Absolute Finality of Arbitral Awards ?

by PIERRE LALIVE *

I. Introduction

During the last fifty years or so (or since the last World War), as everyone knows, international arbitration has met a spectacular success, which is still going on. And there is also no doubt that "international arbitration law" (to use a somewhat ambiguous expression) – together with the development of many national legislations – has made great progress. Let us just mention, by way of examples, the New York Convention of 1958 on the "recognition" of arbitral awards, the work of UNCITRAL (with its Model Law and its Arbitration Rules) and the present work of the UNCITRAL Working Group – not to cite many other institutions and rules.

From a "sociological" point of view, the fact is that many things have changed in the last fifty years or so. Let me mention, in brief and by way of introduction and if I may venture a few generalizations, a few elements which should be taken into account.

(1) Today, the activity of the international arbitrator can hardly be described, as it often was in the first half of the last century, as a *"nobile officium"*. The fact is that it has become a business (especially for lawyers, experts, engineers, accountants and the like).

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A few years ago, two sociologists, one French and one American, Mr Yves Dezalay and Mr Bryan Garth, published a very interesting study under the title of *"Dealing in Virtue"* [1]. Although somewhat dated in a few respects, this book remains very valuable, especially insofar as it analyzes in depth international arbitration practice and, for example, what the authors describe as the "conquest of the arbitration market by U.S. and English firms".

This phenomenon, which is still going on in several continents, is also very interesting inasmuch as it increases the importance in arbitration, not only of comparative law in this age of globalization, but also of conflicts of cultures, which should be distinguished from conflicts of interests.

(2) Another aspect of contemporary evolution is the extraordinary proliferation of arbitral institutions everywhere, together with the proliferation of more or less unnecessary regulations. There seems to be, in certain quarters, especially among lawyers, a certain legislative or regulatory "frenzy".

An independent observer may be permitted to have certain doubts about either the necessity or even the usefulness of many of these new regulations, which are said or supposed to help arbitration practitioners, while in reality they often jeopardize the flexibility supposed to be an advantage of international arbitration and in fact complicate the work of arbitrators and counsel rather than facilitate it.

(3) Now, when I try to contrast the present characteristics of international arbitration practice with the situation existing before the Second World War in the first half of the Twentieth Century, I do not wish to appear as a *"laudator temporis acti".* We have to be realistic and face the fact that we live in a globalized world, in an increasingly complicated society, characterized by increasing competition, economic, legal and political. As a result, and in spite of efforts at harmonization or unification, new legal difficulties, new legal conflicts (of cultures as well as interests), have appeared. International arbitration remains today the prevailing and normal way of solving international business disputes, in spite of the fact that it has become, perhaps inevitably, more and more complicated. The time has long passed since it could be described

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[1] Chicago University Press, 1996, translated into French, Les Marchands de Droit.

(as has been the case before the Second World War), as "a simple, quick and cheap way of solving disputes between gentlemen" !

(4) It stands to reason that the quasi-universal success and expansion of international arbitration depends to a very large extent on the consent of the international community of States. They have come to recognize and even favour arbitration as a necessary private justice. The liberal attitude of modern States as regards both contractual autonomy and arbitration may be said to be motivated by a general recognition of the advantages or necessity of globalization and of international economic commerce.

It is René David (the great French comparatist, and author of an excellent treatise on international commercial arbitration) [2], who suggested that – in the absence of an international commercial court of justice like the International Court of Justice – there was in fact a kind of agreed division or repartition of tasks between, on the one hand, the States (and inter-governmental organizations) and, on the other, the private operators of international trade and the community of "merchants" (including non-governmental organizations).

This favourable attitude of States is shown for instance by national legislations limiting or excluding the jurisdiction of national Courts in case of a valid arbitration agreement, restricting the possibilities of "appeals" against Awards, or lending assistance for the enforcement of Awards.

(5) Another remark should be obvious: such consent or favour by States has inevitable limits. To attempt here even a short summary of such limits would of course go much beyond the scope of our subject. I need only refer the reader to the well-known decision of the Court of Justice of the European Communities in the famous *Eco-Swiss v. Benetton case* – where the Court states, in short, that the effectiveness of arbitral procedure justifies that:

"control of arbitral awards should have a limited character and ... annulment of an award or the refusal of its recognition, should only take place in exceptional cases." [3]

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[2] "L'Arbitrage et le Commerce international", éd. Economica, 1982.
[3] Recueil 1999, p. I-3055 - 1er juin 1994.

