APPLICATIONS FOR SETTING ASIDE UNDER ARTICLE 34 UNCITRAL MODEL LAW AND ANNULMENT CLAIMS UNDER ARTICLE 52 ICSID CONVENTION: A COMPARATIVE ANALYSIS OF THE NATURE AND SCOPE OF REVIEW OF ARBITRATION AWARDS

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ABSTRACT

A vast majority of International Investment Agreements nowadays allow the investor to submit its dispute either to the International Centre for Settlement of Investment Disputes or to an *ad hoc* or institutional arbitration. The difference between the ICSID and non-ICSID systems in terms of annulment is significant: ICSID annulment proceedings are independent of any national jurisdiction, while non-ICSID review takes place under the laws of a particular jurisdiction that might be based on the Model Law on International Commercial Arbitration. The purpose of this thesis is to compare the annulment of the ICSID and non-ICSID awards in terms of the procedure, scope and applicable standards of review. It is concluded that the standards developed by the domestic courts under Article 34 of the Model Law might seem more intrusive but are applied with deference to the tribunals' findings. The standards developed in the ICSID system, on the other hand, read as rather demanding and difficult to satisfy but on many occasions have been interpreted inconsistently and unpredictably so as to justify the examination of the merits of the award. The parties might consider resolving their investment dispute outside the ICSID system in an arbitration-friendly jurisdictions, thus, avoiding inconsistencies of the ICSID system.

INTRODUCTION

The finality of an arbitral award is an attractive advantage of arbitration since it is arguable that the absence of the need to go through several levels of judicial review promotes time-efficiency and reduces costs in complicated cases.[1] This is exactly what makes business favor arbitration rather than litigation. Nevertheless, whenever the party believes that the award is tainted with fundamental flaws, it shall be entitled to challenge the award, which explains why the importance of annulment shall not be understated. In this respect, Juan Fernandez-Armesto has correctly argued that "*Arbitrators' powers cannot reign unfettered; there must be checks and balances to their prerogatives. These comes in two forms: transparency and review.*"[2]

There is, however, no appellate review of arbitral awards and the remedy comes in different forms. Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States has established a self-contained regime independent of any national jurisdictions[3] for the review of the investment arbitration awards – by an *ad hoc* committee, in the course of the procedure established by the ICSID Convention and on the grounds stipulated by Article 52 of the Convention. In the meantime, the awards in arbitrations conducted outside of the ICSID system will be subject to review by the domestic courts on the limited grounds stipulated by Article 34(2) of the Model Law as long as that country's arbitration law is based on the Model Law.

[1] Jung Won Jun, 'The Integrity of Finality of International Arbitral Awards: International Commercial and ICSID Arbitration Awards' (2018) 28 Journal of Arbitration Studies 137, 138

[2] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26 1 Foreign Investment Law Journal 128, 128

[3] Bishop D and Marchili S, Annulment under the ICSID Convention (Oxford University Press 2012), 3

Usually, investment treaties allow investor some freedom to choose among several procedural options when that investor decides to seek relief through international arbitration under such treaties.[4] When deciding between these varying options, the implications of such choice shall be born in mind, since the compared two regimes differ significantly in terms of the procedure of review, types of awards subject to review, level of discretion whether to annul or upheld the award and applicable standards of review. All these considerations greatly influence the finality and enforceability of the award. This thesis examines these differences in two systems and seeks to answer the question: which of the systems preserves the final nature of the awards better?

Chapter 1 explores the differences in the procedure of review in two systems that might have an implication on the outcome of the annulment and set aside proceedings. Chapter 2 provides statistics regarding the number of the awards annulled by the ICSID *ad hoc* committees and set aside by the domestic courts to show which of the systems shows greater deference to international arbitral awards. Chapter 3 explains why more awards are annulled in one system by comparing standards of review applied by the ICSID *ad hoc* committees and the domestic courts.

[4] Gaetan Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID', in Albert Jan van den Berg, *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009), 285

CHAPTER 1: FUNDAMENTAL FEATURES OF THE ICSID ANNULMENT MECHANISM COMPARED WITH THE SETTING-ASIDE PROCEDURE UNDER THE MODEL LAW

1.1. Exceptional nature of the post-award remedies

Efficiency and economy are two well-known features of international arbitration.[5] Finality of the award is a principle that serves the purpose of efficiency in terms of expeditious and economical settlement of the disputes.[6] Finality is a natural consequence of the long-recognized principles of *pacta sunt servanda* and *res judicata*.[7] As regards the former, Kenneth Carlston noted that by entering into an arbitration agreement and participating in the proceedings the parties undertake to abide by the award.[8] *Res judicata* principle, in turn, implies that once the dispute is solved, the decision is definite and cannot be appealed against.[9]

The principle of the finality of the award has constantly been in tension with the principle of the correctness.[10] It was, however, noted that correctness is an elusive goal that takes time and effort to be achieved and may require several layers of control.[11] Correctness is the prevailing principle in domestic litigation that can be achieved by means of an appeal procedure in the domestic courts.[12] In the field of international arbitration, correctness yields to the finality,

[5] Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 The Law and Practice of International Courts and Tribunals 211, 211
[6] Schreuer, 'ICSID Annulment Revisited' (2003) 30(2) Legal Issues of Economic Intergation 103, 103
[7] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 17
[8] K. Carlston, *The Process of International Arbitration* (Columbia University Press, 1946), 205
[9] *Société Commerciale de Belgique (Belgium v. Greece)* PCIJ Rep Ser A/B No 78, 175
[10] Schreuer, 'ICSID Annulment Revisited' (2003) 30(2) Legal Issues of Economic Intergation 103, 103
[11] ibid
[12] ibid

efficiency and economy considerations.[13] This implies that the traditional review mechanisms known in domestic litigation are abandoned in view of their length, costliness, and complexity.

Nevertheless, the principle of finality is not absolute. The annulment was designed to be a narrow exception to it and an extraordinary remedy for emergency situations.[14] Annulment strikes a compromise between the competing interests ensuring that the award is procedurally fair.[15] In view of its exceptionally limited character, the annulment procedure shall not be confused with the appeal procedure.

Article 53 of the ICSID Convention provides that the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention. This implies that annulment, provided for in Article 52, is a remedy distinct from the appeal. The difference is that in annulment the decision can either be left intact or declared void, while in appeal the modification of the original decision is also permissible. Thus, unlike in the appeal procedure, the body conducting the annulment cannot substitute the deficient reasoning in the decision with its own arguments.[16] It is a natural consequence of the fact that the annulment procedure is focused on examining the fairness of the decision-making process rather than checking the correctness of the substance of the decision. [17]

The Tribunals seem to constantly stress the importance of this distinction and their limited functions in the process of the review of the awards.[18] In particular, in *Wena Hotels v. Egypt* the

[13] Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 The Law and Practice of International Courts and Tribunals 211, 211
[14] ibid
[15] R. Doak Bishop and Silvia M. Marchili, *Annulment under the ICSID Convention* (Oxford University Press 2012), 20
[16] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), 901
[17] ibid
[18] *Vivendi v. Argentina,* Decision on Annulment, 3 July 2002, paras 62, 64; *MTD v. Chile*, Decision on Annulment, 21 March 2007, para 31; *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, paras 20, 24

ad hoc Committee noted that "the remedy of Article 52 is in no sense an appeal. The power for review is limited to the grounds of annulment as defined in this provision."[19]

Under the Model Law, the recourse against the award is also considered to be rather an exceptional remedy, which is evidenced by the wording of the first paragraph of Article 34: "Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article."[20] The drafting history of Article 34 reveals that it was proposed at the outset that instead of incorporating a wide range of different ways to attack an award, the Model Law should stipulate a single, exclusive method of judicial recourse against the award. This proposal was accepted and never disputed thereafter.[21]

The Working Group specifically considered the question of whether an appeal on the merits of the award is possible and reached a conclusion that it is supported in numerous jurisdictions that an award rendered in international commercial arbitration should not be subject to court review on its merits and that such a trend was discernible to further reduce the remaining instances where court review was still allowed.[22]

As a result, numerous courts, entrusted with the task of setting the arbitral award aside, has consistently emphasized that setting aside is not an appeal against the award, where evidence is re-evaluated and the correctness of the arbitral tribunal's decision on the merits is examined.[23] In describing the nature of setting aside proceedings, Madrid Court of Appeal held that the "applicable review in annulment proceedings is that of an external trial, … in such a way that the

[19] *Wena Hotels v. Egypt*, Decision on Annulment, 5 February 2002, para 18 (citations omitted)
[20] UNCITRAL Model Law on International Commercial Arbitration, Article 34 (emphasis added)
[21] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989), 911-912
[22] ibid, 929
[23] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 134 < http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf > accessed 8 February 2019

competent court examining the case solely decides on the formal guarantees of the proceedings and the arbitral award, but cannot review the merits of the matter."[24] The Singapore Court of Appeal reasoned that the reason for such a limited judicial intervention with the final arbitral award is the acknowledgment by the courts of the primacy of the dispute resolution mechanism that the parties have expressly chosen.[25]

Similarly to the annulment proceedings in the ICSID Convention cases, the courts performing the setting aside task seem to acknowledge that the extraordinary nature of their powers flows from the res judicata principle. The courts also expressly agree with the effectiveness-correctness balance discussed above - Spanish courts, for example, reiterated that the ultimate purpose of arbitration to reach a prompt extrajudicial settlement of disputes, justifies the attribution of res judicata effect to awards that were clearly wrong.[26]

It is therefore evident that the remedies offered by the Model Law and the ICSID Convention are similar in their nature. Those are extraordinary means to attack an arbitral award rendered in violation of the essential procedural guarantees pertinent to the decision-making process. Both procedures are distinct from the appeal procedure and have the common roots – the sanctity of the principle of the finality of the award.

1.2. Key differences and similarities between the ICSID annulment and the setting aside procedures

[24] ibid, citing *Sofía v. Tintorería Paris*, Madrid Court of Appeal, Spain, case No. 19/2006, 20 January 2006,
[25] *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, Court of Appeal, Singapore, [2011] SGCA 3, 13 July 2011, , para 25
[26] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 134 < http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf > accessed 8 February 2019, citing *Uniprex S.A. v. Grupo Radio Blanca*, Madrid Court of Appeal, Spain, case No. 178/2006-4/2004, 22 March 2006

To compare the ICSID annulment and the setting aside mechanisms some commentators had identified several criteria from which the divergencies in the two procedures are evident. Those include: (2.1.) the significance of the seat; (2.2.) the annulment body and its composition; (2.3.) the types of awards that can be subject to challenge; (2.4.) the annulment procedure; and (2.5.) the possibility of a remand.[27] The discretion of the adjudicating body as to whether the award shall actually be annulled or set aside (2.6.) and the impact of the review on the enforcement of the award (2.7.) were also explored by the scholars.[28]

1.2.1. Importance of the seat of arbitration

Article 52(4) stipulates that the provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee. According to Article 62, which is located in Chapter VII and is applicable to the annulment proceedings, the latter shall be held at the seat of the Centre. However, this Article defines the locale, not the legal seat of arbitration – the concept that does not exist as such within the framework of the ICSID Convention.[29] Thus, the seat plays no role for the purposes of annulment as neither the arbitration not the annulment proceedings are rooted in any specific jurisdiction.[30] It can, therefore, be concluded that Article 52 of the ICSID Convention has established a self-contained regime independent of any national jurisdictions and no domestic court will have a jurisdiction to review the award.[31]

[27] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 623-624

[28] Gaetan Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID' in Albert Jan van den Berg, *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009), 924-925; Piero Bernardini, 'ICSID Versus Non-ICSID Investment Treaty Arbitration' in Miguel Angel Fernandez-Ballester and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010), p 180

[29] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 133

[30] ibid

[31] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 3

As opposed to the self-contained mechanism of the annulment provided for under the ICSID Convention, in non-ICSID arbitration, the setting aside procedure is performed by national courts at the seat of arbitration.[32] In particular, Article 34(2) of the Model Law designates a court specified in Article 6 of the Model Law as the one competent to review the award. In accordance with Article 6, each State enacting it specifies the court, courts or other authority competent to perform these functions.

