

Different Systems for the Annulment of Investment Awards*

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I. INTRODUCTION

ONE OF THE MOST FREQUENTLY MISQUOTED citations is Seneca's "*Errare humanum est.*" Seneca actually said, rather, "*Errare humanum est, sed in errore perseverare dementis*"—to err is human, but not to correct the error is so contrary to human nature as to be demented. Errors are magnified if they are committed by those who wield power, because, as Lord Acton said, "power tends to corrupt, and absolute power corrupts absolutely."¹ Arbitrators are human, and not immune to errors. They wield wide powers and are not immune to hubris. Arbitrators' powers cannot reign unfettered; there must be checks and balances to their prerogatives. These come in two forms: transparency and review.

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¹ Lord Acton, *Letter to Mandell Creighton, 5 April 1887*, in *ESSAYS ON FREEDOM OF POWER* 335–336 (1972).

II. LIMITATIONS ON ARBITRATORS' POWERS

A. Transparency

As regards transparency, arbitration is schizophrenic. In investment arbitration, openness is now the norm—and ICSID has been a driving force behind this development. The ICSID web site² includes a list of all arbitrations filed, the names of the arbitrators are known, hearings are increasingly streamed through the internet, and almost all awards are now published. It is now possible to keep track of the investment decisions issued by any arbitrator.

In commercial arbitration, however, the *status quo* is unmovable. Total secrecy is the rule. The existence of cases, the names of arbitrators, and the decisions adopted—everything is confidential.³ The present situation is untenable. Commercial arbitration cannot continue to be “surrounded by secrecy which works against the public interest,” as the Financial Times famously put it.⁴ It is for arbitral institutions to lead the change, to amend their rules and to establish transparency as the guiding principle. Except if parties expressly opt for confidentiality, commercial awards should be published, with the names of the parties, but not those of the arbitrators, deleted.⁵ This would “keep the judge himself, while trying, under trial,” to use Bentham’s words.

B. Review

The insufficiency of transparency reinforces the importance of judicial review. If awards can be submitted to a judge, the risk of abuse of power by arbitrators, or of recklessness in the performance of their duties, is minimized. Some countries, notably Belgium, tried to create an international arbitration system without judicial review; it has not been successful.⁶

This is only one side of the coin. There is another one. It can also be validly argued that judicial interference is contrary to the very idea of arbitration. Parties are choosing for experienced and knowledgeable arbitrators to resolve

² ICSID, <http://icsid.worldbank.org/ICSID/Index.jsp>.

³ The only exceptions are that certain institutions publish sanitized excerpts of some awards years after issuance and that listed companies must disclose the existence of arbitrations which have an impact on the share price.

⁴ See Michael Peel & Jane Croft, *Arbitration: Case Closed*, FINANCIAL TIMES (Apr. 15, 2010).

⁵ My position, although clearly a minority one, has some support. See Cindy Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT’L ARB. 121, 135 (2003); UGO DRAETTA, IL “ROVESCIO” DELL’ARBITRATO 154–155 (2010).

⁶ See Belgian Judicial Code, art. 1717(4) (pre-1999 version); see also GARY BORN, II INTERNATIONAL COMMERCIAL ARBITRATION 2658 *et seq.* (2009).

their dispute, and for the arbitrators' decision to be final and not subject to a second-instance review by a judge. If parties want the merits of a dispute to be resolved by a judge, it would make more sense for them to submit it directly to the courts, rather than follow the circuitous route of having first an arbitration and then a judicial procedure. Submission to arbitration can be viewed as final acceptance of the decision by the chosen arbitrators.

There is thus a dilemma: users of arbitration are signing up to a one-shot procedure, but, at the same time, the system must have emergency procedures in place to flush out inequity and arbitrariness. Commercial arbitration developed a system, based on the UNCITRAL Model Law,⁷ which has successfully balanced both aims. This model⁸ is based on four principles:

- Any party that feels aggrieved is entitled to seek protection from the courts at the place of arbitration;⁹
- Such judicial protection is limited to the annulment of the award;
- The reasons for annulment are analogous to the reasons considered under the New York Convention for denying *exequatur*;¹⁰
- There is no appeal mechanism: the arbitrators' decision as regards the merits of the dispute cannot be corrected by a judge, even if the judge finds that the award is premised on errors of fact or of law.

In practice, judges in most countries have shown a high level of deference towards arbitral awards, and decisions have only been annulled in exceptional circumstances. But this statement must be qualified: certain "problem jurisdictions" show a tendency to annul awards for unforeseeable reasons, especially if the home State is a party. Even in jurisdictions with a friendly attitude, from time to time polemic decisions are issued.¹¹ But, all in all, the system has worked, because by choosing as place of arbitration a jurisdiction where judges are experienced and have shown a favourable attitude to arbitration, the risk of improper annulment of commercial awards can be minimized.

In investment arbitration, the situation is quite different, because two totally different systems of judicial review coexist. If the arbitration is subject to

⁷ 1985 UNCITRAL Model Law on International Commercial Arbitration ("Model Law") (as amended 2006).

⁸ See *id.* art. 34.

⁹ See 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V.1(e) ("New York Convention") (authorizing set aside "by a competent authority of the country in which, or under the law of which, that award was made").

¹⁰ See Model Law, art. 34 and New York Convention, art. V.

