

ALEKSANDER WRÓBEL, LL.M.\*

## THE ICSID ANNULMENT COMMITTEE: THE BLOSSOMING FLOWER OR THE ROTTEN TOMATO

*What is the main base of explanation depends on what is to be explained,  
and to some extent on the aim or interests of the person demanding the explanation.*  
B.N. Cardozo, *The Paradoxes of Legal Science*<sup>1</sup>

### 1. METHODOLOGY OF WORK

This work will have a comparative character. The author weighs the differences between the mechanisms of the annulment under the ICSID system and award challenging in international commercial arbitration. The comparative study will be performed in accordance with the model proposed by Kötz and Zweigert, with slight modifications. The first step will be a formulation of the problem, question or statement. The upcoming step will be to choose the materials, systems in order to compare them. The third stage will appertain to a description of chosen parts of the judicial systems without giving a personal opinion about them. Last but one step will consist of building the system of results of comparison which can be presented in the form of legal institution. Only remaining, fifth, point shall have a form of critical evaluation of results<sup>2</sup>. Thereby the author will survey the history of the annulment mechanism in the ICSID Convention will be presented in order to give a picture of its evolution and the reason for its wording as it is today. Subsequently, the author will portray the prevailing situation of the analysed topic in the area of the invest-

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\* PhD candidate, Chair of Criminal Law Faculty of Law and Administration JU, LL.M. in international investment arbitration Uppsala University in Sweden.

<sup>1</sup> B.N. Cardozo: *The Paradoxes of Legal Science*, Clark, New Jersey: The Lawbook Exchange, Ltd., 2012, p. 83–85.

<sup>2</sup> R. Tokarczyk: *Komparatystyka prawnicza*, Wolters Kluwer, Kraków 2008, s. 70–72.

ment arbitration and in regard to the international commercial arbitration. Following that, the differences between the annulment proceedings in investment arbitration and commercial arbitration, respectively, will be underlined. Penultimate, the discussion on the problematic aspects of the topic and possible solutions to presented in the doctrine and formed by practice. The last step will be to envisage possible solutions, if any of them needed, to existing problems present in the area of the review mechanism in investment arbitration.

## 2. INTRODUCTION

This article will touch upon the topic of the annulment mechanism in the international investment arbitration system, especially in the ICSID system as one of the most widespread and the most scrutinised systems of investment arbitration, along with, the solutions adopted in the area of international commercial arbitration. By doing, the author would like to answer the question whether there are any solutions accepted in the field of international commercial arbitration or other systems of dispute resolutions which can be successfully implemented in the investment arbitration and *vice versa* if there are the solutions from the investment arbitration, which can be used in those systems.

To give more picturesque reasons for the comparison of both types of the arbitration, one can imagine that international commercial arbitration is an automobile, which has been used to go on the same route, with the selfsame tires and same load, for many years and that vehicle was simply copied with adjustments by replacing particular parts to make it more practical and adding other parts in order to make it possible to go with a bigger load, on different routes, but still with the same “engine”. *Ipso facto* in order to solve some problems which have appeared while using this “automobile” in investment arbitration, there should be a second look which is of juxtaposing nature in the nature, to the original model international commercial arbitration in order to see if any answer to the problems was discussed, and maybe even presented and properly implemented in it.

## 3. HISTORICAL DEVELOPMENT OF THE ICSID ANNULMENT MECHANISM

The feature which distinguishes the ICSID arbitration system from other systems is its hermetic nature, which means that it is free from the interference of domestic courts during the ICSID proceedings. The uniqueness of the ICSID system lies also in the fact that it contains all the procedural rules from the commencement of the

arbitration to the enforcement of an award without external interference. In this work, special interest will be given to the remedies provided in the Convention to the parties to an arbitration, predominantly the annulment procedure. In order to challenge the award issued by an ICSID Tribunal one should employ the instruments given by the Convention. As a result, it is of great importance to articulate all remedies which are vested in the parties. The ICSID convention encompasses five possibilities to interfere with the finality of a rendered award. Those remedies are regulated in articles 49, 50, 51 and 52.

Art. 49 empowers the Tribunal to correct any obvious errors in awards (arithmetical, clerical, etc.), furthermore to issue supplementary decisions when during the proceedings the Tribunal omitted some issue/question which ought to have been decided in the specific award. As for the art. 50, it concerns the interpretation of an award rendered when the parties have some dispute because of their different understanding of some parts of an award. The next remedy embraced in the ICSID Convention is art. 51, which qualifies party to apply restriction of a rendered award after the discovery of “some fact of such a nature as decisively to affect the award”<sup>3</sup>. Finally, the last and at the same time most interesting for this work remedy is provided in art. 52 of the ICSID Convention. This article gives a ground to the formation of the *ad hoc* Committee which consists of three arbitrators appointed by the Chairman among the members of the Panel of Arbitrators. This *ad hoc* Committee can annul an award partially or fully in case one or more of the grounds mentioned in art. 52 are met, i.e. if the tribunal was not properly constituted; the Tribunal manifestly exceeded its powers; corruption was present on the part of a member of the Tribunal; serious departure from a fundamental rule of procedure was present; or the award has failed to state the reasons on which it was based.

Before analysing each of the grounds, in order to discern them better, one should look into the history of the adoption of those grounds for annulment and the discussions which surrounded the works on article 52.

Adopting the ICSID Convention was not an easy endeavour and it was preceded by the five years of negotiations, during which preparatory work conducted by the World Bank workers, the Regional Consultative Meetings of Experts and meetings of a Legal Committee which was assembled out of representatives from countries which were interested in adopting the Convention<sup>4</sup>. The final version of the Convention was approved on 18<sup>th</sup> of March 1965 and entered into force on 14<sup>th</sup> of October 1966.

The grounds for the annulment regulation in the Convention came out in 1953 while works on the United Nations International Law Commission Draft Convention on Arbitral Procedure were under way. That work was aimed to codifying already

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<sup>3</sup> ICSID, article 52.

<sup>4</sup> *Background paper on annulment for the Administrative Council of ICSID*, electronic version, p. 4, source: [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment\\_English.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf) last accessed on 25.05.2015.

existing arbitration procedure law when states were the parties<sup>5</sup>. It was agreed that awards rendered under the Convention should be final, but at the same time there should be remedies which ought to be “exceptional remedies calculated to uphold the judicial character of the award as well as the will of the parties as a source of the jurisdiction of the tribunal”<sup>6</sup> moreover it was sought to give parties at least some instruments to prevent “excess of jurisdiction and injustice”<sup>7</sup>. It was equally discussed whether there should be the prospect of an appeal which could be used in order to challenge an award. The result of the discussion can be seen today in the lack of such a regulation, but still, International Law Commission agreed on the possibility to challenge awards on narrow bases<sup>8</sup>. The principle of challenging awards on separate basis was present in the doctrine for a long time, for instance, it was presented earlier by Pufendorf: “But the statement that one has to abide by the decision of the arbitrator, whether it is just or not, must be taken with a grain of salt. For just as we cannot refuse to stand by the decision which has been against us, even though we had entertained higher hopes for our case, so his decision will surely not be binding upon us if it is perfectly obvious that he connived with the other party, or was corrupted by presents from him, or entered into an agreement to defraud us. For whoever clearly leans to one side or the other is unfitted to pose as an arbitrator”<sup>9</sup>.

What body was ought to decide upon the annulment of awards? It was meant to be the International Court of Justice<sup>10</sup>.

The annulment provision in the ILC Draft Convention stated that an award may be challenged when i.e. the Tribunal exceeded its powers; one of the members of the tribunal was corrupted or serious departure from a fundamental rule of procedure was present.

The discussion also concerned the scope of the portrayed grounds, for example, that an excess of jurisdiction could constitute a grounds for annulment, but on the other hand, that misapplication of the law could not lead to annulment<sup>11</sup>.

The culminating result of the work did not give any definition of each ground of annulment, but there was still an exception embodied in adopting the ground of failure of the Tribunal to state the reasons for the award<sup>12</sup>.

