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THE NOTION OF AWARD IN INTERNATIONAL COMMERCIAL ARBITRATION

A COMPARATIVE ANALYSIS OF FRENCH LAW, ENGLISH LAW, AND THE UNCITRAL MODEL LAW

GIACOMO MARCHISIO

Wolters Kluwer

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About the Author

Giacomo Marchisio is a Research Associate at McGill University's Faculty of Law, where he conducts research in the fields of comparative civil procedure, international arbitration, and contract law. He holds a doctoral degree and an LLM from McGill University, and a law degree from the Università degli studi di Torino. Dr Marchisio is the Academic Coordinator of the Private Justice and the Rule of Law Research Group at McGill University, and the former Editor-in-chief of the McGill Journal of Dispute Resolution. He is a member of the ICC Task Force on emergency arbitration, and of the Canadian Committee of the ICC.

This book is based on a condensed and updated version of a doctoral thesis carried out at McGill University.

Foreword

From a sociological perspective, international commercial arbitration may be viewed as a semi-autonomous social field constituted by the practices and understandings of the actors who participate in and influence the private adjudication of international commercial disputes. From a legal perspective, those practices and their interpretation define the field by shaping the key legal notions that distinguish and situate arbitration within the broader universe of law. Notably, the legal notions in question guide and in time determine the important relationship between arbitration and national legal systems and their courts.

There are three closely related legal notions that define the field: arbitration, arbitrator, and arbitral award. This important work of Giacomo Marchisio adopts a McGillian, transnational approach to legal inquiry. Although presented in the English language and clearly influenced by the pragmatism associated with the English legal tradition, his work follows naturally from, and usefully builds upon, the French tradition of fundamental theorizing about arbitration. After the immensely influential work of Charles Jarrosson on the notion of arbitration and the brilliant and encyclopaedic treatment of the notion of arbitrator by Thomas Clay, this book is poised to become an international reference on the notion of arbitral award.

This study comes at a key moment in the development of international arbitration practice. This is because the recent adoption of emergency arbitration provisions by all of the significant commercial arbitration institutions has made the notion of arbitral award and its pivotal role in determining the enforceability of decisions a focus of renewed concern. This has served to highlight the fact that, although the New York Convention and the UNCITRAL *Model Law* give the impression of a near-universal, common understanding of 'award' (after all, their enforcement provisions turn in key respects on that notion), one need only scratch the surface to reveal the absence of such common understanding. This is a serious issue not only in the theoretical terms that define the social field of arbitration, but also in the legal and very practical terms of determining which decisions are enforceable under the relevant international instruments.

Mr Marchisio takes us through the difficulties of defining the arbitral award through a study of three kinds of decision that can be viewed as borderline cases:

decisions on competence, awards by consent, and awards *ante causam* (with emphasis on emergency arbitrator decisions). The comparison of English Law, French Law and the UNCITRAL *Model Law* is enlightening for each of these borderline cases, highlighting for each of them the contrasting models he uses to help show the way forward: a monodimensional model of the award in which the arbitrator resolves a dispute in a final manner, and a multidimensional model of the award in which the arbitrator renders justice. This builds on the first chapter of the book where a persuasive account of the evolution of arbitration from the beginning of the twentieth century to the beginning of the twenty-first century lays the table for what follows. The undeniable institutionalization of arbitration, it is shown, naturally begs for a notion of award that is capable of accommodating the various kinds of decisions actually made by arbitrators who are increasingly expected to render justice by deploying the broad range of tools available to state judges.

The course taken by Mr Marchisio is not an easy one to steer. By broadening the range of decisions that may be characterized as awards, one faces the constant danger of swallowing up – and thus subjecting to judicial review – the countless procedural decisions that make arbitration run smoothly on a day-to-day basis. Having all procedural orders subject to review because they now fall under a broader definition of award would quickly sound the death knell of arbitration. Mr Marchisio, skilfully steers the course toward a tentative notion of arbitral award that guides us, I believe, in the right direction. He does so with a rare combination of theoretical awareness and attention to the requirements and self-understandings of arbitral practice. It is this salutary combination that makes this work an important piece in the ongoing construction of the field that is international commercial arbitration.

