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2.8 Post-Award Remedies  
and Procedures



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## NOTE

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## OVERVIEW

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This Module gives an overview of the post-award remedies and procedures in ICSID dispute settlement.

Under Art. 53 of the ICSID Convention, an award is final and binding and not subject to any remedy except those provided for in the Convention. In particular, an award is not subject to any review by domestic courts. But the Convention itself provides for a number of remedies and procedures that are administered by the original tribunal, by a new tribunal or by an *ad hoc* committee. All these remedies and procedures are regulated in detail by the Convention and the Arbitration Rules and are administered by ICSID.

Of these post-award remedies and procedures, some are relatively uncontroversial and deal with routine situations. Thus supplementation and correction deal with minor technical and clerical mistakes in the award. Interpretation clarifies the meaning of the award if the parties disagree on its construction. Revision takes account of new facts that were unknown when the award was rendered.

Annulment is a remedy that is much more dramatic. It is a limited exception to the principle of finality. Awards are not subject to substantive review and an allegation of a mere error of fact or of law will be of no avail. Annulment provides limited emergency relief for situations in which the basic legitimacy of the arbitration process is called into question. It is available only on the basis of a few specific grounds listed in the Convention. A successful plea of nullity leads to a decision that declares the award void in whole or in part. The parties may then resubmit their dispute to a new tribunal.

This Module gives a relatively brief overview of supplementation and correction, interpretation and revision. With respect to annulment, it explains in more detail the grounds for annulment and the procedure that may lead to it. It also describes the powers of the *ad hoc* committee that decides on a request for annulment and the consequences of a decision annulling the award.



## OBJECTIVES

Upon completion of this booklet the reader should be able to:

- List the different remedies available after the award has been rendered.
- Compare the function of the different remedies.
- Compare the formal requirements for the different remedies.
- Understand the difference between annulment and appeal.
- Identify the different grounds for annulment.
- Discuss the relevance of the individual grounds for annulment.
- Describe the procedure upon a request for annulment.
- Explain the procedure after the total or partial annulment of an award.



## INTRODUCTION

<b><u>Post-award remedies</u></b>	The ICSID Convention provides for several possible remedies after an award has been rendered. These are supplementation and rectification (Art. 49(2)), interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52). Of these, annulment has turned out to be by far the most important. An ICSID award is not subject to any other appeal or remedy (Art. 53(1)). In particular, there is no resort to domestic courts against an ICSID award.
<b><u>Supplementation and Rectification</u></b>	Art. 49(2) provides a remedy for omissions and errors in the award. Supplementation and rectification can only be made by the tribunal that rendered the award.
<b><u>Interpretation</u></b>	Art. 50 deals with disputes between parties to arbitration proceedings relating to the interpretation of the award. The interpretation will be given, if possible, by the tribunal that rendered the award. If this is not possible, a new tribunal will be constituted for this purpose.
<b><u>Revision</u></b>	Art. 51 deals with revision, that is a substantive alteration of the original award on the basis of newly discovered facts that were unknown when the award was rendered. Any revision shall be made, if possible, by the same tribunal that rendered the award. If this is not possible, a new tribunal will be constituted for this purpose.
<b><u>Annulment</u></b>	Art. 52 foresees the annulment of an award under certain narrowly defined circumstances. Annulment proceedings always take place before a separate <i>ad hoc</i> committee.
<b><u>Time limits</u></b>	Interpretation is not subject to a time limit. But supplementation and rectification, revision and annulment are subject to tight time limits. These time limits differ considerably.
<b><u>Initiative</u></b>	All post-award remedies require a specific request by a party. There is no <i>ex officio</i> remedy.
<b><u>The Additional Facility</u></b>	The ICSID Convention does not apply to arbitration under the Additional Facility Rules <sup>1</sup> . Therefore, the post-award remedies described in this booklet are not applicable to awards rendered under the Additional Facility. The Additional Facility has its own rules on interpretation, correction and supplementation. <sup>2</sup> Unlike ICSID arbitration, arbitration under the Additional Facility is not insulated from national law. An award rendered under the Additional Facility is subject to any review or appeal provided by the law of the place of arbitration. The normal method to challenge such an award would be through national courts.

<sup>1</sup> For an explanation of the Additional Facility see booklet 2.4 dealing with requirements *ratione personae*.

<sup>2</sup> See *Additional Facility Arbitration Rules, Articles 56-58, 1 ICSID Reports 268-269*.

**Summary:**

- **There are four types of remedies after an award has been rendered:**
  - 1. supplementation and rectification**
  - 2. interpretation**
  - 3. revision**
  - 4. annulment.**
- **These remedies are available only upon the request of one or both parties.**
- **With the exception of interpretation, these remedies are subject to time limits.**
- **These remedies are exclusive. ICSID awards are not subject to any other remedy.**
- **The ICSID Convention's remedies do not apply to awards under the Additional Facility.**

# 1. SUPPLEMENTATION AND RECTIFICATION

**Art. 49(2)** The Convention provides for supplementation and rectification in Art. 49(2) in the following terms:

*The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award.*

**Inadvertent omissions and technical errors** This remedy is designed for inadvertent omissions and minor technical errors. It is not designed for a substantive review of the decision. Rather, it enables the tribunal to correct mistakes that may have occurred in the award's drafting in a simple way.

**Award only** Rectification and supplementation is available only in respect of awards. Therefore, this remedy is not applicable to decisions preliminary to awards. In particular, decisions on jurisdiction and on provisional measures are not, by themselves, subject to this procedure.

**Rectification** Rectification is appropriate in case of a clerical, arithmetical or similar error. Under the Convention's wording, a rectification is mandatory if such an error is pointed out to the tribunal.

**Supplementation** Supplementation is discretionary. It relates to an omission in the award. Art. 48(3) of the Convention states that the award shall deal with every question submitted to the tribunal. Supplementation will be useful where the omission is due to an oversight on the part of the tribunal which is likely to be corrected by it once this oversight is pointed out. But supplementation is unlikely to be useful where the omission is the result of a considered and deliberate decision by the tribunal. In such a situation a request for annulment may be the appropriate course of action.

**Request** Supplementation and rectification depend upon a request by a party to the case directed to the Secretary-General of ICSID. The tribunal may not issue such a decision on its own initiative. The request must say what points it wishes to have supplemented or corrected.

**Time limit** The request must be made within 45 days of the dispatch to the parties of the original award.

**Decision by original tribunal** Unlike the other post-award remedies, supplementation and rectification can only be made by the tribunal that rendered the award. If the original tribunal is no longer available, the remedy of Art. 49(2) cannot be used. In that case it may be possible to achieve the desired result through interpretation, revision or annulment.

In *CDSE v. Costa Rica*, the Award was rendered on 17 February 2000. On 30 March 2000, Claimant submitted a Request for Rectification of the Award. The Respondent was given an opportunity to file written observations on the Request. The Tribunal gave its decision on 8 June 2000. It corrected two minor clerical errors as well as a mistake in the identification of a witness. But it refused to correct an alleged misstatement of a party's position on a point of law. It found that the Award had given an accurate summary of Claimant's stated position.<sup>3</sup>

**Effect of  
supplementation or  
rectification**

A tribunal's decision on a request for rectification or supplementation has certain substantive and procedural consequences. The rectification or supplementation becomes part of the award. Therefore, all rules relating to an award, as reflected in Arts. 48, 49, 50, 51, 52, 53 and 54 also apply to the rectification or supplementation. Moreover, the time limits for a request for revision or annulment do not start to run until a decision on a request for rectification or annulment has been rendered.