¹¹ See, e.g., *Nurdin Jivraj v. Sadruddin Hashwani* [2010] EWCA Civ 712; *J&P Avax S.A. v. Société Tecnimont SPA*, RG 07/22164 (CA Paris, 1e civ., Feb. 12, 2009) and *Commercial Caribbean Niquel v. Overseas Mining Invest. Ltd.*, RG 08/23901 (CA Paris, pôle 1, ch. 1, June 7, 2010).

the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention"), the award is not subject to review by any domestic judge. The Convention created a self-contained, arbitration-based annulment procedure which does not allow for the intervention of, or interference by, any local court.¹² The annulment procedure can be used to set aside jurisdictional or merits awards¹³ rendered in all types of disputes submitted to the ICSID Convention, whether jurisdiction is bestowed by treaty or by contract. The system represents a great achievement. The Convention would have become a tame paper tiger, unable to offer a minimum amount of certainty to foreign investors, if a respondent State's own courts had been entrusted with the last say. The drafters of the Convention hit upon an innovative solution, creating a true review mechanism, while at the same time shielding ICSID awards from interference by State courts.

But not all investment arbitrations are administered under the ICSID Convention. A variety of multilateral and bilateral treaties (including NAFTA, CAFTA, the Energy Charter Treaty and thousands of investment treaties) open the possibility that investors choose arbitration that is not subject to the ICSID Convention (*e.g. ad hoc* arbitration under UNCITRAL Rules, arbitration under ICSID Additional Facility Rules, or arbitration administered by the ICC or the Stockholm Chamber of Commerce). These arbitrations cannot benefit from the special annulment procedure created by the ICSID Convention. In theory, these other modes of arbitration could have created special review mechanisms, mirroring the ICSID procedure. In practice, however, NAFTA,¹⁴ CAFTA,¹⁵ the Energy Charter Treaty¹⁶ and investment treaties¹⁷ have preferred to deviate from

¹² See ICSID Convention, art. 52.

¹³ See *id.* art. 41(2).

¹⁴ Article 1120 of the North American Free Trade Agreement ("NAFTA") allows investors to submit their claims to arbitration under the ICSID Convention (provided that both the host State and the State of the investor are party to the ICSID Convention), ICSID Additional Facility Rules (provided that only one of the parties is a party to the ICSID Convention) or the UNCITRAL Arbitration Rules. Therefore, only the parties that have access to the ICSID Convention will benefit from its special annulment procedure, and no separate procedure is created specifically for the annulment of other NAFTA cases.

¹⁵ Similarly, under Article 10.16.3 of the Dominican Republic–Central America–United States Free Trade Agreement ("CAFTA"), investors can submit investment disputes to arbitration under the ICSID Convention, ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules. Like under NAFTA, however, there is no separate annulment system.

¹⁶ Article 26 of the Energy Charter Treaty ("ECT") allows an investor to choose, *inter alia*, arbitration under the ICSID Convention, ICSID Additional Facility, the UNCITRAL Arbitration Rules or the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"). However, the Treaty does not include specific annulment procedures, and only the cases decided under the ICSID Convention will have access to its procedures.

¹⁷ To the best of my knowledge, no BIT creates a special annulment regime.

the route initiated by the ICSID Convention, and have abstained from creating their own annulment procedures.

How then is annulment handled in these cases? In accordance with the general principle of international law that "*locus regit processum*,"¹⁸ the existence and scope of judicial review must be governed by the laws of the place of arbitration. Since no jurisdiction seems to have developed a special legal regime for the annulment of investment arbitration awards, the rules for review of commercial arbitration awards must be applied by extension. In jurisdictions where the law differentiates between annulment of domestic and international awards, the international rules seem preferable.¹⁹

All investment arbitration awards are thus subject to a review mechanism, but two very different systems coexist: ICSID Convention awards can only be reviewed by an *ad hoc* arbitration committee, designated by ICSID, which must apply the limited grounds of annulment established in the ICSID Convention, while all other awards are subject to judicial review before the courts of the place of arbitration, under the same conditions as international commercial awards.

It is not only that these two different review systems coexist. What is more striking is that, on a number of occasions, multilateral treaties and BITs authorize investors to choose between different types of investment arbitrations in order to adjudicate the investment dispute. Treaties typically offer a choice between ICSID Convention arbitration and *ad hoc* arbitration under the UNCITRAL rules. Any investor is thus authorized to define, not only the rules which will govern the arbitration procedure, but also how and by whom the award will in due course be reviewed. The existence of this right to choose reinforces the importance of conducting a comparative analysis between the two different review systems. This will be done by comparing the place of arbitration, the procedure, the adjudicators, the reasons for setting aside and the effects of the annulment. The theoretical analysis will be followed by a description of the actual track record: the number of awards issued, challenged and eventually annulled under the different systems.

¹⁸ See NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 180, para. 3.51 (5th ed. 2009); see also MATTI KURKELA, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 46 (2005); see also New York Convention, art. V.1.(a).

¹⁹ See *United Mexican States v. Metalclad Corp.*, Reasons for Judgment, 2001 B.C.S.C. 664 (May 2, 2001) and Supplementary Reasons for Judgment, 2001 B.C.S.C. 1529 (Oct. 31, 2001). The Supreme Court of British Columbia decided to apply the International Commercial Arbitration Act, instead of the domestic Commercial Arbitration Act, to the annulment of the award in this NAFTA arbitration between a private corporation and a State.

III. PLACE OF ARBITRATION

The relevance of the place of arbitration is radically different in investment arbitrations under the ICSID Convention as compared to other types of procedures. The ICSID Convention provides that the proceedings normally shall be held at the seat of the Centre,²⁰ but this rule determines the locale, not the legal place of arbitration—a concept which, in ICSID arbitration, does not exist as such, because the arbitration is not rooted in a specific jurisdiction.