The exact jurisdiction where the award might be a review in the future is rarely known in advance. This is because most investment treaties do not contain a provision on the place of arbitration, and since the investor will hardly agree to arbitrate in the host State, the parties will have to define a neutral jurisdiction with a record of knowledgeable and predictable decisions in the field of investment.[33] In case parties fail to agree, it will be the arbitrators or the institution fixing the place of arbitration.[34] As practice shows, investment treaty tribunals, as well as institutions, usually choose an arbitration-friendly and neutral seat in major European and North American jurisdictions,[35] which means that even if the parties failed to agree on the place of arbitration the assigned jurisdiction will most probably still be favorable to arbitration.

The important difference as to the seat between the ICSID and UNCITRAL annulment proceedings is that in the latter the choice of the seat is a fundamentally important aspect of the proceedings. It will be definitive to the standard of review that varies from jurisdiction to jurisdiction, while the seat as a notion does not even exist in the system established under the ICSID Convention.

[32] Li, Fenghua, 'The divergence and convergence of ICSID and non-ICSID arbitration' (PhD thesis, University of Glasgow 2015), 111
[33] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 133
[34] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 629-630
[35] ibid

1.2.2. The annulment and setting aside body and its composition

Article 52(3) of the ICSID Convention provides that for the purposes of annulment an *ad hoc* committee of three persons shall be appointed by the Chairman from the Panel of Arbitrators. In accordance with Article 5 of the Convention, the function of the Chairman is performed ex officio by the President of the World Bank. This is a striking difference with the extensive participation of the parties in the appointment of the arbitrators in the ICSID cases.[36] In principle, the Chairman is free in his choice of persons, except for the fact that the persons appointed shall be eligible to sit in the committee in accordance with the requirements enshrined in Article 52(3) of the ICSID Convention. Those requirements are that none of the members of the committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The policy of excluding those persons who might have any interest in the case is aimed at achieving the goal of a completely unbiased body.[37] The members of the committees are often recognized experts in the field of international law with prior experience in investment, which is good for rendering a high-quality award.[38] Consultations with the parties before the appointment of the committee were practiced in the earlier cases, but nowadays, it is the Secretary-General who advises the Chairman on the composition of *ad hoc* committees without consultation with the parties.[39]

[36] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 135
[37] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), para 457
[38] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 625
[39] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), para 454

The situation is totally different with setting aside the award rendered in the course of non-ICSID arbitration. As previously noted, the task will be performed by a judge selected without any participation of the parties. Most importantly, unlike the arbitrators of the *ad hoc*, the judge would rarely have any prior experience in investment and the case would be one of a few instances offering the possibility to deal with investments in his or her professional career.[40] Also, the decisions of the court will most probably be subject to appeal (sometimes even twice) which may result in the increased length and costliness of proceedings.[41]

1.2.3. Types of awards subject to annulment and setting aside

Requests for annulment in the ICSID annulment proceedings may be made in respect of the final awards and awards denying jurisdiction (which are by definition final awards[42]).[43] The legislative history reveals that the proposal to subject other interim decisions to the annulment failed as the one that might cause unnecessary interruption of the arbitral proceedings.[44] A preliminary decision on jurisdiction can, however, become subject to annulment s as part of the final award after it is incorporated into awards either explicitly or by implication.[45] The principle works in a similar manner for the procedural orders and decision on interim measures.[46] Article 52(3) of the ICSID Convention confers the powers to annul the award or any part thereof upon the committee. This implies that the parties can request the annulment of the part of the award and in

[40] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 136
[41] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 632
[42] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), para 63
[43] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 626
[44] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), para 61
[45] ibid, para 62
[46] ibid

MINE v. Guinea the Committee had confirmed the admissibility of such a request.[47] Post-award decisions rendered in accordance with Article 49(2) of the ICSID Convention (rectification of a clerical, arithmetical or similar error in the award) are part of the award and are similarly subject to annulment.[48] Awards that embody the settlement reached by the parties can also be annulled, however, the grounds for the annulment will be limited.[49] For example, departure from the fundamental rule of the procedure will hardly be material to the agreed settlement.[50]

Similarly to the ICSID review process, final awards on the merits can be subject to an annulment proceeding. The important point on which the procedure of setting aside differs from the annulment is that in some jurisdictions it is permitted to annul interim and partial awards affirming or denying jurisdiction. As was noted above, the decision affirming jurisdiction will only become subject to annulment under the ICSID Convention once it becomes part of the final award. Nevertheless, in *Achmea v. Slovak Republic*,[51] Slovakia challenged the interim arbitral award upholding the tribunal's jurisdiction over the dispute in German courts. Germany is a country that has adopted legislation based on the Model Law.[52]

It follows that the difference in the types of decisions that can be annulled is not huge in the compared systems of review. The important point on which they nevertheless differ is the possibility to apply for the review of the decision upholding the jurisdiction. While such possibility exists in some jurisdictions that adopted Model Law, it is being categorically denied by the ICSID *ad hoc* committees to prevent unnecessary interruption of the arbitral proceedings.

[47] *MINE v. Guinea*, Decision on Annulment, 22 December 1989, para 2.01
[48] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), para 77
[49] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), para 76
[50] ibid
[51] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 630-631
[52] Status of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 8 February 2018

1.2.4. The procedure of annulment and setting aside

By virtue of Article 52(4), the procedure for the annulment of the ICSID awards follows the same pattern as the ICSID arbitration. Parties can participate in the proceedings directly or be represented by the counsel, the language can be English, French or Spanish, the procedure is divided into written and oral parts, same rules that apply to the awards are applicable to the annulment decision and the closure of the proceedings happen in the manner similar to the arbitration procedure.[53] The rule regarding the automatic recognition and enforcement of the awards applies to the annulment decision as well.[54] It was therefore argued that the parties who have gone through the ICSID arbitration are quite familiar with the annulment procedure as well.[55]

The procedure in the case of setting aside the award rendered in non-ICSID arbitration will be fully regulated by the domestic law and might be quite burdensome for the parties. Usually, the local law would require that the parties are represented by counsels admitted to the local bar, the language of the proceedings will be that of the country where such proceedings are conducted, all the documents will require translation and different domestic procedural formalities and requirements will be applicable to a foreign party.[56] This procedure will represent a complete break with the one that the parties became familiar with during the arbitration.

Therefore, two procedures of review would be entirely different: one is provided for by the ICSID Convention, another – differs from jurisdiction to jurisdiction and is comprised of rules and formalities in most cases totally unfamiliar to the parties.

[53] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 134
[54] ICSID Convention, Articles 53, 54
[55] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 134
[56] ibid, 134

1.2.5. The possibility of remand

ICSID annulment was described to be a "drastic" or "radical" one in that the decision to annul invalidates the award entirely or partially.[57] The committee cannot modify or amend the award and there is no remedy of remission to the original tribunal under the ICSID Convention since the old tribunal is functus officio.[58]

The consequences of setting aside proceedings are broader than those under the ICSID Convention. Apart from leading to the award being void, the Model Law also offers a remedy of remission to the arbitral tribunal.[59] Under Article 34(4) of the Model Law, the court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

This means that, unlike in the ICSID proceedings, the original tribunal may still play a role in post-award proceedings.

1.2.6. Discretion to annul

Under Article 52(3) of the Washington Convention, an *ad hoc* committee has "the authority" to annul the award or any part thereof on one of the grounds set forth in Art. 52(1) is fulfilled, Thus, under the ICSID Convention the committee retain the discretion to annul the award. The *ad hoc* Committee in *Amco II* noted that the Committee "may refuse to exercise its authority

[57] Sylvia Tonova, 'Compliance and Enforcement of Awards: Is There a Practical Difference between ICSID and Non-ICSID Awards?', in Ian A. Laird, Borzu Sabahi, Frédéric G. Sourgens, and Todd J. Weiler, Investment Treaty Arbitration and International Law (Vol 5, Juris Publishing 2012), 249
[58] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 628
[59] ibid, 631

to annul an Award if and when an annulment is clearly not needed to remedy procedural injustice and annulment would unwarrantably erode the binding force and finality of ICSID Awards".[60] In *Vivendi I,* the *ad hoc* Committee stated that the decision whether to annul should depend on the relation between the significance of the error and the legal rights of the parties.[61] Therefore, the annulment is not merely an automatic consequence of the review by the *ad hoc* committee and the latter is allowed some flexibility as to the necessity of such a radical measure.