This may well be seen as a correct summary of a general, not to say, universal position of States. But it remains to be seen in practice what is the precise meaning of the terms "limited character" or "exceptional cases".

(6) Moreover, one of the great problems faced today by international arbitrators – and later by national judges – is that of the autonomy of the international arbitrator confronted by international public policy or mandatory laws (either of the seat or of the applicable law – or laws [4]). On this important subject, it is sufficient to say here that, as we all know, the prevailing judicial practice, together with the majority of doctrinal writings, favours a very restricted and narrow application of international public policy as a ground for annulling or revoking arbitral decisions. [5]

(7) Third and last remark: should the same or different considerations prevail in international relations involving one State ? And this suggests a question, important in theory as well as in practice, on which there is no agreed or universal answer: Is "Investor-State arbitration" a different kind, a different or specific category, to be distinguished from "ordinary international commercial arbitration"?

I do not intend to discuss that question here, for lack of space, and even less to answer it ! It should suffice in this connection to mention the opinion of René David who rightly observed that, while it is common to speak of "arbitration" in the singular, there are in reality a fairly large variety of "arbitrations", no one having been able to prove the existence of a simple, monolithic or unique category or definition.

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[4] cf. the French concept of *"Lois de police"*.

[5] This is a reference to international public policy in the traditional, national sense of private international law, to be distinguished from the concept of "transnational (or truly international) public policy"; cf. P. Lalive ICCA Congress Series N° 3, 1986, p. 257 and *House of Lords in Kuwaiti v. Iraqi Airways* [2002] AC 883, at 1100 ff; cf. also ICSID Case N° ARB/00/7 - Award, in *World Duty Free v. Kenya*, at no. 139, 172-173.

II.

It is now time to turn to the "finality", or not, of international arbitral awards.

This is hardly a "new" topic and it may be said to have always existed ever since people resorted to arbitration. But it has become much more "present" or important today than it used to be, especially with the remarkable and recent development of Investor-State BITs (and the expanding activities of institutions like ICSID (with its Additional Facility), NAFTA, or the Energy Charter Treaty, not to mention again UNCITRAL, or the ICC, the LCIA, etc.) The question is simple: "should arbitral awards be "absolutely" final and binding, or should they be subject to "appeals" (in the narrow and in the wide sense of the term)?

Most, if not all, arbitration regulations (in particular in the case of "institutional arbitration") say that the arbitration award is "final and binding". For example, in the "Code of Sports – related Arbitration". Rule 46 reads: *"The award [notified by the CAS Court Office] shall be final and binding upon the parties."*

According to Art. 28(6) of the ICC Rules: *"Every Award shall be binding on the parties...*[and] *... by submitting to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."*

In the case of Iran/US Claims, the Declaration of the Algerian Government (Article IV) and the Tribunal Rules of Procedure (Art. 32(2)) state that *"all decisions and awards of the Tribunal shall be final and binding"* – which by the way does not mean that they are "self-executing". [6]

[6] On this, see Zachary Douglas in BYBIL, 2003, pp 151-228.

The Swiss Private International Law Statute (Art. 192) states that an Award *"may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement... ."* And the same Swiss Statute (in Art. 190) provides that:

(1) "The award is final from the time it is communicated.";
2) Proceedings for setting aside the award may only be initiated:
a) where... (b)... (c)... (d)... (e)... [7]

In France, Art. 1476 NCPC states that, as soon as it is delivered, the Award has, as regards the dispute, the authority of a *"res judicata"*.

In a recent Note [8], a well-known French practitioner (Serge Lazareff) stressed the danger, for the effectiveness of arbitration, of the multiplication of setting aside proceedings and he called upon heavier judicial sanctions against the abuse of such proceedings and the repudiation of promises. Indeed, there is no doubt about the tendency of many attorneys, in many countries today (especially of course among "losing parties"), to use and abuse whatever possibilities legislation and case law offer to set aside an award or delay or paralyze its enforcement.