In non-ICSID investment arbitration, the establishment of the place of arbitration is fundamental, since it defines the jurisdiction which will carry out the judicial review of the award. Treaties normally do not include any rule defining the place of arbitration.²¹ The choice requires that both parties agree. Investors normally reject that the place of arbitration be established in the jurisdiction of the respondent State—they worry that local courts may interfere during the arbitration or that the judicial review process would be tilted in favor of the host State. Agreement between an investor and a host State requires that a jurisdiction be identified, which is seen as neutral by both parties, and where courts have a record of knowledgeable and predictable decisions. Sometimes this is possible, but often agreement is not forthcoming. In those cases, the place of arbitration must be decided in accordance with the rules to which the arbitration is subject. The resulting solutions vary: if the arbitration is administered by an institution, the decision normally corresponds to the institution,²² and sometimes the rules voice a preference for the city where the institution was created.²³ In *ad hoc* arbitrations under the UNCITRAL Rules, the place of arbitration must be established by the arbitrators.²⁴ The UNCITRAL Rules do not provide the tribunal with much guidance: they simply state that the tribunal must decide “having regard to the circumstances of the case.”²⁵

²⁰ See ICSID Convention, arts. 62, 63.

²¹ Some treaties establish certain requirements for the place of arbitration: Article XII(6)(b) of the BIT between Canada and Venezuela requires that “the venue for any arbitration . . . shall be such as to ensure enforceability under the New York Convention”; NAFTA Article 1130 similarly requires that the place of the arbitration be in the territory of a NAFTA country that is a party to the New York Convention, unless the parties agree otherwise; and CAFTA Article 10.20.1 includes a similar requirement.

²² See, e.g., ICC Rules, art. 12.

²³ Thus, absent agreement among the parties, under Article 16.1 of the LCIA Rules, the place of arbitration normally is London.

²⁴ UNCITRAL Rules, art. 18.

²⁵ See UNCITRAL, Notes on Organizing Arbitral Proceedings, XXVII Y.B. UNCITRAL, Part One, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf> (providing a non-exclusive list of factors that may be taken into account).

IV. ANNULMENT PROCEDURE

Annulment procedures under the ICSID Convention follow the same pattern as ICSID arbitrations.²⁶ Parties can participate directly in the procedure or may be represented by counsel,²⁷ the language of the arbitration must be either English, French or Spanish,²⁸ the procedure is divided into written and oral phases, evidence is marshaled in the same way as in ICSID arbitrations, and the same rules apply to the closure of the proceedings and the issuance of the award. If either of the parties wishes to file an annulment request against an ICSID award, there is no significant procedural hurdle, and, after having gone through the investment arbitration, both parties must have acquired the necessary expertise.

The situation is totally different if the award is not subject to the ICSID Convention and judicial review must be sought from the courts at the place of arbitration—usually a neutral jurisdiction, unfamiliar to both claimant and respondent. Domestic law normally requires that parties be represented by counsel admitted to the local bar, that the local language be used throughout the procedure, with foreign language documents duly translated, and that its own procedural rules and requirements be applied throughout. A court procedure subject to municipal law represents a complete break with the practices followed in the past arbitration.

V. ADJUDICATORS

The procedure for selecting and appointing adjudicators in the review process is also substantially different between ICSID and other systems. Within the ICSID Convention, there are striking differences between the procedures used for appointing members of tribunals and members of annulment committees. When selecting arbitrators, parties have significant say. They can choose between a single arbitrator or any uneven number of arbitrators. If the tribunal comprises three arbitrators—which is the default rule—each party appoints one arbitrator, an individual who does not have to belong to the ICSID panel. The president of the tribunal is also normally designated by agreement, and again there is no requirement that he or she be a member of the panel.²⁹ If no

²⁶ See ICSID Convention, art. 52(4) and ICSID Arbitration Rule 53.

²⁷ See ICSID Arbitration Rule 18.

²⁸ However, the parties may agree on the use of a different language, provided that the committee, after consultation with the Secretary-General, gives its approval. See ICSID Arbitration Rule 22.

²⁹ ICSID Convention, art. 37.

agreement is reached, then the Chairman of ICSID's Administrative Council steps in and, after consulting with both parties, designates the president of the tribunal.³⁰

The extensive participation of the parties in the appointment of arbitrators sits in stark contrast with the total absence of participation in the designation of members of annulment committees. The Convention provides that all annulment (or *ad hoc*³¹) committee appointments shall be made directly by the Chairman of ICSID's Administrative Council, not even requiring that the parties be consulted beforehand.³² The members are chosen from the ICSID panel of arbitrators, a restricted pool of candidates with four designees from each member State, plus 10 additional names proposed by the Chairman of ICSID's Administrative Council.³³ This system is unique. In international arbitration, there is no other procedure in which all the members of a tribunal or committee are designated by an appointing authority, without any involvement by the parties.³⁴ The appointment system is *ius cogens*: parties cannot agree on a different system. The underlying reason seems to be that in annulments, consistency of decisions is important—and this is best achieved through a high degree of continuity in the composition of successive *ad hoc* committees.³⁵ Not only the system of designation, but also the number of committee members, seems mandatory: even if in the arbitration the parties agreed to a single arbitrator, the Convention does not leave any room for a single-person annulment committee. Article 52(3) requires the appointment of three members.

