

**Types of international arbitral awards and their effects,
focusing on two case studies:
arbitral award on case "La Petrolifera Italo-Rumena" vs Republic
of Albania (2007) and arbitral award on case "DIA Ltd. vs OSHEE
sh.a" (2015)**

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Abstract

An international arbitral award must be final, so that it may be subject of a request for a judicial recognition and enforcement in a particular state. The New York Convention instruments apply only to the final arbitral award, regardless of the different way it reflects the dispute in question. A final award is also considered to be one which does not directly resolve the dispute, but suffices to declare that the dispute would be settled by the parties themselves through a negotiating agreement. An arbitral award called a "partial award", which deals an interim measure, generally is not considered to be an arbitral award enforceable forcefully through the Convention's framework. However, in some jurisdictions, a partial award can be enforced in accordance with the local arbitration law, if the award disposes ultimately on a particular and independent issue. Parties in an arbitral process can reach a settlement agreement before the arbitrators make an award. This arbitral award may incorporate the agreement reached by the parties, accordingly being considered as a "settlement award" or it can only declare that the parties have a settlement agreement which have legal effects on them. In the case when the settlement agreement is converted into an arbitral award, the execution of the rights and obligations agreed by the parties materialized in the disposition of an arbitral award will be more effective through the New York Convention mechanism. This article, through literature review, regulatory frameworks interpretation, as well as the analysis of case studies, aims at identifying aspects related to the decision-making process of arbitrators. The manner in which the arbitral Tribunal disposes of important moments of arbitral procedure and for the final settlement of the dispute constitute very important procedural aspects of the international arbitral procedure.

Keywords: international arbitral procedure; international arbitral awards; UNCITRAL Rules; New York Convention.

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1. Final and partial arbitral awards. The effect of the New York Convention on them

The widely known concept for the arbitral award is that it is the final disposition of arbitrators over all parties' claims on the dispute. Arbitration forums may also issue partial awards, provisional awards, or orders during arbitration proceedings, but that do not constitute an "arbitral award".

Orders generally serve to procedural issues that need to be resolved in order that the arbitration process proceeds, for example on issues of evidence, place and time of hearings, etc. While final arbitral awards resolve substantial rights of the parties in the process. According to the New York Convention², only the latter are object to a judicial review, on the basis of a limited list of reasons, in the country of arbitration origin or in the place of its enforcement.

The main difference between "arbitrator orders" and "arbitral awards" is that orders cannot usually be reviewed by a state court, although they may be object to review by the arbitral tribunal itself. However, there are cases when arbitrators' orders are also appealable to the court because of their final character. In particular, orders to secure the lawsuit prior to the conduct of arbitral hearings were considered as likely to be reviewed by some courts due to their final character³.

If a party cannot appeal an arbitrator's order to a court, but still is of the opinion that the order is improper, it must immediately express its objection to the arbitral tribunal. Such thing should be done with a view to later guaranteeing the right to challenge the arbitral award by arguing that the order in question was the cause of an unfair, improper or prejudicial procedure that denied the party the right to present and honestly defended the case⁴. If a party does not object an order at the time of its release, it may subsequently be deemed to have waived the objection of the final arbitral award by claiming the reasons for the objection of the order⁵.

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, approved by the United Nations Conference on International Commercial Arbitration, New York, 10 June 1958, entered into force on 7 June 1959.

³ See Case "Banco de Seguros del Estado against Mutual Marine Offices, Inc.", 344 F.3d 255 (US Court of Appeal, 18 September 2003); "The arbitration panel issued a provisional order forcing the Claimant to file a warrant of guarantee, a letter of guarantee in the sum ... The Claimant objected the order at the Southern District Court of New York in the United States. The court confirmed the order of the panel of arbitrators, stating that "provisional orders are considered" arbitration decisions "and are therefore object to be reviewed by the court."

⁴ See British Arbitration Act, Article 73 - Many arbitrary rules require that a party raise an objection at the time of the order, or otherwise it will be deemed to have renounced its right to object (see also ICC Rules, Article 33, UNCITRAL Rules, Article 30, LCIA Rules, Article 32.1, ICSID Rules, Article 27, ILO Rules, Article 58).