**Summary:**

- **Rectification takes care of minor technical errors.**
- **Supplementation takes care of inadvertent omissions.**
- **A request must be made within 45 days of the award.**
- **The decision can only be made by the original tribunal.**
- **The decision becomes part of the original award.**

<sup>3</sup> *CDSE v. Costa Rica, Rectification of Award, 8 June 2000, 15 ICSID Review—Foreign Investment Law Journal 205 (2000).*

## 2. INTERPRETATION

### Art. 50

The Convention provides for the interpretation of awards in Art. 50 in the following terms:

*(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General. (2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.*

### Dispute

There must be a specific dispute concerning the meaning or scope of the award. General complaints about the award's lack of clarity would not be admissible. The existence of a dispute also presupposes a certain degree of communication between the parties. In addition, the dispute must have some practical and not merely theoretical relevance.

### Award only

The request for interpretation must relate to an award. A decision preliminary to the award such as a decision on jurisdiction or on provisional measures is not subject to this procedure unless it is eventually incorporated into the award.

### Request

The request for interpretation must come from one of the parties to the arbitration. The tribunal may not give an interpretation on its own initiative. The request must state the precise points on which an interpretation is sought.

### No time limit

There is no time limit for an application requesting an interpretation. In this respect, interpretation differs from the provisions on supplementation and rectification, revision and annulment. This means that a request for interpretation may be submitted at any time after the award has been rendered. It also means that successive requests for interpretation may be made at different times without any limitation.

### Legal Nature of Interpretation

Art. 50 does not state that the decision on interpretation shall become part of the award. But Art. 53(2) provides that for the purposes of the Section on "Recognition and Enforcement of the Award", "award" shall include any decision interpreting, revising or annulling the award pursuant to Arts. 50, 51 and 52. Therefore, for purposes of recognition and enforcement, the award will be binding as interpreted in accordance with Art. 50. On the other hand, the decision on interpretation cannot itself be the object of supplementation and rectification, interpretation, revision and annulment.

### Interpretation by original or new tribunal

The purpose of the procedure for interpretation is to clarify the meaning of the original award. Therefore, it seems logical to try to obtain an explanation from the tribunal that gave the award. If this is not possible, a new tribunal will be constituted for the purpose of the interpretation. When constituting

this new tribunal, it may be wise to appoint some or one of the arbitrators who served on the original tribunal. New arbitrators should remain faithful to the considerations and approach of the original tribunal. Their task is to ascertain the meaning of the original award and not to rewrite it.

**Stay of enforcement**

Under Art. 50(2), a stay of enforcement may be ordered by the tribunal, if so requested by a party, pending the decision on interpretation.

**Summary:**

- **Interpretation settles disputes between the parties concerning the meaning of an award.**
- **A request for interpretation is not subject to any time limits.**
- **An interpretation is to be treated like an award for purposes of recognition and enforcement.**
- **If possible, the interpretation should be given by the original tribunal.**

### **3. REVISION**

#### **Art. 51**

The Convention provides for the revision of awards in Art. 51 in the following terms:

*(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.*

*(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.*

*(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.*

*(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.*

#### **Award only**

Revision involves a substantive alteration of the original award on the basis of newly discovered facts that were unknown when the award was rendered. The request must relate to an award. Revision is not available in respect of decisions preliminary to awards such as a decision on jurisdiction or on provisional measures unless these are eventually incorporated into the award.

#### **Request**

The request for revision must come from one of the parties to the arbitration. The tribunal may not revise the award on its own initiative. The application for revision must state the precise points on which a change is sought in the award. It must also specify the new facts which are to affect the award decisively. In addition, the application must contain evidence that these facts were unknown to the applicant and to the tribunal and that the applicant's ignorance was not due to negligence.

#### **New Facts**

Revision is contingent upon the discovery of new facts. These must be capable of affecting the award decisively. The new element must be one of fact and not of law.

#### **Decisiveness**

The new fact is decisive if it would have led to a different decision had it been known to the tribunal. The new fact may relate to jurisdiction or to the merits. A fact that affects the legal position of the parties in an important way may be regarded as decisive even if it is not reflected in monetary terms in the award. This would be the case if the new fact could have led to a finding of lawfulness or unlawfulness of the acts of one of the parties.

#### **Unknown new fact**

The decisive fact must have been unknown to the tribunal and to the party

making the application when the award was rendered. A party's failure to draw the tribunal's attention to a decisive fact where it had the opportunity to do so at any time before the award's signature results in the inadmissibility of an application for revision. In addition, the applicant's ignorance of the newly discovered fact must not be due to negligence.

**Time limit**

The Convention imposes a dual time limit. A party must make its request within 90 days of the discovery of the new fact. In addition, there is an absolute cut-off for applications after three years from the date on which the award was rendered

**Legal nature of revision**

The legal nature of a decision on an application for revision is the same as that of a decision on interpretation (see above).

**Revision by original or new tribunal**

Submission of the request for revision to the original tribunal is the better solution since the original tribunal is in the best position to decide whether the fact adduced by the applicant was unknown to it. If the original tribunal is no longer available in its entirety, a new tribunal will have to be constituted.

**Stay of enforcement**

A party submitting an application for revision may request a stay of the award's enforcement. Such a request is granted provisionally upon the application's registration. Once the tribunal is constituted, the stay of enforcement will be confirmed or denied at the tribunal's discretion.

**Summary:**

- **Revision takes account of newly discovered facts.**
- **The new facts must be decisive.**
- **The application must be made within three years of the award and within 90 days of the discovery of the new facts.**
- **If possible, the revision should be made by the original tribunal.**

## 4. ANNULMENT: SCOPE AND SIGNIFICANCE

**Art. 52 constitutes a limited exception to the principle of the finality of awards. Art. 52 is the only way of having the award set aside. Domestic courts have no power of review over ICSID awards.**

### Annulment and appeal

Annulment is different from an appeal. Appeal may result in the modification of the decision. Annulment results in the legal destruction of the original decision without replacing it. An *ad hoc* committee acting under the ICSID Convention may not amend or replace the award by its own decision on the merits. After annulment, the dispute may be resubmitted to a new tribunal. Annulment is only concerned with the basic legitimacy of the process of decision but not with its substantive correctness. Therefore, annulment is based on a very limited number of fundamental standards.

### Request

The request for annulment must come from one of the parties to the arbitration. There is no *ex officio* annulment. Such a request is purely discretionary. Typically, a party requesting annulment hopes for a decision that is more favourable to it after annulment.

### Waiver of annulment

A party may waive its right to request annulment. This will normally be done by not submitting a request during the time limit. Exceptionally, a party may also waive its right explicitly.<sup>4</sup> A party's failure to object before the tribunal to a defect that may give rise to an annulment may also be regarded as a waiver.<sup>5</sup> The party may not later use this defect as a ground for annulment.

### Award only

Only awards are subject to annulment. Annulment is not available in respect of decisions preliminary to awards such as decisions on jurisdiction or on provisional measures unless these are eventually incorporated into the award. But a decision by a tribunal declining jurisdiction is an award and as such subject to annulment.

In *SPP v. Egypt*, the Tribunal had made a Decision on Jurisdiction upholding its competence.<sup>6</sup> Egypt filed an application for annulment of this decision. The Acting Secretary-General declared that the Decision on Jurisdiction was not an award in the sense of Art. 52 of the Convention. Therefore, he did not have the power to register the application for annulment.<sup>7</sup>

### Parts of awards

Art. 52(1) only speaks of a request for the annulment of the award but not of a part of the award. But Art. 52(3) states specifically that the *ad hoc* Committee may annul the award or any part thereof. The practice of *ad hoc* committees

<sup>4</sup> *Amco v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 513, 527/8.*

<sup>5</sup> *The situation is covered by Arbitration Rule 27, 1 ICSID Reports 167.*

<sup>6</sup> *SPP v. Egypt, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 131.*

<sup>7</sup> *News from ICSID, Vol. 6/1, p. 2.*

demonstrates that annulment of parts of awards as well as requests for partial annulment of awards is covered by Art. 52. The *ad hoc* committee may annul only part of an award even if the annulment of the entire award has been requested.