There is a second striking difference between the system for appointment of arbitrators and that for designation of committee members: the relevance of the panel of arbitrators. When designating arbitrators, membership in the panel only becomes relevant if the parties cannot agree on the appointment of the president. The situation is quite different in the selection of committee members: each one must have been deemed appropriate by one member State party to the Convention³⁶ to form part of the official list of ICSID arbitrators. States have rather wide discretion in their choice of panel members, the Convention only

³⁰ *Id.* art. 38.

³¹ This is the expression used in Article 52(3) of the ICSID Convention.

³² ICSID Convention, art. 52(3).

³³ See ICSID Convention, art. 13. The persons designated by the Chairman must each have a different nationality.

³⁴ Some institutions have rules permitting the institution to appoint all members of a tribunal (*e.g.* Netherlands Arbitration Institute, American Arbitration Association or London Court of International Arbitration), but the parties are usually authorized to veto these proposals and instead rank candidates, and they can also validly agree to alternative systems.

³⁵ CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1029 (2d ed. 2009).

³⁶ Or, exceptionally, by the Chairman of ICSID's Administrative Council.

requiring that candidates have high moral character and recognized competence in the field of law.³⁷ In practice, States may select not only jurists with experience as arbitrators, but also academics, diplomats or judges. This contrasts with the practice followed when claimants and respondents are authorized to appoint arbitrators from outside the panel. In these cases, parties naturally prefer, for obvious reasons, persons with relevant and direct arbitration experience. The professional background and legal experience of party-appointed and panel-appointed arbitrators do not have to coincide.

There is an often-quoted phrase from Alan Redfern, already made in 1987, who worried that “the decisions of three eminent arbitrators, appointed by or on behalf of the parties, [would then be] wiped out by another three eminent arbitrators, appointed by the President of the World Bank, in what might seem like an elaborate and expensive game of snakes and ladders.”³⁸ The statement certainly is true; but it is true because the ICSID Convention decided to create completely different systems for the appointment of adjudicators in the arbitration and in the review phase of the procedure. The drafters of the Convention must have worried that awards, even if issued by “three eminent arbitrators, appointed by or on behalf of the parties,” could still go wrong, and wanted to entrust the correction to a body of experts who were truly independent from the parties and from the arbitrators, and could serve as impartial and unbiased adjudicators of last instance. To achieve this, the Convention not only curtailed any party intervention in the ultimate designation, but additionally created a number of tests of independence which prospective candidates must meet.³⁹

The situation is totally different in the review of awards issued in investment arbitrations outside the ICSID Convention. In these cases, the review process is entrusted to a local judge or court, selected without any participation of the parties and in accordance with applicable municipal rules. Normally, the judge will be a professional civil servant who has never had any prior involvement with international investment arbitration, and the case at hand will in all likelihood be the only instance in the judge’s professional career when he or she is confronted with this type of situation.⁴⁰

³⁷ ICSID Convention, art. 14.

³⁸ Alan Redfern, *ICSID – Losing its Appeal?*, 3 *ARB. INT’L* 98 (1987).

³⁹ Under Article 52(3) of the ICSID Convention, *ad hoc* committee members cannot be selected from among the arbitrators who issued the award, nor can they have the same nationality as any of these arbitrators, or of any of the parties to the dispute. In addition, committee members cannot have been designated to the panel by the host State or the home State of the investor, nor can they have acted as conciliator in the same dispute.

⁴⁰ The two countries where the highest number of annulment requests have been filed before the domestic courts are Canada and the U.S., with five each, followed by Sweden with four.

Summing up, there are marked differences in the background, knowledge and experience of the person who will have to decide on the annulment of an investment award:

- Under the ICSID Convention, the adjudication is entrusted to three “persons of high moral character and recognized competence in the field of law,” vetted through a double procedure: first by States,⁴¹ who must have elected them to the panel of arbitrators, and then by the Chairman of ICSID’s Administrative Council, who selects from this list. The members who pass this test will normally have extensive experience in international investment law, will have previously sat on tribunals and annulment committees, and will have the expectation that in the future new appointments may be forthcoming;
- In arbitrations not subject to the ICSID Convention, the review is carried out by a professional judge, selected in accordance with the criteria established by municipal law, who, under normal circumstances, will have no specific experience in international investment law, and will look on the case as an interesting, legally challenging but rather exotic phenomenon.

VI. REASONS FOR SETTING ASIDE

The reasons which authorize an *ad hoc* committee to annul an ICSID award are the five set forth in Article 52(1) of the Convention. In non-Convention arbitrations, the judge will apply the standards for review of international awards provided for in his or her own legal system. In most jurisdictions, these standards will be based on the six reasons defined in Article 34 of the UNCITRAL Model Law. Both systems create procedures which only authorize the annulment of awards in a number of limited and legally defined sets of circumstances. Neither error of law nor error of fact qualify as reasons for annulment, and relief is only afforded for egregious violations of a few basic principles. Neither the ICSID Convention nor the Model Law create a mechanism for appeal, in which the review extends to the merits of the decision. This is the general rule, valid at the level of principles. The difficulties, as so often happens, lie in the details—the precise scope of the reasons for setting aside. These reasons will be analyzed in the following sections.

⁴¹ Or, exceptionally, by the Chairman of ICSID’s Administrative Council.