Article 34(2) of the UNCITRAL Model Law similarly uses the permissive "may" providing courts with the discretion as to whether the award shall be set aside the award if one or several of the grounds listed in that provision are fulfilled. Very similarly to the ICSID annulment proceedings, the courts in Canada[62] and Hong Kong[63] assumed such discretion, reasoning that the procedural defect did not affect the outcome of the case, given that the award was based on several conclusions, the court should make use of its discretion in deciding whether to uphold or set aside the award.[64]

1.2.7. Stay of enforcement

Under the ICSID system, the enforcement of the award which is the subject of the annulment proceedings may be stayed. This is expressly allowed by Article 52(5) which provides that: "The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request." In the practice of the *ad hoc* committees, the provisional stay of enforcement until a final decision

[60] *Amco v. Indonesia,* Decision on Annulment in the Resubmitted Case, 3 December 1992, para 1.20
[61] *Vivendi v. Argentina,* Decision on Annulment, 3 July 2002, para 66
[62] *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, 02 May 2001
[63] *Brunswick Bowling and Billiards Corporation v. Shanghai Zhonglu Industrial Co. Ltd*, High Court—Court of First Instance, Hong Kong Special Administrative Region of China, [2009] HKCFI 94, 10 February 2009, para. 111
[64] ibid

on the request for annulment is taken is almost always granted either subject to the applicant providing a bank guarantee or other form of security for the full amount of the award or formal declaration by the applicant State of readiness to fulfil the award in case of rejection of the request for annulment or even without any type of security.[65] Contrary to the ICSID system, stay of enforcement is not even regulated by the Model Law and is falling within the ambit of the New York Convention rules. Article 6 provides that the authority before which the award is sought to be relied upon (in enforcement proceedings) may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security. The requirements that the party seeking to stay the enforcement will need to satisfy will be embedded in national procedural legislation.[66] The important difference is that, while under the ICSID system the *ad hoc* committee is empowered to order the stay and prevent the enforcement in the territory of any Contracting State, stay of enforcement ordered in the context of a non-ICSID proceedings prevents the enforcement only in the territory of the court ordering the stay.[67]

1.3. Grounds for the annulment and setting aside

The grounds for the review of an award laid down in the ICSID Convention and the Model Law are not identical. Paragraph 1 of Article 52 of the ICSID Convention contains the exhaustive list[68] of grounds for annulment, namely:

> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the Tribunal;

[65] Piero Bernardini, 'ICSID Versus Non-ICSID Investment Treaty Arbitration' in Miguel Angel Fernandez-Ballester and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010), p 180
[66] ibid
[67] ibid
[68] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), paras. 17, 18

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

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

Paragraph 2 of Article 34 of the Model Law also lists grounds on which an award may be set aside. The listing appears to be exhaustive judging by the wording of the article and the expression that the award can be set aside "only" in accordance with paragraph 2 and 3 of Article 34. The Courts have also construed the Article to provide for the exhaustive list of grounds for setting the award aside.[69] The first category of grounds is to be proven by the party:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

The existence of the second category of grounds should be examined by the court:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

[69] CLOUT case No. 10, *Navigation Sonamar Inc. v. Algoma Steamships Limited and others*, Superior Court of Quebec, Canada, 16 April 1987; CLOUT case No. 12, *D. Frampton & Co. Ltd. v. Sylvio Thibeault* and *Navigation Harvey & Frères Inc.*, Federal Court, Trial Division, Canada, 7 April 1988; *Bayview Irrigation District et al. v. United Mexican States*, Court File No. 07-CV-340139-PD2, 05 May 2008

A number of the grounds are only present in the Model Law but not in the ICSID Convention. Those include non-arbitrability under Article 34(2)(b)(i), public policy under Article 34(2)(b)(ii) and incapacity or invalid arbitration agreement under Article 34(2)(a)(i). Paragraph (b) of Article 34 contains two grounds very specific to the setting aside system of the Model Law.. The grounds of the non-arbitrability of disputes under the *lex fori* or the conflict of the award with the State's public policy constitute a reference to principles of the domestic system that the domestic courts of this system have to respect and apply. This is why both of them may be raised by the annulment court *ex officio* and no similar reference is contained in the ICSID annulment system.[70]

In the meantime, certain grounds that are listed in the ICSID Convention are not included into the Model Law, i.e. corruption under Article 52(1)(c) and the failure to state reasons under Article 52(1)(e). These two grounds, despite not being covered by the Model Law expressly, can still constitute a ground for setting aside under the latter. In particular, corruption can be addressed under the public policy ground in Article 34(2)(b)(ii),[71] while the failure to state reasons in practice was classified as a violation of procedural public policy under Article 34(2)(b)(ii)[72] or as an incorrect procedure under Article 34(2)(a)(iv).[73]

Despite the difference in the wording, some of the grounds in the ICSID Convention and the Model Law are essentially the same. In particular, under Article 52(1)(b) of the ICSID

[70] Piero Bernardini, 'ICSID Versus Non-ICSID Investment Treaty Arbitration' in Miguel Angel Fernandez-Ballester and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010), p 179

[71] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 635

[72] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 134 < http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf > accessed 8 February 2019, citing *Uniprex S.A. v. Grupo Radio Blanca*, Madrid Court of Appeal, Spain, case No. 178/2006-4/2004, 22 March 2006

[73] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 134 < http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf > accessed 8 February 2019, citing Oberlandesgericht Rostock, Germany, 1 Sch 04/06, 18 September 2007

Convention, the notion of "excess of power" may correspond to the following grounds of the Model Law: lack or invalidity of an arbitration agreement (Article 34(2)(a)(i)), an award dealing with matters outside scope of submission to arbitration (Article 34(2)(a)(iii)) and lack of arbitrability (Article 34(2)(b)(i)).[74] The important difference is the availability of a recourse against the decision upholding jurisdiction. Under the ICSID system the manifest excess of powers ground can only be invoked to challenge an award denying jurisdiction, without any possibility to have a recourse against a decision upholding jurisdiction. The latter can only be challenged in the proceedings for annulment of the award on the merits.[75] In the meantime, under all national systems that have adopted the Model Law, if jurisdiction is upheld either party may request the competent court to rule on the matter.[76]

Further, a serious departure from a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention also corresponds to a number of grounds enshrined in the Model Law. Procedural irregularities, such as the violation of the right to be heard or of due process, violation of the rules of participation or representation, refusal to hold oral hearings, unreasonable rejection of evidence presented by a party, refusal to properly consider the arguments of the parties may be covered under Article 34(2)(a)(ii) – inability to present one's case, Article 34(2)(a)(iv) - "incorrect" procedure and Article 34(2)(b)(ii) - violations of procedural public policy. There is no sharp delimitation between the cited grounds, rather the submissions of the parties are the primary criteria in determining under which ground or defense the alleged violation of the right to be heard

[74] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 634-635
[75] Piero Bernardini, 'ICSID Versus Non-ICSID Investment Treaty Arbitration' in Miguel Angel Fernandez-Ballester and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010), p 181
[76] ibid

is discussed.[77] Some decisions explicitly state that the right to be heard can be invoked under different grounds.[78]

Improper constitution of the tribunal is a ground for the annulment common to the ICSID Convention[79] and the Model Law.[80]

Consequently, the grounds for setting the award aside in the Model Law are broader in scope[81] as either explicitly or implicitly they incorporate all the grounds present in the ICSID Convention and provide for some additional reasons to set the award aside.

1.4. Conclusion

It can be concluded that both procedures share its limited and exceptional nature and have a common purpose – to ensure that the decision was rendered in a fair manner. Neither the annulment nor setting aside is aimed at correcting the substantive deficiencies or errors in the decision of the arbitral tribunal. Apart from that, annulment fundamentally differs from setting aside. It is performed by *ad hoc* committees which are non-permanent bodies appointed without the participation of the Parties by the Chairman of the ICSID Administrative Council. Setting aside, on the other hand, is conducted by the domestic courts designated by the States to perform respective tasks. Parties in investment cases have little control over the selection of judges for the annulment and in most cases do not know the jurisdiction where the review will be performed in advance. This creates a high level of uncertainty as to what standard the adjudicator will apply and how deferential towards the award the judge will be. Annulment proceedings before ICSID *ad hoc*

[77] CLOUT case No. 391, *Re Corporación Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al.*, Ontario Superior Court of Justice, Canada, 22 September 1999
[78] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 134 < http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf > accessed 8 February 2019, citing Oberlandesgericht München, Germany, 34 Sch 12/09, 5 October 2009
[79] ICSID Convention, Article 52 (1) (a)
[80] Model Law, Article 34(2)(a)(iv)
[81] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 634-635

committees are conducted in accordance with the procedure established by the ICSID Convention, while the setting aside follows the procedural rules of each specific country and those rules vary from jurisdiction to jurisdiction. The remedy of remission to the arbitral tribunal does not exist in annulment under the ICSID Convention but is available under Article 34 of the Model Law. In both systems, the *ad hoc* committee members and the judges retain a discretion to annul the award on one of the grounds specified in the Convention and the national law (adopting the Model Law). However, the grounds for setting the award aside under the Model Law seem to be broader in scope as either explicitly or implicitly they incorporate all the grounds present in the ICSID Convention and provide for some additional reasons to set the award aside. Both under the ICSID system and outside it is possible to stay the enforcement proceedings before the annulment or setting aside decision is rendered. However, when an *ad hoc* committee is ordering stay, it is preventing the enforcement in the territory of any Contracting State to the ICSID Convention, while the stay of enforcement ordered in the context of a non-ICSID proceedings prevents the enforcement only in the territory of the court ordering the stay.

CHAPTER 2: ANNULMENT AND SETTING ASIDE IN FIGURES

The number of the annulment proceedings has increased along with the number of the treaty awards issued.[82] In order to provide an overview of the annulment proceedings in investment arbitration, different scholars were relying on the data gathered and processed by the UNCTAD - the United Nations body dealing with trade, investment, and development issues.[83] In its turn, UNCTAD publications are based on the data available in the Investment Dispute Settlement Navigator, that contains information about known international arbitration cases initiated by investors against States pursuant to international investment agreements.[84] This source is open to everyone interested.

In the meantime, it should be born in mind that any attempt to collect information about investment arbitration awards is subject to several important caveats. In particular, there is no complete transparency, especially when it comes to the non-ICSID arbitrations.[85] The Investment Dispute Settlement Navigator disclaims that due to the fact that some proceedings (or certain aspects of proceedings) remain confidential, the information contained in the Navigator cannot be deemed exhaustive. In addition to that, one commentator has noted that every investment arbitration statistics is skewed by the large number of arbitrations involving the Argentine Republic (60 cases as of July 2017[86]), and those arbitrations led to 9 ICSID annulment proceedings

[82] Gaetan Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID' in Albert Jan van den Berg, *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009), 285

[83] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 143; Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 622-623

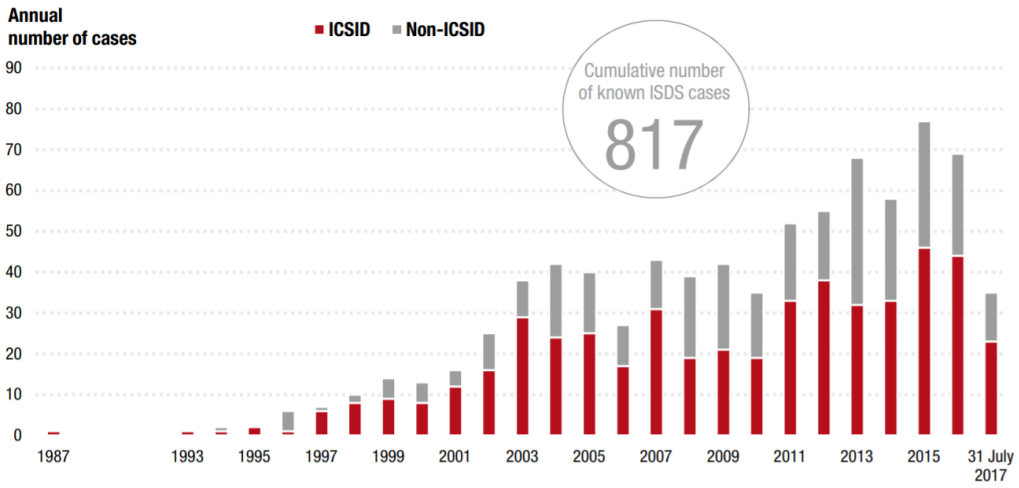
[84] Investment Policy hub, Investment Dispute Settlement Navigator <https://investmentpolicyhub.unctad.org/ISDS> accessed 5 February 2019

[85] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 143

[86] Special Update on Investor–State Dispute Settlement: Facts and Figures (November 2017, issue 3) <https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf> accessed 5 February 2019

and 2 non-ICSID annulment proceedings before the U.S. District Court for the District of Columbia.[87]

The latest UNCTAD update on Investor-State Dispute Settlement compares the number of cases initiated under the ICSID Convention against the non-ICSID arbitrations. The information is relevant as of July 2017:[88]



As of July 2018 and based on the data available in the ISDS Navigator, the chart can be updated as follows. A cumulative number of known ISDS cases has risen to 904. In 2017 41 cases were initiated under the ICSID Convention, while 29 cases were brought under the non-ICSID rules. In 2018, 21 case under the ICSID Convention was registered as opposed to 13 non-ICSID cases.