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<sup>5</sup> *Yearbook of the International Law Commission* 211, U.N. Doc. A/CN.4/SER.A/1953/Add.1, Article 30 of the Draft Convention on Arbitral Procedure.

<sup>6</sup> *Yearbook of the International Law Commission* 211, U.N. Doc. A/CN.4/SER.A/1953/Add.1 note 15, 202.

<sup>7</sup> *Supra* note 15, p. 298.

<sup>8</sup> *Supra* note 15, p. 205.

<sup>9</sup> S. Pufendorf: *De Jure Naturae et Gentium*, Oldfarber Translation, 1688 edition, Oxford 1934, Vol. II, book V, p. 829.

<sup>10</sup> Article 31 of the Draft Convention on Arbitral Procedure.

<sup>11</sup> *Yearbook of the International Law Commission* 84, U.N. Doc. A/CN.4/SER.A/1952; 1953 ILC Yearbook I, note 17, p. 44.

<sup>12</sup> *Yearbook of the International Law Commission* 66, U.N. Doc. A/CN.4/SER.A/1952/Add.1; 1953 ILC Yearbook II, note 15, p. 205.

Having this background of the ILC Draft Convention, the work on the Preliminary Draft ICSID Convention commenced. It needs to be stressed that the first draft of the ICSID Convention did not have any provision on annulment, notwithstanding it was included in the Preliminary Draft of Convention on the Settlement of Investment Disputes between States and Nationals of other States<sup>13</sup>. The Preliminary Draft in section 13 (1) included such a provision on annulment listing situations of exceeding powers by the Tribunal; corruption of the member of the Tribunal; the serious departure from a fundamental rule of procedure was committed and here the ground of a failure of stating the reasons for the award was present.

Commentary to Section 13 described the aim of the rule as emphasising the need to underline the finality of an award and as a result of the absence of an appeal mechanism, nonetheless it allowed for revision of the award if some of the points from article 13 were present<sup>14</sup>.

Forming the Convention was furthermore a work of local representatives in the Regional Consultative Meetings, who made some suggestions to the Preliminary Draft of the ICSID Convention also in the area of grounds of annulment. What was noticeable is that Aron Broshes, who occupied the post of General Counsel of the World Bank, strongly discouraged making comparisons to commercial arbitration, by stating: “it had been fully recognized that only limited recourse had been provided and that acceptance of the binding character of the award went beyond what was normally expected in respect of an arbitral tribunal”<sup>15</sup>.

Aside from the above mentioned, there was a proposal to add to the ground of “serious” misapplication/misuse of law or trying to present failure to apply the proper law<sup>16</sup>. Chairman Broshes answered that according to him a mistake of law as a ground for annulment was not a good idea, because “a mistake of law, as well as a mistake of fact, constituted an inherent risk in a judicial or arbitral decision for which appeal was not provided”<sup>17</sup>. He was presented with the counter argument that situation can be different if parties agreed that particular law will be applicable and the Tribunal simply applied another one and as a result the Tribunal will go against arbitration agreement<sup>18</sup>. Among others, there was also an interesting proposal to adopt the wording “a serious departure from the principles of natural justice”<sup>19</sup>. In response, Chairman Broshes explained that such a ground as breaking “fundamental rule of procedure” already included principles of natural justice<sup>20</sup>.

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<sup>13</sup> *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States Vol. I–IV* (1970), 14, Vol. II, p. 19.

<sup>14</sup> *Ibidem*, p. 218.

<sup>15</sup> *Ibidem*, p. 423.

<sup>16</sup> *Ibidem*, p. 423 and 517.

<sup>17</sup> *Ibidem*, p. 518.

<sup>18</sup> *Ibidem*, p. 518.

<sup>19</sup> *Ibidem*, p. 517.

<sup>20</sup> *Ibidem*, p. 480.

On the foundation of the discussion conducted at the regional Consultative Meeting, the Draft of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which included annulment mechanism, was taken into account in a particular case by the Legal Committee<sup>21</sup>. The grounds for annulment were presented in article 55 (1) and such provisions as improper constitution of the Tribunal; manifest excess of powers by the Tribunal; corruption of a member of the Tribunal; serious departure from a fundamental rule of the procedure; failure to state the reasons for the award, unless the parties agreed for that vast amount of useful interpretative information was advanced during the Legal Committee Meetings in 1964. There was a clarification of the meaning of the additional ground of improper constitution of the Tribunal for example mechanism was intended to be used when there was no binding agreement between the parties, an investor not a national of a party or a member of the tribunal was not entitled to be an arbitrator<sup>22</sup>.

Chairman Broches stated that failure to apply the law which was chosen by the parties could result in the excess of power<sup>23</sup>.

Few words were also said about the corruption by a member of the Tribunal. There was the proposal to change word “corruption” with the word “misconduct”<sup>24</sup> which obviously has a wider meaning and this proposal was not accepted.

A further suggestion was to have an independent ground of annulment according to which both parties must have a fair hearing, but this suggestion was not accepted either<sup>25</sup>.

The final stage started after the Legal Committee’s meetings and resulted in the formation of the Revised Draft Convention on the Settlement of Investment Disputes. It included art. 52 which furnished following grounds of annulment: a) the Tribunal was not properly constituted; b) the Tribunal manifestly exceeded its powers; c) a member of the Tribunal was corrupted; d) a serious departure from a fundamental rule of procedure occurred; e) the award did not state the reasons on which it was based<sup>26</sup>.

Almost all of the art. 52 proposals were the same and became a part of the ICSID convention apart from the modification made to subsection 1 (e), because parties were no longer the question of agreeing to not giving reasons of an award<sup>27</sup>.

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<sup>21</sup> *Ibidem*, p. 610.

<sup>22</sup> *Background paper on annulment for the Administrative Council of ICSID*, electronic version, p. 9, source: [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment\\_English.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf).

<sup>23</sup> *Background paper on annulment...*, *op. cit.*, p. 10.

<sup>24</sup> *Ibidem*, p. 851.

<sup>25</sup> *Ibidem*, p. 853.

<sup>26</sup> *Ibidem*, p. 926.

<sup>27</sup> *Background paper on annulment for the Administrative Council of ICSID*, electronic version, p. 101, source: [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment\\_English.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf).

#### 4. PRESENT DEVELOPMENT OF THE ARTICLE 52 (1) OF THE ICSID CONVENTION

As it was articulated above the ICSID annulment mechanism is unique in its nature because it excludes any challenge of an award before courts of particular countries and as a result is regulated only internally by the ICSID Convention.

This approach is apparent from an article 53 (1) of the Convention, which clearly states that the ICSID awards are binding on the parties to the arbitration and are not to be subject to any appeal or any remedy except the provisions provided in the Convention. Going even further the ICSID Convention in art. 54 (1) is providing that country party to the Convention should recognise finality, the binding force of an award and by that is excluding the possibility of reviewing awards by domestic courts of Countries-parties of The Convention. The request for annulment proceeding, according to art. 52 (2) can be issued by one of the parties in a period of 120 days counting from the date when the award was rendered. There is an exception when the ground of possible annulment is a corruption — than 120 days is counted from the date when the corruption came to know but within three years taken from the date of the Tribunal's rendering of the award.

Annulment is concerned only with a legitimacy aspect of issuing an award and by that is not taking into account, at least in theory, substantive issues of the specific case. On the other hand, an appeal can be aimed at giving new decision instead of old one and the role of annulment is mere to eliminate examined decision — judging on that the ICSID Committee cannot render its own decision<sup>28</sup>.

As the *Ad hoc* Committee in annulment decision in Klöckner I elaborated:

“It should be recalled that as a rule an application for annulment cannot serve as a substitute for an appeal against an award and permit criticism of the merits of the judgments rightly or wrongly formulated by the award. Nor can it be used by one party to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments”<sup>29</sup>.