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Preface

Devoting an entire book to the notion of arbitral award may come across as an otiose exercise. Some will wonder – is there anything we don't already know about awards? As a matter of fact, we know very little. Even the most venerated arbitration treatises take dogmatic positions, providing mere overviews of the concept. Such a lack of interest can be regarded as a consequence of scholars' excessive emphasis on the contractual aspects of international commercial arbitration, to the detriment of its procedural components. The neglect of the procedural dimension of international commercial arbitration has somehow survived the numerous developments that have led to an increasingly sophisticated arbitral procedure.

In general, a silent tension can be observed in the field. Since the effectiveness of arbitral decisions depends on their enforceability, there is a tendency to place the label of award on heterogeneous decisions with a view to ensuring their enforcement. This is so because, contrarily 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 generally be enforced only if they amount to awards. There is more. Not only is the notion of award crucial for practical purposes (i.e., it allows one to predict which arbitral decisions will be enforced by state courts), but also for theoretical ones. By reflecting on arbitral awards, new light can be shed on our understanding of the adjudicative powers of arbitral tribunals. As pointed out below, the notion of award provides a useful reflection of how arbitral justice operates, indicating the extent of its role vis-à-vis public justice.

Acknowledgements

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The drafting of this book would not have been possible without the immense support of my family, and my dearest Éloïse. Every day, I remind myself of how blessed I am to have them in my life.

– *'e il naufragar m'è dolce in questo mare'.*

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CHAPTER 1
Introduction

§1.01 THE ISSUE: UNCERTAINTIES REGARDING THE DEFINITION OF ARBITRAL AWARD

The work and research relating to the present book started from a banal observation: international commercial arbitration literature has not been able, so far, to generate a comprehensive and satisfying analysis of the notion of arbitral award.[1] With a few exceptions,[2] there are virtually no contributions on the topic.[3] At the same time, given the controversial nature of the notion of award, some of the most important arbitration treatises merely provide short overviews of the concept. Gary Born, for instance, limits his study to a summary description and classification of awards.[4] Gaillard and Savage's treatise is also instructive on this point.[5] 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.'[6] Conversely, Redfern and Hunter endorse a stricter definition, according to which 'the

1. Alan Redfern et al., *Redfern & Hunter on International Commercial Arbitration*, para. 9.05 (Oxford University Press 2015) ('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*').
2. Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 631 (Sweet & Maxwell 2007).
3. Few articles have appeared on the matter. *See*, e.g., Jacques Pellerin, *La sentence arbitrale: incertitudes et propositions* in *Mélanges Mayer* 679 (LGDJ 2015); Jennifer Kirby, *What Is an Award, Anyway?* 31:4 JOIA 475 (2014); Philipp Peters & Christian Koller, *The Award and the Courts – The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion* in Christian Klausegger et al., *Austrian Yearbook on International Arbitration* 137 (Manz'sche Verlags 2010).
4. Gary Born, *International Commercial Arbitration*, 3012 (Kluwer Law 2014).
5. Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 735 (Kluwer Law 1999).
6. *Ibid.* at 737.

term "award" should generally be reserved for decisions that finally determine the substantive issues with which they deal'.[7] This is as far as the most venerated literature is willing to go, showing self-restraint and caution. Most often, in fact, the notion of award is treated incidentally, when matters such as enforcement or annulment proceedings are considered.[8] The neglect of arbitral awards has two distinct explanations.

First, it is a direct consequence of the emphasis placed on arbitration's contractual dimension, which tends to reduce the arbitral process to a contractual phenomenon,[9] allowed and sustained by national legislators (the so-called contractual theory).[10] In this context, the award would merely amount to the performance of the arbitrator's contractual duties and would acquire the status of a judicial-like decision only with its recognition by a national legal order.[11] In recent years, however, the focus on the contractual dimension of arbitration has been greatly tempered by Emmanuel Gaillard's theory of an autonomous arbitral legal order.[12] His work has allowed scholars to look at arbitration as a system of justice and not only as a private (contractual) phenomenon, creepingly surviving under the shadow of the States. At the same time, the flourishing of forum selection clauses in private international law has also made clear that, while the element of consent may be a prerequisite for submitting a claim to a certain jurisdiction, it does not entail that the subsequent proceedings will necessarily have a contractual nature.[13]

