseas Cosmos v. NR Vessel Corp, mentioned by Andrew Tweeddale, Keren Tweeddale, *op.cit.*, p. 336.

According to Article 41, paragraph 4 of English Arbitration Act, if a party fails to attend or be represented at a hearing of which due notice was given, or if one of the parties fails to submit written evidence, the tribunal may continue the proceedings in the absence of that party and may issue an award on the basis of the evidence before it.

The English doctrine[37] marked the application of these provisions as being drastic so that before exercising it, the arbitral tribunal must ensure that each party was granted the opportunity to present its case and to reply to the arguments of the opposing party. To avoid any issues regarding the recognition and enforcement of the decision, it was considered that it would be useful for the arbitral tribunal to issue a notification after the first hearing when one party is missing, even just to make it absolutely equitable.

Therefore, the arbitral proceedings held in the absence of one of the parties is not different from that in which both parties participate personally or by proxy, and the award so rendered is valid if the fundamental principles of the process are respected, particularly the adversarial and equality of arms principles[38].

[37] See Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996. A commentary*, Blackwell Publishing House, Oxford, 2007, p. 203.
[38] See Jacques Béguin, Michel Menjucq, *op.cit.*, p. 1037.