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THE ANNULMENT PROCEDURE UNDER THE ICSID CONVENTION

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1. INTRODUCTION

The purpose of this study is to examine arbitral awards, especially Art. 52 of the "Convention on the Settlement of Investment disputes between States and Nationals of Other States"[1], which provides the annulment procedure for the "International Center For The Settlement of Investment Disputes"[2]. The concept of annulment rather deals with finality issues in the procedural area of arbitration. Therefore, it would be useful to give an overview of the finality of arbitral awards of the main conventions and main arbitration rules.

2. ICSID ARBITRATION AND FINALITY AND JUDICIAL REVIEW OF ARBITRAL AWARDS

Being a procedural issue the importance of the annulment procedure of the ICSID Convention might be better understood by examining the relevant issues, such as finality and judicial review of arbitral awards, in the framework of the main conventions and arbitration rules.

2.1 ICSID ARBITRATION AND FINALITY OF ARBITRAL AWARDS IN RESPECT TO THE MAIN ARBITRATION RULES AND CONVENTIONS

ICSID, as an international institution, has been created by the ICSID Convention (The Washington Convention) in order to encourage private foreign investment in developping countries [3] and to establish a forum to resolve international disputes between the States and nationals of other States, by balancing the interest and requirements of the parties of the

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1) Hereinafter cited as ICSID Convention

2) Hereinafter cited as ICS ID

3) PETER, W. Arbitration and Renegotiation of International Investment agreements, 1986, p. 201.

dispute and by providing depoliticization of investment disputes for settlement processes[4]. Thereby it provides a basis for private investors to litigate with host States in an equal process, without the necessity of help or intervention of his national State[5].

The paramount objective of the ICSID Convention is "to promote a climate of mutual confidence between investors and States favorable to increasing the flow of resources to developing countries under reasonable conditions"[6].

The extent of jurisdiction of ICSID arbitration covers legal disputes arising out of an investment between a contracting state and a national of another[7]. The distinctive features of ICSID arbitration are its volontary character[8], flexibility[9] and effectiveness[10].

The effectiveness of the ICSID system concern jurisdictional as well as procedural provisions of the ICSID Convention. Pursuant to Art. 25 (1) ICSID Conv., once the parties have decided to submit their dispute to ICSID Arbitration, none of them can unilaterally withdraw its consent. Moreover, the consent is exclusive of any other remedy, unless the parties to the dispute agree otherwise[11].

The provisions of the ICSID Convention relevant to finality, recognition and enforcement if ICSID arbitral awards, assures the effectiveness of the award[12]. According to Art. 53 (1) ICSID Conv. the award which has been rendered pursuant to the ICSID Conv. is binding on the parties, also, Art. 54 ICSID Conv. provides a simplified procedure for recognition of ICSID arbitral awards[13]. Any party to the award can obtain recognition and enforcement of the award by furnishing a copy of the award certified by the Secretary-General to a

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4) *SHIHATA I.F.I. Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA, in : F.I.L.J., vol. 1986, p.4; DELAUME, G.R. ICSID Arbitration, in : Contemporary Problems in International Arbitration, ed. LEW, 1986, p. 23.*

5) *BROCHES, A. Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, in : The Art of Arbitration, 1982, p. 64.*

6) *SHIHATA, I.F.I., op.cit., p.4.*

7) *Art. 25 (1) of the ICSID Convention provides that: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a contracting State (or any constituent Subdivision or Agency of a Contracting State and a National of another State designated to the Center by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally".*

8) *Volontary character of ICSID Arbitration means that there is no obligation for a contracting State to make use of its machinery. cf. SHIHATA, I.F.I., op. cit., p.4.*

9) *Only specific provisions within the context of the ICSID Convention are mandatory rules. ibid.*

10) *See, DELAUME, G.J. Transnational Contracts, binder II, booklet 17, p. 72.*

11) *Art. 26 ICSID Conv.*

12) *Shihata, I.F.I, op. cit., p.8.*

13) *In the Case of Benvenuti E. Bonfat v. Congo, the French Court has indicated the simplified procedure for recognition and enforcement; SARL Benevenuti E. Bonfat v. Gouvernement de la Republique Populaire du Congo, 20, ILM 1981, p. 878.*

competent Court or other competent authority of the recognising State[14]. Another point relevant to the distinguished features of ICSID arbitration is the "rule of abstention"[15]. According to the provisions of Art. 44 and 26 of the ICSID Conv., a national Court should abstain from further action and refer the parties to ICSID to seek ruling on the matter if it is confronted with a question that may call for a decision under ICSID[16].