In *MINE v. Guinea*, Guinea requested partial annulment of the award, explaining that “Guinea does not seek annulment of the decision on the two counter-claims, ...”.<sup>8</sup> The *ad hoc* Committee had no doubts concerning the admissibility of this request:

*Guinea’s request for partial annulment is clearly admissible. It seeks the annulment of the portion of the Award adjudging MINE’s claim. It does not request annulment of the portion of the Award adjudging Guinea’s counter-claim. Nor, for that matter, has annulment of that portion been requested by MINE. That portion of the Award will remain in effect regardless of the annulment in whole or in part of the portion of the Award in respect of which Guinea has formulated its request for annulment.*<sup>9</sup>

#### Interrelated parts of awards

If parts of awards are closely interrelated, the nullification of one part of an award may automatically entail the nullification of other parts.

In *MINE v. Guinea*, the Tribunal had based its award of costs on the fact that Guinea was the losing party.<sup>10</sup> The *ad hoc* Committee spoke of the possibility that “by necessary implication annulment entails the annulment of other portions.”<sup>11</sup> It applied this principle to the award of costs:

*6.112 The award of costs can nevertheless not remain in existence since its basis, viz., that Guinea was the losing party, had disappeared as a result of the annulment of the portion of the Award relating to damages. The award of costs cannot survive the annulment of that portion of the Award with which it is inextricably linked. The Committee therefore finds that the award of costs must be annulled in consequence of the annulment of the damages portion of the Award.*<sup>12</sup>

#### Post award decisions

Annulment is not available in relation to decisions interpreting or revising awards. Also, decisions on annulment are not themselves subject to annulment. Decisions on supplementation and correction are subject to annulment since they become part of the award. The award of a new tribunal, to which a dispute is resubmitted after the annulment of the first award, is subject to annulment in exactly the same manner as the award of the first tribunal.

#### Discretion to annul

The Convention states that the *ad hoc* committee shall have the authority to annul. The question of whether an *ad hoc* committee has some discretion in deciding whether or not to annul has led to conflicting answers.

<sup>8</sup> *MINE v. Guinea, Decision on Annulment, 22 December 1989, 4 ICSID Reports 82.*

<sup>9</sup> *At p. 85.*

<sup>10</sup> *MINE v. Guinea, Award, 6 January 1988, 4 ICSID Reports 54, 77-78.*

<sup>11</sup> *MINE v. Guinea, Decision on Annulment, 22 December 1989, 4 ICSID Reports 86.*

<sup>12</sup> *At p. 109.*

The first decision on annulment in *Klöckner v. Cameroon* was still based on the conception that once the *ad hoc* committee had found a ground for annulment it was bound to annul no matter how minor the fault. The Committee said:

*...the finding that there is one of the grounds for annulment in Article 52(1) must in principle lead to a total or partial annulment of the award, without the Committee having any discretion,...*<sup>13</sup>

Subsequent decisions on annulment show a more flexible approach.

In *Amco v. Indonesia* the *ad hoc* Committee refused to annul where the Tribunal had reached the correct result though on the basis of the wrong legal system.<sup>14</sup> It supplied missing reasons for a substantively correct decision<sup>15</sup> and it declared certain incriminated passages in the Award as *obiter dicta*.<sup>16</sup>

In *MINE v. Guinea*, the *ad hoc* Committee found that it had discretion which had to be exercised in the service of material justice:

*4.10 An ad hoc Committee retains a measure of discretion in ruling on applications for annulment. To be sure, its discretion is not unlimited and should not be exercised to the point of defeating the object and purpose of the remedy of annulment. It may, however, refuse to exercise its authority to annul an award where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards.*<sup>17</sup>

### Summary:

- **Annulment does not modify the award but removes it.**
- **Annulment is possible only on the basis of a limited number of serious grounds.**
- **Annulment is possible only upon the request of a party.**
- **Only awards or parts of awards are subject to annulment.**
- **More recent practice indicates that there is some discretion in a decision on annulment.**

<sup>13</sup> Klöckner v. Cameroon, *Decision on Annulment*, 3 May 1985, 2 ICSID Reports 162.

<sup>14</sup> Amco v. Indonesia, *Decision on Annulment*, 16 May 1986, 1 ICSID Reports 524/5, 529/30.

<sup>15</sup> At p. 526.

<sup>16</sup> At pp. 538, 539, 540.

<sup>17</sup> MINE v. Guinea, *Decision on Annulment*, 22 December 1989, 4 ICSID Reports 86.



## 5. GROUNDS FOR ANNULMENT

The grounds for annulment under the ICSID Convention are listed exhaustively in Art. 52(1):

*(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 the 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.*

### Exhaustive nature of grounds

Annulment is restricted to the five grounds listed in Art. 52(1). The *ad hoc* committee may not annul on other grounds. Therefore, any request for annulment must be brought under one or several of these grounds. In particular, a party may not present new arguments on fact or law that it failed to put forward in the original arbitral proceeding. Typically, an application for annulment will put forth several of the grounds listed in Art. 52(1). Not infrequently, one and the same perceived flaw is brought under different grounds for annulment cumulatively.

### Limitation to grounds in request

An award may be affected by more than one ground for annulment. Parties requesting annulment have almost invariably claimed the presence of more than one defect justifying annulment. But the *ad hoc* committee is limited to the grounds invoked by the party or parties requesting annulment. There is no *ex officio* annulment of awards and annulment is subject to waiver by the parties. It follows that an *ad hoc* committee may not annul on a particular ground unless it is asked to do so by a party.

### a) Improper Constitution of Tribunal

The first ground for annulment listed in Art. 52(1)(a) is the improper constitution of the tribunal. Questions concerning the tribunal's constitution could arise from the Convention's provisions on the nationality of arbitrators.<sup>18</sup> Such issues could also arise in relation to the qualifications of arbitrators or an allegation of a conflict of interest. Apart from facts that are hidden at the time, problems in connexion with a tribunal's constitution are unlikely to arise: the ICSID Secretariat carefully monitors the constitution of tribunals. Arts. 57 and 58 provide for the disqualification of an arbitrator. A party that has not availed itself of this procedure where it had the opportunity to do so, will not be able to invoke this ground for annulment after the award has been rendered. In actual practice, this ground has never been used.

<sup>18</sup> Arts. 38 and 39.

## **b) Manifest Excess of Powers**

### **Excess of powers**

The second ground for annulment listed in Art. 52(1)(b) is manifest excess of powers. An arbitral tribunal derives its power from the parties' agreement. A deviation from the terms of the agreement to arbitrate constitutes an excess of powers. The most important form of excess of powers occurs when a tribunal exceeds the limits of its jurisdiction. Another instance of excess of powers would be a non-application of the law agreed by the parties.

### **Manifest**

In order to constitute a ground for annulment, any excess of powers must be manifest. The manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it means that the excess of powers must be obvious. An excess of powers is manifest if it can be recognized with little effort.

### **Lack of jurisdiction**

The most obvious example of an excess of powers is a decision on the merits by a tribunal that lacks jurisdiction. Jurisdiction is determined by Art. 25 of the Convention.<sup>19</sup> If any of the requirements listed there<sup>20</sup> is not met, there is no jurisdiction. For instance, if there is no legal dispute there is no jurisdiction and an award on the merits would constitute an excess of powers. The same would apply if the dispute does not arise directly out of an investment. The parties must meet certain conditions in that one must be a Contracting State and the other a national of another Contracting State. If these requirements are not met there is no jurisdiction and a decision on the merits would be an excess of powers. If the dispute is not covered by a consent to arbitration there is no jurisdiction and an award on the merits would be an excess of powers.

### **Failure to exercise jurisdiction**

Failure to exercise jurisdiction where jurisdiction does, in fact, exist also constitutes an excess of powers. A decision by a tribunal that states that it lacks competence is rendered in the form of an award. Such an award may be the subject of annulment proceedings. If a tribunal renders an award on the merits but declines jurisdiction on certain points, this may also give rise to a claim of excess of powers.

### **Failure to apply the proper law**

Art. 42(1) of the ICSID Convention deals with the law applicable to the dispute.<sup>21</sup> The provisions on applicable law are essential elements of the parties' agreement to arbitrate and are part of the framework for the tribunal's activity.