A. Serious Violation of Due Process

Serious violation of due process is an undisputed ground for annulment under both systems: the ICSID Convention refers in generic terms to “serious departure from a fundamental rule of procedure,”⁴² while the Model Law, in a more descriptive fashion, mentions lack of notice (of the appointment of an arbitrator or of the proceedings) or other factors affecting the ability of a party to present its case.⁴³ In essence, both rules, even if defined differently, cover the same ground: if there is a serious violation of due process, which undermines the principle that each party has a right both to be heard on equal terms and to contradict the reasoning of the counterparty, the award warrants set aside. This ground is frequently invoked by appellants, normally in conjunction with other grounds. It has been successfully applied twice in ICSID annulment procedures.⁴⁴

B. Corruption

The ICSID Convention includes corruption on the part of a member of the tribunal as a ground for annulment.⁴⁵ There is no precedent of an ICSID award being set aside for this reason. The Model Law does not include corruption of the tribunal as a separate ground of annulment, but there can be no doubt that an award affected by this vice would be immediately quashed by the courts.⁴⁶

C. Improper Constitution of the Tribunal

Incorrect constitution of the arbitral tribunal is a ground for annulment accepted under both systems. Under the ICSID Convention, Article 52(1)(a) specifically states so, and under the Model Law, Article 34(1)(2)(iv), the same principle is echoed, referring to situations where the composition of the tribunal is not completed in accordance with the agreement of the parties. The ground

⁴² ICSID Convention, art. 52(1)(d).

⁴³ Model Law, art. 34(1)(a)(ii). Section (c)(iv) adds a related reason: if the procedure is not in accordance with the agreement of the parties.

⁴⁴ *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Second Decision on Annulment, sec. 1.11 (Dec. 17, 1992) [*Amco Annulment II*]; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, para. 247 (Dec. 23, 2010) [*Fraport Annulment*].

⁴⁵ ICSID Convention, art. 52(1)(c).

⁴⁶ Either under Model Law, art. 34(2)(a)(iv) (arbitral procedure not in accordance with the law) or Model Law, art. 34(2)(b)(ii) (violation of public policy).

has been raised in a few ICSID annulment procedures. It was then thoroughly examined in one case,⁴⁷ but did not lead to annulment.

D. Manifest Excess of Power

The third reason for setting aside an award is when the tribunal has acted in excess of its power. The power of any arbitral tribunal derives from the authority vested upon it through the consent of the parties; if arbitrators address disputes not included in the powers granted, or decide issues not subject to their competence or not capable of being solved by arbitration, their decision cannot stand and must be set aside. Interpreted in this literal sense, excess of power constitutes a clear cause for annulment, accepted under both systems. The ICSID Convention refers to situations where the tribunal has “manifestly exceeded its powers,”⁴⁸ and the Model Law uses the concepts of “lack of validity of the arbitration agreement,” “disputes or decisions outside the terms of the submission to arbitration,” and “subject-matter not capable of settlement by arbitration.”⁴⁹

Excess of power can be committed both by overreach and by defect. Awards can be annulled if tribunals assume powers to which they are not entitled, but awards can also be set aside if arbitrators do not use the powers that have been vested upon them by the parties. ICSID annulment committees have, at the request of the investor, set aside awards in cases where the tribunal, having jurisdiction, failed to exercise it. Somewhat paradoxically, a manifest shortfall in the exercise of jurisdiction may constitute a manifest excess of power and lead to annulment of the decision.⁵⁰

In addition, excess of power is a polysemic concept, and can also be viewed in the context of tribunals failing to choose the proper law. ICSID *ad hoc* committees have concluded that manifest excess of powers can occur if tribunals err by:

- Totally disregarding the applicable law, or
- Basing the award on a law that is not the applicable law under Article 42 of the ICSID Convention.⁵¹

⁴⁷ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Second Decision on Annulment, para. 232 (Aug. 10, 2010).

⁴⁸ ICSID Convention, art. 52(1)(b).

⁴⁹ Model Law, art. 34(2)(a)(i),(iii) and (b)(i).

⁵⁰ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, para. 115 (July 3, 2002); *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, para. 80 (Apr. 16, 2009).

⁵¹ *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment, paras. 67, 377, 393 and 405 (July 30, 2010) [*“Enron Annulment”*];

The underlying reasoning is the following: the powers which the parties vest upon an arbitral tribunal are not unlimited, they are restricted. Arbitrators are only authorized to decide a case in accordance with applicable law, not on the basis of a law different from that agreed upon, or *ex aequo et bono*. If they act in a contrary manner, they are violating the empowerment received from the parties, and the award deserves annulment.

It is important to stress that, in order for an award to be annulled, the *ad hoc* committee must find that the error committed by the tribunal consisted of applying the wrong law, not wrongly interpreting the correct law. To understand the contrary would change the nature of the ICSID annulment procedure, transforming it into an appeal mechanism and violating the letter and the spirit of the ICSID Convention. However, there is a fine line between manifest error in the choice of law and error in the application of the law. In practice, the broader interpretation of excess of power, that is, incorrect choice of law, has been the ground on which most of the annulments of ICSID awards have been justified.⁵²

Summing up, if tribunals exceed the powers vested upon them by agreement of the parties or by law, their awards can be set aside both under the ICSID Convention and under the Model Law. ICSID annulment committees have developed an expansive line of interpretation, construing the concept of manifest excess of powers to include cases where the arbitrators erred in the choice of law. Judges applying the Model Law, by contrast, have usually resisted temptations to construe grounds for setting aside expansively (although certain jurisdictions like the U.S. and the U.K. extend the scope of grounds for setting aside foreseen in the Model Law and permit annulment for a manifest error of law).⁵³

Patrick Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on Annulment, para. 46 (Nov. 1, 2007) [*Patrick Mitchell Annulment*]; *Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment, para. 55 (June 14, 2010) [*Helnan Annulment*]; *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, para. 207 *et seq.* (June 29, 2010) [*Sempra Annulment*].