The arguments are well-known in favour of a really or absolutely final arbitration award, and the first of these is of course the (presumed) common intention of the parties to the arbitration agreement. They have decided to resort to international arbitration (rather than to a judicial decision) of a potential dispute; and this for a variety of rather well-known reasons (including the possibility of choosing the arbitrators and the procedure, including also, presumably, confidentiality, and perhaps mainly in order to save time, to be able to "turn the page" over their differences and quarrels so that they can resume their normal commercial relations [9]. In other words, in the exercise of their autonomy of the will, they have deliberately assumed the so-called "arbitration risk".

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[7] + Art. 191 - [they] may only be brought before the Federal Supreme Court.
[8] Published in the Cahiers de l'Arbitrage - July 2007.
[9] Cf. the formula suggested by E. Minoli in Italy (cited by R. David, *op. cit.* N° 20): *" Far giustizia, conservando l'amicizia ".*

Should they, then, be allowed to go back on their common consent and repudiate their choice when an award has been rendered, because one party (or, on more exceptional occasions, both parties) is so dissatisfied that resort to State justice and setting aside proceedings appear to be the desirable solution ?

III.

Justice or Finality ? Correctness or legal certainty ? In order to appreciate whether there is a need or justification for allowing "appeals" against international arbitral awards, it is useful to have a rapid look at contemporary practice and consider a few examples of somewhat controversial arbitral decisions (including judicial decisions in arbitration matters). And this scrutiny should not be limited to Investor-State relationships, notwithstanding their particular nature or degree of "specificity", because comparisons with commercial, "ordinary" arbitrations may well prove relevant and indeed illuminating.

Before entering into a brief review of examples of recourse (leading or not to annulment), two general observations seem called for, in order to gain a better view of the context: (a) one on the particular difficulty that exists, in many cases, for "outsiders", of interpreting and correctly understanding international awards; (b) the second on a comparison between the force of an award and that of a court decision.

(a) The first observation may seem too general or even marginal but is directly relevant, I submit, to the present topic, and in particular to the vexed question whether, in the ICSID system, there has been too many, or too few annulments of awards by *ad hoc* committees interpreting Article 52 of the Washington Convention. [10] Experience shows that it may be very difficult for the outside reader or observer to properly understand an arbitral decision, unless

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[10] In a conference on the "Annulment of ICSID Awards", organized in 2003 by IAI in Washington, I took the opportunity, with particular reference to the first annulment decided, unanimously, by the *Ad Hoc* Committee in the *Klöckner v. Cameroun case* - to answer the criticism levelled by some writers based, in my submission, on insufficient understanding of both the annulled award and the Convention.

he has had access to the file and the full facts of the case. Some distinguished lawyers have thus been led, on occasions, to erroneous interpretations and comments, whether or not it was also the fault of the arbitrators themselves (or of members of an ICSID *ad hoc* Committee !) [11]

That observation should not, of course, be considered as some sort of bar or limit to the freedom of expression of commentators or critics of arbitral awards or of annulment decisions. But it might serve as a word of caution: critics would be wise to check their information and think with some humility of the difficulty of coming to a decision and drafting its reasons – before they venture to accuse an *ad hoc* Committee or an arbitral tribunal, for instance, of disregarding the parties' intention and "legitimate expectations" in order to replace them with the tribunal's "conviction", own understanding or "vision".

No one will of course challenge the statement that, in interpretation, the "fundamental duty is to give effect to the parties' words and actual intention" [12] – rather than giving a priority to the interpreter's own subjective feeling or conviction. But a similar duty would seem to bear on all commentators, practitioners or doctrinal critics whenever they are called upon to analyze either the reasons given in an award or in a decision of an ICSID *ad hoc* Committee, or, for that matter, a State Court in arbitral matters.

(b) The second general observation is a passing reference to the finality of judicial decisions and to the philosophy underlying the concept of *"res judicata"*. This reference or this comparison is useful in the present discussion although the arbitrator's activity is definitely *not* identical to that of a judge but, at best, "quasi-judicial". [13]

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[11] For instance because they exercized perhaps too much diplomatic restraint in the drafting of their decision. Practitioners as well as commentators should keep in mind that often neglected aspect of the arbitrators' task; cf. Erasmus' wise saying: *"Toute vérité n'est pas toujours bonne à dire ! Ce qui importe principalement c'est la façon de la proclamer."* Hence a potential conflict with the duty to state reasons (cf. Articles 52(1) and 48(3) ICSID Convention).

[12] E. Gaillard, *op. cit.* in New York Law Journal, March 1, 2007.