<sup>19</sup> The jurisdictional requirements as set out in Art. 25 of the ICSID Convention are explained in detail in Modules 2.3 (consent), 2.4 (requirements *ratione personae*) and 2.5 (requirements *ratione materiae*).

<sup>20</sup> The relevant part of Art. 25(1) runs as follows: «(1) 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 designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.»

<sup>21</sup> Art. 42(1) provides: «(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.» For a discussion of the law applicable in ICSID arbitration see Module 2.5.

Their violation may amount to an excess of powers. The parties may agree explicitly on the applicable law. In the absence of such an agreement, the residual rule of Art. 42(1) provides that the tribunal is to apply the law of the host State, including its rules on the conflict of laws, and such rules of international law as may be applicable. If the parties do not agree explicitly on the rules of law to be applied by the tribunal, the parties consent to the residual rule of Art. 42(1) by incorporating the ICSID Convention into their agreement to arbitrate.

**Erroneous application of the law**

A careful distinction must be made between failure to apply the proper law and an incorrect application of that law. Application of a law other than that agreed to by the parties constitutes an excess of powers and is a valid ground for annulment. A mere error in the application of the proper law is not a ground for annulment. *Ad hoc* committees have emphasized this distinction.<sup>22</sup>

The *ad hoc* Committee in *Amco v. Indonesia* described its task in the following terms:

23. *The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Articles 52(1)(b) of the Convention.*<sup>23</sup>

**Standards for the application of the proper law**

*Ad hoc* committees have applied strict standards to the application of the proper law. In one case the non-application of a particular provision in the applicable law led to a holding of excess of powers and hence to annulment.<sup>24</sup> A broad reference to general principles also gave rise to discussions as to whether this amounted to a non-application of the proper law:

In *Klöckner v. Cameroon*, the applicable law was Cameroonian law based on French law. The Tribunal had relied on the basic principle of “frankness and loyalty”.<sup>25</sup> The *ad hoc* Committee found that this style of reasoning amounted to a failure to apply the proper law.<sup>26</sup> It found that the absence of specific legal authority made it impossible to determine whether the proper law had been applied:

<sup>22</sup> See also *Klöckner v. Cameroon*, *Decision on Annulment*, 3 May 1985 2 ICSID Reports 119; *MINE v. Guinea*, *Decision on Annulment*, 22 December 1989, 4 ICSID Reports 87.

<sup>23</sup> *Amco v. Indonesia*, *Decision on Annulment*, 16 May 1986, 1 ICSID Reports 515.

<sup>24</sup> *Amco v. Indonesia*, *Decision on Annulment*, 16 May 1986, 1 ICSID Reports, 534/5.

<sup>25</sup> *Klöckner v. Cameroon*, *Award*, 21 October 1983, 2 ICSID Reports 59-61.

<sup>26</sup> *Klöckner v. Cameroon*, *Decision on Annulment*, 3 May 1985, 2 ICSID Reports 121-125.

71. Does the “basic principle” referred to by the Award ... as one of “French civil law” come from positive law, i.e., from the law’s body of rules? It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions.<sup>27</sup>

By not demonstrating the existence of concrete rules, the tribunal, in the eyes of the *ad hoc* Committee, had not applied the proper law:

79. ...in this reasoning, limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form, the Tribunal has not applied “the law of the Contracting State.”<sup>28</sup>

Subsequent *ad hoc* committees did not apply similarly strict standards:

In *Amco v. Indonesia*, the proper law was Indonesian law and applicable rules of international law.<sup>29</sup> The *ad hoc* Committee said:

25. ...the *ad hoc* Committee does not believe that the Tribunal had necessarily to preface each finding or conclusion with a specification of the Indonesian or international law rule on which such finding or conclusion rests.<sup>30</sup>

The Tribunal had held that the procedure leading to the revocation of the investment license had been contrary “to the general and fundamental principle of due process”.<sup>31</sup> Before the *ad hoc* Committee, Indonesia argued that Indonesian administrative law did not include a general principle of due process. But Indonesia admitted that Indonesian law offered redress against administrative decisions on the basis of certain general standards.<sup>32</sup> The *ad hoc* Committee held:

*It appears to the ad hoc Committee that these general standards of Indonesian law are not qualitatively different from, and seem equivalent in a functional sense to, what the Tribunal appears to have had in mind in referring to “the general and fundamental principle of due process”.*<sup>33</sup>

Therefore, the *ad hoc* Committee held that this part of the Award was not vitiated by a failure to apply the proper law amounting to a manifest excess of powers.

### Proper law and equity

Art. 42(3) of the ICSID Convention provides that the tribunal may decide *ex aequo et bono* if the parties so agree. The tribunal’s power to decide *ex aequo*

<sup>27</sup> At p. 122.

<sup>28</sup> At p. 125.

<sup>29</sup> *Amco v. Indonesia, Award, 20 November 1984, 1 ICSID Reports 452.*

<sup>30</sup> *Amco v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 516.*

<sup>31</sup> *Amco v. Indonesia, Award, 20 November 1984, 1 ICSID Reports 472/3.*

<sup>32</sup> *Amco v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 529/30.*

<sup>33</sup> At p. 530.

*et bono* is restricted to cases in which the parties have given their explicit permission. A decision based on equity, rather than on law, without an authorization by the parties, constitutes an excess of powers for failure to apply the proper law.

In *Klöckner v. Cameroon*, the Tribunal rejected both the claim and the counter-claim. The Tribunal had reached this result on the basis of a finding that not only Cameroon but also Klöckner had failed to discharge its obligations properly. It made a quantitative comparison of the respective failures of performance and came to the result that the amounts paid corresponded equitably to the value of the Claimant's performance.<sup>34</sup> In the *ad hoc* Committee's view, this amounted to an impermissible resort to equity:

*...the Award is based more on a sort of general equity than on positive law (and in particular French civil law) or precise contractual provisions...<sup>35</sup>*

In *Amco v. Indonesia*, the *ad hoc* Committee refused to follow this strict course. It found that not every mention of equitable considerations in the award amounted to a decision *ex aequo et bono*:

*Equitable considerations may indeed form part of the law to be applied by the Tribunal, whether that be the law of Indonesia or international law.<sup>36</sup>*

The *ad hoc* Committee concluded:

*The ad hoc Committee thus believes that invocation of equitable considerations is not properly regarded as automatically equivalent to a decision ex aequo et bono which, in view of the determination of the law applicable to the present case ..., would constitute a decision annulable for manifest excess of powers. Nullity would be a proper result only where the Tribunal decided an issue ex aequo et bono in lieu of applying the applicable law.<sup>37</sup>*

## c) Corruption of an Arbitrator

The third ground for annulment listed in Art. 52(1)(c) is that there was corruption on the part of a member of the tribunal. Corruption of an arbitrator is an obvious ground for annulment. At the same time it appears to be extremely rare. No allegation of corruption has ever been made in ICSID proceedings.

### Concept of corruption

Corruption would be improper conduct by an arbitrator induced by personal gain. Acceptance of an improper payment in connection with ICSID proceedings would create a strong presumption of corruption. Mere bias without improper payment would not amount to corruption. A situation in

<sup>34</sup> *Klöckner v. Cameroon, Award, 21 October 1983, 2 ICSID Reports 61-72.*

<sup>35</sup> *Klöckner v. Cameroon, Decision on Annulment, 3 May 1985, 2 ICSID Reports 156.*

<sup>36</sup> *Amco v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 516.*

<sup>37</sup> *At p. 517.*

which the arbitrator is likely to derive personal gain from the outcome of the proceedings would create a conflict of interests. This could lead to a presumption of corruption.

**Special time limit**

Almost by definition, corruption will be clandestine. Evidence of corruption may emerge some time after the conclusion of proceedings. It is for this reason that Art. 52(2) contains a special time limit for corruption. The application for annulment must be made within 120 days of the discovery of the corruption. In addition, there is an absolute cut-off for applications after three years from the date on which the award was rendered. Both time limits must be complied with cumulatively.