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7. Redfern, *supra* n. 1, at para. 9.08.
8. *See* e.g., Christopher Liebscher, *Article V(1)(e)* in Reinmar Wolff, *The New York Convention* 356 (Hart Publishing 2012); Dirk Otto, *Article IV* in Herbert Kronke et al., *Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* 150 (Kluwer Law 2010); Christopher Liebscher, *The Healthy Award*, 137 (Kluwer Law 2003).
9. On the non-adjudicative nature of arbitral awards, *see* Daniel Levy, *Les abus de l'arbitrage commercial international*, 174 (L'Harmanattan 2015); Florian Grisel, *L'arbitrage international ou le droit contre l'ordre juridique*, 124 (LGDJ 2011).
10. Redfern, *supra* n. 1, at para. 1.08 ('[The] emphasis on the [principle of] "autonomy of the parties" might suggest that parties and arbitrators inhabit a private universe of their own. But this is not so. In reality, the practice of resolving disputes by the essentially private process of international arbitration works effectively only because it is supported by a complex public system of national laws and international treaties. Even a comparatively simple international arbitration may require reference to at least four different national systems of law, which in turn may be derived from an international treaty or convention – or indeed from the UNCITRAL *Model Law* itself').
11. Sylvain Bollée, *Les méthodes du droit international privé à l'épreuve des sentences arbitrales*, 38 (Economica 2004). *See also* Pierre Mayer & Vincent Heuze, *Droit international privé*, 520 (Montchrestien 2007).
12. Emmanuel Gaillard, *Legal Theory of International Arbitration*, 35 (Martinus Nijhoff 2010) [Gaillard, *Legal Theory*]. Cf. Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration* in Julian D.M. Lew & Loukas A. Mistelis, *Arbitration Insights* 455, 464–465 (Kluwer Law 2007).
13. *Convention of 30 June 2005 on Choice of Court Agreements*, entered into force on 1 October 2015, 44 ILM 1291 (2005) [*Hague Convention*]. *See* Art. 5(1) ('The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State'). For a commentary, *see* Ronald A. Brand & Paul M. Herrup, *The Hague Convention on Choice of Court Agreements* (Cambridge University Press 2008). *See also* Paul Beaumont, *Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status*, 5:1 J Priv Int'l L 125 (2009); Andrea Schulz, *The 2005 Hague Convention on Choice of*

Second, the neglect of arbitral awards has been caused by the very literature that aimed to consecrate their importance by emphasizing the adjudicative nature of arbitration (the so-called adjudicative theory). In particular, I am referring to works of Henri Motulsky,[14] Bruno Oppetit,[15] Charles Jarrosson,[16] and Antoine Kassis.[17] According to these scholars, the adjudicative role of an arbitral tribunal is ultimately tied to its power to issue a final decision resolving a dispute between the parties (*mission juridictionnelle*).[18] The arbitrator, in light of the contract that he or she has entered with the parties, performs a duty that transforms him or her into a private judge;[19] as such, arbitral awards should look more or less like the final judgments[20] rendered by judges in fulfilment of their main duty.

The main problem with the above theory is that it relies on an out-dated paradigm of adjudication, which considers the rendering of *contentious* judgments (i.e., decisions resolving disputes in a final manner) to be the sole function of an adjudicator. This understanding obscures important aspects of the exercise of adjudicative functions, which are not limited to the resolution of a dispute between the parties and instead cover a range of ancillary functions that are indispensable to the administration of justice.[21] The above authors, Oppetit, Jarrosson, and Kassis, were relying on the theory of *acte juridictionnel*, which is no longer helpful in defining today's adjudication, especially in light of drastic changes that have affected state justice and the notion of civil litigation.[22] Since the 1970s, with the emergence of the welfare state, the function of adjudicating has expanded beyond the classic notions of *acte juridictionnel*[23] and of *intérêt à agir* (standing). We have witnessed the emergence and increasing use of a plethora of special proceedings, either extending the notion of standing – as in the case of class actions – or eroding those of trial and judgment – as in the case, for example, of pre-trial proceedings, injunctions, or summary judgments. Likewise, international arbitration has greatly changed over the last forty years, becoming an often-chosen mechanism to deal with disputes over complex international transactions involving multiple parties. What remains to be done is to reconsider our conception of arbitration in light of these social changes, which have brought about an expansion of the types of decisions rendered by state courts and, in turn, by arbitrators.