⁵ See the case "Paris Court of Appeal: SA Caisse de la Credit Mutuel du Nord de la France against Banque Delubac et Compagnie, 2001", Summary of arbitration 918: The party which did not raise as a claim the lack of impartiality of the arbitrator during the arbitral proceedings, implicitly renounced the right to raise this claim later; See: the case "The Republic of Kazakhstan against Istil Group Inc. [2006] 2 Lloyd's Rep.370 ": Not objecting a perceived irregularity in due time, the party

The relationship between the types of awards the arbitrator or the arbitral panel may take, and the scope of authority of the New York Convention, is as follows:

1.1 Arbitral final awards

The term arbitral "final award" refers to a tribunal award that solves all disputes between the parties. There are some consequences that result from a final award. In the first place is the possibility of objecting the final award by the losing party, which may attempt to annul this award under the laws of the country the arbitration takes place. Likewise, the final award on arbitration can be forcefully enforced through the intervention of a particular national legal order under the provisions of the New York Convention (assuming that the award was made in a Member State of the Convention). And finally, making an arbitral award ends the tribunal's task, which becomes *functus officio* (without any further jurisdiction)⁶.

1.2 Partial and provisional arbitral awards

The term arbitral "partial award" is sometimes used as the synonym of the term arbitral "provisional award". However, some authors make distinctions between these two terms. According to them, "partial awards" refer to substantive claims, while "provisional awards" refer to issues such as jurisdiction or applicable law⁷. Such arbitral awards do not resolve all issues of dispute between the parties.

However, depending on the jurisdiction, the parties may in some cases object or require to confirm partial or provisional awards in a state court, without waiting for the final arbitration award that resolves the entire dispute⁸. So e.g. The UNCITRAL Rules stipulate that the tribunal may take "temporary measures", such as merchandise custodial measures, such as ordering them to be deposited to a third party or selling damaged goods⁹. These tribunal disposition generally takes the form of an *order*, but may also have the form of an *arbitral award* depending on their final form. Indeed, in some cases, the court has estimated that despite the fact that the provisional measure was named "order", in fact, the tribunal has made a *final arbitral award*. So e.g. in the case of "*Publicis Communication vs. True North*

loses the right to object it at a later time; See UNCITRAL Rule 4: The party that does not object in due time loses the right to do so later.

⁶ "*functus officio*": (Latin term) to have fulfilled the function or scope, discharged from the position, and consequently with no later power or authority: Black's Law Dictionary 673 (6th ed.1990).

⁷ See "The Final Report on Provisional and Partial Awards", 2, International Arbitration Court (ICC), Book 26 (1990).

⁸ A partial decision may be confirmed in the USA, if it definitely resolves a discreet case among those within the tribunal mandate; See case "*Metalgesellschaft against M/V Capitan Constante*", 790 F.2d 280, 283 (2d Cir. 1986): the partial decision on the transport payments is confirmed by the Court because it was special and independent.

⁹ UNCITRAL Arbitration Rules, article 26(1).

*Communications*¹⁰, the Court of Appeal in the United States stated that: an order issued by an arbitral tribunal to convert tax recordings despite being described as an "order" was in fact a final arbitral award, meeting the conditions for confirmation. The arbitral tribunal's disposition was not merely an order on several procedural issues, but it was in fact the case (claim) that the claimant had filed. Despite the fact that there were still issues to be addressed and resolved by arbitrators and despite the fact that the tribunal's disposition was referred to as an "order", the substance and the demonstrated impact of this disposition was final, turning it into a *final arbitral award*. The foregoing argument of the court confirms the view that it is precisely the substantive content and the effect produced by the disposition of arbitrators which should be considered as decisive factors in determining the final form of the arbitral award, giving the latter the opportunity to be submitted to the effects of the New York Convention¹¹.

As above mentioned, although in the spirit of the Convention, a partial arbitral award is not generally regarded as an enforceable award¹², in some jurisdictions, a partial award can be confirmed under the orientation of the local law, if it has a definitive ruling on a special and independent case¹³.

An interesting case of a partial award is the decision of the Arbitral Tribunal of the Vienna International Arbitral Centre (VIAC Partial Award), specifically titled "*Partial award on jurisdiction and a payment claim*"¹⁴. This partial award was issued with respect to limited issues, such as: whether the Tribunal had jurisdiction in that arbitration and whether the Tribunal had the authority to decide on the motion for partial award on the reimbursement of the deposit... etc. The Partial Award did not deal with the other claims raised in the arbitration.

The Tribunal ruled that it had jurisdiction to decide on its own jurisdiction and to examine the merits of the claimant's motion for partial award. Regarding the latter, the conclusion of the tribunal was that it had the authority to examine the merits of the reimbursement claim. In considering whether to exercise its discretion and issue a partial award in favor of the Claimant, the Tribunal concluded that

¹⁰ "Publicis Communication & Publicis SA against True North Communications Inc", 206 F.3d 725 (7th Cir. 2000). The Court of Appeal in USA upheld the decision of a lower court which had made applicable, in support of the New York Convention, an order issued by an arbitration court.