**d) Serious Departure from a Fundamental Rule of Procedure**

The fourth ground for annulment listed in Art. 52(1)(d) is that there has been a serious departure from a fundamental rule of procedure. This provision is designed to safeguard the basic fairness and integrity of the arbitration process. The deviation, in order to constitute a ground for annulment, must be serious and it must affect a fundamental rule.

**Serious**

To be serious the departure must be substantial rather than minimal. The departure must have had a material effect on the affected party. It must have deprived that party of the benefit of the rule in question. For instance, if a party is deprived of its rights to be heard, the departure is not serious if it is clear from the circumstances that the party never intended to exercise the right.

**Fundamental**

Not every procedural rule in the Convention or in the Arbitration Rules is fundamental. The history of this provision and the practice under it would suggest that a failure to give both parties the opportunity to be heard would constitute a violation of a fundamental rule. Also, the requirement of deliberation among the arbitrators appears to be fundamental. But arbitrators do not commit a serious departure from a fundamental rule of procedure if they base their decision on an argument that was not developed and discussed by the parties.<sup>38</sup>

In *Amco v. Indonesia*, Indonesia complained that the Tribunal had attributed to Indonesia knowledge of certain facts, but that it had denied that PT Amco had been duly warned about the failure to register its claimed investments. The *ad hoc* Committee refused to see a lack of impartiality in the conclusions reached by the Tribunal on these two unrelated issues:

88. *The ad hoc Committee acknowledges that differing results were reached by the Tribunal in the two above situations. But the ad hoc Committee,*

<sup>38</sup> Klöckner v. Cameroon, *Decision on Annulment*, 3 May 1985, 2 ICSID Reports 127, 129.

*after according due regard to the fundamental rule of equality of the parties, is unable to conclude that the Tribunal in evaluating the surrounding facts in the two situations clearly exceeded the scope of discretionary authority granted to it by Arbitration Rule 34 and must consequently refuse Indonesia's claim of nullity in this regard.*<sup>39</sup>

### Right to be heard

The principle that both sides must be heard (*audiatur et altera pars*) on all issues affecting their legal position is a basic concept of fairness and a fundamental rule of procedure. But this principle does not mean that the tribunal is precluded from adopting legal reasoning that was not put forward by one of the parties without first seeking the parties' opinion.

In *Klöckner v. Cameroon*, Klöckner complained that there had been a serious departure from a fundamental rule of procedure in that the Tribunal had based its decision on arguments not discussed by the parties.<sup>40</sup> The *ad hoc* Committee observed that the Tribunal was neither under an obligation to hear the parties on the reasons it was about to select for its decision nor bound to choose among the arguments put forward by the parties:

*...arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been). Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a serious departure from a fundamental rule of procedure.*<sup>41</sup>

### Timely objection

A party must react immediately to a violation of proper procedure by stating its objection and by demanding compliance. Arbitration Rule 27 states that failure to object will be interpreted as a waiver to object at a later stage. A party that has failed to protest against a perceived procedural irregularity before the tribunal when it had the opportunity to do so, is precluded from arguing that this irregularity constituted a serious departure from a fundamental rule of procedure for purposes of annulment.

In *Klöckner v. Cameroon*, the Claimant complained about the violation of its right to be heard. The *ad hoc* Committee said:

*... it suffices to note that the Claimant has not established that it made a timely protest against the serious procedural irregularities it now complains of. ...Rule [27<sup>42</sup>] of the ICSID Rules of Procedure for Arbitration Proceedings would therefore rule out a good part of its complaints.*<sup>43</sup>

<sup>39</sup> *Amco v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 532. Arbitration Rule 34 deals with evidence: 1 ICSID Reports 169/70.*

<sup>40</sup> *Klöckner v. Cameroon, Decision on Annulment, 3 May 1985, 2 ICSID Reports 128.*

<sup>41</sup> *At p. 129.*

<sup>42</sup> *The Arbitration Rules were renumbered in 1984.*

<sup>43</sup> *Klöckner v. Cameroon, Decision on Annulment, 3 May 1985, 2 ICSID Reports 128.*

## e) Failure to State Reasons

The fifth ground for annulment listed in Art. 52(1)(e) is that the award has failed to state the reasons on which it is based. A statement of reasons is generally seen as a necessity for any orderly administration of justice. The ICSID Convention contains a duty to state reasons in Art. 48(3). The tribunal's obligation to state reasons is absolute and may not be waived. An agreement between the parties to the effect that reasons need not be stated would be invalid.<sup>44</sup>

### Incomplete reasons

In view of the clear obligation to state reasons, a total absence of reasons is extremely unlikely and has never occurred. More likely is the absence of reasons for certain parts of an award. The incompleteness of reasons has been argued in most annulment cases.

In *Klöckner v. Cameroon*, the *ad hoc* Committee found that the Tribunal had imposed an "obligation of result" upon the Claimant without ever explaining the reasons for doing so:

*... the Award in no way allows the ad hoc Committee or for that matter the parties to reconstitute [reconstruct?] the arbitrators' reasoning in reaching a conclusion that is perhaps ultimately perfectly justified and equitable (and the Committee has no opinion on this point) but is simply asserted or postulated instead of being reasoned. The complaint must therefore be regarded as well founded, to the extent that it is based on Article 52(1)(e).<sup>45</sup>*

In other cases the *ad hoc* Tribunals were willing to reconstruct reasoning:<sup>3</sup>

In *MINE v. Guinea*, Guinea had complained that the Tribunal had failed to give reasons for awarding interest at the United States bank rate. The *ad hoc* Committee said:

*6.104 Guinea advances a separate objection to the Tribunal's failure to give reasons for the award of interest at the United States bank rate. In light of the fact that the United States dollar was the currency of the contract, the justification of that currency and bank rate of interest is apparent. An express statement to that effect is however wanting.<sup>47</sup>*

### Insufficiency of reasons

A statement of reasons that does not explain to the reader of the award, especially to the parties, how and why the tribunal came to its decision may not properly be called a statement of reasons. On the other hand, the standard for an acceptable explanation is highly subjective. *Ad hoc* committees have tried to formulate standards for the adequacy of reasons. They have postulated

<sup>44</sup> *MINE v. Guinea, Decision on Annulment, 22 December 1989, 4 ICSID Reports 88.*

<sup>45</sup> *Klöckner v. Cameroon, Decision on Annulment, 3 May 1985, 2 ICSID Reports 149.*

<sup>46</sup> *See also Amco v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 526.*

<sup>47</sup> *MINE v. Guinea, Decision on Annulment, 22 December 1989, 4 ICSID Reports 108.*

that reasons must be “sufficiently relevant”<sup>48</sup> or that they “must constitute an appropriate foundation for the conclusions reached”.<sup>49</sup>

The *ad hoc* Committee in *MINE v. Guinea*, sought to introduce a less subjective test. The standard introduced by *MINE* merely requires that the reasons enable the reader to understand what motivated the tribunal. The *ad hoc* Committee said:

*5.09 In the Committee’s view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.*<sup>50</sup>

### Contradictory reasons

Contradictory reasons will not enable the reader to understand the tribunal’s motives. They are inadequate by definition. Contradictory reasons amount to a failure to state reasons since “two *genuinely* contradictory reasons cancel each other out”.<sup>51</sup>

In *Amco v. Indonesia*, the issue of contradictory reasons concerned the method employed by the Tribunal for calculating the required amount of invested capital. The Award had included a loan in its calculation although it had acknowledged previously that only equity capital but not loans could be taken into account.<sup>52</sup> The *ad hoc* Committee said:

*the Tribunal was aware of the rule excluding loan funds from the foreign capital investment ...therefore...the Tribunal seems to have contradicted itself. At least this impression is not fully disproved by the text of the Award itself.*<sup>53</sup>

The *ad hoc* Committee concluded that the Tribunal had failed to state reasons for its calculation of the investment.