Court Clauses, 12 J Int'l & Comp L 433 (2006); Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53:3 Am J Comp L 543 (2005).

14. Henri Motulsky, *Écrits – études et notes sur l'arbitrage*, 6 (Dalloz 1976) ('L'arbitrage est une justice privée, dont l'origine est normalement conventionnelle. … La mission de l'arbitre est exactement la même que celle du juge').
15. Bruno Oppetit, *Théorie de l'arbitrage*, 217 (Dalloz 1998).
16. Charles Jarrosson, *La notion d'arbitrage*, 101 (LGDJ 1987).
17. Antoine Kassis, *Problèmes de base de l'arbitrage*, 27 (LGDJ 1987).
18. Jean Robert, *L'arbitrage*, 170 (Dalloz 1993).
19. Jarrosson, *supra* n. 16, at 101.
20. Robert, *supra* n. 18, at 170 ('La sentence constitue l'aboutissement de la procédure d'arbitrage').
21. *See* Louis Marquis, *Droit de la prévention et du règlement des différends*, 144 (Les Éditions de la Revue de Droit 2015).
22. Serge Guinchard et al., *Procédure civile*, 717 (Dalloz 2014).
23. *Ibid.*

In light of the above, the present work will take a fresh look at the notion of award, by placing it in a broader context, that of the contemporary evolution of adjudication. To do so, I will employ a sociological and comparative methodology, which offers an analysis of arbitration in terms of an institution administering justice rather than as a purely contractual creature.

§1.02 THEORY AND METHODOLOGY

In recent years, the literature on international commercial arbitration has made increasing use of the term 'judicialization'. In political science, the field from which the term was borrowed, judicialization refers to 'the process by which non-judicial negotiating and decision-making *fora* come to be dominated by quasi-judicial (legalistic) rules and procedures'.[24] In this field, the concept has been used to explain the judicialization of politics and the concurrent expansion of the judicial powers of state (and non-state) litigation *fora*. A major example of judicialization, in this context, can be found in the expansion of constitutional litigation.[25] At the international level, the term has been employed to indicate the significant increase in specialized international adjudicative bodies for the resolution of investment law disputes or the prosecution of human rights violations.[26] Taking a closer look at the process of judicialization in private matters (such as commercial cases and other private law disputes), Alec Stone Sweet has defined judicialization as the construction of legitimacy by a third party in a position of authority vis-à-vis two litigants.[27]

Interestingly, the judicialization of private justice can be contrasted with the process of contractualization of public justice. Contractualization refers to the trend toward leading parties to agree on most of the aspects of a civil trial, so as to implement a cooperative approach favouring a non-adversarial attitude, and encouraging them to enter contractual agreements for the settlement of their disputes.[28] Therefore, it can be noticed that at the same time as, on the one hand, private justice tends to become a

24. Neal C. Tale, *Why the Expansion of Judicial Power?* in Neal C. Tale & Torbjörn Vallinder, *The Global Expansion of Judicial Power* 26, 28 (New York University Press 1995).
25. Neal C. Tale & Torbjörn Vallinder, *Judicialization and the Future of Politics and Policy* in Tale & Vallinder, *supra* n. 24, 515, 516 ff.
26. Cesare Romano, *The Shadow Zones of International Adjudication* in Cesare Romano et al., *The Oxford Handbook of International Adjudication* 90, 104 (Oxford University Press 2013). *See also* Karen Alter, *New Terrain of International Law: Courts, Politics, Rights*, 335 (Princeton University Press 2014) ('Judicialization occurs where citizens, organizations, and firms see law as conferring upon them rights, and where politicians conceive of their policy and legislative options as bounded by what is legally allowed. Where judges have jurisdiction and litigation becomes a useful way to reopen political agreements, negotiations among actors become debates about what is legally permissible, and politics takes place in the shadow of courts with the lurking possibility of litigation shaping actor demands and political outcomes').
27. Alec Stone Sweet, *Judicialization and the Construction of Governance* in Martin Shapiro & Alec Stone Sweet, *On Law, Politics, and Judicialization* 55, 71 (Oxford University Press 2002) ('The "judicialization of dispute resolution" is the process through which a [triadic dispute resolution] mechanism appears, stabilizes, and develops authority over the normative structure governing exchange in a given community').
28. Loïc Cadiet, Jacques Normand & Soraya Amrani Mekki, *Théorie générale du procès*, 213 ff. (PUF 2013) [Cadiet et al., *Théorie générale*].