It should be underscored that according to the practice of *ad hoc* Committees it is not their obligation to annul an award if they find the grounds listed in the article 52 (1). What they have is the authority to do this, as it was mentioned by the Committee decision in Vivendi case:

“Finally, it appears to be established that an ad hoc committee has a certain measure of discretion as to whether to annul an award, even if an annulable error is found. Article 52(3) provides that a committee “shall have the authority to annul

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<sup>28</sup> R. Dolzer, C. Scheuer: *Principles of International Investment Law*, Oxford: Oxford University Press, 2008, p. 302.

<sup>29</sup> *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (Klöckner I)*, ICSID Case No. ARB/81/2, Decision of the ad hoc Committee, para. 83.



the award or any part thereof”, and this has been interpreted as giving committees some flexibility in determining whether annulment is appropriate in the circumstances. Among other things, it is necessary for an *ad hoc* committee to consider the significance of the error relative to the legal rights of the parties”<sup>30</sup>.

Turning to a closer analysis of the grounds of annulment, first mentioned in an art. 52 (1) is not the proper constitution of the Tribunal. In practice, this ground of the annulment is rarely used<sup>31</sup>. The tribunal can be constituted in not a proper way when articles 38 and 39 of ICSID Convention were violated, to be more precise for example when the arbitrator is the national of the host state<sup>32</sup>.

Another ground for annulment can be a violation of art. 14 (1) of the Convention, it is present when a person designated to be an arbitrator — to serve in Panel of Arbitrators, is not properly qualified, so for example, does not have proper education, is not a person of high moral standards. One should bear in mind that arbitrators who do not serve as members of Arbitration Panel according to the article 40 (2) should also possess mentioned qualities<sup>33</sup>.

The second ground for annulment is the Tribunal’s manifest exceeding its powers. An excess of powers is present when, in its award, the Tribunal is, to put it plainly, doing more than it should, so when it deviates from the arbitration agreement concluded between the parties i.e. the situation when the Tribunal is issuing a decision on merits even though it does not have the jurisdiction<sup>34</sup>.

The main point of this regulation is to give a ground for an annulment of the award when an excess of the powers conducted by the Tribunal is manifest. As it was mentioned in part concerning the historical development of the topic, the word “manifestly” was appended during the works on the ILC Model Rules. According to Christoph H. Schreuer, that word relates to “the seriousness of the excess or the fundamental nature of the rule that has been violated”<sup>35</sup> to go further action understood as excess must be obvious and should not be a question of interpretation in one or another way. This approach was adopted in *ad hoc* Committee decision in *CDC v. Seychelles*, where it was stated that:

“even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal’s conduct, if susceptible of argument »one way or the other«, is not manifest”<sup>36</sup>.

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<sup>30</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, Decision on annulment, 3 July 2002, para. 66, Omitted footnote 58.

<sup>31</sup> C.H. Schreuer: *The ICSID Convention*. [Online]. 2nd ed. Cambridge: Cambridge University Press 2009, p. 935.

<sup>32</sup> *Ibidem*, p. 936.

<sup>33</sup> *Ibidem*, p. 936.

<sup>34</sup> R. Dolzer, C. Schreuer: *Principles of International Investment Law*, *op. cit.*, p. 304.

<sup>35</sup> *Ibidem*, p. 938.

<sup>36</sup> *CDC v. Seychelles*, Decision on annulment, 29 of June 2005.



There is a discussion concerning the way of defying whether the excess was manifest or not, but generally, two approaches are used in *ad hoc* Committee practice<sup>37</sup>. The first approach, consisting of the two steps is to see whether or not there was an excess of the powers and the second step is to see if this excess was of manifest character<sup>38</sup>. The second method is just to check if any probable excess of powers was manifest if the answer is no — no further action in that direction is taken<sup>39</sup>.

An example from practice, when the jurisdiction was a question of a manifest excess of powers is illustrated in *Mitchell v. Congo* case. In that case, the request for the annulment stated that the Tribunal exceeded its powers manifestly by granting the jurisdiction in spite of the fact that the dispute did not arise from an investment. Case concerned legal counselling company and her actions were found by an *ad hoc* Committee as such that did not contribute to the economic development of the host State and as a result, cannot be seen as an investment under ICSID Convention. The Committee came to the conclusion that the Tribunal exceeded manifestly its powers by assuming jurisdiction even though investment as such was not present<sup>40</sup>.

In *Vivendi* case, the *ad hoc* Committee stated that ICSID Tribunal exceeded its powers manifestly also in the situation when “it fails to exercise a jurisdiction which it possesses”<sup>41</sup>.

Article 52 (1), does not provide any grounds for the annulment when the Tribunal failed to apply the law chosen by the parties. But as a part of the arbitration agreement it is of the great importance, therefore the application of law different than that chosen by the parties can constitute the manifest excess of powers, so be the ground for annulment. Still, as it was mentioned before, mere error in the application of law chosen by the parties cannot constitute annulment of the award<sup>42</sup>.

In art. 51 (1) (c) the next ground of the annulment is designated. The award can be annulled as a result of the corruption of one of a member of the Tribunal. The corruption must be confirmed and not only inferred in order to be the valid ground for the annulment. Dishonest dealings will be present for example when an arbitrator will receive and accept some compensation which is improper. The conversation between the parties and the arbitrator outside the official situations demanded by the procedure can be seen as a break of the procedure but cannot be seen as a corruption itself<sup>43</sup>. If an arbitrator has a business connection with one of the parties and can

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<sup>37</sup> *Ibidem*, p. 940.

<sup>38</sup> *Ibidem*, p. 940.

<sup>39</sup> *Ibidem*, p. 940.

<sup>40</sup> *Mitchell v. Congo*, Decision on Annulment, 1 november 2006, par. 22–49.

<sup>41</sup> *Vivendi v. Argentina*, 21 November 2000, par. 86.

<sup>42</sup> This approach was taken, for example in Annulment Committee decision from 3 of may 1985, *Klökner v. Cameroon*, par. 60–61; *Mitchell v. Congo*, Decision on annulment, 5 February 2002; *Duke Energy Intl. v. Peru*, Decision on Annulment, from 1 of march 2011, par. 212 etc.

<sup>43</sup> *Schrüer...*, *op. cit.*, p. 974–975.

benefit from the proceedings, fail to disclose that information and accepted appointment as an arbitrator, this can be seen as corruption<sup>44</sup>.

Next ground for the annulment takes place when a serious departure from a fundamental rule of procedure. Literal analysis of the art. 52 (1) (d) show that in order to have this ground for the annulment there should be a serious departure from the rule of procedure — a departure from fundamental one.

The example of the fundamental rule is the right to be heard. It is guaranteed by the ICSID Convention in numerous articles e.g. 37, 42, 49.

In practice, the violation of this rule was analysed by the Annulment Committee in *Amco II* case. The *Ad hoc* Committee annulled a supplement award, because it found a violation of Arbitration Rule 49 (4), stating that the party should have a chance to make its observations in order to ask for rectification or supplementation of an award<sup>45</sup>.

As for the rule being fundamental, it means that breaking that rule will be targeted at the fairness of the proceedings. This approach was presented in many Annulment Committee's decisions<sup>46</sup>.

Another rule which was the subject of the Annulment Committee decision is a lack of deliberation. The requirement of the deliberation is not explicitly articulated in Rules, but still, the Arbitration Rule 15 is saying that deliberations have to be performed in private and also been secret. In *Klöckner I*, the *ad hoc* Committee stated that this rule is a basic rule of procedure and need to be observed, but still in the case did not found that it had been broke<sup>47</sup>.

Last but not least, the final ground for the annulment is a failure to state the reasons of rendered award. The aim of this demand is to show to the parties the way in which the Tribunal came to conclusions in the award. Article 48 (3) of ICSID Convention put a duty on arbitrators to give reasons for award, so it is quite obvious that it is hard to find an award without any reasoning, but of course, parties tend to be not satisfied with the quality of the reasoning on some specific points included in the award and often use it as a ground for the request of an annulment<sup>48</sup>. *Ad hoc* Committee in *Vivendi* case presented the following approach:

“In the Committee's view, annulment under Article 52 (1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often

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<sup>44</sup> *Ibidem*, p. 978–979.