### Failure to deal with every question

Article 48(3) of the Convention states:

*(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.*

52(1)(e) lists failure to state reasons but it does not state that failure to deal with every question is a ground for annulment. Nevertheless, *ad hoc* committees have held that both requirements of Art. 48(3) are covered by Art. 52(1)(e).<sup>54</sup>

<sup>48</sup> Klöckner v. Cameroon, *Decision on Annulment*, 3 May 1985, 2 ICSID Reports 138/9, 143.

<sup>49</sup> Amco v. Indonesia, *Decision on Annulment*, 16 May 1986, 1 ICSID Reports 520.

<sup>50</sup> MINE v. Guinea, *Decision on Annulment*, 22 December 1989, 4 ICSID Reports 88.

<sup>51</sup> Klöckner v. Cameroon, *Decision on Annulment*, 3 May 1985, 2 ICSID Reports 137. *Italics original.*

<sup>52</sup> Amco v. Indonesia, *Award*, 20 November 1984, 1 ICSID Reports 474, 483, 486, 487.

<sup>53</sup> Amco v. Indonesia, *Decision on Annulment*, 16 May 1986, 1 ICSID Reports 536.

<sup>54</sup> Klöckner v. Cameroon, *Decision on Annulment*, 3 May 1985, 2 ICSID Reports 137; Amco v. Indonesia, *Decision on Annulment*, 16 May 1986, 1 ICSID Reports 517/8; MINE v. Guinea, *Decision on Annulment*, 22 December 1989, 4 ICSID Reports 82, 87-89, 96, 104-7.

Supplementation under Art. 49(2) will be useful only in cases of inadvertent omissions of a technical character. Art. 49(2) will not be useful in cases of a failure to address major facts and arguments which go to the core of the tribunal's decision.

### Essential questions

The tribunal's obligation to deal with every question submitted to it does not mean that it has to address every argument advanced by a party. Some arguments may be irrelevant, peripheral or obsolete. In order to form a basis for annulment, a question that has not been dealt with, must be an essential question in the sense that it could have affected the outcome of the award. An essential question may also be understood in the sense of a crucial or decisive argument. An argument is crucial or decisive if its acceptance would have altered the tribunal's conclusions.

### How to deal with questions

Normally an essential question or a decisive argument should be addressed directly. This may be done by either accepting it or by rejecting it and giving reasons for its rejection. Sometimes it is unnecessary to address an argument directly, since it is logically ruled out or made irrelevant by something the tribunal has found. In situations of this kind, questions may be dealt with indirectly. If it can be implied from the reasons given by the tribunal why a particular argument cannot be sustained, it is not necessary to dismiss that argument explicitly.

### Summary:

- **The five grounds for annulment are listed exhaustively in Art. 52(1).**
- **Improper constitution of a tribunal has never been alleged.**
- **Manifest excess of powers may occur if the tribunal decides without or beyond its jurisdiction.**
- **Failure to exercise an existing jurisdiction also constitutes an excess of powers.**
- **Failure to apply the proper law has also been found to constitute an excess of powers.**
- **Failure to apply the proper law must be distinguished from a mere error of law.**
- **If the parties have not authorized the tribunal to decide *ex aequo et bono*, a decision based on equity rather than on law constitutes an excess of powers.**
- **Corruption of an arbitrator has never been alleged in ICSID proceedings.**
- **Not every violation of a procedural rule constitutes a serious departure from a fundamental rule of procedure.**
- **Incomplete, insufficient and contradictory reasons amount to a failure to state reasons.**
- **Failure to deal with an essential question has also been held to constitute a failure to state reasons.**

## 6. ANNULMENT: PROCEDURE

The procedure governing annulment is covered by the Convention in Art. 52 (2)-(5) in the following terms:

*(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 provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee.*

*(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.*

### **Application for annulment**

The application for annulment must state which of the award's features exhibit flaws that constitute grounds for annulment. The information contained in the application may be developed by the requesting party in subsequent phases of the proceeding.

### **Time limits**

Art. 52(2) imposes a general time limit for all cases except corruption and a special set of time limits for corruption. The general time limit is 120 days calculated from the date on which the award was rendered. In the case of an allegation of corruption, the time limit of 120 days is calculated from the day the corruption is discovered. In addition, there is an absolute cut-off date three years after the award was rendered.

### **Effect of time limit**

The time limit means that any application for annulment must be submitted before its expiry. But it also means that all grounds for annulment must be put forward within the time limit. A party may not rely on additional grounds for annulment after the time limit has lapsed. The application must state the grounds on which it is based in detail.<sup>55</sup> Therefore, it is not sufficient to file a formal application within 120 days and provide substantiation later on.

<sup>55</sup> *Arbitration Rule 50(1)(c).*

In *Amco v. Indonesia*, Amco contended that a number of pleas advanced by Indonesia for the annulment of the Award were time-barred since they were raised for the first time in a memorial, after the expiry of the time limit. The *ad hoc* Committee agreed that it would be insufficient for an application for annulment merely to recite grounds for annulment as contained in Art. 52(1) together with a prospect for further submissions at a later stage. But it also found that statements made in the Application could be taken together with their development and amplification in a later memorial. The *ad hoc* Committee proceeded to a detailed examination of whether the claims for annulment made by Indonesia were reasonably covered by the statements made in Indonesia's Application for annulment, which had been lodged in a timely manner.<sup>56</sup> This examination led to the following result:

*53. The ad hoc Committee believes that the grounds above pointed to by Amco are not really new grounds raised for the first time by Indonesia in its Memorial but were either in fact referred to in the Application or reasonably implicit in the Application. The statements in Indonesia's Memorial thus constitute developments or specifications of statements already made in the Application.*<sup>57</sup>

**Appointment of members of ad hoc committee**

Annulment proceedings take place before an *ad hoc* committee that is appointed especially for this purpose. Unlike an arbitral tribunal, an *ad hoc* committee is not appointed by the parties but by the Chairman of ICSID's Administrative Council. This function is performed *ex officio* by the President of the World Bank. Appointments must be made from the Panel of Arbitrators. The Panel of Arbitrators is composed of persons designated by Contracting States and by the Chairman in accordance with Arts. 12-16.

**Exclusionary rules**

Art. 52(3) of the Convention excludes certain categories of persons from serving on an *ad hoc* committee. These exclusionary rules are considerably stricter than those for arbitral tribunals as provided by Arts. 38 and 39. The exclusionary rules are designed to safeguard maximum objectivity and to avoid even the remote semblance of partisanship.

**Procedure: applicable provisions**

Many but not all of the Convention's provisions on procedure before a tribunal apply to annulment proceedings. Article 52(4) specifies which of the Convention's provisions apply *mutatis mutandis*<sup>58</sup> to annulment. Provisions dealing with procedure that are to be applied by analogy include Art. 43 dealing with evidence, Art. 45 dealing with default by a party and Art. 48 dealing with majority voting, written form, statement of reasons, individual opinions and publication of awards. Other provisions that apply in annulment proceedings are Art. 49 dealing with dispatch, supplementation and correction. The reference to Art. 53 means that the decision on annulment is binding on the

<sup>56</sup> *Amco v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 521/2, 528.*

<sup>57</sup> *At p. 523.*

<sup>58</sup> *Mutatis mutandis: with the necessary changes.*

parties and not subject to any appeal or remedy except as provided in the Convention. The reference to Art. 54 means that decisions on annulment must be recognized and enforced by all States parties to the Convention. The reference to Chapter VI means that the Convention's provisions on the cost of proceedings extend to annulment proceedings. The reference to Chapter VII means that the place of annulment proceedings is the seat of the Centre unless the parties agree otherwise.