All of these jurisdictional and procedural provisions of the ICSID Convention assures the effectiveness of its mechanisms and thereby differing its system from other transnational conventions.

Concerning the finality of the ICSID awards, it must be mentioned on first hand that it is difficult to ensure the finality of an arbitral award because national courts can review the award rendered by arbitral tribunals by imposing different reasons[17].

Recently it is possible to see the strong movement to reinforce international arbitrations as an institution limiting the intervention of domestic courts in the arbitral process[18]. For example, Art. V of the UN Convention on The Recognition and Enforcement of Foreign Awards (The New-York Convention) provides limited ground to refuse the recognition and enforcement of the award rendered pursuant to the provisions of the Conventions concerned. Besides, Art. 36 of the United Nations Commission On International Trade Law (UNCITRAL) provides grounds to refuse the recognition that have been closely modelled on the New-York Convention[19]. The International Chamber of Commerce (ICC) rules of Conciliation and Arbitration do not include any provisions for grounds to refuse the award[20].

Within the context of the ICSID Convestion, in addition to the provisions mentioned above, Art. 53 (1) of the ICSID Conv. stipulates that "the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each Party abide by and comply with the terms of the award...." According to the provision of the article, no domestic court of a contracting State can review the award

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14) In other words, the award rendered pursuant to the ICSID Conv. has equal authenticity with decisions of the courts of each contracting states in their territory. See GIARDINA, A. The International Center For Settlement, in : International Commercial Arbitration, 1989, p. 218.

15) DELAUME, G.R. ICSID Arbitration and The Courts, 77 A.J.I.L. 1983 p. 785

16) This is called the autonournous and exclusive character of ICSID Arbitration, see: DELAUM E ICSID Arbitration and the Courts, p. 781-785.

17) For example in the "Pyramids Resort" case, the french Court of Appeal set aside the ICC award : The Arab Republic of Egypt v. Southern Pacific Properties Ltd. (SPP) and Southern Pacific Properties Middle East. Cour d'Appel Paris, Arret du 12 juillet 1984, 23 ILM p. 1048 (1984)

18) Feldmann, M.B. The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 3. ICSID Rev. F.I.L.J. 1987, p. 87.

19) HOLTZMANN & NEUHAUS, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, 1989, p. 1005.

20) Art. 24 of the ICC rules does not provide any further arbitral procedure for finality of the award.

rendered pursuant to the ICSID Convention. Moreover, domestic Courts might not set aside ICSID awards even for the reason of "public policy". This is, regarding to the finality of ICSID awards, an important advantage of the ICSID Convention compared with other Conventions[21].

All of these provisions of the ICSID Convention strengthen its effectiveness and assure the finality of its awards. In this regard, the issue of judicial review requests further explanations.

2.2. JUDICIAL REVIEW OF ARBITRAL AWARDS AND ICSID

Arbitral Awards are reviewed usually by the domestic courts of the country in which the arbitration took place, or in which the successful party seeks recognition or enforcement of the award[22].

There are two kinds of judicial review of awards[23]. The first type concerns preconditions of the reference to arbitration. The New-York Convention provides a list of cases in which recognition and enforcement of an arbitral award shall be refused by the competent authority where the recognition is sought[24]. The UNCITRAL Model Law provides grounds that an arbitral award shall be set aside by a competent Court[25]. The second type of judicial review deals with the question of whether the arbitral tribunal has committed errors in the merits of the award. This is, in fact, an appeal from the arbitration tribunal to the court[26]. The application of judicial review on the merits by a national court depends on the attitude of the national system to this issue.

Judicial review can be applied to other than ICSID arbitral awards but not to ICSID awards, because there is no remedy open[27]. In accordance with the relevant provisions of the ICSID Convention an application for interpretation, revision or annulment of the award may be made to the Secretary-General of the ICSID. These provisions are completely internal. (Art. 50, 51, 52 ICSID Conv.).

Some remarks should be made on the ICSID mechanisms, especially the rule of "judicial abstention" and the "self-contained" system, that are the ensurance for the parties to take full advantage of detailed international procedural rules. The annulment procedure within the ICSID system is one of the important illustrations of these features of the ICSID Convention.