<sup>45</sup> *Amco v. Indonesia*, (*Amco II*) *Decision on Annulment*, 3 December 1992, paras. 9.08.

<sup>46</sup> For example *Wena v. Egypt*, *Decision on Annulment* from 5 of February 2002, par. 56; *CDC v. Seyshelles*, *Decision on Annulment*, 29 June 2005, par. 49.

<sup>47</sup> *Klöckner v. Cameroon*; *Decision on Annulment*, 3 May 1985, par. 84.

<sup>48</sup> R. Dolzer, C. Scheuer: *Principles of International Investment Law*, *op. cit.*, p. 307.

struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations"<sup>49</sup>.

According to art. 48 (3) of the ICSID Convention the Tribunal has an obligation to deal with every issue which parties submitted to it, but the failure to do so is not included in article 52 (1) of the Convention so as a result this omission is often dealt on basis of failure to provide the reasons for the award. This does not mean that the Tribunal is obliged to answer every even smallest argument. It should take into account crucial arguments, so those which if accepted would influence the Tribunal's decision<sup>50</sup>.

## 5. THE CONTEMPORARY SITUATION OF THE SETTING ASIDE THE AWARDS IN THE INTERNATIONAL COMMERCIAL ARBITRATION

International commercial arbitration differs in its nature from international investment arbitration mainly because of its dependence on national legal systems, i.e. it is not closed — hermetic system as the one proved by the ICSID.

Starting from the Geneva Protocol of 1923 and the Geneva Convention of 1927 international commercial arbitration was strongly tied to national systems. Article 2 of the Geneva Protocol stated that the procedure of the arbitration "shall be governed by the will of the parties and by the country in whose territory arbitration take place" in addition there is a requirement that issued award should be final according to law of the country where the arbitration took place, as a result, it means that the award in order to be final had to be recognised — enforced in the country where it was rendered. Nowadays this approach has almost vanished but for the needs of this work, it is giving a solid example of the connection between international commercial arbitration and domestic laws.

The situation changed when one of the most successful Conventions was adopted in 1958 — the New York Convention. The role of the courts was minimised and by that international commercial arbitration was, at least in theory, more independent from national laws.

The New York Convention in its article V (1) gives an exhaustive number of grounds of setting aside awards. According to its wording award, which has not yet become binding, an award which was suspended by a competent authority of the country where it was issued, has been set aside by the court of the seat of arbitration, may be refused recognition and enforcement.

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<sup>49</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, Decision on annulment, 3 July 2002, par. 65.

<sup>50</sup> *Ibidem*, p. 308.

It should be noticed that according to the system, the award can be annulled only by the courts of the seat of arbitration because they have primary jurisdiction and as a domestic court they will also use domestic laws — domestic arbitration acts. Going further, the courts of other countries, where the party tries to enforce an award cannot annul it, but can just simply not enforce it.

Here the distinction between the award, which cannot be enforced and annulled award must be underlined as one of the features of international commercial arbitration. The scale of non-enforcement is mere domestic, so award cannot be enforced in the exact country. On the other hand, based on the New York Convention, the annulment of the decision has its consequences in supranational level. Article V (1)(e) by using the word “may” is giving a choice to domestic courts in choosing to enforce or not award which was set aside.

Parties in order to have certainty that award is final and neither of them will go to the court in order to challenge the award, can put into their arbitration agreement provision excluding or just limiting to some aspects possibility of judicial review. This possibility is not given by every domestic system, but still can be tracked, *i.e.* in the Swedish Arbitration Act in art. 51. Although according to this article this option is only given when both parties of an arbitration are not domiciled or neither of them has a place of business in Sweden. This possibility is very valuable and useful for the parties because they can form arbitration in their arbitration agreement like a lego bricks construction in which also this element is up to them.

Review of awards in international commercial arbitration is in general limited to some scope. Most of the institutional arbitration rules provide limitations on judicial review of an arbitral award. To give an example, the London Court of International Arbitration in its Arbitration Rules (art. 26.9, 27.1), International Chamber of Commerce in its Rules of Arbitration (art. 28 (6), 29 (2)) and both of them limit the scope of the review to some procedural errors.

In practice review of the awards is possible, as was mentioned, in the court of the seat of arbitration — which can annul the award and court of the country where a party seeks to enforce an award. Appeal on the merits is generally excluded and as a result, arbitration acts are often eliminated, in theory at least, the possibility of substantive review.

One can say, however, that substantive review is incorporated into international commercial arbitration by presenting as one of the grounds of setting aside an award by the inclusion of public policy, which is taking into account domestic regulation and is an open door to substantive review. After all, as it was famously said:

“Public policy it is an unruly horse and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail”<sup>51</sup>.

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<sup>51</sup> J. Burroughs in: *Richardson v. Mellish*, 2 Bing. 229 (1824) at 303.

As a result, each country can try to infer the award by using a wide interpretation of the public policy and by that even perform a substantive review.

## 6. THE PRACTICE OF REVIEW OF AWARDS UNDER THE ICSID CONVENTION

Some time ago, it has become a very habitual thing for the parties which have lost in arbitral proceedings to turn to annulment proceedings by putting the request for annulment often on the basis of more than one of the grounds laid in the art. 52 in order to succeed<sup>52</sup>.

Examples of such cases are: *Sempra v. Argentina* annulment procedure where Argentina in annulment request puts more than one ground for annulment of an award<sup>53</sup>, *Enron* case where more than one ground was presented in annulment request<sup>54</sup>. Some of the cases used even all of the five grounds, an example of such case is *Vivendi II*<sup>55</sup>.

One of the heavily criticised approaches used by the ad hoc Committees is a wide interpretation of the annulment grounds, even though Annulment Committees tend to underline that those grounds need to be interpreted in a restrictive way. This approach in some cases seems to be a memorised line which has to appear needed or not. This kind of practice is most vividly noticeable in analyses performed Committees referring to two “popular” grounds of the annulment: an excess of powers by the failure to apply law chosen by the parties and a serious departure from a rule of procedure<sup>56</sup>.

As it was mentioned the tribunal can excess its powers by the failure to apply the law, chosen by the parties in an arbitration agreement. As stated above, mere error in the application of the law is not enough to annul an award. However, in practice, this distinction can be problematic. Apart from the simple problem of not applying any particular law, second appearing question is concerned with the failure to apply a rule of law<sup>57</sup>.

In *AMCO v. Indonesia* case, *ad hoc* Committee in its decision annulled the award because the tribunal did not apply the provision of Indonesian Investment Law<sup>58</sup>.

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<sup>52</sup> C. Schreuer: *From ICSID Annulment to Appeal — Half Way Down the Slippery Slope*, The Law and Practice of International Courts and Tribunals 10 (2011), source: [http://www.univie.ac.at/intlaw/wordpress/pdf/lape\\_010\\_02\\_211\\_225.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/lape_010_02_211_225.pdf), p. 212 (accessed last time on 24.05.2015).

<sup>53</sup> *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, par. 41.

<sup>54</sup> *Enron v. Argentina*, Decision on Annulment, 30 July 2010, ex. 185, 204, 214.

<sup>55</sup> *Vivendi II v. Argentina*, Decision on Annulment, 10 August 2010, par. 17.

<sup>56</sup> *Ibidem*, p. 216.

<sup>57</sup> *Ibidem*, p. 217.

<sup>58</sup> *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, paras. 97.

In *CMS v. Argentina* case Annulment Committee held, differently than in *AMCO* case, as following:

“Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers”<sup>59</sup>.

In the annulment proceedings in *Sempra v. Argentina*, Committee used a similar approach to this adopted in *CMS* case, but the result was different. *Ad hoc* Committee stated:

“The Tribunal simply replaced Article XI of the BIT with the state of necessity under customary international law which, as explained, differs substantially from the former as to its sphere of operation, nature and functioning, content, scope and effects. The Tribunal did not apply Article XI of the BIT, thus manifestly exceeding its powers”<sup>60</sup>.