**Procedure: provisions that are not applicable**

Other provisions of the Convention are not applicable to annulment proceedings. These include Art. 47 dealing with provisional measures, Art. 46 dealing with incidental, additional or counter-claims, Art. 50 dealing with interpretation and Art. 51 dealing with revision. The non-inclusion of Art. 52 means that a decision on annulment is not itself subject to annulment. The non-inclusion of Chapter V (Arts. 56-58) dealing with the replacement and disqualification of conciliators and arbitrators creates a curious gap. In practice, this gap has been closed by the application of Arbitration Rules 8-12<sup>59</sup> dealing with the incapacity, resignation and disqualification of arbitrators and with the resulting procedural steps.

**Stay of Enforcement**

Under Art. 52(5) the *ad hoc* committee has the power to stay enforcement of the award pending its decision. This power is discretionary. Until the committee is constituted and can rule on a request for stay of enforcement, the stay will be automatic if it is requested in the application for annulment.

**Posting of security**

Some *ad hoc* committees have required that the award debtor provide some security for the eventual payment of the award, should it be upheld. This is a useful counterbalance to a stay of enforcement. Such a security may be in the form of a bank guarantee or a similar arrangement that may be drawn upon when the award becomes final. The guarantee will only operate if annulment is rejected and the award becomes enforceable.

**Summary:**

- **A request for annulment is generally subject to a time limit of 120 days. Corruption has special time limits.**
- **Appointment of members of *ad hoc* committees follows strict rules designed to safeguard maximum objectivity.**
- **Some but not all of the Convention's provisions on procedure before a tribunal apply to annulment proceedings.**
- **Enforcement of the award may be stayed during annulment proceedings.**

<sup>59</sup> 1 ICSID Reports 162/3.



## 7. RESUBMISSION TO A NEW TRIBUNAL AFTER ANNULMENT

Article 52(6) of the Convention provides for resubmission of a dispute after the annulment of an award in the following terms:

*(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.*

### New tribunal

A decision to annul does not replace the award with a new decision. Rather, the parties are given the opportunity to start ICSID arbitration proceedings before a new tribunal. The initiative for resubmission must come from one or both parties. A person who had previously acted as arbitrator or member of the *ad hoc* committee in the case may not be appointed as a member of the new tribunal<sup>60</sup> unless the parties agree otherwise.

### Partial annulment and res judicata

If the original award had only been annulled in part, the unannulled portion of the original award remains *res judicata* and is binding on the new tribunal.<sup>61</sup>

In *Amco v. Indonesia*, the *ad hoc* Committee annulled the first Award subject to broad qualifications. In addition, it identified certain specific findings of the first Tribunal to which the annulment did or did not apply.<sup>62</sup> The new Tribunal in the resubmitted case undertook a careful stocktaking of findings of the first Tribunal that had been annulled or had not been annulled by the *ad hoc* Committee.<sup>63</sup> It identified a list of points on which the *ad hoc* Committee had explicitly refused to annul the first Tribunal's findings or had specifically confirmed the holdings in the original Award. In addition, the new Tribunal gave a list of specific annulment findings of the *ad hoc* Committee.<sup>64</sup> It was clear that points on which the Award was annulled fell to be relitigated.<sup>65</sup> It was equally clear that matters sought by a party to be annulled but which had expressly not been annulled or had been expressly confirmed were *res judicata*.<sup>66</sup> Holdings by the first Tribunal that had not been challenged in the annulment proceedings and on which the *ad hoc* Committee, consequently, had not made a pronouncement were also held to be *res judicata*.<sup>67</sup>

<sup>60</sup> *Arbitration Rule 1(4)*.

<sup>61</sup> *Arbitration Rule 55(3)*.

<sup>62</sup> *Amco v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 542*.

<sup>63</sup> *Amco v. Indonesia, Resubmitted Case: Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports 547*.

<sup>64</sup> *At pp. 546/6, 553-556*.

<sup>65</sup> *See also at p. 558*.

<sup>66</sup> *At p. 553*.

<sup>67</sup> *At pp. 556/7*.

**Reasoning of ad hoc committees**

At times *ad hoc* committees did not restrict themselves to finding that there were grounds for annulment but also expressed opinions as to what the correct decision should have been. The question arises whether the findings of the *ad hoc* committee on the substance of the case are binding on the new tribunal or whether it is free to make its own determinations once the award or part of the award has been annulled.

In *Amco v. Indonesia*, Indonesia argued that certain findings of fact and law that were essential to, or necessarily flow from the Annulment Decision, must also be binding on the new Tribunal.<sup>68</sup> The new Tribunal refused to accept the Indonesian argument under which the reasons of the *ad hoc* Committee were to be treated as *res judicata*. Rather, the normal effect of annulment was to place the parties in the legal position in which they stood before the commencement of the proceedings.<sup>69</sup> Only the *ad hoc* Committee's determination as to the existence of one of the grounds for annulment listed in Art. 52(1) was binding. The *ad hoc* Committee was not an appeals court rehearing the case on its merits.<sup>70</sup> The new Tribunal said:

*The authority given to the ad hoc Committee is clearly that of nullity and not of substantive revision. If the present Tribunal were bound by "integral reasoning" of the ad hoc Committee, then the present Tribunal would have bestowed upon the ad hoc Committee the role of an appeal court.<sup>71</sup>*

**New claims and arguments**

Under Art. 52(6) it is the original dispute which may be submitted for relitigation. This means that the parties may not introduce new claims before the new tribunal. This does not mean that a party may not reintroduce claims or arguments that it had used before the first tribunal but on which that tribunal had found it unnecessary to rule.

In *Amco v. Indonesia*, a claim of unjust enrichment had been advanced by Amco before the first Tribunal but that Tribunal reached its findings on other grounds. The second Tribunal rejected Indonesia's contention that the introduction of unjust enrichment would create a new argument to evade the force of *res judicata*. It ruled that the claim of unjust enrichment could still be advanced in the resubmitted proceeding<sup>72</sup> but rejected it on the merits.<sup>73</sup>

<sup>68</sup> At p. 548.

<sup>69</sup> At p. 459.

<sup>70</sup> At p. 550.

<sup>71</sup> At p. 552.

<sup>72</sup> At p. 560/1.

<sup>73</sup> *Amco v. Indonesia, Resubmitted Case: Award, 5 June 1990, 1 ICSID Reports 578, 607/8.*

**Summary:**

- **If the award has been annulled, the dispute may be submitted to a new tribunal.**
- **In the case of partial annulment, the unannulled portion of the award remains binding.**
- **The reasons of the *ad hoc* committee are not binding on the new tribunal.**
- **The parties may not introduce new claims before the new tribunal.**



## TEST MY UNDERSTANDING

After having studied this Module the reader should be able to answer the following questions. Most answers should go beyond a simple yes/no alternative and would require a brief explanation.

1. What remedies are available to a party after an ICSID award has been rendered?
2. Is it possible to take steps against an ICSID award before domestic courts?
3. What are the bodies that decide upon the various remedies?
4. What is the difference between annulment and appeal?
5. May a party request partial annulment of an award?
6. What are the grounds for annulment listed in the Convention?
7. Which of these grounds have been used in practice?
8. Why does failure to apply the proper law constitute an excess of powers?
9. What constitutes a serious departure from a fundamental rule of procedure?
10. Does “failure to state reasons” just mean a total absence of reasons?
11. What remedies are available if an award is incomplete and does not cover all points raised by the parties?
12. May a party raise new grounds for annulment in the course of annulment proceedings?
13. How and by what criteria are members of *ad hoc* committees appointed?
14. If an *ad hoc* committee finds that there is a ground for annulment, is it under an obligation to annul?
15. If an award is annulled and the dispute is resubmitted to a new tribunal, is that tribunal in any way limited in its discretion by:
  - a) the decision of the original tribunal?
  - b) the decision of the *ad hoc* committee?