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21) *DELAUME, ICSID Arbitration and the Courts, p. 801.*
22) *REDFERN, HUNTER, Law and Practice of International Commercial Arbitration, 1986, p. 310.*
23) *SCHMITTHOF, L.M., Finality of Arbitral Awards and Judicial Review, in : Contemporary Problems in International Arbitrations, ed. LEW, 1986, p. 231.*
24) *Art. V of the New-York Convention*
25) *Art. 34 (2) of the UNCITRAL Model Law.*
26) *SCHMITTHOFF, op. cit. p. 235.*
27) *DELAUME, Transnational Contracts, ch. X, para. 10.9, p. 385, cf. Art. 53 of the ICSID Convention.*

As far as all the features relevant to the procedural and jurisdictional provisions are concerned, their paramount objective renders the essence of the annulment procedure obvious.

3. THE ANNULMENT PROCEDURE UNDER ART. 52 OF THE ICSID CONVENTION

As it has been noted above, the award rendered pursuant to the ICSID Conv. is final and binding on the parties. Only two remedies against the award exist : revision of the award "on the ground of discovery of some fact of such nature as decisively to affect the award", (Art. 51 ICSID Conv., so far, no application for revision has been filed), and the annulment of the award on specific and limited grounds which are provided by Art. 52 on the ICSID Convention. (see Annex).

3.1. THE PROCEDURE PROVIDED BY ART. 52 OF THE ICSID CONVENTION

As it has been mentioned above, the ICSID Conv. offers an internal procedure for review of ICSID arbitral awards. Accordingly the annulment proceedings under Art. 52 of the ICSID Convention are ultimately governed by the relevant ICSID arbitral tribunal in accordance with the provisions of the ICSID Convention.

Pursuant to Art. 52(1) of the ICSID Convention "either party may request annulment of the award by an application in writing addressed to the Secretary-General". He has to register the applications and request the Chairman of the Administrative Council to appoint an ad-hoc Committee[28].

The application for the annulment of the award shall be made within the 120 days after the date on which the award was rendered. In case of corruption the application cannot be made more than 3 years after the date on which the award was rendered. In any case it shall be made within the 120 days after the discovery of the corruption. (Art. 52 (2) of the ICSID Conv.)

The Chairman (being "ex-officio" the president of the World Bank) shall appoint from the Penal of Arbitrators an ad-hoc Committee of three persons on receipt of the request from the Secretary-General.

Concerning the Constitution of the Committee, in accordance with the paragraph 3 of the article, it may not include any person who has been a member of the tribunal which rendered the award or has the same nationality of such member or is the national of the state-party to the dispute or that has been designated to the panel of arbitrators by either party of those states, or has acted as a conciliator in the same dispute.

The ad-hoc Committee which has been appointed in accordance with art. 52 (3) IC-

28) *Rules of Procedure of Arbitration Proceedings, Art. 50 (2) and 52.*

SID Conv. has authority to annul the award in toto or in part, on one or more grounds set forth in para. 1 of Art. 52. In case of an annulment of the award the dispute shall be submitted to a new tribunal constituted in accordance with section 2 of chapter IV (cf. Art. 52 (6).

The ad-hoc Committee has the authority to stay enforcement of the award in two situations: if it considers that the circumstances so require or if the applicant requests a stay of enforcement of the award in his application. In the former consideration it may stay enforcement of the award pending its decision. In the latter consideration it shall provisionally stay enforcement of the award until it rules on such request. (Art. 52 (5)).

3.2. THE GROUNDS FOR ANNULMENT OF ICSID AWARDS

Art. 52 (1) has provided 5 limited grounds for annulment of ICSID awards. So far the grounds set forth in subparagraphs (b), (d) and (e) of the Article have been subjected in two cases.

Constitution of the arbitral tribunal :

The Arbitral Tribunal is to be properly constituted in accordance with relevant provisions. Most of the provisions relevant to the number of the arbitrators and to the method for appointment, except Art. 37 (2) and 39 of the ICSID Conv., are permissive[29].

In accordance with these provisions, if the parties have not made any specific agreement regarding the constitution of the tribunal or if they do not agree on the number of the arbitrators and the method of their appointment, the tribunal consists of three arbitrators. In the case of the absence of such agreements, the tribunal shall consist of an even number of arbitrators, and each party shall appoint one arbitrator, the appointed arbitrators shall appoint the third member who shall be the president of the tribunal, Art. 37 (2). In this case the majority of the arbitrators shall not be nationals of the contracting state-party to the dispute, or the contracting State whose national is a party to the dispute. The majority of the arbitrators shall be nationals of other States, Art. 39.