As was noted above, the overall number of treaty-based investor-State arbitrations 904, out of which 580 cases are concluded.

The number of arbitrations under the ICSID Convention that resulted in the award and which are not pending and were not settled or discontinued amounts to 199. Annulment

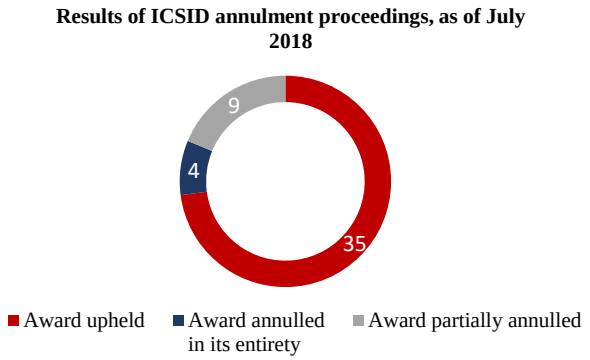
[87] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 143

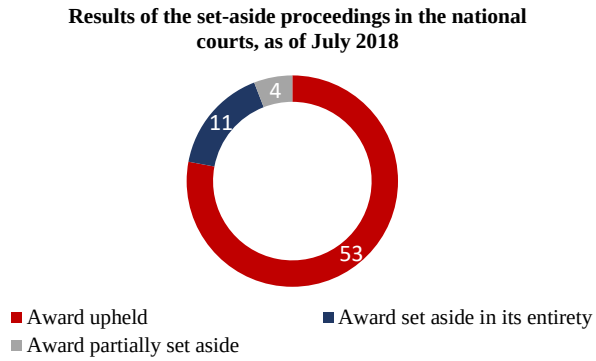
[88] Special Update on Investor–State Dispute Settlement: Facts and Figures (November 2017, issue 3) <https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf> accessed 5 February 2019

proceedings were instituted in 95 cases, which comprises around 47 percent of the total number of the ICSID cases. 13 awards were annulled either partially or in full as a result of these proceedings. This is almost 14 percent of the awards challenged and slightly less than 7 percent of the total number of ICSID awards.

In the meantime, there were 183 cases decided under the rules different than the ICSID Convention, in particular, under the rules of Cairo Regional Centre for International Commercial Arbitration, International Chamber of Commerce, London Court of International Arbitration, Moscow Chamber of Commerce and Industry, Permanent Court of Arbitration and Stockholm Chamber of Commerce, UNCITRAL Arbitration rules, ICSID Additional Facility and *ad hoc* rules. Similarly, those are the cases not pending, settled or discontinued. Of 183 non-ICSID cases, 84 have been subject to judicial review by the national courts, which is around 46 percent of all cases. 15 awards were actually set aside, fully or partially, by the judicial authority. This is around 18 percent of the total amount of setting aside proceedings and almost 8 percent of all the non-ICSID cases.

Two charts below illustrate the outcomes of the procedure of review in two systems:





What do these calculations tell us? The number of arbitral awards that were annulled by the *ad hoc* committees and domestic courts is almost even – it is 13 ICSID awards and 15 non-

ICSID ones. It might seem that the domestic courts are a lot more deferential to the decisions of the arbitral tribunals, which is evidenced by the number of the awards upheld in the domestic proceedings – 53 awards, which constitutes 63 percent of all the awards subject to judicial review. In the ICSID review mechanism, the percentage of the awards upheld by the *ad hoc* committees amounts to only 37 percent, almost two times less than the number of the awards upheld by domestic courts. However, if one compares the number of awards upheld against the number of the cases actually concluded (those that are not pending or discontinued), it can be concluded that at the time being, domestic courts proved to be a more quick and efficient mechanism for the review. The courts reviewed 68 cases and in 78 percent of those cases they sided with the opinion of the arbitral tribunal. The ICSID *ad hoc* committees managed to review only 48 cases and agreed with the award of the tribunals in approximately 73 percent of those cases.

It follows that the domestic courts tend not to set the award aside too frequently. Statistics show that they set aside 4 percent more awards comparing to the *ad hoc* committees. Some commentators in different years had reached a slightly different conclusion. Back in 2011, professor Fernandez-Armesto concluded that *ad hoc* committees accept more challenges than the ordinary courts.[89] More recently, in 2015, two commentators also found that statistics show that more ICSID awards were annulled than non-ICSID awards,[90] and that state courts appear more reluctant to set aside awards than ICSID *ad hoc* committees are.[91] This difference might be attributed to the fact that information concerning arbitration and annulment proceedings is not

[89] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 145

[90] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 622-623

[91] Barbara Helene Steindl, 'ICSID Annulment vs. Set aside by State Courts' (2015) 4 Yearbook on International Arbitration 181, 199

always available and different commentators may depart from different figures in their calculations. In particular, the aforementioned commentators obtained data regarding domestic setting aside proceedings from the "investment treaty arbitration" initiative[92] while the number in this chapter were taken from the ISDS Navigator. In any event, the difference is not a drastic one and the percentage of annulment is almost similar. Additionally, numbers suggest that the court upheld more awards than the committees: in 78 percent of concluded cases the courts sided with the opinion of the arbitral tribunal as opposed to the 73 percent of upheld award in ICSID annulment proceedings. Therefore, the courts adopt a rather favorable approach towards the arbitral awards.

[92] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, footnote 4; Barbara Helene Steindl, 'ICSID Annulment vs. Set aside by State Courts' (2015) 4 Yearbook on International Arbitration 181, 199

CHAPTER 3: STANDARDS OF REVIEW UNDER THE ICSID CONVENTION AND THE MODEL LAW

According to the commentators, of the grounds available in the ICSID Convention, only three had mattered in practice: manifest excess of powers, failure to state reasons and serious departure from a fundamental rule of procedure.[93] In non-ICSID setting aside proceedings the most important grounds, most commonly invoked in the applications, were excess of powers, followed by public policy, due process and failure to state reasons.[94] Such asymmetry was explained by Professor Verhoosel in the following terms: "[i]t is frequent practice in ICSID annulment proceedings to characterize the same alleged flaw in an award as both a manifest excess of powers and a failure to state reasons. Since many of the jurisdictions reviewed expressly or implicitly exclude failure to state reasons as a ground for setting aside, applicants appearing before those courts have less of an incentive to double-dip the way many ICSID applicants do."

This chapter, therefore, explores and compares first, how the *ad hoc* committees and second, the national courts interpreted various grounds for review and what standards they have applied when deciding of the awards shall be annulled or set aside. The grounds subject to comparison would be: manifest excess of powers in cases involving jurisdictional errors and failure to apply proper law; serious departure from a fundamental rule of procedure and failure to state reasons. These grounds were chosen because, as noted above, in one form or another thy are present in both the ICSID Convention and the Model Law. Thus, unlike such grounds as non-arbitrability or violation of public policy, they are capable of being compared and can illustrate the

[93] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 635; Gaetan Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID' in Albert Jan van den Berg, *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009), 293 -294

[94] ibid

difference in standards applied by the *ad hoc* committees and the courts. Another thing that must be noted is that not all important arbitration jurisdictions have their arbitration laws based on the Model Law. For example, Sweden, Switzerland, the United Kingdom and France do not base their domestic laws on the Model Law, thus, sections examining the interpretation and application of the Model Law setting aside grounds mainly cite cases decided by Canada, Denmark, Belgium, Singapore and other Model Law jurisdictions.

3.1. Manifest excess of powers: jurisdictional errors

3.1.1. ICSID annulment proceedings

One of the most popular grounds invoked by the applicants in their application for annulment under the ICSID Convention is excess of powers by the tribunal. The power of any tribunal derives from the authority vested upon it through the agreement between parties.[95] Such agreement constitutes both the basis and the outer limit of the tribunal's power.[96] Michael Reisman explained that the doctrine of excess of powers is an indispensable control mechanism in arbitration since without it the arbitration "would lose its character of restrictive delegation and the arbitrator would become a decision maker with virtually absolute discretion".[97] This ground was, thus, designed to deal with situations where the tribunal exceeds its powers by deciding matters not within is competence as well as by failing to exercise jurisdiction it does have.[98] It also

[95] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 139

[96] Irmgard Marboe, 'Annulment of ICSID Awards' in Christina Knahr, Christian Koller, Walter Rechberger, August Reinisch, *Investment and Commercial Arbitration – Similarities and Divergences* (Eleven International Publishing 2010), 101

[97] Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) Duke Law Journal 739, 745-746

[98] Irmgard Marboe, 'Annulment of ICSID Awards' in Christina Knahr, Christian Koller, Walter Rechberger, August Reinisch, *Investment and Commercial Arbitration – Similarities and Divergences* (Eleven International Publishing 2010), 101

applies to failure to apply the applicable law examined in the next section as this would similarly go against parties' agreement to arbitrate.[99]

This is one of the most complex grounds for annulment since it is unclear what exactly would constitute a "manifest" excess of powers. The Preliminary Draft to the Convention did not contain the word "manifestly". It was Germany's successful proposal to insert this requirement without which, they feared, there might be some risk of frustration of awards. Some proposals to delete this word from the Article were unsuccessful, and as a result, Article 52(1)(b) entails a dual requirement: there must be an excess of powers, and that excess must be "manifest".[100]

The *ad hoc* committees did not develop any consistent standard under this ground for review. They had applied it in a controversial manner and had rendered some imprudent annulment decision.[101] The issue that proved so controversial is what type of excess of powers would qualify as a "manifest" one.

The Committee in the *Wena Hotels* case noted that "[t]he excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest."[102] The standard was upheld in the *CDC v. Seychelles* decision, where the Committee stated that "… the excess must be plain on its face for annulment to be an available remedy".[103] This approach seems consistent with the aim of the annulment – only if it is obvious that the tribunal exceeded its powers will the award be annulled.