¹¹ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, 2008, pg.182.

¹² See case "Resort Condominiums Int'l, Inc. against Ray Bolwell et al. (S. Ct. Queensland)", Annual of Commercial Arbitration XX 628, 642 (1995): "It doesn't seem that Convention is referred (has a scope) any kind of decision or arbitrator order, except for the decision that defines all or at least some of the cases referred for arbitration to the arbitrators".

¹³ See case "Island Creek Coal Sales against City of Gainesville, Florida", 729 F.2d 1046, 1049 (6th Cir.1984): (The Court admitted a provisional arbitration decision that required the defendant to continue the application of the contract until the final decision issued by the arbitration panel).

¹⁴ Partial award issued from the Arbitral Tribunal, established by Vienna International Arbitral Centre, on case No.SCH-5317/Kn between Debt International Advisory Ltd. (British Virgin Islands), Albania Branch (Claimant) and Operatori i Shpërndarjes se Energjisë Elektrike sha. (OSHEE), Tirana, Albania (Respondent).

fairness, good faith and the principle of *pacta sunt servanda* dictate the necessity to issue this award despite the fact that the Claimant was established in British Virgin Island, an offshore jurisdiction, and that the New York Convention is not applicable in offshore jurisdiction.

2. Arbitral award on the parties' conciliation and their legal effect

The parties, at any time during the arbitral proceedings, may decide to settle the matter by *conciliation*, avoiding the arbitration procedure. Many arbitration rules are used for such a thing, allowing the parties, by their request, to get an arbitral award which would have the terms of the conciliation agreement between the parties¹⁵, as their enacting clause. If the parties reach a conciliation agreement on the dispute issues, arbitrators may further pursue two ways: (a) they may incorporate the agreement into an arbitral award (settlement award), or (b) be merely limited to referral or merely declaring the agreement reached between the parties themselves and dismissal of the judgment of the merits of the case.

Parties may not need to incorporate their agreement into a "settlement award" if at the time they sign the settlement agreement (conciliation agreement), all the obligations between them are fulfilled (all payments are made, etc.). But if any obligations between the parties have remained unfulfilled, after the signing of the agreement, it is more likely for the parties to convert their agreement into an arbitral award. This is because, if they do not do so and one of the parties does not voluntarily fulfill its obligation under the settlement agreement, this would be considered merely as a breach of a "contractual obligation" rather than as a non-execution of an award. In such a case, the other party will have to go to court and prove the breach of the contract (settlement agreement) before it can initiate the execution procedure of the breached obligation. On the contrary, if the settlement agreement is converted into an arbitral award, the execution of the rights and obligations for which the parties have agreed is materialized in the enacting clause of the award and will be more effective through the mechanism of the New York Convention.

Another reason justifying the need to convert the agreement into a settlement award is the legal status of the concerning parties, particularly when one of the parties is a sovereign state or a state agency. From a political perspective, the sanction of the arbitral institution and the signatures of arbitrators can make a state system more willing to enforce the obligation than it would be if the obligation were to be determined only in an agreement reached between the parties¹⁶.

Interesting, in this point, is the case of the International Court of Arbitration (ICC'A) ruling on "La Petrolifera Italo-Rumena" S.p.a and "La

¹⁵ See the UNCITRAL Rules, Article 34(1); ICC Rules, Article 26; UNCITRAL law model, article 30.

¹⁶ Redfern & Hunter, "The law and practice of international commercial arbitration", Oxford, (2004), p. 377.

Petrolifera Italo-Albanese" Sh.A. Versus the Republic of Albania "(2007)¹⁷. The ruling of the final award of the foreign arbitration concludes that the parties have completely resolved the dispute between them, according to the Settlement Agreement, renouncing all their claims in this arbitration procedure and also orders the parties to enforce the conditions of the Settlement Agreement. The above award, issued by the arbitral tribunal for the settlement of the dispute, has been requested to be recognized and enforced in the Republic of Albania by the interested party ("La Petrolifera Italo -Rumena" Spa and "La Petrolifera Italo-Albanese" Sh.A)¹⁸.