## HYPOTHETICAL CASES

### Asterix Corp. v. Middleland

The ICSID Tribunal in *Asterix Corp. v. Middleland* found that it had jurisdiction and upheld the claim on the merits. In this case, a concession contract between the two parties had granted an investment license to Asterix to establish film studios in Northtown, the capital of Middleland. The contract provided for the settlement of any disputes arising from the investment through ICSID arbitration but did not contain a choice of law clause. Asterix is a national of Easterly. Both Middleland and Easterly are parties to the ICSID Convention.

Shortly after Asterix started operating, the authorities of Middleland complained in a letter to the management that Asterix was operating in violation of the local labour law. That law contains a provision mandating that all businesses must adhere to employment practices that avoid any form of discrimination especially those on the basis of gender and national origin. All higher management positions in Asterix's operation in Middleland were occupied by male nationals of Easterly. Exactly one year after the complaint, Middleland revoked the investment license on the ground that Asterix had consistently violated the non-discrimination provision in Middleland's labour law. At the same time, Middleland ordered all of Asterix's employees of Easterly nationality to leave the country. Asterix was also informed that this decision was not subject to any appeal.

The Tribunal held that the revocation of the license was "a grave violation of the principles of fair procedure and due process" and that it constituted a "de facto expropriation" of Asterix. The Tribunal did not rely on any specific provisions of the law of Middleland but referred to "basic and universally recognized precepts of international law" without entering into a specific discussion of their contents. The Tribunal's award of damages was based on an "equitable estimate" of possible future profits. The Tribunal awarded compound interest on the amount of damages to run from the date of the cancellation of the license. This more than doubled the amount of the damages. Neither party had presented arguments on the method of calculating damages to the Tribunal.

Middleland wishes to request the annulment of the award. It turns to you for advice. You have three tasks:

1. Advise Middleland on the procedure and the necessary steps to be taken to secure annulment.
2. Draft Middleland's application for annulment to be submitted to ICSID.
3. Advise Middleland on possible counter-arguments by Asterix and ways to deal with these.

## Aquarius Corp. v. Eldorado

Aquarius is a company with its registered head office in Franconia. It is specialized in the processing and distribution of drinking water. In 1999 Aquarius entered into a contract with Aridia, a province of Eldorado. The contract provides for the setting up and operation of a modern water supply system in Aridia by Aquarius. The contract with Aridia contains a dispute settlement clause which provides:

“Any dispute between the parties to this agreement concerning its interpretation and application shall be subject to the exclusive jurisdiction of the courts of Aridia.”

A Bilateral Investment Treaty (BIT) between Eldorado and Franconia contains the following clause:

“10.4: Any dispute between a Contracting Party and a national of the other Contracting Party relating to an investment shall be submitted, at the request of the investor, to arbitration by the International Centre for Settlement of Investment Disputes.”

The BIT also contains the following choice of law clause:

“10.6: The tribunal shall decide on the basis of this treaty, the law of the Contracting Party which is a party to the dispute, the terms of possible specific agreements concluded in relation to the investment and principles of international law.”

The BIT also provides for full protection and security, for national treatment and for most favoured nation treatment for investors of the other country. In addition, the BIT prohibits direct or indirect expropriation except for a public purpose, without discrimination and against full, prompt and effective compensation.

Both Franconia and Eldorado are parties to the ICSID Convention.

Shortly after Aquarius completed constructing the water supply system and commenced operations, the provincial government of Aridia increased the taxes to be paid by Aquarius sevenfold. At the same time, Aridia issued a decree freezing the rates for public utilities, thereby preventing Aquarius from passing on the costs of the tax increases to its customers. Aquarius argues that, as a consequence, it was no longer able to operate profitably.

Aquarius instituted ICSID proceedings against Eldorado on the basis of the BIT. The Tribunal issued an Award consisting of a part dealing with jurisdiction and a part dealing with the merits.

In the Award’s section on jurisdiction, the Tribunal held:

1. The BIT between the two countries conferred jurisdiction upon the tribunal, notwithstanding the dispute settlement clause in the 1999 contract between Aquarius and Aridia.
2. Under accepted principles of State responsibility, acts of a constituent subdivision or province of a State that are in violation of international law, are attributable to the central government.

In the Award's section on the merits, the Tribunal held:

In view of the dispute settlement clause in the 1999 contract, an ICSID tribunal will not hear the claim until and unless the Claimant has first used all remedies available in the courts of Aridia.

Aquarius seeks annulment of the Award.

Your task is to:

1. Draft a memorial for Aquarius setting out the grounds for annulment as comprehensively as possible.
2. Draft a memorial for Eldorado refuting all the grounds for annulment put forth by Aquarius.
3. Draft the decision of the *ad hoc* Committee.  
The decision may either:
  - a) refuse to annul the Award; or
  - b) annul the Award in its entirety; or
  - c) annul the Award in part.



## FURTHER READING

### Books

- **Schreuer, C.**, *The ICSID Convention: A Commentary* (2001).

### Articles

- **Broches, A.**, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, Explanatory Notes and Survey of its Application*, 18 *Yearbook of Commercial Arbitration* 627, 686-699 (1993).
- **Broches, A.**, *Observations on the Finality of ICSID Awards*, 6 *ICSID Review—Foreign Investment Law Journal* 321 (1991).
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- **Caron, D. D.**, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 *ICSID Review—Foreign Investment Law Journal* 21 (1992).
- **Craig, W. L.**, *The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk*, 8 *ICSID Review—Foreign Investment Law Journal* 264 (1993).
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- **Feldman, M. B.**, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 *ICSID Review—Foreign Investment Law Journal* 85 (1987).
- **Giardina, A.**, *ICSID: A Self-Contained, Non-National Review System*, in: *International Arbitration in the 21st Century: Towards ‘Judicialization’ and Uniformity?* (Lillich, R. B./Brower, C. N. eds.) 199 (1994).
- **Leigh, M.**, *Arbitration—Annulment of Arbitral Award for Failure to Apply Law Applicable Under ICSID Convention and Failure to State Sufficiently Pertinent Reasons*, 81 *American Journal of International Law* 222 (1987).
- **Pirrwitz, B.**, *Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 23 *Texas International Law Journal* 73 (1988).
- **Redfern, D. A.**, *ICSID—Losing its Appeal?*, 3 *Arbitration International* 98 (1987).
- **Reisman, W. M.**, *The Breakdown of the Control Mechanism in ICSID Arbitration*, *Duke Law Journal* 739 (1989).

- **Reisman, W. M.**, Systems of Control in International Adjudication and Arbitration. Breakdown and Repair 184 (1992).
- **Reisman, W. M.**, Repairing ICSID's Control System: Some Comments on Aron Broches' «Observations on the Finality of ICSID Awards», 7 ICSID Review—Foreign Investment Law Journal 196 (1992).
- **Schreuer, Ch.**, Decisions Ex Aequo et Bono Under the ICSID Convention, 11 ICSID Review—Foreign Investment Law Journal 37 (1996).
- **Sturzenegger, M.**, ICSID Arbitration and Annulment for Failure to State Reasons, 9 Journal of International Arbitration 173 (1992).

## Documents

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States:  
<http://www.worldbank.org/icsid/basicdoc/9.htm>
- List of Contracting States and other Signatories of the Convention:  
<http://www.worldbank.org/icsid/constate/c-states-en.htm>
- ICSID Cases:  
<http://www.worldbank.org/icsid/cases/cases.htm>
- ICSID Arbitration Rules (1984).

## Cases

- *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 509.
- — Resubmitted Case: Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports 543.
- — Resubmitted Case: Award, 5 June 1990, rectified 17 October 1990, 1 ICSID Reports 569.
- — Resubmitted Case: Rectification, 17 October 1990, 1 ICSID Reports 638.
- *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Award, 21 November 2000, 40 ILM 457 (2001).
- — Decision on Annulment, 3 July 2002, 41 ILM ??? (2002).
- *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 95.
- *LETCO v. Liberia*, Decision on Rectification, 17 June 1986, 2 ICSID Reports 380.
- *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports 79.
- *Wena Hotels v. Egypt*, Decision on Annulment, 5 February 2002, 41 ILM 933 (2002).