As one can read from the passage, Annulment Committee found that Article XI of the BIT is different than provisions from ILC articles. Thereby the application of Article 25 of the ILC Articles instead of Article XI of the BIT, which, according to Tribunal was here first law to apply, the Tribunal correctly identified the law but accepted the wrong approach to the relationship between those two. The *ad hoc* Committee concluded that the Tribunal has manifestly exceeded its powers and as a result, it can be a ground of the annulment<sup>61</sup>. According to Professor Schreuer, Committee in *Sempra v. Argentina* made two assumptions. First one was that by failing to apply one particular norm of the applicable laws the Tribunal failed to apply the law as it is and by that exceeded its powers, and, secondly, by its erroneous interpretation of the one applicable rule using another rule, caused a lack of application of the first one<sup>62</sup>. By doing so the Committee in *Sempra* case seems to forget about the distinction between failure to apply the law, which is traditionally ground for annulment, and improper application of the law chosen<sup>63</sup>.

It should be mentioned that the Committee in the annulment decision is admitting this approach by stating:

“As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers”<sup>64</sup>.

A similar approach was adopted in *Enron v. Argentina* which is often given as an example of the wide interpretation of the excess of powers in the annulment proceedings. The Annulment Committee in the first step found that the Tribunal

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<sup>59</sup> *CMS v. Argentina*, Decision on Annulment, 25 September 2007, par. 136.

<sup>60</sup> *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, par. 126.

<sup>61</sup> *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, paras. 125–126.

<sup>62</sup> *Ibidem*, p. 219.

<sup>63</sup> *Ibidem*.

<sup>64</sup> *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, par. 164.

correctly recognised art. 25 of the ILC Articles as applicable, but the *ad hoc* Committee expressed its concerns as for the interpretation adopted by the Tribunal:

“The Committee concludes that in determining that the measures adopted were not the »only way«, the Tribunal did not in fact apply Article 25 (1)(a) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue. In all the circumstances the Committee finds that this amounts to a failure to apply the applicable law, as ground of annulment (*sic*) under Article 52 (1)(b) of the ICSID Convention”<sup>65</sup>.

By stating that the Annulment Committee simply ignored the fact that the Tribunal identified the law correctly and applied it, but still *ad hoc* Committee was concerned about the interpretation of the rule identified and even explained in the decision what should be the proper way of interpretation, step after step:

“The Tribunal’s process of reasoning should have been as follows. First, the Tribunal should have found the relevant facts based on all of the evidence before it, including the Edwards Report. Secondly, the Tribunal should have applied the legal elements of the Article 25(2)(b) to the facts as found (having if necessary made legal findings 159 as to what those legal elements are). Thirdly, in the light of the first two steps, the Tribunal should have concluded whether or not Argentina had »contributed to the situation of necessity« within the meaning of Article 25(2)(b)”<sup>66</sup>.

The most interesting fact is that the issue was not even raised by the party seeking the annulment and as a result, it was the *ad hoc* Committee’s decision to analyse the question.

Based on those two decisions, it is noticeable how wide and far reaching in consequences an interpretation of article 52 of the Convention can be. The *ad hoc* Committees transformed failure to use the proper law into the failure of wrong application/interpretation of the single rule.

The second ground, often discussed by the ICSID Annulment Tribunals, is a serious departure from the fundamental rule of procedure. A good example of a wide interpretation of this ground can be again the annulment decision in *Enron v. Argentina*. The Committee accepted Argentina’s objection that accepting the expert opinion when it was filed after the time was a violation of the parties’ agreement concerning the submission of the evidence<sup>67</sup>. According to the *ad hoc* Committee the Tribunal by this action violated the rule of party autonomy, which is seen as a fundamental rule of procedure and because of that that violation can be the ground for the annulment:

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<sup>65</sup> *Enron v. Argentina*, Decision on Annulment, 30 July 2010, par. 377.

<sup>66</sup> *Ibidem*, par. 393.

<sup>67</sup> *Enron v. Argentina*, Decision on Annulment, 30 July 2010, par. 194.



“The Committee does not doubt that the principle of party autonomy is a fundamental rule of procedure, and paragraph 19.1 of the minutes of the First Session records an agreement of the parties on a procedural matter”<sup>68</sup>.

In its further deliberation, the *ad hoc* Committee did not find that allowing admission of the expert’s report mounted to a serious violation of the fundamental rule of procedure<sup>69</sup>.

Once more this decision can be given as the perfect example of an expansion of the grounds for annulment by their wide interpretation. Even the minor issue, agreed by the parties can be perceived as a use of the rule of a party autonomy. By such a wide interpretation any procedural rule can be connected to some fundamental principle and as a result violation of this, every procedural rule can cause the annulment of an award<sup>70</sup>.

From the first annulment decision, the *ad hoc* Committees tend to have a very wide definition of what is up to them to examine and to decide. Annulment Committees tend to take into consideration issues, which were not presented by the party.

An example of taking into account questions, which were not asked to be examined, has already partly been presented while discussing *Enron v. Argentina* annulment decision. Despite the fact that Argentina presented more than one ground for the annulment, the *ad hoc* Committee took into account also the question of the party autonomy and even submitted it by stating:

“Although Argentina includes this argument under the heading of breach of the principle of equality of the parties and denial of the right of defence, the Committee has additionally considered the argument as an alleged breach of the principle in ICSID Arbitration Rule 20(2)”<sup>71</sup>.

The Annulment Committee by this wording admits that Argentina mentioned the argument under different “heading” and that the Committee took the possibility of breaching party autonomy rule *ex officio*.

In the other part of the decision *ad hoc* Committee examined *ex officio* also the question of partiality:

“However, Argentina has not expressly sought to rely on Article 52 (1)(d) as a ground for annulment of the portions of the Award dealing with.... Nor in the Committee’s view has it 114 demonstrated that any findings or reasoning of the Tribunal were in the circumstances such as to establish the existence of partiality justifying annulment under Article 52 (1)(d)”<sup>72</sup>.

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<sup>68</sup> *Ibidem*, par. 195.

<sup>69</sup> *Ibidem*, par. 196.

<sup>70</sup> C. Schreuer: *From ICSID..., op. cit.*, p. 222.

<sup>71</sup> *Enron v. Argentina*, Decision on Annulment, 30 July 2010, par. 195.

<sup>72</sup> *Ibidem*, par. 278.

It should be stressed that the award was annulled on the basis of failure to apply the applicable law, so on the basis of article 52 (1)(b)<sup>73</sup>, while Argentina claimed that the actions of the Tribunal mount failure to state the reasons:

“(j) The reasons provided by the Tribunal in relation to the requirements of the state of necessity under customary international law were contradictory and insufficient, which warrants annulment of the Award pursuant to Article 52 (1)(e) of the ICSID Convention”<sup>74</sup>.

Apart from this the Committee also concluded that the Tribunal failed to state the reasons for the award:

“[...] it is not apparent from the reasoning in the Award how or why the Tribunal came to that legal conclusion. Even if, contrary to all appearance, the Tribunal did apply the “only way” requirement in Article 25 (1)(a), the Committee considers that the Tribunal failed to state reasons for its decision. This constitutes a ground for annulment under Article 52 (1)(e) of the ICSID Convention”<sup>75</sup>.

The next point which should be mentioned is that it is not unusual to see in annulment decisions a lot of extra information which seem to be more like a lecture<sup>76</sup>.

*Vivendi II v. Argentina* annulment proceedings are more than a good example. Firstly, the Committee discussed the question of the annulment and afterwards served an extra piece of information about the arbitrator’s work:

“The ad hoc Committee is aware of its grave responsibility in matters of this nature. They concern not only the continued validity of the Second Award but, as already mentioned, more particularly the integrity of the ICSID process as a whole, which is the clear and undisputed underlying concern of Article 52 of the ICSID Convention”<sup>77</sup>.