Another interesting case of a final award, which does not settle the dispute but only states for the legal effect of the *settlement agreement* reached by negotiation between the parties, is the award issued in the arbitration between Debt International Advisory Ltd. (British Virgin Islands), Albania Branch (Claimant) and Operatori i Shpërndarjes se Energjisë Elektrike sha. (OSHEE), Tirana, Albania (Respondent)¹⁹. In this case, *firstly*, the Tribunal recognized that the Claimant had a legitimate interest in obtaining a final settlement of the substantive issues it had raised. *Secondly*, the Tribunal recognized that the final settlement of the dispute about the powers of the claimant to settle the case and the validity of the settlement of 3 December 2014, requires that the Tribunal's decision be taken in the form of

¹⁷ On 24.05.2004, based on law no. 9231 dated 13.05.2004, between "La Petrolifera ItaloRumena" Spa. ("the concessionaire ") company and the Government of Republic of Albania ("the state") were signed two concession agreements, specifically: the BOO agreement "For the construction and use of the coastal terminal "For the depositing of petroleum and its byproducts in the bay of Vlora" and the BOT Agreement "On the construction and use of port infrastructure at the service of the coastal terminal in Vlora bay". The Law No. 9231 on the Approval of these Agreements entered into force on 21 June 2004, which is the date of entry into force of the Concession Agreements. According to these two agreements, the parties are given certain rights to comply within the established deadlines. The concessionaire had the obligation to complete the final project, within 9 months, which he fulfilled several months before the deadline. But these obligations the state failed to fulfill for a period of about two years and from this failure to fulfill the obligations of the BOO Agreement, the concessioners caused them considerable damage. Under these conditions the concessionaire, pursuant to Article 17 of the BOO Agreement, addressed on 12 June 2006 to the International Arbitration in Paris.

¹⁸ After many negotiations, the parties agreed to settle in agreement the disputes between them, which were the cause of the start of the arbitral proceedings. Thus, a Memorandum of Understanding was signed between the state and the concessionaire, which was approved by the Decision of the Council of Ministers No. 235 dated 27.04.2007. According to this last agreement, the state recognized the default of its obligations, the damages caused to the concessionaire consequently, and undertook to compensate these damages, according to the agreed amounts. The state also agreed to fulfill its obligations within a time limit set in the Understanding Agreement. For his part, the concessionaire agreed to waive compensation for damages (the rest) if the state fulfilled unfulfilled obligations. The Settlement Agreement, after the signing and approval of the Council of Ministers, was submitted to the International Arbitration, which gave this agreement the form of the final award with the award no.14420 / FM dated 25.07.2007.

¹⁹ Final Award, made on 14 December 2015 from Arbitral Tribunal composed of three arbitrators, established by Vienna International Arbitral Centre. Case No. SCH-5317, pursuant to the Rules of Arbitration and Conciliation of the Austrian Federal Economic Chamber, in the Arbitration between Debt International Advisory Ltd. (British Virgin Islands), Albania Branch (Claimant) and Operatori i Shpërndarjes se Energjisë Elektrike sha. (OSHEE), Tirana, Albania (Respondent).

an *award* and not in the form of a *procedural order*, according to the provision of the article 25 of the VIAC Rules.

In this award, the final disposition of the Arbitral Tribunal is the declaration of two statements:

(a) *the declaration that the lady (the representative person), was authorized to act for the Claimant, when on 3 December she concluded with the Respondent the settlement of all disputes involved in the present arbitration and when she withdrew all the Claimant's claims with prejudice²⁰ and*

(b) *the declaration that the settlement of 3 December (concluded by negotiation between the parties) is valid and all claims in the present arbitration were dismissed²¹.*

According to the analyses made by the arbitrators, the Tribunal concluded that the "Authorization to Negotiate" dated 3 October 2011 and the "General Power of Attorney" dated 16 August 2010 were not revoked and were effective when the lady settled the dispute on behalf of the Claimant on 3 December 2014. Each of the two authorizations entitled that natural person to negotiate and conclude a wide spectrum of agreements, which included the right to settle the present dispute between the Parties. The Tribunal also concluded that no reasons have been established that would vitiate the validity of the settlement of 3 December 2014. On the basis of these conclusions, the Tribunal stated that the lady was authorized to act for the Claimant when she concluded with the Respondent the settlement of all disputes involved in the present arbitration, when she expressed the Parties' concordant will to terminate the arbitration, and when she withdrew all of the Claimant's claims with prejudice.

Concerning the effect of this final arbitral award, based on its enacting part, we can say that the only legal effect of this award would be the eventual prohibition of any other forum to review and express on the issue of whether *there is any agreement between the parties to resolve the dispute and is it valid or not?* Thus, this final arbitration award, which only states the existence of a settlement (conciliation) agreement between the parties to the conflict, only ensures that in the future, the validity of the settlement agreement between the parties, to resolve the conflict, is not disputed. While, the concrete obligations between the parties provided for by the settlement agreement, which are the basis of the conflict and for which the arbitral award is "silent", are not considered as executable (they are not *executive orders*) and therefore they can't be enforced through the mechanism of the New York Convention.