⁵² *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, para. 47 (May 16, 1986) [*Amco Annulment I*]; *Helnan Annulment*, *supra* note 51, para. 55; *Sempra Annulment*, *supra* note 51, para. 207 *et seq.*; *Enron Annulment*, *supra* note 51, paras. 377, 393 and 405.

⁵³ In the U.S., the courts have applied a "manifest disregard of the law" review standard set forth by the 1953 decision of the Supreme Court in the case *Wilko v. Swan*, 346 U.S. 427. See BORN, *supra* note 6, at 2639. Section 69.3.c of the English Arbitration Act states that leave to appeal shall be given if the court is satisfied "that, on the basis of the findings of fact in the award (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt"

E. Failure to State Reasons

The failure to state reasons is a separate ground for annulment under the ICSID Convention.⁵⁴ If the tribunal has failed, either explicitly or implicitly, to state the reasons for its decision, the award can be set aside. As long as reasons have been stated, even if incorrect or unconvincing, the tribunal's decision is not subject to annulment. Nonetheless, *ad hoc* committees have held that contradictory or frivolous reasons are to be equated with a failure to state reasons and can result in annulment.⁵⁵ Just as with the fine line between manifest error in the choice of law and error in the application of the law described above, the distinction between "incorrect or unconvincing" and "contradictory and frivolous" is a narrow one. Given the length and detail of the legal and factual analysis contained in most ICSID awards, it should be expected that annulments based on a lack of reasons should be inexistent or very rare. In practice, however, this ground has given rise to a number of ICSID annulments.⁵⁶

Failure to state reasons is not as common under the Model Law, but if the parties have agreed (directly or by way of the rules of arbitration) that the tribunal's decisions should be reasoned, lack of reasoning could lead to the award being set aside under the general ground that "the arbitral procedure was not in accordance with the agreement of the parties."⁵⁷ In practice, annulment of commercial awards for lack of reasoning is infrequent—possibly because judges, who know by experience the labors of drafting well-reasoned decisions, are more tolerant with sloppiness in this area.

F. Violation of Public Policy

Ordre public represents the last bulwark of sovereignty: a final defence which permits States to expunge awards which violate its fundamental legal principles. Under the Model Law, if an award conflicts with the public policy of the State where the annulment is being sought, the court can, at the request

⁵⁴ ICSID Convention, art. 52(e).

⁵⁵ *Enron Annulment*, *supra* note 51, para. 74 (quoting *Maritime Int'l Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, paras. 5.08, 5.09 (Dec. 22, 1989) ["*Maritime Annulment*"]).

⁵⁶ *Klückner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, para. 154 (May 3, 1985); *Amco Annulment I*, *supra* note 52; *Maritime Annulment*, *supra* note 55, para. 6.108; *Patrick Mitchell Annulment*, *supra* note 51, para. 67; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, para. 97 (Sept. 25, 2007).

⁵⁷ Model Law, art. 34(2)(a)(iv).

of a party or even *sua sponte*, set it aside.⁵⁸ The concept of public order to which the Model Law refers is the public order “of this State” *i.e.* of the jurisdiction where the annulment is being decided. The situation is quite different under the ICSID Convention, in which the reasons for annulment do not include the violation of the public order, because the aim of the Convention was to create a mechanism for the resolution of disputes which are truly international. The insertion of the concept of public order, rooted in domestic legal principles, would have represented a step backward.

VII. EFFECTS OF SETTING ASIDE

The similarities between both systems also extend to the effects: if an *ad hoc* committee or a competent judge finds that one or more reasons for setting aside exist, the award will be partially or totally annulled. There is, however, a difference regarding finality: an ICSID annulment decision is final, there being no procedure for revisiting the decision of the *ad hoc* committee.⁵⁹ In an annulment under the Model Law, municipal law may afford the possibility of appealing the decision of the first instance judge to a higher court.

Once annulled, the award ceases to exist for all legal purposes, but the underlying dispute remains unsettled, there being no *res judicata* with regard to the merits of an annulled award. Who will adjudicate the dispute if any of the parties decide to resubmit it? Under the ICSID Convention, the rule is very clear: the old arbitral tribunal is *functus officio* and a new tribunal must be constituted.⁶⁰ Under the Model Law, the rule is not so straightforward, and the court can order that the original arbitral tribunal be given a chance to resume the arbitral proceeding in order to eliminate the defects.⁶¹ Otherwise, any of the parties can start a new arbitration proceeding.⁶²

⁵⁸ Model Law, art. 34 (2)(b)(ii).

⁵⁹ Even the possibility of revision seems to be barred under the ICSID Convention. For example, Article 52(4) does not refer to Article 51.

⁶⁰ ICSID Convention, art. 52(6).

⁶¹ Model Law, art. 34(4). This is what happened with the Judgments of the Supreme Court of British Columbia of May 2, 2001 and October 31, 2001 in *Mexico v. Metalclad Corp.*, 2001 B.C.S.C. 664 and 2001 B.C.S.C. 1529, respectively [*Metalclad Review*], which partially set aside the Award rendered by a Tribunal constituted under Chapter 11 of the NAFTA for having based the decision on matters beyond the scope of the arbitration to the extent that it included interest prior to September 20, 1997.

⁶² This is true unless municipal law provides that the original arbitration clause is also affected by the annulment, which is apparently what happens under Jordanian law. See Jordanian Arbitration Law, art. 51, as referred to in *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, para. 25 (May 18, 2010).