Another point of view regarding this ground was developed in the *Vivendi v. Argentina* annulment decision. The Committee noted that if the tribunal lacked jurisdiction, "it was a manifest

[99] ibid
[100] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), para 134
[101] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 66
[102] *Wena Hotels v. Egypt*, Decision on Annulment, 5 February 2002, para.25
[103] *CDC v. Seychelles*, Decision on Annulment, 29 June 2005, para 41

excess of power for the tribunal to proceed to consider the merits and the whole [a]ward must be annulled".[104] With regard to the failure to exercise jurisdiction, the manifest excess of powers would be present if "the failure to exercise a jurisdiction is clearly capable of making a difference to the result".[105] The Committee in essence stated that only when the excess is material to the outcome of the case will the award be annulled. This point of view does not enjoy much popularity.[106] This might be due to the fact that, as noted earlier, this ground is used to annul the awards for jurisdictional errors. Obviously, by declining jurisdiction, the tribunal fails to consider certain claims which is material for the outcome of the case. Similarly, if the Tribunal considers claims not submitted for its determination, it makes conclusions as to the responsibility of the parties that it wasn't supposed to be making. Hence, under the *Vivendi* approach, if the tribunal exercises jurisdiction when it does not have it (or *vice versa*), it is always a manifest excess of power (the "correctness test").[107]

Yet another approach towards this ground for annulment was developed by other committees. They analyzed if the findings of the tribunals were "tenable". For example, the Committee in *Klockner I* upheld the award despite the sever criticism of virtually every conclusion of the tribunal precisely because the tribunal's findings were "tenable and not arbitrary" and the required level of a manifest excess of powers was not achieved.[108] Through the application of a "tenable" standard, the *Lucchetti* Committee also refused to annul the award.[109] In *Fraport v. Philippines*, the Committee similarly refused to annul the award because it acknowledge that it

[104] *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, para 72
[105] *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, para 86
[106] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 67
[107] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 640
[108] *Klockner v. Cameroon*, Decision on Annulment, 3 May 1985, para 52
[109] ibid, para 117

wasn't its task "to decide which interpretation is correct"[110] and the findings of the tribunal were "not untenable".[111] However, the meaning of "tenable" conclusions is vague and subjective.[112] It can also be noted that the committees that do not annul awards for being "not untenable" still tend to extensively criticize the conclusions of the tribunals and express their opinion on how the issues should have been resolved. This was the case in *Klockner I* and this creates an impression that the Committee does not have an authority to annul a completely wrong award, which can influence the willingness of the responsible party to comply with it. The divergency of approaches to the manifest excess of powers under the ICSID system is evidenced by several controversial decisions of the *ad hoc* committees, in particular, in the cases of *Mitchell v. Congo* and *Malaysian Historical Salvors v. Malaysia*. There, the committees substituted their own view of the correct interpretation of jurisdictional requirements under the ICSID Convention for the view of the tribunals.

In *Mitchell v. Congo* the issue at stake was connected to the intervention ordered by the Military Court of the Democratic Republic of Congo, which resulted in sealing of the premises of the Mr. Mitchell's law firm, seizure of some documents and property, evacuation of the employees and arrest of two lawyers.[113]The question before the Tribunal was whether the activities of a law firm can qualify as investment under the BIT and the ICSID Convention. The Tribunal answered in the affirmative, stating that "movable property and any documents, like files, records and similar items … the investor's right to 'know-how' and 'goodwill' … as well as the right to exercise its activities …"[114] are covered by the protections prescribed in the BIT. This also concerned the payments registered on the accounts of Mr. Mitchell in the United States. The *ad hoc* Committee

[110] *Fraport v. Philippines*, Decision on Annulment, 23 December 2010, para 112
[111] ibid
[112] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 68; Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) Duke Law Journal 739, 766
[113] *Mitchell v. Congo*, Decision on Annulment, 1 November 2006, para 1
[114] ibid, para 48

disagreed, firstly, because the Tribunal erroneously considered certain assets and rights to constitute "investment", while in the Committee's opinion, it is the economic operation or project which should fall under this definition. Also, the Committee noted that it was a mistake to include the non-reinvested returns into the notion of "investment". Thus, the Committee concluded that the Tribunal exceeded its powers.[115] The decision of the *ad hoc* Committee is puzzling since it stated that this would not be identified as a manifest excess of powers if it wasn't for already found serious failure to state reasons as to the existence of an investment on which the jurisdiction of the Tribunal was based. The Committee observed that the mistake "… is certainly not one of inadvertence and … compounds reasoning which is already incomplete and obscure. The *ad hoc* Committee is thus inclined to believe that the Arbitral Tribunal forced the concept of investment in the case at hand in order to affirm its jurisdiction." [116] Before that, in paragraphs 25-33 the Committee developed its own understanding of the term "investment" both under the BIT and the ICSID Convention and then annulled the decision of the Tribunal for having another opinion on the issue. The annulment decision in *Mitchell* has been severely criticized and according to Schreuer, it "stands apart from an otherwise consistent line of cases in which *ad hoc* committees have refrained from substituting their own view of the correct decision for that of the tribunal".[117]

In *Malaysian Historical Salvors v. Malaysia*, the Tribunal found that the claim fell outside its jurisdiction, because the contract involved in the dispute was not an "investment" within the meaning of Article 25(1) of the ICSID Convention. It was the contract under which Malaysian Historical Salvors retrieved thousands of pieces of Chinese porcelain from the Strait of Malacca in the 1990's but was not fully paid for its works. The Committee decided that the Tribunal had

[115] ibid, paras 38, 43, 46
[116] ibid, para 46
[117] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), 40

manifestly exceeded its powers by failing to exercise jurisdiction with which it was endowed by the terms of the BIT and the Convention. This was so because the Tribunal failed to apply the BIT's definition of "investment' in broad and encompassing terms but limited itself only to the consideration of the requirements of the "investment" under the ICSID Convention; because in the Tribunal's analysis of the criteria under the ICSID Convention it elevated some characteristics of investment to jurisdictional conditions and exigently interpreted the condition of a contribution to economic development of the host state so as to exclude small contributions and contributions of a cultural and historic nature; because it reached conclusion not consonant with the *travaux preparatoires* in key respects relevant for the determination of what constitutes an investment under the ICSID Convention.[118] It is evident that the Committee re-assessed the jurisdiction of the Tribunal *de novo* and annulled the award because it disagreed with the notion of "investment" preferred by the Tribunal.

There are also several cases against Argentina, notably *CMS v. Argentina* and *Azurix v. Argentina*, whereby the *ad hoc* Committee upheld the decisions of the Tribunals, however, the manner of its analysis resembles a *de novo* jurisdictional review. In both cases Argentina applied for annulment arguing that the Tribunals exceeded their powers by exercising jurisdiction over claims by a company's shareholder for income lost by the company. Argentina argued that such claims are excluded and the only claims within the jurisdiction of ICSID would be those relating to the shareholder's rights *qua* shareholders. As noted above, the *ad hoc* Committees sided with the interpretation of the Tribunals, however, the Committees were not analyzing the Tribunals' decision itself but focused on whether their conclusions were sound and the ones with which the Committees agree. These cases illustrate how difficult it can be in the ICSID annulment

[118] *Malaysian Historical Salvors v. Malaysia*, Decision on Annulment, 16 April 2009, para 80

proceedings not to proceed to in-depth review of the tribunal's decision on the merits. The Committees in the both cases formally declared all the principles pertaining to their limited functions but failed to adhere to those principles.

The review of the practice of annulment under this ground evidences that there exist several competing standards applied by the *ad hoc* committees when they are reviewing the award. It is rather unpredictable which exact standard a particular committee will decide to follow, and it can rarely be told how they will interpret the standard. The possibility that the committee will decide to re-examine the merits of the award even after declaring that it is not empowered to do so is high.

3.1.2. Domestic set aside proceedings

It was concluded by the scholars that the municipal courts tend to conduct a *de novo* review of arbitral tribunals' decisions on jurisdiction when they are faced with the task of deciding whether the award should be set aside.[119] This includes courts in England, Sweden, Switzerland and Canada.[120] However, only Canadian practice is relevant for the studies on the application of Article 34 of the Model Law as, of the listed countries, Canada is the only Model Law jurisdiction.[121] The municipal courts examine whether the tribunal was right in assuming or refusing jurisdiction which implies that the courts adopt the standard of "correctness" of the award. Their analysis can include issues of treaty interpretation, whether there was an "investment" and whether the party qualifies as an "investor", whether dispute is within the scope of consent clause

[119] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 644; Gaetan Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID' in Albert Jan van den Berg, *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009),296

[120] ibid

[121] Status of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 24 March 2018

and other issues which led to the adoption of the decision on jurisdiction by the tribunal.[122] This is a more intrusive standard compared to the one applied by the *ad hoc* committees.

One of the decisions where the standard of correctness was applied is the annulment decision in *SD Myers v. Canada* by the Federal Court of Canada. The case is interesting, amongst other things, because it was heard before the losing party's own judiciary.[123] Canada made an application to seek judicial review of arbitration awards issued against it pursuant to Chapter 11 of NAFTA in the case that concerned the transboundary transportation of the materials which were contaminated with polychlorinated biphenyls (PCBs) from Canada to the SD Myers' Ohio. SD Myers Inc. (SDMI), was a family-owned corporation in Ohio which established a subsidiary in Canada - Myers Canada. SDMI's claim was that Canada's ban on PCB waste exports to the United States, had caused economic harm to Myers Canada and amounted to a violation of national treatment and minimum standard of treatment under Article 1105 NAFTA. The Tribunal held that, based on a principle of indirect control, SDMI was an investor in Canada even though Myers Canada was owned only by the family members controlling SDMI and not by SDMI directly.[124] During the setting aside proceedings Canada argued that by deciding that SDMI qualifies as an investor and Myers Canada as an investment under Article 1139 of NAFTA the Tribunal went beyond the scope of the submission to arbitration.[125] Also, it was argued that the Tribunal exceeded the scope of submission to arbitration by applying Chapter 11 to cross-border trade in services which are governed by Chapter 12 while Chapter 12 is beyond the scope of arbitration.[126] Firstly,

[122] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 644
[123] Angela Cousins, 'Case Comment: Canada (A-G) v. S.D. Meyers, Inc., [2004] 3 F.C.J. NO. 29' (2005) 14 Dalhousie Journal of Legal Studies 191
[124] Kaj Hober and Nils Eliasson, 'Review of Treaty Awards by Municipal Courts' in Katia Yannaca-Small, *Arbitration under International Investment Agreements* (Oxford University Press 2010), 646
[125] *The Attorney General of Canada v. S.D. Myers, Inc.*, 2004 Fe 38, 13 January 2004, para 46
[126] ibid

the Federal Court held that since Canada failed to raise this jurisdictional objection during the original proceedings, it waived its right to the judicial review of the tribunal's findings on the jurisdiction.[127] In the alternative, in case the Court erred in this conclusion, it proceeded to examining Canada's argument. The Court held that the applicable standard of review was "correctness" regarding "pure questions of law", and "reasonableness" regarding "mixed questions of fact and law".[128] The Court held that definition of "investment of an investor of a Party" was broad enough to conclude that the tribunal's interpretation was correct and the application of the correct legal definition to the fact was reasonable.[129] The Court then found that, though SDMI's investment activities could also be characterized as cross-border trade in services regulated under Chapter 12, the Tribunal was correct in not precluding Chapter 11 from applying to SDMI's rights and obligations.[130]