[13] A source of confusion here is the tendency of certain practitioners, institutions or legislators to loose sight of the distinction between *analogy* and *identity* (see for example the theory of civil irresponsibility or immunity of arbitrators).

It should be enough to recall in this connection that, in comparative civil procedure, i.e. in municipal law, the principle *"res judicata pro veritate habetur"* aims at the rapid and lasting restoration of juridical peace; from which it follows that a judicial decision (a) must remain unchanged, unaltered and (b) should be binding for the parties in case of later conflict. [14] The consequence is that a judgement can only be attacked or changed in the conditions and time-limits provided by the law of civil procedure – a law which may be said to be based on the Constitution of the State and its duty to maintain peace and the "rule of law".

It is within such broad and general context that the consent, or favour of States towards international arbitration, and that national legislations and attitudes, should be viewed and analyzed. And before proceeding with examples, three elementary points may be recalled: (i) States cannot be expected to recognize and assist in the enforcement of awards without reserving their right of supervision and control; (ii) in the absence of an international commercial court (more or less similar to the International Court of Justice) – which is not likely to be created before long – such control can only take place in the national sphere; (iii) in such domestic sphere, such control can only be exercised by the State's judicial organization (which, contrary to what exists in the domain of arbitral institutions, is characterized by a hierarchy).

IV.

Let us now consider briefly, at random, a few concrete cases, in which the question has arisen, or might well arise: which value should prevail, finality or certainty – justice or correctness ? Lack of space makes it of course impossible to discuss here a large and representative number of cases but it is hoped that the following limited selection will nevertheless provide a significant illustration of the basic problem under scrutiny.

(a) In a recent ICC case, a dispute had arisen between a foreign investor (Japanese or American) and a State organization of the Czech Republic regarding an international contract between the parties. A significant feature of

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[14] Cf. in German terminology the concepts of (a) *formelle Rechtskraft* and (b) *materielle Rechtskraft*.

the case was that the Czech State had been closely involved in the negotiations leading to the signing of the contract, including in the discussion about the arbitration clause. So much so that an earlier version of the contract had expressly mentioned the Czech State as a party. That clause had later been deleted.

In the arbitration taking place in Switzerland, the Czech Republic decided – perhaps in consideration of its economic and political interests in the case – to appear as one of the claimants on the side of its State organization. The foreign investor objected that it had not consented to arbitrate with the State, as proved by the text of the contract. Nevertheless, the arbitral tribunal (although presided by an experienced Swiss arbitrator) accepted to consider the Czech State as a party, surprisingly without much analysis of the fundamental condition of consent. A recourse to the Swiss Federal Tribunal was made (without success) by the foreign investor, who argued that the Czech State was clearly not a party to the contract (as proved *inter alia*, by the deletion of the clause just mentioned). [15]

(b) Second example: in an important international arbitration which lasted several years in Paris, between a group of oil companies as claimants and a European Government as defendant, a recent award was rendered by three distinguished arbitrators. [16]

It contains a few important errors (regarding e.g. evidence); for instance it suggests that contract breaches alleged by the defendant took place only after the defendant Government was elected, while relying against that same defendant – sometime on the same page – on documents dating from an earlier period ! The award also shows examples of sloppiness in drafting, for instance it omits any decision on a Counterclaim. Moreover, on some not unimportant issues, there is also a (surprising) lack of reasoning or arguments by the arbitral tribunal (a fact which is understandably frustrating for both counsel and parties).

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[15] Strangely enough, the Federal Tribunal rejected the recourse without discussing the existence or inexistence of consent between the Czech State and the appellant.

[16] Two of them University Professors (but this is of course no guarantee !).

In such circumstances, the (difficult) question inevitably arises: if, under the applicable rules, there do exist possibilities of recourse, should counsel recommend them ? Is a challenge practically possible and, if so, is it advisable (having regard to the work, time and costs involved and the uncertainty of the results) ?

(c) A very interesting decision of the Swiss Supreme Court has attracted a lot of attention, all the more since it contrasts with the general and very restrictive practice of that Court in annulment proceedings [17]: In an arbitration between a tennis player and the ATP Tour, an Award of the Court of Arbitration for Sport (CAS) was set aside – quite rightly in my submission – although the player had signed an "exclusion agreement" expressly, providing for the "final, non-reviewable, non-appealable and enforceable character of the decisions of CAS".