VIII. ANNULMENT IN PRACTICE

The annulment systems provided for in the ICSID Convention and in the Model Law are, in essence, quite similar, their general thrust being that errors of law and of fact stay uncorrected, and that awards can only be annulled in exceptional cases. There are, however, differences with regard to the specific reasons for setting aside. While serious violations of due process are grounds for annulment under both systems, the ICSID Convention offers two reasons which do not exist as such in the Model Law. The first is manifest excess of power, which, as interpreted by ICSID tribunals, includes failure to apply the correct law. The second is failure to state reasons in the award. The Model Law, however, provides that awards which violate the State's public policy can be set aside.

This is the law, but the rule in abstract is just one side of the coin. What is of greater relevance is to analyze and explain how the rule is applied in practice in order to determine—under both systems—the total number of arbitrations decided, the annulments requested and the annulments finally granted and rejected.⁶³

The total number of known concluded investment arbitrations commenced by investors against States includes 302 ICSID Convention arbitration cases⁶⁴ and 161 non-ICSID cases.⁶⁵ The proportion of ICSID to non-ICSID arbitrations is thus roughly two to one. Of the 302 ICSID cases, 130 led to a final award on the merits or a rejection of jurisdiction (the rest were settled or discontinued for other reasons).⁶⁶ Thus, approximately 43% of arbitrations filed eventually ended with a final award. Although the precise number of non-ICSID arbitrations in which a final award was issued is not publicly available, it may be safely assumed that the same percentage determined for ICSID arbitrations can be extrapolated to non-ICSID procedures. This implies that approximately 69 final awards in non-ICSID arbitrations have been issued.

⁶³ Any effort to collate data regarding international investment arbitration is subject to important caveats: (i) there is no total transparency; not all decisions are public and it is very possible that there may be non-published decisions which have not been taken into account; this is especially true as regards non-ICSID Convention arbitrations; and (ii) every investment arbitration statistic is skewed by the large number of arbitrations involving the Argentine Republic (51 in total); this very high number has led to nine ICSID annulment proceedings and two non-ICSID annulment proceedings before the U.S. District Court for the District of Columbia.

⁶⁴ These numbers were provided by the ICSID Secretary-General during a presentation at the 5th Annual Investment Treaty Arbitration Conference held on April 5, 2011 in Washington, D.C.

⁶⁵ Accurate as of the end of 2009. UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA ISSUES NOTE No. 1 (2010).

⁶⁶ The ICSID Caseload – Statistics, Iss. 2011–1, at 15 (2011).

How many of these awards have actually been challenged? Thirty-three annulment proceedings have been concluded by *ad hoc* committees in ICSID proceedings and 24 decisions challenging an award in non-ICSID arbitrations have been issued by competent courts in nine different jurisdictions.⁶⁷ The statistics show that the percentage of challenges was significantly higher in non-ICSID

⁶⁷The breakdown of these 24 decisions by jurisdiction is as follows:

Canada (5): Judgment of the Ontario Superior Court of Justice of May 5, 2008 in *Bayview Irrigation District et al. v. The United Mexican States*, No. 07-CV-340139-PD2, 2008 CanLII 22120; Judgment of the Ontario Superior Court of Justice of Aug. 26, 2010 in *Cargill, Inc. v. The United Mexican States*, No. CV09-391935, 2010 ONSC 4656; Judgments of the Ontario Superior Court of Justice of Dec. 3, 2003 and of the Court of Appeal for Ontario of Jan. 11, 2005 in *The United Mexican States v. Marvin Roy Feldman Karpa*, No. 03-CV-23500 and No. C41169, respectively; *Metalclad Review*, *supra* note 61; Order of the Federal Court of Canada of Jan. 13, 2004 in *Attorney General of Canada v. S.D. Myers, Inc.*, 2004 F.C. 38.

U.S. (5): Memorandum Opinion of the U.S. District Court for the District of Columbia of Oct. 31, 2005 in *Raymond L. Loewen v. United States*, Civ. No. 04-2151 (RWR); Memorandum Opinion of the U.S. District Court for the District of Columbia of June 7, 2010 in *BG Group Plc v. Argentina*, Civ. No. 08-485 (RBW); Memorandum Opinion of the U.S. District Court for the District of Columbia of Aug. 14, 2008 in *Canfor Corp. v. U.S.*, Civ. No. 07-1905 (RMC); Memorandum Opinion of the U.S. District Court for the District of Columbia of Feb. 14, 2007 in *Int'l Thunderbird Gaming Corp. v. The United Mexican States*, Civ. No. 06-00748 (HHK), 473 F. Supp. 2d 80, *aff'd*, 255 Fed. Appx. 531 (D.C. Cir. 2007); Order of the U.S. District Court for the District of Columbia of June 7, 2010 in *National Grid plc v. The Argentine Republic*, Civ. No. 09-248 (RBW).

Sweden (4): Judgment of the Svea Court of Appeal of May 15, 2003 in *CME Czech Republic B.V. v. Czech Republic*, Case No. T 8735-01; Review by Svea Court of Appeal of Apr. 13, 2006 in *Petrobart Limited v. Kyrgyz Republic*; Review by Svea Court of Appeal of Aug. 26, 2005 in *Nagel v. Czech Republic*; Judgment of the Svea Court of Appeal of June 15, 2005 in *Sedelmayer v. Russian Federation*.