Another decision which is an excellent example of “giving advices” to the arbitrators by the Committee is *Fraport v. Philippines* case. The Committee criticised the way of the interpretation of the BIT by the Tribunal:

“The Tribunal relied heavily on the Philippines’ Instrument of Ratification to determine whether Fraport’s investment fell within the meaning of the BIT. The Vienna Convention on the Law of Treaties is directly applicable to the interpretation of the BIT. However, the Tribunal did not provide any explanation based on the Vienna Convention for attaching so much importance to the Instrument, in its determination of the scope *ratione materiae* of the BIT and its jurisdiction”<sup>78</sup>.

The Committee did not annul the award by stating that despite some reservations towards the interpretation, the procedure is of annulment character, as a result,

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<sup>73</sup> *Ibidem*, par. 378–379.

<sup>74</sup> *Ibidem*, par. 353 (j).

<sup>75</sup> *Ibidem*, par. 378.

<sup>76</sup> C. Schreuer: *From ICSID..., op. cit.*, p. 223–224.

<sup>77</sup> *Vivendi II v. Argentina*, Decision on Annulment, 10 August 2010, par. 206.

<sup>78</sup> *Fraport v. Philippines*, Decision on Annulment, 23 December 2010, par. 99.

differs from the appellate mechanism and that is why the Committee is not in power to decide which interpretation is a valid one<sup>79</sup>.

On the basis of the presented analysis of some flag cases, the tendency towards the wide and extensive interpretation of an article 52 can be noticed even though *ad hoc* Committees are hiding behind the “fence of the words” that the interpretation is narrow.

## 7. PROBLEMATIC ISSUES OF SETTING ASIDE AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION

International commercial arbitration is also struggling with problems of annulment nature. As it was mentioned international commercial arbitration is more connected and therefore depends more on domestic courts. The New York Convention of 1958 can be called “the guard” trying to put an order into the system, but is this working in practice?

There are several cases in which one can notice: 1) a departure from the traditional understanding of setting aside the award by the courts of the country of the seat of arbitration; 2) substantive review of the rendered awards by national courts of the country of an enforcement is present.

The first country whose courts seem to have a different approach to the setting aside awards is France. In Article 1502 of the French New Code of Civil Procedure are stated grounds for the annulment of the arbitral awards. Mainly problems appear in two following areas: 1) arbitrator ruled contrary to an assignment given to him by the parties, and 2) the enforcement of the award would violate the international public order. Based on that parties often brought before the French Courts that the tribunal did not manage to provide appropriate reasoning in the award or on the other hand this reasoning was against mentioned international public policy. These kinds of questions allowed French Courts to examine also substantive matters included into the award<sup>80</sup>.

An example of such a case can be *Societe et Maitre v. Societe Ortec*<sup>81</sup>. The case was based on the notion that reasoning included in the award was contradictory. The main issue of the case was the amount of money to be paid according to the construction contract which was amended. Appellant argued that the Tribunal has not properly calculated the amount to be paid because the calculation was based on the contract itself and not on the amendment. The Court of Appeal examined the reasoning of the Tribunal, accordingly performed the substantive review. At the end of the

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<sup>79</sup> *Ibidem*, par. 112.

<sup>80</sup> T.H. Webster: *Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication*, arbitration international, Vol. 22, No. 3, 2006, p. 436–437.

<sup>81</sup> Cour d'appel de Paris, Decision of 15 May 1997 (Ire Ch. C), (1998) *Revue de Arbitrage*.

story award was not annulled, but still, the line of the strictly procedural review was crossed<sup>82</sup>.

The heavily criticised case which is an example of interpretation problems in the area of the finality of the commercial awards is *Chromalloy v. Egypt* case decided by the US District Court for the District of Columbia. It concerned arbitration between Chromalloy and the State of Egypt. Rendered award was set aside by the Egyptian court, but in spite of that, the Court in the US declared that the arbitral award is enforceable and ignored the fact that the award was already set aside in Egypt, explaining it by the matters of US public policy<sup>83</sup>.

Next case worth to be mentioned is a case decided by the Amsterdam Court of Appeal, the *Yukos Capital v. Rosneft*. In the case, there were four awards, which were set aside by the Arbitrazh Court of the City of Moscow (orig. *Арбитражный Суд города Москвы*). The annulment was later confirmed by the Federal Arbitrazh Court of the District Moscow (orig. *Федеральный арбитражный суд Московского округа*) and the Supreme Court of the Russian Federation (orig. *Верховный Суд Российской Федерации*).

Subsequently, an attempt to enforce those awards in the Netherlands before the Amsterdam District Court was made. The Court refused to enforce the awards on the basis of article V 1 (e) of New York Convention, but second Court — Court of Appeal in Amsterdam had a different opinion. It reversed the decision of District court and by that enforced those four awards<sup>84</sup>. The Court of Appeal stated:

“[...] the Dutch court is in any rate not compelled to refuse the leave to enforce a set aside arbitral award if the foreign judgment under which the arbitral award was set aside, cannot be recognised in the Netherlands. This particularly applies if the manner in which said judgment was brought about does not satisfy the principles of due process and for that reason recognition of the judgment would lead to a conflict with Dutch public order”<sup>85</sup>.

Court of Appeal concluded that Dutch court is not obliged to refuse enforcement on the basis that it was set aside by the court of the country of awards origin if the judgement of the foreign court cannot be recognised in the Netherlands.

The Court of Appeal continued:

“Therefore the court of appeal will first follow general law to see whether the decisions of the Russian civil court to set aside the arbitral awards of 19 September 2006 can be recognised in the Netherlands”<sup>86</sup>.

After those considerations, Court of Appeal summed up that there was a high possibility that a Russian court could be “partial and dependent” that is why the

<sup>82</sup> Cour d'appel de Paris, Decision of 15 May 1997 (Ire Ch. C), (1998) *Revue de Arbitrage* — general analysis.

<sup>83</sup> A.J. van den Berg: *Enforcement of Annulled Awards?*, (1998) 9(2) *ICC intl Ct Arb. bull* 15, 18.

<sup>84</sup> A.J. van den Berg: *Enforcement of Arbitral...* — generally.

<sup>85</sup> *Yukos Capital SARL v. OAO Rosneft, Gerecht-shof Amsterdam* LJN BI 2451, 200.005.369 (28 April 2009) s.3.5; source: <http://iiiglobal.org/component/jdownloads/finish/170/4135.html> (Yukos).

<sup>86</sup> *Ibidem*, p. 3.6.

decision cannot be recognised in the Netherlands and by that award could be enforced<sup>87</sup>.

The ruling of Dutch court was one of many rulings concerning enforcement of the award in the Yukos case and most of them concerned the question of partiality of domestic courts in the Russian Federation<sup>88</sup>.

This “bite” of information about the inconsistencies in international commercial arbitration in the area of enforcement of awards and the attempts of some domestic courts to perform the substantive review of the awards, is showing how vastly dependable on the domestic laws of particular countries every award rendered by the international commercial tribunals, is.

Those few cases are not presenting the mainstream, they are a mere example of worst scenarios, which show the possible practice of using i.e. public policy as a key pass to the substantive review of the awards or as a way to overcome annulment of an award in the country where the seat of an arbitration was. Those different approaches to the problem in different countries cause unneeded inconsistency and form the market of countries where even annulled awards can be enforced. To cite Professor Albert J. van den Berg one doesn't want to have the situation when “[...] international arbitration would have to operate on the basis of the famous line in the 1942 movie Casablanca »We'll always have Paris«”<sup>89</sup>.

## 8. QUESTIONS AND ANSWERS?

Before writing this article the author thought that there is something wrong with the ICSID annulment system and maybe some answers can be found in the commercial arbitration system. To authors' surprise, the benefits could be mutual: there are possible solutions which can be used in commercial arbitration or at least in rules governing commercial arbitration which are present in the ICSID system and *vice versa*.

Nowadays one cannot say that some system is only for commercial arbitration. There are and most definitely will be many cases flagged as those of international investment character which are commenced under the SCC Rules, ICC Rules, UNCITRAL Model Law and by that will struggle with all the problems which are present in international commercial arbitration.

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<sup>87</sup> *Yukos...*, *op. cit.*, p. 3.10.