The Swiss Federal Tribunal, in a lengthy and well-reasoned judgment considered, in brief, that the "exclusion agreement" (although formally valid under Swiss law, Article 192 LDIP), had not been freely entered into but under constraint, a professional player having no choice but to accept the rules imposed by the organisation (e.g. on the anti-doping program) as a condition of participating in any event organized by ATP. Recourse to Court had therefore to be admitted.

Furthermore, it was held that the player's right to be heard by the arbitral tribunal had been violated because the latter, either carelessly or willingly, had failed to examine important elements relevant and capable to influence the solution of the case – which had been invoked by the parties. [18]

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[17] See e.g. Fr.Knoepfler-Ph.Schweizer-S.Othenin-Girard: Droit international privé suisse, 3e éd. Staempfli, Berne, pp 454 ss; F. Dasser, International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis. In Bulletin ASA, vol. 25, N° 3, 2007, p. 444 ss.

[18] It is generally admitted that Arbitrators are not bound to discuss all the arguments alleged by the parties; they can implicitly reject some of them. However, they have a "minimum duty" of explanations so that the losing party is able to see, when reading the award, that the arbitral tribunal has in fact duly considered all its relevant arguments, be it to reject them. It is interesting to compare this approach of the Swiss Supreme Court with the requirements of Articles 48 (3) and 52 of the ICSID Convention - see below - e.g. on the duty to state reasons.

(d) In still another case involving *inter alia* both public and private international law, contract law and procedure, a case decided first in Geneva and then, on appeal, in London, the Sole Arbitrator had decided to refuse to hear several witnesses requested by the Respondent. Following which the latter (which eventually lost the case) argued in London before the Commercial Court and later the Court of Appeal that the ICC award should be annulled on the ground of the "misconduct" of the Arbitrator when rejecting those procedural requests. The appeal and the arguments were rejected and the award was confirmed. [19]

V.

Turning now to the ICSID system, where does it stand regarding finality of awards ? It is not possible here to deal in any detail with the various grounds for annulment of awards listed in Article 52 of the ICSID Convention or even to attempt some general or synthetic judgement on the system regarding finality or correctness of awards. Let me however submit to you a few personal opinions, based on a practical experience of many years in different capacities – Counsel, Arbitrator and Member of an *Ad Hoc* Committee.

My own views have not changed substantially since the Washington Conference of IAI, in 2003, and you may find them in the volume published by Professor Emmanuel Gaillard under the title "Annulment of ICSID Awards". [20]

I remain convinced today that "the ICSID system as a whole, and its annulment mechanics in particular, is a good and balanced system". And I agree with Professor Emmanuel Gaillard who conceded that *"an essential part of the criticism" (*levelled at the first Annulment decisions) *relates in fact to the system of the Washington Convention itself."* [21] – rather than with its interpretation or practical application.

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[19] See the English decisions *Dalmia Cement Ltd. v. National Bank of Pakistan* [1975 Q.B.9]; [1974] 3 All E.R. 189.

[20] JurisPublishing Inc. and International Arbitration Institute, New York, 2004, 499 pages. The volume contains many valuable contributions and discussions of ICSID cases, such as *Wena Hotels v. Egypt*, *Vivendi v. Argentina*, etc.

[21] p. 197 ad Klöckner, E. Gaillard, La Jurisprudence du CIRDI, Editions A. Pedone, Paris 2004.

The system is of course the product of a difficult political and legal compromise by the authors of the Convention. [22] And there is no denying that Article 52 uses very flexible and somewhat vague notions (e.g. like "manifest" excess of power, or "serious" violations...) – notions which not only often overlap but are not easy to interpret.

It was probably inevitable that the very first annulment of Awards by an *Ad Hoc* Committee would create a certain surprise or "*emotion*" [23], and should have been misunderstood. Leaving aside "normal" differences of juridical opinions, what is rather striking and indeed amusing is to notice what may well be called the "sensational" criticism of some commentators, who went so far as to claim that such annulments implied the "breakdown (sic!) of the Control Mechanism in ICSID Arbitration", a system which was going to "*lose its appeal*" [24]. The remarkable success and expansion of ICSID arbitrations since then suffice to illustrate the rather ridiculous character of such statements. [25] Equally absurd seems to me the repetition (by some self-styled specialists of ICSID arbitration, of the idea that, after the so-called "*early activism* (sic !) *of the Klöckner Case*", later *Ad Hoc* Committees "returned" to more "cautious" attitudes, with one or two exceptions. [26]

Readers would be well-advised not to accept at face value such hasty and superficial generalizations, though constantly repeated, and to reserve judgment until after they have read and properly analyzed the decisions, the awards and (preferably) the respective parties' arguments !