Switzerland (3): Decision of the Swiss Federal Tribunal of Sept. 7, 2006 in *Saluka Investments BV v. The Czech Republic*, Case No. 4P.114/2006/bie; Decisions of the Swiss Federal Tribunal of Nov. 10, 2005 in *France Telecom v. Lebanon*, Case No. 4P.154/2005/avc and Case No. 4P.98/2005/avc; Decision of the Swiss Federal Tribunal of Mar. 1, 2002 in *Saar Papier Vertriebs GmbH v. Poland*.

U.K. (2): Judgment of the High Court of Justice, Queen's Bench Division of Mar. 2, 2006 in *Occidental Explor. & Prod. Co. v. The Republic of Ecuador*, Case No. 04/656, [2006] EWHC 345 (Comm); Judgment of the High Court of Justice, Queen's Bench Division of Dec. 5, 2007 in *European Media Ventures SA v. Czech Republic*.

France (2): Judgment of the Paris Court of Appeal of Sept. 25, 2008 in *Pren Nreka v. Czech Republic*, Case No. 07/04675; Judgment of the Paris Court of Appeal of Nov. 18, 2010 in *Kaliningrad Region v. Lithuania*, Case No. 09/19535.

Denmark (1): Review by the Copenhagen Maritime and Commercial Court of Jan. 7, 2003 in *Swembalt AB, Sweden v. Latvia*.

Czech Republic (1): Review by the District Court of Prague of June 22, 2009 in *Binder v. Czech Republic*.

Belgium (1): Judgment of the Court of First Instance of Brussels of Nov. 23, 2006 in *Eureka B.V. v. Republic of Poland*, Case No. R.G. 2005/14005/A.

For more information regarding the non-ICSID Convention annulment decisions, see Investment Treaty Arbitration, http://ita.law.uvic.ca/annulment_judicialreview.htm.

arbitrations (approximately one in four ICSID awards was challenged, while the equivalent number for non-ICSID awards was one in three).

The underlying reasons for this difference are difficult to gauge. Neither convenience nor cost considerations appear to be the driving cause—it is possibly easier and less expensive to file an application for annulment of an ICSID award than to challenge a non-ICSID award before a court in the place of arbitration. What may have happened is that parties—and especially States—are more willing to accept awards rendered in proceedings administered by an international organization like ICSID, whose members are the States themselves. Non-ICSID awards are, in most cases, issued in non-administered *ad hoc* proceedings, and parties may be under more intense pressure to have the arbitrators' decision either confirmed or rejected by a judicial body.

How successful have the challenges been?

The 33 ICSID annulment procedures resulted in six annulments of the entire award, five partial annulments and 16 rejections of annulment, *i.e.* one in three of the challenged awards were eventually either partially or totally annulled.⁶⁸ The results are strikingly different for non-ICSID awards. None of the 24 set-aside proceedings filed before national courts led to annulment of the entire award. There is a single case of partial annulment of a minor element⁶⁹ and 19 cases finalized with the dismissal of the request for annulment.⁷⁰

Overall, ICSID awards have been challenged on fewer occasions than non-ICSID awards. However, in those cases where the annulment was requested, *ad hoc* committees accepted more challenges than ordinary courts.

The reasons for this pattern of behavior are again difficult to establish. Most ICSID annulments have been based on manifest excess of power in its wider, non-literal construction and/or on failure to state reasons.⁷¹ These grounds do not exist as such under the Model Law. This cannot be the fundamental reason for the diverging results, however, because if judges want to annul awards based on these grounds, the Model Law offers alternative bases, such as: the dispute was not contemplated in the submission to arbitration; the arbitral procedure was not conducted in accordance with the law; or the award is contrary to public policy. What may have happened is that judges, compared with *ad hoc* committees, show a higher level of deference towards investment arbitration awards. In most jurisdictions, international arbitration awards *per se* attract

⁶⁸ As of March 1, 2011, six further cases have been discontinued.

⁶⁹ *Metalclad Review*, *supra* note 61.

⁷⁰ In four cases the challenge was discontinued or the result is unknown.

⁷¹ In fact, all save two: *Amco Annulment II*, *supra* note 44, para. 1.11; *Fraport Annulment*, *supra* note 44.

a high level of deference, and annulments are the exception. The particular characteristics of investment arbitration awards may have exacerbated this deference: judges are confronted with an award rendered by three well regarded experts chosen by, or on behalf of, the parties; the case is a highly complex investment dispute between an investor, not residing in the court's jurisdiction, and a foreign State;⁷² and, finally, the investor and the State previously agreed to submit their dispute to the arbitrators and to accept their decision. In these circumstances, judges seem to feel that parties must stand by the result of their agreement and are disinclined to second-guess the arbitrators' decisions. As Judge Walton of the U.S. District Court of the District of Columbia put it,

[t]he Court . . . must remain mindful of the principle that "judicial review of arbitral awards is extremely limited", and that this Court "do[es] not sit to hear claims of factual or legal error by an arbitrator" in the same manner that an appeals court would review the decision of a lower court.⁷³

This special degree of deference seems to be less prevalent in annulments under the ICSID Convention: *ad hoc* committee members are experts in investment arbitration, with their own views regarding contentious issues and, consequently, when they feel that tribunals have clearly erred, they are reluctant to show special deference to the award submitted to their scrutiny.

⁷²This is the normal situation when a neutral location is chosen as the place of arbitration.

⁷³Memorandum of Opinion of the U.S. District Court for the District of Columbia of Jan. 21, 2011 in *Republic of Argentina v. BG Group*, Civ. No. 08-485 (RBW), at 10.