<sup>88</sup> To put forward representative case, one can name rulings of Court of Appeal for England and Wales: *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2012] EWCA CIV 855 (27 June 2012), source: <http://www.bailii.org/ew/cases/EWCA/Civ/2012/855.html>, and England and Wales High Court (Commercial Court): *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2014] EWHC 2188 (Comm), source: <http://www.bailii.org/ew/cases/EWHC/Comm/2014/2188.html>.

<sup>89</sup> A.J. van den Berg: *Should Setting Aside of the Arbitral Award be Abolished?*, ICSID Review 2014, p. 26.

The ICSID Annulment Committee was and is something new to arbitration market, especially in investment arbitration, because it gives an internal level of review. Forming the Annulment Committee has its logic in the frame of the ICSID system, because of its closed character, what gives a guarantee to its user, that the rendered award will not be subject to a review by the domestic courts of the countries parties to the Convention, with some exceptions concerning execution of the awards and issuing by the domestic courts decisions on interim measures.

Nowadays one can find few approaches to the *ad hoc* Committees and their practice. One of them is putting before us the question if there is a need at all for *ad hoc* Committees to exist owing to the fact that the only thing they do is introducing inconsistency into the ICSID system by the wide interpretation of article 52 of the Convention, producing decisions which are inconsistent with each other.

The second approach, which can be called semi-negative, is on the other hand, stating that the *ad hoc* Committee is half-way to success — there is a market need for something more than just an annulment mechanism, there is a need to form an appellate body which will fill the desolate space of the internal system of substantive review in investment arbitration.

The third approach is of a positive nature and states that the Annulment Committee is at the right place and at the right time and there is no need for a change. According to this approach, Annulment Committee is just what is needed nowadays and it performs its functions in a genuine way.

In order to understand each of this approaches one should show a lot of scientific empathy and try to see the reasons for each approach.

During the research, there were few cases presented where the ICSID Annulment Committees were acting like appellate courts and even though they were stating all the time that their role is not of an appellate character. It is more than obvious that their decisions included something more: they were stepping out of the boundaries between the simple use of proper law to the way of using it and giving instructions for future “generations” how to perform some duties during the arbitration step by step<sup>90</sup>. Judging on those decisions one should say that the Committees are not doing only annulment work and it is at most legit to say that in many cases the Annulment Committees were, in fact, appellate committees.

What is the possible solution to such a problem? One can say that liquidation of the *ad hoc* Committees, but is it possible? There are more and more investment arbitration proceedings under the ICSID Convention and judging on the rapid progression of the cases the role of the Annulment Committees will be bigger and bigger with each year. Taking out the possibility to have at least a procedural revision of an award with such a hermetic system as the ICSID system, can cause probable chaos and feeling of insecurity.

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<sup>90</sup> *Vide* commentaries to Enron Case etc.

What can be a possible solution for the one part of the criticism is to make stricter boundaries for the decisions on a formal level: to make the annulment decision forms in which there will be the special sections for every part of the decision and by that to make some guidelines for the *ad hoc* Committees in which strictly procedural way they should think. It could reduce the possibility of discussing things which Committees are not supposed to discuss, because at the end of the day parties are paying for the “words” which strictly concern their case.

What with the wide interpretation of the grounds for annulment from art. 52? The Author cannot see any solution to the problem of the wide interpretation of the annulment grounds, but it is worth to say that in some way this kind of interpretation is an evolutionary process which has already taken off.

A second approach which was called earlier, semi-negative, is demanding something more than the annulment mechanism — it is stating the need to form an appeal mechanism. What are the positive aspects of such a mechanism?

One of the arguments which seem to support the proposition of forming this kind of system is the consistency of the system. In its discussion about introducing the appellate solution, ICSID Secretariat underlined that it could “foster coherence and consistency in the case law”<sup>91</sup>. Further, it can be explained that investment arbitration is growing rapidly and the more cases the more inconsistencies. Forming an Appellate body would gather all those pieces and organise them. Through its decisions the Appellate body can form some strong basis, the framework of approaches for the consistent approaches at least to some certain issues, of course, there is no practical chance of making utterly organised system otherwise, arbitration will lose its uniqueness. Still, there will be some at least minimal psychological pressure on members of the Tribunal to use approaches which is generally accepted and by that to issue an award which will not be suppressed by the appellate mechanism.

A further argument for presenting an appellate mechanism can be the possible higher quality of awards, because even if an award will be the subject of appellate review, it will turn out to be better, at least in theory, because appeal structure is more qualified than the Tribunals<sup>92</sup>. This argument is not perfect because after all in reality parties will go from the one Tribunal to another which is also capable of making mistakes.

Forming the Appellate body can also cause an increase in trust in the ICSID system. As a hermetic mechanism which gives a product of certain qualities: an award accepted by the systems of the countries — parties to the ICSID Convention, it must take into account possibility of mistakes also those of a substantive nature which could occur during ICSID Tribunal’s analysis. By not giving any form of the

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<sup>91</sup> *ICSID Discussion Paper*, note 5, par. 21.

<sup>92</sup> C.J. Tams: *An appealing....*, *op. cit.*, p. 26.



internal recourse ICSID system is becoming less attractive from one perspective, but from the other — introducing an internal system of substantive review can cause more expensive procedure and what is also important can cost the loss of the most precious good in the world — time.

In practice appellate system fulfilled its role as a guard of consistency in the World Trade Organization Appellate Body (WTO AB) which provided the WTO dispute resolution system with certain consistency and predictability<sup>93</sup>. The question arises whether WTO AB is a good model to admire from the standpoint of ICSID system. As might be expected, the answer is perplexing.

From the very beginning, WTO AB was not perceived as a standard element of WTO proceedings. It was originally formed to ward off “wrong cases” and “rogue panels”<sup>94</sup>, what in a measure was strengthened in the act regulating WTO AB, by not bestowing the period in which appeal should be filed, no more than mentioning in art. 16.4 that it should be filed before the adoption of the panel’s report by the Dispute Settlement Body (DSB)<sup>95</sup>.

The role of WTO AP is set in Understanding on Rules and Procedures Governing the Settlement of Disputes, in art. 17. Altogether, parts 1, 6 and 13 of art. 17 form a purpose of WTO AB: to hear appeals, from the perspective of issues of law used in the panel report and legal interpretations provided by the latter, to uphold, modify and reverse panel reports<sup>96</sup>. Its reports should be then adopted by the DSB according to art. 17.14<sup>97</sup>.

This article does not concern the topic of comparison WTO AB and ICSID system, but the author decided to include a short description in order to show that WTO AB cannot be an indisputable formula for the ICISD system, even though it is most definitely discerned as one. First of the reasons is self — intelligible: can one compare two systems one of which is judicial (ICSID system) and another is quasi — judicial (WTO system). The answer is probably negative, seeing that the decisions made by ICSID Tribunals are final, on the other hand, reports of WTO AB should be validated by an additional body — Dispute Settlement Body and as a result “It would be wrong to qualify it as a purely judicial process. It is a quasi-judicial mechanism”<sup>98</sup>. Thereby, it is fraught with danger to compare systems which are different in their cores.

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<sup>93</sup> C.J. Tams: *An appealing option? The debate about ICSID Appellate Structure*, p. 24, source: <http://www.economiclaw.uni-halle.de/sites/default/files/altbestand/Hef57.pdf>.

<sup>94</sup> D. McRae: *The WTO Appellate Body: A model for and ICSID Appeals Facility?*, *Journal of International Dispute Settlement* (2010) 1 (2), p. 369, source: <http://jids.oxfordjournals.org/content/1/2/371.full>.

<sup>95</sup> *WTO Agreements, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to WTO Agreement*, (1994) 33 ILM 1226, art. 17.

<sup>96</sup> *WTO Agreement*..., *op. cit.*, art. 17.1, 6, 13.

<sup>97</sup> *WTO Agreement*..., *op. cit.*, art. 17.14.