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[22] Well outlined in a presentation by Professor Andreas Lowenfeld delivered in October 2007 at a Seminar organised by the Lisboa Faculdade de Direito.

[23] Cf. E. Gaillard *op. cit.*, Jurisprudence CIRDI p. 199, *op. cit.* Supra note 21.

[24] References in P. Lalive in IAI Conference p. 300. See e.g. W. Michael Reisman in 1989 Duke L.J. 739.

[25] A Broches, ICSID's Secretary-general, though less than enthusiastic about the Klöckner annulment, wrote, in ICSID Review vol 6, N° 2, Fall 1991, p. 321, 361, about Prof. M. Reisman's criticisms: *"With all due respect, he overstates his case... He furnishes in particular no arguments to support his suggestion that the real thrust of the Committee's concern was that the Tribunal's conclusion... constituted a mistake of law"* (at p. 769). Prof. D. Caron, in ICSID Review, vol 7, N° 1, Spring 1992, p. 53, while of the opinion that the Committee's decision *"appeared to lack in "judicial restraint""* (?), *expresses astonishment not that the annulment process is used as much as it is, but that it had not been resorted to more !*

[26] According to E. Gaillard , in New York Law Journal, March 1, 2007: *Patrick Mitchell v. D.R. of Congo, ad hoc* Committee, Nov. 1, 2006, and *El Paso v. Argentina*, April 27, 2007.

A better summary is Professor Hans van Houtte's statement [27] that, to decide on an annulment, *Ad Hoc* Committees *"have navigated between two extremes... between the Scylla of complete fairness and the Charybdis of absolute finality."*

Such "navigation" – it is submitted – can only take place on the basis of the concrete circumstances of each particular case, and not on some preconceived ideology or doctrine, for instance in favour of a restrictive interpretation of Article 52, seen as a narrow exception to the (desirable) finality of ICSID Awards. Nor should any finding that Arbitrators have failed to state reasons [28] (or, more precisely "the reasons on which [the Award] is based)" be immediately characterized as crossing the proper line between annulment and appeal.

On this ground, it is interesting to mention the long and detailed Dissent which was written, in a recent Committee's Decision of September 5, 2007, by Sir Franklin Berman, a well-known English Arbitrator. [29] While agreeing on other points with the majority of his colleagues (and paying tribute, as is customary, to the "eminence" of the Arbitral Tribunal), Berman strongly criticized his two Colleagues for failing to explain how and why they had come to their conclusions, particular care being required in his view when the arbitrators decline jurisdiction.

Such analysis is miles apart from the criticism of those commentators who ventured to believe that an *Ad Hoc* Committee should never, or could not, examine whether the reasons mentioned by the Award are "pertinent" or "sufficiently pertinent", but should limit itself to check whether some reasons have in fact been mentioned at all ! Such a theory is not only in conflict with the generally admitted idea that "arguable reasons" (whether preferable or not) are sufficient, but it cannot be reconciled with the (majority) view that clearly contradictory reasons amount to an absence of reasons, an inference which seems to imply necessarily some examination of the nature or contents of such reasons.

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[27] in IAI Conference, *op. cit.* Supra note 10.
[28] Admittedly "*the most difficult ground for annulment to apply and to analyze*" (Schreuer, Conference IAI , p.30).
[29] ICSID Case N° ARB/03/4. Annulment Proceedings - Industria Nacional de Alimentos SA v. Republic of Peru.

A more balanced and reasonable theory has been adopted by some Committees, e.g. on December 22, 1989, in the case MINE v. Guinea [30] where the object and purpose of Articles 48(3) and 52(1)(e) of the Washington Convention was said to make sure that the parties will be able to follow and understand the grounds of the Award. This is a "minimum requirement" which, adds the Decision, *"is in particular not satisfied by either contradictory or frivolous reasons."* (emphasis supplied). Interestingly enough, the same Decision stresses that *"the adequacy of the reasoning is not an appropriate standard of review"* (under Art. 52(1)(e) because *"it would almost* (sic) *inevitably draw"* an *Ad Hoc* Committee into the domain of appeals. But how could a reasoning be judged "frivolous" without any consideration of its "adequacy" ?