Manifest excess of powers :

It is difficult to give a definition of a "manifest excess of powers", but some findings in relevant cases do help.

In the Klockner v. Cameroon case, the Commmittee held that excess of power, "may consist in the non-application by the arbitrators of the rules contained in the arbitration agree-

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29) *This is one of the illustrations of the flexibility and effectiveness of the ICSID system see. DELAUME, ICSID and the Transnational Financial Community, 1 ICSID Rew. F.I.L.J. 1986, p. 244.*

30) *Klockner v. Republic of Cameroon, ARB/81/2, decision of the Ad Hoc Commitee May 3, 1985 published in 1 ICSID Rew. F.I.L.J., 1986 p. 89, para. 59.*

ment (compromis) or in the application of other rules"[30]. In its view, failure to apply the correct law to the dispute (in the case Art. 42 (1), provides the ground for annulment in the meaning of "manifest excess of powers"[31].

In the Amco Asia case, the Committee held that "the tribunal.... clearly failed to apply the relevant provisions of Indonesian Law. The Ad-Hoc Committee holds that the Tribunal manifestly exceeded its power" and therefore it "feels obliged to consider that the tribunal manifestly exceeded its power in failing to apply fundamental provisions of Indonesian Law"[32].

Considering the term of "manifestly" it should be mentioned that in the Klockner Case, the Committee stated that "an misinterpretation of the agreement and especially of the two arbitration clauses... does not in any event constitute a manifest excess of powers"[33].

Under the light of those decisions of the ad-hoc Committee, it can be concluded that, failure to apply correct law or rules may give a reason to annul an ICSID award in the meaning of "manifest excess of powers", but misinterpretation of the rules cannot be considered as within the meaning of the notion of "manifest".

Corruption on the part of a member or the tribunal :

Art. 52 (1) c of the ICSID Conv. has never been requested by a party. But it is important to note that in case of corruption on the part of a member of the tribunal the award is to be annulled in whole[34].

Serious departure from a fundamental rule of procedure :

This ground has been requested by Klockner for annulment of the award. But the ad-hoc Committee did not find complaints relevant to the claims of serious departure from a fundamental rule of procedure well enough for an annulment. Nevertheless it should be refered to the Committees view to better understand the meaning of the issue grounds.

According to the Committee, "impartiality of an arbitrator is a fundamental and essential requirement. Any shortcoming in this regard, that is a sign of partiality, must be considered to constitute, within the meaning of Art. 52 (1)d, a serious departure from a fundamental rule of procedure in the broad sense of the term procedure"[35].

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31) *In the view of Feldman, as the preparatory work of the Convention and the paramount objective of the drafter which is finality of the award are concerned "failure to apply the proper law" cannot consist of the grounds in the meaning of Art. 52 (1) b, see. FELDMAN op. cit.p.101.*

32) *Decision of the Ad-hoc Committee setting aside the award rendered on the merits in the arbitration between Amco Asia Corp. at alt. and Indonesia, May 16, 1986, in : XXV I.L.M. p. 1439.*

33) *Klockner Case, supra note 30 at para 52.*

34) *Decision on Jurisdiction in AMCO v. Republic of Indonesia, Resubmitted case, May 10, 1988 published in : I.L.M. 1988, p. 1281, para. 25.*

35) *Klockner decision, supra note 30, para. 95.*

From the interpretation of the Committee on the issue it can be concluded that any obvious lack of impartiality may result in a serious departure from a fundamental rule of procedure.

Failure to state reasons :

Art. 48(3) of the ICSID Conv. stipulates that "the award shall deal with every question submitted to the Tribunal and shall state the reason upon which it is based". This obligation set out in the article, to the question and the reasons, finds its sanction in Art. 52 (1) (e) of the ICSID Conv. Pursuant to Art. 52(1) e an award that has failed to state reasons on which it is based gives ground for annulment. According to the Ad-Hoc Committee in the Klockner case, "there would be a 'failure to state reasons' if no resoning or explanation whatsoever, or no 'sufficiently relevant' or 'reasonably acceptable' reasoning could be found for some conclusion or decision in the award" and the term of "sufficiently relevant" means "reasonably capable of justifying the result reached" by a tribunal. In other words, "reasonably sustainable and capable of providing a basis" for a decision[36]. In the Amco Asia Case the Committee refering to the Klockner case added that "there must be a reasonable connection between the bases invoked by the tribunal and the conclusions reached by it"[37].