In another Canadian case, namely, *Cargill v. Mexico*, the Ontario Court of Appeal determined one the issues before it to be: "… what is the standard of review to be applied by the … court in reviewing a decision of a Chapter 11 NAFTA arbitral panel under Article 34(2)(a)(iii) of the Model Law?".[131] The case concerned an award rendered in favor of Cargill for losses that Cargill and its Mexican subsidiary, Cargill de Mexico, suffered after Mexico enacted laws restricting the importation of high fructose corn syrup into Mexico in what the tribunal deemed to be a violation of NAFTA.[132] Mexico was dissatisfied that in addition to granting losses that Cargill de Mexico suffered, the Panel also awarded USD 41,000,000 in damages for Cargill not as an

[127] ibid, para 53
[128] ibid, para 58
[129] ibid, para 70
[130] ibid, para 71
[131] *Mexico v. Cargill*, 2011 ONCA 622, 04 October 2011, para 26
[132] Supreme Court of Canada upholds NAFTA award against Mexico (DLA Piper International Arbitration Newsletter, 19 September 2012) <https://www.dlapiper.com/en/hungary/insights/publications/2012/09/supreme-court-of-canada-upholds-nafta-award-agai__/#_ftnref4> accessed 24 March 2019

investor but an a seller of the fructose corn syrup to Cargill de Mexico (which is could no longer be due to the Mexican ban).[133] Mexico, therefore, contended that in granting those damages to Cargill the Panel exceeded its jurisdiction. After reviewing the *Dallah* decision, as well as the decisions in *Metalclad* and *SD Myers*, the Court concluded that the proper standard of review is the "correctness" standard which demands the review of the tribunal's assumption of jurisdiction *de novo* to establish whether the tribunal was correct in its determination that it had the ability to make a decision it made.[134] Despite the strictly-articulated standard, the court did not set the award aside. It stated that the role of the court is limited to identifying and narrowly defining any true question of jurisdiction without proceeding to consider the reasonableness of the awards on the merits.[135] Even though Mexico argued that the Panel was jurisdictionally precluded from awarding such type of damages, the Court condemned Applicant for an attempt to expand the jurisdictional inquiry into merits issues and declined its application.[136]

Similar path of a *de novo* review is preferred by the Danish courts, another Model Law jurisdiction.[137] In *SwemBalt v. Latvia*,[138] Latvia brought an application to set the award aside before the Maritime and Commercial Court of Copenhagen on the basis that a vessel bought for the purpose of a floating trade centre did not constitute an "investment". The Danish court was faced with the issue of whether the Tribunal had interpreted the term "investment" in the BIT between Latva and Sweden correctly, which required it to develop its own understanding of an

[133] ibid
[134] *Mexico v. Cargill*, 2011 ONCA 622, 04 October 2011, para 42
[135] ibid, paras 53, 74
[136] ibid, para 66
[137] Status of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 24 March 2018
[138] *Republic of Latvia v. SwenBalt Ltd*, Case No. S-22-01, 7 January 2003

"investment".[139] The Court upheld the interpretation of the Tribunal holding that the Latvia-Sweden BIT did not give any grounds for a limited interpretation of the term "investment". Latvia's application to set aside was, therefore, dismissed.[140]

Courts in Singapore also conduct a *de novo* review of jurisdictional decisions by the tribunals. Importantly, during the *de novo* hearing, the tribunals determination regarding its jurisdiction has no legal or evidential value.[141] The example is the award in *Sanum Investments Ltd. v. Laos* set aside by the Singapore High Court. In that case, the Tribunal ruled that it had jurisdiction to arbitrate certain expropriation claims brought by a Macanese investor (Sanum Investments) against Laos. Dissatisfied, Laos brought proceedings before the High Court challenging the Tribunal's ruling on jurisdiction.[142] Unlike the Tribunal, the High Court found that, firstly, Laos had proved that China and Laos had not intended the 1993 BIT to apply to Macao and, secondly, the arbitration clause in the BIT only applied to disputes involving the monetary amount of compensation for expropriation and did not apply to expropriation claims.[143] Interestingly, Sanum brought an appeal before the Court of Appeal against the decision and the standard of review on the appeal was the following: "… the court should consider the matter afresh. In doing this, it will of course consider what the Tribunal has said because this might well be persuasive. But beyond this, the court is not bound to accept or take into account the arbitral tribunal's findings on the matter".[144] Thus, the Court of Appeal had reconsidered two relevant

[139] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 645
[140] ibid
[141] Ole Jensen, 'Setting Aside Arbitral Awards in Model Law Jurisdictions: The Singapore Approach From a German Perspective' (2015) 4(1) European International Arbitration Review 55, 64
[142] *Sanum Investments Limited v. The Government of the Laos People's Democratic Republic*, [2016] SGCA 57, 29 September 2016, para 1
[143] Ibid, para 2
[144] ibid, para 41

issues: whether the BIT applies to Macao and whether the dispute was within the subject-matter jurisdiction of the Tribunal, answered both in the affirmative and overruled the decision of the lower court.[145]

Hence, the national courts in most jurisdictions conduct a *de novo* review of the tribunals' decisions on jurisdiction. This seems to be a more intrusive standard that the one applied by the *ad hoc* committees. Nevertheless, in the domestic proceedings the applicant will at least know the applicable standard since the latter is consistently applied from one court decision to another across different jurisdiction. This stands in striking contrast with the practice of the *ad hoc* committees where the standard is imprecise and is interpreted quite subjectively by the members of the *ad hoc* committees. Thus, in the vast majority of investment arbitration cases, the courts agreed with the findings of the tribunals and showed a high level of respect for those findings and the expertise of the arbitrators.

3.2. Manifest excess of powers: failure to apply proper law

3.2.1. ICSID annulment proceedings

This ground for annulment addresses the possibility of excess of powers on the questions of merits.[146] Article 42 (1) of the ICSID Convention stipulates that the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. In *MINE*, the *ad hoc* Committee provided some analysis of the significance of Article 42 in the context of annulment proceedings. It stated that: "It grants the parties to the dispute unlimited

[145] ibid, para 152
[146] Irmgard Marboe, 'Annulment of ICSID Awards' in Christina Knahr, Christian Koller, Walter Rechberger, August Reinisch, *Investment and Commercial Arbitration – Similarities and Divergences* (Eleven International Publishing 2010), 105

freedom to agree on the rules of law applicable to the substance of their dispute and requires the tribunal to respect the parties' autonomy and to apply those rules. From another perspective, the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function."[147] These provisions on applicable law are essential elements of the parties' agreement and constitute parameter for the tribunal's activity.[148] Unfortunately, the invocation of this ground had produced several controversial annulment decisions.

As to the role of the *ad hoc* committee faced with the task to decide whether the tribunal applied the proper law, in *Amco I* the Committee stated that the law applied by the Tribunal will be examined by the *ad hoc* Committee not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. The *ad hoc* Committee is not a court of appeals to undertake such a task. It should limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute.[149]

In *CDC v. The Republic of Seychelles*, the latter argued that the Tribunal disregarded the cases on which it relied during the proceedings, and therefore, the tribunal failed to apply English law. The Committee disagreed with the Applicant in the annulment proceedings stating that: "Regardless of our opinion on the correctness of the Tribunal's legal analysis … our inquiry is limited to determination of whether or not the tribunal endeavored to apply English law. That it did so is made plain by its explicit statement in the Awards that it did as well as by its repeated

[147] *MINE v. Guinea,* Decision on Annulment, 22 December 1989, para 5.03
[148] ibid
[149] *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, para 23

citation to relevant English authorities."[150] Such limited approach adopted by the Committee in its review is considered to be the best of its kind and was characterized as an authority that future committees may wish to emulate.[151]

In *Caratube v. Kazakhstan*, the Committee summarized the applicable standard under this ground for annulment as follows: (i) an award can be annulled if the arbitrators have manifestly exceeded their powers by totally disregarding the law, or by grounding their award on a law other than the applicable law; (ii) misinterpretation or misapplication of the proper law, even if serious, does not justify annulment; (iii) only in exceptional circumstances a gross or egregious error of law, acknowledged as such by any reasonable person, could be construed to amount to failure to apply the proper law.[152] With respect to the third requirement, the *M.C.I Power* Committee clarified that when several interpretations of a legal norm were possible and the tribunal chose one of them, no manifest excess of powers occurred.[153] One more feature of the standard can be added to the abovementioned list: in *Duke* the *ad hoc* Committee stated that where Article 42(1) of the ICSID Convention obliges the tribunal to apply the law of the Contracting State, it makes reference to the whole law of the Contracting State and not any particular portion of it.[154] If follows that failure to apply some provisions of the applicable law is not a ground for annulment but is simply a misapplication of the applicable law or an error of law.[155]

The standard looks quite defined on the paper but the practice of its application sometimes proves the opposite. The cited *Amco I* Committee, for example, despite the pronounced refusal to

[150] *CDC v. The Republic of Seychelles*, Decision on Annulment, 29 June 2005, para 45
[151] Bishop D and Marchili S, Annulment under the ICSID Convention (Oxford University Press 2012), 107
[152] *Caratube v. Kazakhstan*, Decision on Annulment, 21 February 2014, para 237
[153] *M.C.I. Power v. Ecuador*, Decision on Annulment, 19 October 2009, para 51
[154] *Duke Energy International v. Peru*, Decision on Annulment, 1 March 2011, para 212
[155] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 68; Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) Duke Law Journal 739, para 6-165

examine the substantive correctness of the award, looked into the question of how the tribunal applied the applicable law.[156] In *Amco I,* one of the questions before the Committee was whether the Tribunal failed to apply fundamental provision of Indonesian law when calculating the amount of Amco's investment. The *ad hoc* Committee found the Tribunal's calculation deficient because the Tribunal didn't apply the provisions of Indonesian Foreign Investment law regarding such a calculation. This mistake led the Committee to annul to award on the basis of disregard by the Tribunal of the "fundamental provision" of Indonesian law.[157] The *ad hoc* Committee went as far as to start explaining that this mistake might have occurred due to the fact that the tribunal was too busy analyzing by lengthy and complicated arguments pertaining to some accounting principles and problems.[158] Schreuer later commented that a look at the Award shows that the Tribunal undertook a detailed examination of Indonesian law, came to a conclusion different from that of the tribunal and described what it perceived as an erroneous application as a non-application.[159] Even in the resubmitted case the second tribunal acknowledged that it is an example of an annulment granted by the committee just because a conclusion reached by the first Tribunal was believed to be untenable by it.[160]

Two awards against Argentina were similarly criticized for overstepping the line between an annulment and an appeal. The issue in both cases before the Tribunals was similar: Argentina pleaded the necessity defense to prevent its responsibility under international law. Article XI of the US-Argentina BIT addressed the issue of necessity, however, both tribunals referred to customary international law and Article 25 of the ILC Articles on the Responsibility of States for