Such "motivation" is therefore not fully convincing; it amounts to a mere affirmation that any examination of the substance of the award would "almost inevitably" create a confusion with an appeal (a remedy excluded by Article 53). But the exceptions made for "contradictory" and especially for "frivolous" reasons seem necessarily to imply at least some examination of the "adequate", "arguable" or "pertinent" character of the reasons mentioned. [31]

This would seem to follow from the very idea mentioned in some of the decisions approved by critics of annulment decisions (like Wena [32] and Vivendi) i.e. that it is sufficient that arbitrators identify and "let the parties know the factual and legal premises leading the tribunal to its decision". Similarly it has been said that, *"provided the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point."* (italics supplied)

To be followed or to be understood, in other words, the reasoning must be "in particular" neither "contradictory" nor "frivolous" (cf. MINE) or, to use still another, analogous terminology, "sufficiently relevant" (i.e. it must "relate to the issues before the tribunal"; cf. Amco and Klöckner – which seems another way to say that they must be "pertinent" or "adequate") or, still in other terms, it must be "capable of providing a basis for the decision in the eyes of the parties".

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[30] ICSID Case N° ARB/84/4; see also Wena Hotels v. Egypt, February 5, 2002 41 ILM M. 933, at N° 81.

[31] In the abovementioned Dissent supra Note 29, Sir Franklin Berman asks whether the Arbitrators *"did in fact adequately explain"* their reasons.

[32] Wena decision Feb. 5, 2002 para 79.

As analyzed in depth by Sir Frank Berman in his Dissent already quoted, the requirement that parties must be able to follow and understand the Arbitrators' reasoning is fundamental, and can hardly be considered as satisfied by "contradictory", "frivolous", "incoherent", non-pertinent or "inadequate" reasons. Some of the critics of annulment decisions have failed to appreciate the essential ambiguity and also the equivalence of such qualifications. [33]

Be that as it may, I have always been of the opinion (expressed in the first Klöckner decision of the *Ad Hoc* Committee) that Article 52 should be interpreted neither extensively nor restrictively but according to its purpose and context, i.e. according to the usual principles of interpretation – one of which, of course, is the principle of Effectiveness ("*Ut res magis valeat quam pereat*"). What must be kept in mind is that, under Article 52(1), annulment is indeed a limited but *"the only remedy against unjust awards"*, as aptly recognized by the Committee in the MINE Decision. [34]

It is difficult to imagine that States would have ratified the Washington Convention – and thereby abandoned any national possibility of redress or control – if that only remedy against unjust or erroneous awards were to remain largely theoretical and never effectively applied.

Moreover and on a practical and business level, reference should be made to the following anecdote, told by Professor David Caron, of Berkeley University[35]: "Instructing his lawyer in an arbitration, an American client got the answer: *"there is no possibility to appeal in the sense of U.S. courts"*. To which the retort was *"Are you advising me resolving a million dollar dispute with only one roll of the dice ?! "*

A somewhat controversial question must be mentioned at this point. When an *Ad Hoc* Committee has found that there does exist one of the grounds listed in Article 52 (and, *a fortiori*, that several grounds do affect the award),

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[33] For example, E. Gaillard, in his abovementioned article of the New York Law Journal, appears to believe that an *ad hoc* Committee *"engages in a substantive review of the award"* if and when it examines whether the reasoning is sufficient, "coherent" or "relevant".

[34] at para 4.05.

[35] In *"Reputation and Reality in the ICSID Annulment Process...."*, ICSID Review, vol 7, N° 1, Spring 1992, p. 48-49. The author stresses (quite rightly it is submitted, that *"the international community has a greater interest in substantive correctness of ICSID awards than is implicit in the annulment process provided for in Art. 52."* (p. 27). He concludes that *"the criticism of ICSID is misplaced."* (p. 22).

should the award be annulled in part or *in toto* ? Or has the Committee the discretionary power to reject the request for annulment, for instance because the end result would not be substantially affected ? Can it maintain the award – for instance by substituting its own reasons (a method often used by some national Courts of appeal) ?