3. Arbitral award in absentia

An arbitral award in absentia is a decision taken despite the non-participation of a party in the relevant procedure²².

²⁰ *Id.* paragraph 175(a).

²¹ *Id.* paragraph 175(b).

The abovementioned case “*DIA versus OSHEE*”, is a final award taken in absentia of the Claimant party. For such cases, i.e. where one party does not take part in the proceedings, Article 20(6) of the VIAC Rules provides that the case must be heard with the other party alone. The Tribunal heard the case and evaluated evidence before it in line with Article 600 ZPO²³, which *requires it to hear the case without treating the failure of the Claimant to take part in the proceedings in itself as an admission of the opponent’s allegations*. In taking evidence on the disputed issues, the Tribunal assumed that either side in the dispute might be right, and none of the statements made by the Respondent were treated as admitted by the Claimant due to its failure to take part in the proceedings. On that basis, the Tribunal recognized that the Claimant had a legitimate interest in obtaining a final settlement of the substantive issues it had raised.

Also, if the respondent does not participate or withdraws from the process, the tribunal cannot automatically take an award in favor of the claimant²⁴. Rather, the arbitration forum will have to carefully examine the evidence presented and make an award on the merits of the case. In a way, the lack of participation of the losing party in the process, charges a "burden" to the arbitral tribunal, which has to prove that at every stage of the process the lost party has been notified and has had every opportunity to participate actively. In order to make an enforceable decision, the arbitral tribunal must show that it has made reasonable and continuous efforts, even substantial, to allow the other party to submit its arguments and to prove them. Otherwise, the applicability of the award will be easily vulnerable, referring to the refusal of recognition and enforcement provided for in Article 5 of the New York Convention²⁵.

4. Conclusions

From the practice of international arbitration cases, by the point of view of the New York Convention effects, these types of arbitral awards are identified: *final* arbitral awards, *partial* and *provisional* arbitral awards. A final arbitral award is a final disposition of arbitrators over all parties' claims on the dispute, which settles all the substantial rights of the parties in the process.

Partial awards generally refer to substantive claims but there are still issues to be addressed and resolved by arbitrators. Sometimes this tribunal's disposition was referred to as an "order". Despite the above mentioned facts, the substance and the demonstrated impact of this disposition was final, turning it into a *final arbitral award*. Although in the spirit of the Convention, a partial arbitral award is not generally regarded as an enforceable award, in some jurisdictions, a partial award

²² The abovementioned case “*DIA versus OSHEE*”, is a final award taken in absentia of the Claimant party.

²³ German Code of Civil Procedure.

²⁴ The UNCITRAL Model Law, article 25(b): If the respondent fails to present the defense, unless sufficient and convincing cause fails to present the defense, the arbitral tribunal will continue the proceedings without considering such a fact in itself as an acceptance of the claim of the claimant.

²⁵ Margaret L. Moses, *op. cit.*, p. 183.

can be confirmed under the orientation of the local law, if it has a definitive ruling on a special and independent case. It is precisely the substantive content and the effect produced by the disposition of arbitrators which should be considered as decisive factors in determining the final form of the arbitral award, giving the latter the opportunity to be submitted to the effects of the New York Convention.

If the parties reach a conciliation agreement on the dispute issues, arbitrators may further pursue two ways: (a) they may incorporate the agreement into an arbitral award (settlement award), or (b) merely declaring the agreement reached between the parties themselves and dismissal of the judgment of the merits of the case.

Arbitral awards that embody the conciliation agreement and those that only state the existence of such an agreement has different effect. If the settlement agreement is converted into an arbitral award, the execution of the rights and obligations for which the parties have agreed is materialized in the enacting clause of the award and will be more effective through the mechanism of the New York Convention.

Whereas, if the award only states the existence of the conciliation agreement and a party does not voluntarily fulfill its obligations under these agreement, this would be considered merely as a breach of a "contractual obligation" rather than as a non-execution of an award. In such a case, the other party will have to go to court and prove the breach of the contract before it can initiate the execution procedure of the breached obligation. This final arbitration award (which only states the existence of the agreement) only ensures that in the future, the validity of the settlement agreement between the parties, to resolve the conflict, is not disputed. While, the concrete obligations between the parties provided for by the settlement agreement, for which the arbitral award is "silent", cannot benefit from the advantages established by the mechanism of the New York Convention.

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