[156] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), para 214
[157] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 101
[158] ibid
[159] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), para 230
[160] *Amco v. Indonesia*, Decision on Jurisdiction in the Resubmitted Case, 10 May 1988, para 88

Internationally Wrongful Acts to interpret the terms of the necessity clause in the BIT. The *Sempra ad hoc* Committee observed that the Tribunal failed altogether to apply the applicable law and annulled the award for manifest excess of powers. It also stated that "the Tribunal adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law".[161] It thus contradicted itself by firstly stating that the applicable law was not applied altogether and later saying that there was an error in application of the applicable law.[162] Professor Schreuer criticized the awards and pointed that the *ad hoc* Committee in *Sempra* was guided by two wrongful assumptions: first, that the failure to apply one norm of the applicable law qualifies as a failure to apply proper law; and second, that an error in the interpretation of an applicable rule with the help of another rule amounts to its non-application. [163] Bishop also noted that the *Sempra ad hoc* Committee permitted Argentina to introduce new arguments on Article XI in the annulment proceedings, which to "… put simply, cannot be right, not only because it would seem an inappropriate burden on the tribunal to have to foresee any arguments that the parties may raise in the future, but also because it might amount to a manifest excess of powers if it did so."[164]

In another case against Argentina, the *Enron case*, interestingly, the Committee did not decide that same resort to Article 25 of the ILC Articles was a manifest excess of powers. Instead, it annulled the award for wrongful application of Article 25. The *Enron ad hoc* Committee found that under Article 25 of the ILC Articles, Argentina could only plead the defense of necessity if its conduct was the only way for the State to safeguard an essential interest against a grave and

[161] *Sempra v. Argentina*, Decision on annulment, 29 June 2009, para 208
[162] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 113
[163] Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 The Law and Practice of International Courts and Tribunals 211, 219
[164] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 113

imminent peril. The Committee stated that the reasoning of the Tribunal did not address a number of issues that were essential to the question of whether the "only way" requirement was met.[165] Most importantly, the Committee itself identified those issues and concluded that the Tribunal should have addressed them even in absence of the arguments of the Parties to this effect.[166] As explained by Bishop, it seems that in *Enron* the Committee disregarded the annulment case law which clearly suggests that Article 52(1)(d) does not allow for annulment of the award for insufficient or not persuasive reasoning but only for a complete absence of the latter.[167] Thus, despite upholding the tribunal's reliance on Article 25 of the ILC Articles, it annulled the award simply because it had another understanding of an application of Article 25.

The cases cited in this chapter demonstrate that the ICSID *ad hoc* committees have by now developed a set of standards to interpret the manifest excess of power. Nevertheless, those standards are vague and ambiguous and may result in unexpected annulments. Even if the committee acknowledges that it is not the court of appeal to review if the tribunal has correctly interpreted and applied certain laws, in practice, this declaration doesn't mean that the committee would be able not to overstep the annulment/appeal line. *Ad hoc* committees also tend to lecture the tribunals about how they should have resolved question put before them which in absence of a hierarchy in the system of ICSID only undermines the credibility of the awards.

3.2.2. Domestic set aside proceedings

[165] ibid, 116
[166] ibid, 117
[167] ibid

Some commentator concluded that the inquiry by ICSID committees into the question of the application of the proper law may at times be more rigorous than that by the domestic courts.[168] The domestic courts were praised for being consistent in distinguishing between misinterpretation or misapplication of the proper law and applying the wrong governing law.[169] An oft-cited example of the restricted approach to the review adopted by the domestic courts is the decision in *CME case* by the Svea Court of Appeal. Even though Sweden is not a Model Law jurisdiction, the question of whether the Tribunal had applied the proper law was posed before the Svea court of Appeal and the latter managed to give the answer without going into the in-depth review of the award. The Svea Court of Appeal refused to review "the various sections in the arbitral award … in order to ascertain which of the sources of law listed in Art. 8.6 of the Treaty have been applied by the arbitral tribunal".[170] Instead, the Court held that: "to clarify whether the arbitral tribunal applied any of the sources of law listed in the choice of law clause or whether the tribunal has not based its decision on any law at all but, rather, judged in accordance with general reasonableness".[171] Thus, the Court took a very restrictive approach and only verified if any of the laws that the Tribunal was supposed to apply by virtue of Article 8.6 of the Treaty were in fact applied. This is extremely beneficial for the preservation of the finality of the arbitral award.

Another example of the deferential approach adopted by the court towards the ruling of the tribunal can be found in the decision in the *BG Group v. Argentina* by the US Federal District Court for the District of Columbia[172] upheld in the end by the Supreme Court of the United

[168] Gaetan Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID' in Albert Jan van den Berg, *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009), 300
[169] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 658
[170] *CME Czech Republic B.V. v. The Czech Republic*, 42 ILM 919, 15 May 2003, p 94
[171] ibid
[172] *BG Group Plc v. Republic of Argentina*, 764 F.Supp.2d 108, 7 June 2010

States.[173] Again, Washington is not a Model law jurisdiction, but the mentioned case is an interesting material for comparison as the issue before the US court concerned the same emergency legislation as in *Sempra* and *Enron* discussed above. Unlike the ICSID *ad hoc* Committee, the Court did not find that the tribunal did not apply the proper law. In *BG Group*, Argentina argued that the tribunal's rejection of Argentina's necessity defense was made in manifest disregard of the law. The Committee did not agree and stated that the tribunal sufficiently explained its interpretation by a colorable construction of the treaty's provisions and applicable concepts derived from international law.[174] Thus, the court applied a more deferential standard than the standard applied by the annulment Committees in *Sempra* and *Enron*.[175]

These decision evidence some positive tendencies in the practice of the domestic courts tasked with setting the awards aside for the application of improper law. Nevertheless, there are still examples of confusing judgments where the line between the non-application of proper law and error of law was not properly drawn. One of those is the decision to set aside the award in *Metalclad v. Mexico*. Despite The tribunal established under the ICSID Additional Facility Rules found that the denial of a construction permit, absence of a clear requirement of a municipal construction permit in the regulations, and the absence of any procedure or established practice for obtaining the permit amounted to a failure to ensure transparency under the NAFTA's fair and equitable treatment provisions.[176] The British Columbia court stated that it wasn't its role to correct errors of law, however, after analyzing Article 1105 of NAFTA and not finding any transparency obligation therein, the court set the award aside. The Court stated the Tribunal misstated the

[173] *BG Group Plc v. Republic of Argentina*, Case No. 12–138, 5 March 2014
[174] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 660
[175] ibid
[176] *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, 02 May 2001, paras 27-30

applicable law to include transparency obligations.[177] In essence, the court did not think it was proper to decide the case of the basis of transparency principle and stated that this amounted to an application of incorrect law and went beyond the limits of the questions submitted to arbitration. It was argued that the British Columbia court substituted its view of the governing law for the tribunal's view.[178]

It can be concluded that the standard developed in the system of ICSID annulment is very similar to the one applied by the domestic courts. Both are focused on whether there was a non-application of the proper law or a misapplication of applicable law. In the latter case the award cannot be annulled or set aside. Both the ICSID *ad hoc* committees and the domestic courts are struggling to draw a line between the two concepts in order not to exceed their powers and not to annul the award for an error in the interpretation of law committed by the arbitral tribunal. In both systems some controversial decisions were rendered which evidences that the proper understanding of the standard is still being developed.

3.3. Serious departure from a fundamental rule of procedure

3.3.1. ICSID annulment proceedings

Article 52(1)(d) stipulates that the award may be annulled due to a "serious departure from the fundamental rule of procedure". The observance of the proper procedure while deciding the case is essential for the preservation of the integrity and legitimacy of the arbitration process.[179] Although parties frequently tried to rely on this ground to annul the award, the committees have

[177] ibid, para 70
[178] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 659
[179] Irmgard Marboe, 'Annulment of ICSID Awards' in Christina Knahr, Christian Koller, Walter Rechberger, August Reinisch, Investment and Commercial Arbitration – Similarities and Divergences (Eleven International Publishing 2010), 106

in most cases failed to credit arguments based on it observing that the applicants were trying to misuse it to appeal against the award.[180]

For a request for annulment to succeed under Article 52(1)(d) it needs to meet three cumulative requirements: (i) identity a fundaments rule of procedure at issue; (ii) show that a departure from that rule occurred; (iii) demonstrate that the departure was serious. The requirements of seriousness and fundamental nature of the rule furnish the aims of the ICSID Convention not to allow an appeal against an award but only allow the annulment in cases of grave and material violations of certain rules.

As to the seriousness of the departure, the Committee in the *ad hoc* Committee in *MINE v. Guinea* stated that the departure is serious when it is "substantial and [is] such as to deprive a party of the benefit or protection which the rule was intended to provide".[181] A slightly different standard was developed in the *Wena Hotels* annulment decision: "the violation of … a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed". In *CDC v. The Republic of Seychelles* the *ad hoc* Committee treated these two standards as two different expressions of the same rule.[182]

The next step for the applicant is to demonstrate there was a departure from the rule. This in practice isn't easy due to the considerable discretion of the tribunal under the ICSID Convention and Arbitration Rules as to how to conduct the case and admit and evaluate evidence.[183]

Additionally, the rule that the tribunal departed from must be fundamental. One of the best definitions of the fundamental rule was given by the *Wena Hotels ad hoc* Committee. It stated in

[180] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 129
[181] *MINE v. Guinea*, Decision on Annulment, 22 December 1989, para 5.05; *Wena Hotels v. Egypt*, Decision on Annulment, 5 February 2002, para 58
[182] *CDC v. Seychelles*, Decision on Annulment, 29 June 2005, para 49
[183] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 133-134

paragraphs 56 and 57 of its decision that: "[Article 52(1)(d)] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defence and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other …".[184]

It is evident that the standard adopted by ICSID *ad hoc* committees when examining the complaints regarding serious departure from a fundamental rule of procedure is set at a high level. Only in evident and straightforward cases will the committee annul the award under this ground. Such a straightforward example of a violation of the right to be heard occurred in *Amco II.* There, after the award in the resubmitted case had been rendered, Amco submitted a Request for Supplemental Decision and Rectification. The Tribunal had rendered the Decision on Rectification on request of Amco without giving Indonesia the opportunity to file its observations.[185] The *ad hoc* Committee held that it amounted to a serious departure from a fundamental rule of procedure, namely the rule aimed at ensuring that both parties are equal and have the right to be heard. Even the fact that the error corrected was rather minor could not justify the denial of the right to be heard,[186] because it is the fundamental nature of the rule violated by the tribunal that requires the annulment of the award.