On the one hand, the text of Article 52 (in the English version – but not in French) merely gives the Committee the authority to annul the award, but not the mandate. On the other hand, to concede unlimited discretion to the Committee seems to create a kind of legal "no man's land". It would be hardly in keeping with an effective interpretation of Article 52, with the purpose and spirit of the Convention and with what the first *Ad Hoc* Committee (in Klöckner v. Cameroun) considered as "*the absolute right* of the parties to an ICSID arbitration *to comply with the Convention's provisions, in particular with Article 52.*" Today, I am inclined to believe the correct solution is probably to recognize a certain but limited discretion to the *Ad Hoc* Committee, allowing it to take appropriate account of the circumstances. Clearly the decision to annul is not, should not be, and has never been "*automatic*". [36]

Lastly, another argument should be mentioned, which has been raised against the ICSID institution of *Ad Hoc* Committees by a distinguished French professor and Arbitrator, Pierre Mayer: Members of *Ad Hoc* Committees are appointed in general (by the President of the Administrative Council) among persons on the ICSID list of Arbitrators) who come from the same professional and qualified *"milieu"* as the arbitrators themselves. So why, it is argued, should they be presumed to be more qualified and in a better position to reach a correct decision than the "Arbitral Tribunal" ? In other words, who are they to think that they know better and are able to decide that the award should be annulled or not ? As you are aware, analogous remarks have been made, in various States, against the decisions of Appeal Courts and Supreme Courts, though the situation is of course not identical.

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[36] As erroneously claimed by Schreuer regarding the Decision Klöckner I in "Annulment of ICSID Awards", *op. cit.* page 19.

I submit that the answer is simple: *Ad Hoc* Committees not only have a different mission, both more limited and more delicate, but have the clear advantage of a "second study" of the case, or rather part of the case, and, so to speak, the benefit of a second debate. This fact would be, in itself, a sufficient justification if one were needed.

VI. Conclusion

In the Washington Conference on Annulment of ICSID Awards mentioned previously on several occasions, I ventured to say that, in the field of dispute settlement, *"there is probably no subject of greater importance than finality or annullability of decisions".* And this raises a most difficult philosophical and practical question: "what is, in the last analysis, the ultimate value, finality or correctness ?"

There seems to exist a large consensus (between States as well as among practitioners and doctrinal writers) about the idea that Arbitral Awards should in principle be binding and "final" (for the Parties), i.e. in the sense of not subject to "appeals" or ordinary challenges. This is clearly the case for normal international commercial arbitration where, as we all know, national legislations and Court decisions have adopted a restrictive attitude regarding the grounds permitting the setting aside of Awards. I agree that this strict or restrictive attitude is desirable in general, but looking back, I feel bound to raise here two interrogations [37] :

When we look at contemporary practice and have a chance of reading certain recent awards (and Court decisions), one cannot help wondering whether that restrictive attitude, that great favour or trust granted to international arbitrators in "ordinary international commercial arbitration" has perhaps, on occasions, not been carried too far in some national systems.

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[37] I must confess that I have some personal responsibility in the position adopted by the Swiss legislator on that point in the Chapter (12) of the Swiss Private International Law Statute of December 18, 1987.

And the second interrogation is the following: Is the same *"favor arbitrii"* (or *"favor arbitrationis"*) – i.e. that is the same hostility against "appeals" (in the broad sense) also justified or acceptable also in the case of Investor-State arbitrations, which often involve the public interest ?

Both questions are difficult and perhaps incapable of receiving one general solution. Nevertheless, by way of conclusion, a tentative, subjective and provisional answer may be offered:

In international commercial arbitration (between private parties, or even involving a State entity when acting as commercial operator), possibilities of setting aside proceedings should remain limited (unless of course the arbitration agreement provides otherwise).

But one may well doubt that the judicial practice of States will or should always accept to "close its eyes" and to recognize and enforce some (manifestly) erroneous, ill-conceived and badly motivated Awards – especially, of course, when public interests are involved. As far as I can see, the number of such poorly reasoned and possibly erroneous awards (but not, let us hope, their proportion of the whole !) appears to have increased – perhaps inevitably with the expansion of international arbitration, and the increasing, and desirable, participation of countries and individuals having a limited experience and knowledge of international practice and "traditional" arbitral ethics.

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