<sup>98</sup> C.D. Tams: *Experiences from the WTO Appellate Body*, *Texas International Law Journal*, Vol. 38, No. 3, p. 470, source: <http://ir.lawnet.fordham.edu/ilj/vol26/iss6/1/>.

Going further, one should agree with the school of thought claiming ICSID Tribunals work with and interpret different legal acts (Bilateral Investment Treaties and Multilateral Investment Treaties) in each case, where WTO AB interpret the single agreement. Still, juxtaposing parallel can be placed between WTO system and NAFTA or ETC as one act system<sup>99</sup>.

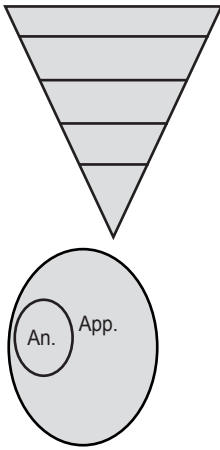
At the same instant, the experience of WTO AB can be invaluable as a starting point for constructing appellate system under ICSID. The WTO AB practice is an excellent mine of imaginable threats which the appellate system in investment proceeding can be confronted by. While constructing an appellate body it is worth to mention *i.e.* that the role of WTO AB crystallised from being an extraordinary instrument to routine option due to political pressure on the parties<sup>100</sup>. This cause prolongation of the litigation process and put an enormous work load on WTO AB. This experience depicts the fact that possible appellate body under CISD should include safeguards protecting it from the obligatory character of an appeal or to show readiness to cope with the extreme number of cases.

In the author's opinion, the ICSID appellate mechanism is an idea worthy of thinking and analysing through the question: "who is the boss"? The answer is obvious: almost everything in arbitration should be in hands of the parties because at the end of the day they are paying money for the arbitration. If the market is showing the need for an appellate body why not to form it, but with the simultaneous possibility for the user of an ICSID system to choose whether they want to have this possibility or not. Here we can reach for some solutions from international commercial arbitration, to be more precise to reach for the exclusion clauses. The core of the proposal is to have an appealing facility, but at the same time to state that parties on some level, for example, before the arbitration, can exclude the possibility of using appellate mechanism. This solution will allow parties to form their investment arbitration procedure in the way they want. At the same time there should be possible to have an annulment revision of an award, but on stricter grounds than those existing today. This proposal predicts both mechanisms one of which will be optional from the beginning, equipped with both appellate and annulment powers and second — the annulment system as a guard of basic procedural guarantees in much narrower understanding than today (picture 1: An. the Annulment Committee powers — annulment; Appellate Committee — annulment + substantive revision). Of course, there are some doubts if the parties would like to choose the possibility of exclusion clauses. It is the author's belief that it is of great impertinence to give such an instrument to the parties, whether it will be used or not. It can be used in one or two cases out of one hundred but it will help the parties to shape the arbitration in the way they want.

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<sup>99</sup> D. McRae: *The WTO...*, *op. cit.*, p. 384.

<sup>100</sup> A. Ziegler: *Scope and Function of the WTO Appellate System: What Future after Millennium Round?*, (1999) 3 Max Planck Yearbook of United Nations Law 439, p. 467–470.



As for the structure of the appellate mechanism, it can be graphically presented as reversed pyramid (picture 2) which is a straining system. The first layer will be the time during which one of the parties can ask for the appellate proceeding. Next layer will be the costs of the proceedings and need to put on some deposit money. The further layer will set the high threshold for cases which can be a subject of appellate review. The fourth layer will be the case selection: a simple interim checking of the cases from the angle of being simple pettifogging — appeal for appeal. After passing through those levels case would be a subject of the appellate proceedings, with limited time for whole work of the Appellate Mechanism.

Almost all of those layers were present in the proposed ICSID Appeals Facility report. The ICSID Secretariat proposed as a layer for cases which would be subject to appeal mechanism the awards with “clear errors of law” and “serious errors of facts”<sup>101</sup>. As a result of this approach, each case would be examined in the scope of the accepted meaning of word “clear” and “serious”, making by this difference between, for example WTO’s Appellate Body, which allows taking into account “issues of law covered in the panel report and legal interpretations developed by the panel”<sup>102</sup>.

The application according to the proposal of the ICSID Secretariat would have to be in a timely matter<sup>103</sup>. Whole proceedings should last no longer than 60 days<sup>104</sup> by that also differently than in WTO system where the Appellate Body has 120 days to render a decision. Another proposal was to provide a deposit, by providing a bank guarantee in the amount of the award<sup>105</sup>. Finally, the Secretary-General should be the last resort of case selection<sup>106</sup>.

The last approach is that there is no need to do anything with the system and it is good as it is. **The author of this work founds this approach, for today, as one of the most convincing.**

Analysed practice is showing that even though there are some States which withdrew from the ICSID system, according to the author it is not the fault of the system as it is. One can say that what is the system blessing is at the same time its curse: in order to have final and binding awards countries have to give up a lot of their powers to the ICSID, which is especially not convenient for investment importing countries and as a result when those countries are losing arbitrations, they want to prompt out of the ICSID system.

<sup>101</sup> *ICSID Proposal*, note 1, par. 7

<sup>102</sup> *DSU*, note 20, art. 17 (6).

<sup>103</sup> *ICSID Proposal*, note 11.

<sup>104</sup> *Ibidem*, note 8.

<sup>105</sup> *Ibidem*, note 10.

<sup>106</sup> *Ibidem*, note 10.

Judging on research introduced in this work one can say that from the beginning annulment committees were something more than just simple guardians of the procedure. In many cases apart of its basic work the *ad hoc* Committees also instructed arbitrators how to perform their duties in substantive matters and in some cases deliberately have crossed the line of substantive review through the wider interpretation of the grounds for the annulment given in article 52. It can be seen after reading those cases, that there is no need for an appeal system because it already exists, by showing some sparkles of the semi-appellate structure. It can be noticed that in situations when *ad hoc* Committees are simply presenting grounds for annulment which were not even included in request for annulment by the party or are crossing lines of checking not only choice of the proper law — law chosen by the parties, but also its application by the tribunals, they are slowly opening the door for substantive review through excessive interpretation of instruments they have. The best approach, according to the author, is to leave the system as it is, analyse its evolution and maybe in a few years, the whole discussion about the need of the Appellate body will have more obvious answers.

At the end of the day why one can have an impression that approach taken by the *ad hoc* Committees can be presented by paraphrasing the words which are the catch phrase of this article: *What is the main base of **interpretation** depends on what is to be **interpreted**, and to some extent on the aim or interests of the person demanding the **interpretation**.*

At last, what is there to borrow from ICSID system to the commercial arbitration system. What ICSID system has and what could be of great need for commercial arbitration of the international character is **almost** total freedom from the domestic systems. The comparative result of this work is showing that finality of international commercial arbitration award could solve a lot of inconsistencies in international commercial arbitration by eliminating possibilities of courts revision (substantive, semi-substantive) of the arbitral awards and by that also make them more solid and dependable in the future perspective.

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ALEKSANDER WRÓBEL

THE ICSID ANNULMENT COMMITTEE:  
THE BLOSSOMING FLOWER OR THE ROTTEN TOMATO

S u m m a r y

The article discusses the question of the annulment proceedings under the ICSID system juxtaposed to the situation existing in international commercial arbitration. The analysis is supported with the presentation of the historical development of the grounds of an annulment under the ICSID system and practice formed throughout years of work of the Annulment Committees. Furthermore, the papers discusses the issue of setting aside awards under the international commercial arbitration by giving examples of the basic regulations in the area, practice in domestic legal systems of selected countries which have in some measure more liberal approach to the setting aside of the awards.

The following parts consist in analysis of the problematic aspects of the annulment system under the ICSID Convention and of the setting aside of awards in the international commercial arbitration.

Its final part is an attempt to find solutions to the presented problems by depicting possible elucidations which can be borrowed from the ICSID system and adopted in the international commercial arbitration and vice versa. The author puts forward the suggestions of the model of an appellate body notwithstanding that final approach is that in today's practice there is no prerequisite to change the system of the revision under the ICSID convention.