Under the light of the decisions, it should be mentioned that, in the absence of a "reasonable connection" between the bases and the conclusions of an award, it may be annulled by the reason of failure to state reasons.

4. THE QUESTION OF RES JUDICATA IN THE ANNULMENT PROCEDURE

In the case of annulment of an award at the request of either party, the dispute may be resubmitted to a new tribunal. In this process the question of res judicata[38] may arise. Especially in the case of annulment of an award in part, the problem what part of the award is res judicata should be resolved. Because in this process a new tribunal may relitigate parts of the award that are not res judicata.

In the Amco (resubmitted) case the tribunal referred to Prof. REISMAN on the question of res judicata and holds that if an ad-hoc committee "decides to annul only part of the award, those parts of the award which have not been annulled are res judicata as between the parties"[39]. In accordance with this opinion, in its view "matters sought by a party to be annulled by an ad-hoc committee, but expressly not annulled, or expressly confirmed, are res judicata"[40].

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36) Ibid para. 120.

37) Amco decision supra note 33 at para 43.

38) The res judicata effects of an award is dealing with the subsequent disputes between the parties and the third parties and the existence of disputes between the parties themselves, REDFERN and HUNTER, op. cit. p. 300.

39) AMCO resubmitted case, supra note 34 at para 28.

40) Ibid at para 46.

Concerning the decision of the Tribunal in the Amco case (resubmitted) it should be noted that the matters which have been expressly annulled by an ad-hoc committee or have not been expressly confirmed shall be relitigated.

CONCLUSION

In conclusion, the ICSID Convention obtained it's effectiveness by the means of finality of the decisions. Accordingly, annulment procedures had to fit in this self - contained pattern and were therefore shaped in a restrictive manner.

Article 52 of the ICSID Convention

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds :

(a) that Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provision of Articles 41-45 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings

BIBLIOGRAPHY

1. BOOKS

DELAUME, G.R., **Transnational Contracts Applicable Law And Settlement of Disputes** (A Study in Conflict Avoidance), Binder II, Booklet 17.

HOLTZMANN, H.M., & NEUHAUS, J.E., **A Guide to the UNCITRAL Model Law on International Commercial Arbitration,** Deventer, Kluwer Law & Taxation Publishers, 1989.

PETER, W., **Arbitration and Renegotiation of International Invesment Agreements,** Dordrecht, Martinus Nijhoff Publisher, 1986.

REDFERN, A., & HUNTER, M., **Law and Practice of International Commercial Arbitration,** London, Sweet-Maxwell, 1986.

2. ARTICLES

BROCHES, A., "Bilateral Investment Protection Treaties and Arbitration of Investmet Disputes" **The Art of Arbitration,** 1986.

DELAUME, G.R., "ICSID Arbitration" **Contemporary Problems in International Arbitration,** (Lew. ed.) 1986.

DELAUME, G.R., "ICSID Arbitration and The Courts", 77 **A.J.I.L.,** 1983.

DELAUME, G.R., "ICSID and the Transnational Financial Community" **1 ICSID Rew.-** F.I.L.J., 1986.

FELDMAN, M.B., "The Annulment Procedings and the Finality of ICSID Arbitral Awards" **ICSID Rew.-** F.I.L.J., 1987.

SCHMITTHOFF, C.M., "Finality of Arbitral Awards and Judicial Review" **Contemporary Problems in International Arbitration,** (Lew. ed.) 1986.

SHIHATA, F.I.I., "Towards a Greater Depoliticization of Investment Disputes : The Roles of ICSID and MIGA" **ICSID Rew.-**F.I.L.J., 1986.

3. CASES

Amco Asia Corporation v. Republic of Indonesai (May 16, 1986), 25 ILM. 1986, p. 1439.

Amco v. Republic of Indonesia (Resubmitted Case) (May 10, 1988) 27 ILM 1988, p. 1281.

Arab Republic of Egypt v. Southern Pacific Properties LTD. 23 ILM. 1984, p. 1048.

SARL Benevenuti E Bonfat v. Gouvernement de la Republique Populaire du Congo, 20 ILM 1981, p. 878.

Klockhen v. Republic of Cameroon (ARB/81/2), (May 3, 1985), 1 ICSID Rew.-FILJ., 1986 p. 89.

4. CONVENTIONS

Convention On The Settlement of Investment Disputes And Nationals of Other States.

1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

5. INTERNATIONAL RULES

International Chamber of Commerce (ICC) Arbitration Rules.

United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.