'public' matter, on the other hand, public justice aspires to transform itself into a 'private' matter.

Be that as it may, in international arbitration, the term 'judicialization' has been used in the most disparate ways. Sometimes, it is seen in a group of critiques concerning the excessive duration of arbitral proceedings and their increasing complexity.[29] In this case, the term is used with a negative connotation: the judicialization of international commercial arbitration would turn this alternative method of dispute resolution into a slow and expensive process. Such an occurrence would put at risk the very existence of arbitration, once an idyllic, fast and simple procedure.[30] Yet 'judicialization' is also used to emphasize the adjudicative power of arbitrators. In this sense, the term is used to underline that arbitration is not purely a private endeavour stemming from a contractual agreement reached by the parties, but also the expression of a broader goal: the administration of civil justice.[31] In this context, judicialization refers to the similarities between arbitral justice and state justice, united in their effort to maintain social cohesion.[32] This is the meaning of judicialization that I will adopt in the present work, as well as the key concept that will allow me to consider how arbitral adjudication is structured and how the notion of arbitral award can be outlined.

To examine this concept, I will rely on two different theoretical approaches. The first is a sociological analysis of arbitration and, more specifically, a historically grounded one,[33] and the second is a comparative analysis. The sociological approach consists in a historical analysis of the foundational traits of contemporary international

29. *See* Rémy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the Judicialization of International Arbitration*, 25 Am Rev of Int'l Arb 223, 230 (2014) ('[judicialization is] a phenomenon by which international arbitration procedure increasingly resembles domestic litigation, as a result of an increase in procedural formality/sophistication and litigiousness'); *See also* Günther J. Horvath, *The Judicialization of International Arbitration* in Stephan Kröll et al., *Liber Amicorum Eric Bergsten-International Arbitration and International Commercial Law* 251, 259 (Kluwer Law 2011); Artur W. Rovine, *Fast-Track Arbitration: A Step Away From Judicialization of International Arbitration* in Richard B. Lillich & Charles N. Brower, *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?* 45, 49 (New York: Transnational Publishers 1994).
30. *See* Giorgio Bernini, *Flexibility or Rigidity?* in Lew & Mistelis, *supra* n. 12, 47, 49; Klaus Sachs, *Time and Money: Cost Control and Effective Case Management* in Loukas A. Mistelis & Julian D.M. Lew, *Pervasive Problems in International Arbitration* 103, 112 (Kluwer Law 2006).
31. Cf. Andrea Marco Steingruber, *Consent in International Arbitration*, 329 (Oxford University Press 2012) ('Arbitration should be reconciled with its jurisdictional side, which is as important and practically relevant as its contractual nature ... as it is not fully settled whether arbitration is of a contractual, jurisdictional, or mixed nature, one should not unduly favour the contractual side over the jurisdictional element').
32. Alec Stone Sweet & Florian Grisel, *The Evolution of International Arbitration: Delegation, Judicialization, Governance* in Walter Mattli & Thomas Dietz, *International Arbitration and Global Governance: Contending Theories and Evidence* 22, 32 (Oxford University Press 2014).
33. *See* James Crawford, *Continuity and Discontinuity in International Dispute Settlement*, 1:1 J Int'l Disp Sett'l 3, 24 (2010) ('first, we must avoid thinking that all our bright ideas are new ideas, for sometimes their roots are to be found deep in the historical experience of international law; second, we must try to achieve a historical understanding of our own activities, for only in such a way we will be able to fully comprehend them – and, it may be, advance beyond them'). On the sociological approach, more generally, *see* Michael Freeman, *Law and Sociology* in Michael Freeman, ed., *Law and Sociology*, 1, 15 (Oxford University Press 2006); Roger Cotterrell, *From Living Law to the Death of Social–Sociology in Legal Theory* in Michael Freeman, *Law and Sociology* 16, 31 (Oxford University Press 2006).