[184] *Wena Hotels v. Egypt*, Decision on Annulment, 5 February 2002, paras 56-57
[185] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), 292
[186] ibid, 309

Another case in which the *ad hoc* committee had annulled the award was the *Fraport* case.[187] The critical question before the *ad hoc* Committee deciding on the annulment was whether the Tribunal respected the right of the Parties to be heard.[188] In particular, the *Fraport* Tribunal decided that it does not have jurisdiction over the case because Claimant's investment was not made in accordance with the Philippine law. In coming to this conclusion, the Tribunal heavily relied on the evidence produced by Philippines after the closure of the proceedings.[189] The Tribunal proceeded to analyzing the new evidence in its deliberation without affording the parties to make any submissions on it. In fact, he Tribunal specifically stated it does not want to receive any submissions with respect to the produced evidence.[190] The *ad hoc* Committee ruled that the Tribunal's decision was incompatible with the fundamental obligation to permit both parties to present their case in relation to the new material.[191] It should have reopened the proceedings to examine new evidence.[192]

Apparently, the right to be heard is one of the most frequently invoked one when the applicants try to annul the award for the departure from a fundamental rule of procedure. This is further supported by the annulment decision in *Victor Pey Casado* case. The facts underlying this case go back to 11 September 1973 when the Chile's President Allende was overthrown, and the military occupied and seized the premises and equipment of a newspaper that had been sympathetic to him. The newspaper's property was confiscated. Mr Pey Casado, who was closely associated with the newspaper, fled Chile but subsequently, after the reestablishment of democracy in 1989,

[187] *Fraport v. Philippines*, Decision on Annulment, 23 December 2010
[188] Bishop D and Marchili S, *Annulment under the ICSID Convention* (Oxford University Press 2012), 148
[189] *Fraport v. Philippines*, Decision on Annulment, 23 December 2010, paras 230-231
[190] ibid, paras 225-228
[191] ibid, para. 230
[192] ibid, para 231

returned back.[193] In 1998 he initiated ICSID arbitration claiming illegal expropriation.[194] The Tribunal declined the claim of expropriation but held that Chile had violated the fair and equitable treatment standard. Claimant was awarded damages in the amount of USD 10 million. The *ad hoc* Committee held there was a departure from the Chile's right to be heard in the following respect. Claimants' damages arguments had been restricted to their unsuccessful expropriation claims. There were no pleadings of the parties on damages based on the denial of justice or discrimination claims.[195] The Parties did not make any submissions on the appropriate standard of compensation.[196] It was held that the Tribunal should have re-opened the proceedings and allowed each Party to present its arguments on the Tribunal's method of calculating the damages.[197]

The practice of the *ad hoc* Committees shows that the serious departure from a fundamental rule of procedure is not a ground under which they easily annul the awards. Numerous claims, such as lack of impartiality based on the tribunal's critical and hostile attitude towards Claimant;[198] unequal treatment of the parties in the allocation of the burden of proof;[199] allegations of the ineffective deliberations[200] or violation of the limits standing[201] have failed. This is due to two high standards that need to be satisfied before the award can be annulled – "serious" departure from a "fundamental" rule of procedure. As David Caron has observed, this ground "has not and likely will not be … a source of many annulments …".[202]

[193] *Victor Pey Casado v. Chile*, Decision on Annulment, 18 December 2012, para 23
[194] ibid, para 24
[195] ibid, para 262
[196] ibid, para 269
[197] Christoph H. Schreuer, '*Victor Pey Casado and President Allende Foundation v. Republic of Chile:* Barely an Annulment' 29(2) ICSID Review 321
[198] *Klockner v. Cameroon,* Decision on Annulment, 3 May 1985
[199] *Amco v. Indonesia,* Decision on Annulment, 16 May 1986
[200] *Klockner v. Cameroon*, Decision on Annulment, 3 May 1985
[201] *Repsol v. Petroecuador,* Decision on Annulment, 8 January 2007
[202] David Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Bettween Annulment and Appeal' (1992) 7 ICSID Review - Foreign Investment Law Journal 21, 42

3.3.2. Domestic set aside proceedings

Several domestic cases indicate the existence of a very deferential standard during the domestic courts review of awards rendered with alleged procedural violations. For example, in *Bayview v. Mexico* the Ontario Superior Court of Justice declined to annul the award rendered by the Tribunal in view of a limited scope of the review that the court is empowered to undertake. The case concerned the capture and diversion to Mexican farmers and municipalities of water allocated to the United States under a treaty between the US and Mexico in 1944, over which the Claimant and a number of other persons claimed ownership.[203] One of the arguments advanced by Bayview was that the right to water was an investment in Mexico, which is why the ICSID AF tribunal should exercise its jurisdiction over the case. The Tribunal disagreed and declined jurisdiction since the international agreement between the US and Mexico was not intended to create any property rights amounting to "investment".[204] Bayview was dissatisfied with this ruling and lodged an application with the Canadian court to set the award aside. One of the Applicant's claim was that it was deprived of the opportunity to present its case because at the jurisdictional stage the Tribunal should have presumed the correctness of the fact that the water belonged to Bayview. The actual question of the correctness of this assumption should have been decided on the merits stage. However, as the Tribunal addressed the merits at the jurisdictional stage, the applicant was deprived of the opportunity to submit evidence to prove that they owned water in Mexico and was, thus, deprived of the opportunity to present its case.[205] The Court held that: "[w]hile the decisions of international arbitral tribunals are not immune from challenge, any

[203] Kaj Hober and Nils Eliasson, 'Review of Treaty Awards by Municipal Courts' in Katia Yannaca-Small, *Arbitration under International Investment Agreements* (Oxford University Press 2010), 656
[204] ibid, 657
[205] ibid

challenge advanced is confronted with the 'powerful presumption' that the tribunal acted within its authority. An arbitral decision is not invalid because it wrongly decided a point of fact or law".[206] Also, the Court articulated a demanding standard for the review under Articles 34(2)(a)(ii), 34(2)(a)(Ui) and 34(2)(b)(ii) of the Model Law: the award must "… be construed narrowly and the Applicants must satisfy a high threshold to succeed in having the Award set aside".[207] After examining the record, the Court concluded that there was no breach of the principles of fundamental justice in the conduct of the Tribunal as the claimant fully engaged in discussions regarding the establishment of the arbitration process, filed all necessary documents, presented documentary evidence and was given all opportunities to argue its case.[208] The court dismissed the application.

Similarly high threshold was adopted in *Feldman v. Mexico*[209] by another Justice of the Ontario Superior Court of Justice. The case concerned a dispute regarding the denial of certain tax benefits by Mexico to the domestic company involved in export of tobacco products (CEMSA), owned and controlled by Mr. Feldman. He claimed violations of a NAFTA Articles 1102 (National Treatment), 1105 (Minimum Level of Treatment), and 1110 (Expropriation and Compensation). During the arbitral proceedings, Mexico did not produce certain tax records of Mexican competitors requested by Feldman, citing domestic privacy legislation. Mexico admitted, however, that five cigarette marketing companies had applied for the tax rebates and three had been granted

[206] *Bayview Irrigation District et al. v. United Mexican States*, Court File No. 07-CV-340139-PD2, 05 May 2008, para 63
[207] ibid
[208] ibid, paras 67-78
[209] *The United Mexican States v. Marvin Roy Feldman Karpa*, Docket No C41169, 11 January 2005

them.[210] The Tribunal found discrimination and awarded damages to Feldman.[211] Mexico brought an application to set the award aside, notably arguing that by inferring negative conclusions from the non-production of evidence the tribunal violated the procedure established by NAFTA, which stipulates that nothing in the Agreement shall be construed as requiring any party to disclose information protected by privacy laws.[212] Mexico further submitted that by drawing adverse inferences from its failure to present evidence of the position of other taxpayers, the Tribunal effectively prevented Mexico from presenting its defense.[213] After stating that "domestic law in Canada dictates a high degree of deference for decisions of specialized tribunals generally and for awards of consensual arbitration tribunals in particular"[214] the court refused to annul the award. It observed that Mexico in fact produced certain evidence, however, not persuasive enough to convince the tribunal that it did not discriminate. Therefore, Mexico could present its case but failed to do so.[215]

The conclusion that stems from the reviewed cases is that procedural violations will not form a ground for the annulment of the award unless they are extremely serious and undermine the integrity of the award. While in ICSID proceedings there were not a lot of annulments on this ground due to a very high threshold developed by the *ad hoc* committees – that there should be a "serious" departure from a "fundamental" rule of procedure, Article 34 of the Model Law does not contain any similarly worded high threshold. Nevertheless, in practice, the courts are not willing

[210] Rajeev Sharma and Adam Goodman, 'Ontario Court of Appeal Upholds NAFTA Chapter 11 Award' (*ASIL Insight*, 04 February 2005) <https://www.asil.org/insights/volume/9/issue/6/ontario-court-appeal-upholds-nafta-chapter-11-award> accessed 27 March 2019
[211] ibid
[212] *The United Mexican States v. Marvin Roy Feldman Karpa*, Docket No C41169, 11 January 2005, para 45
[213] ibid, para 51
[214] ibid, para 37
[215] Rajeev Sharma and Adam Goodman, 'Ontario Court of Appeal Upholds NAFTA Chapter 11 Award' (*ASIL Insight*, 04 February 2005) <https://www.asil.org/insights/volume/9/issue/6/ontario-court-appeal-upholds-nafta-chapter-11-award> accessed 27 March 2019

to set the award aside due to any minor procedural violation. They show a high degree of respect for the award rendered by the tribunal and observe that the threshold for the application of the ground for annulment is very high. Thus, under both the ICSID system and the system established under the Model Law the finality of the award is preserved against an intrusive review based on allegations of procedural violations.

3.4. Failure to state reasons

3.4.1. ICSID annulment proceedings

Article 48(3) of the Convention provides that "[t]he award shall deal with every question submitted to the Tribunal and shall state reasons upon which it is based". Additionally, ICSID Arbitration Rule 47(1)(i) requires that the award must contain 'the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based.

The standard under this ground for annulment has evolved throughout time. In *Klockner I* the *ad hoc* Committee required that the reasons of the tribunal shall be "'sufficiently relevant', that is, reasonably capable of justifying the result reached by the Tribunal".[216] This same standard was echoed by the *ad hoc* Committees in *Amco I*[217] and *Soufraki*[218] annulment decisions. The described standard was condemned by other *ad hoc* committees, in particular, by the one in *MINE* case, because its application can lead to the review of the award on the merits which is not authorized by Article 52: "[t]he adequacy of the reasoning is not an appropriate standard of review under paragraph (l)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that

[216] *Klockner v. Cameroon*, Decision on Annulment, 3 May 1985, para 120
[217] *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, para 43
[218] *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, para 131

examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment".[219] According to the *MINE ad hoc* Committee, "the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law".[220] Same position was expressed in the *Amco II* decision. The *ad hoc* Committee held that there can be no justification for adding a further requirement that the reasons stated be "sufficiently pertinent".[221] Such a phrase would amend the standard set out in Art. 52(1)(e), not merely explain it.[222] The *ad hoc* Committee thought that to require that reasons be "sufficiently pertinent" would be "to provide an *Ad Hoc* Committee with an unwarranted opportunity to act as a Court of Appeal".[223] Additionally, the Committee in the *CDC* case observed that the reasons must not be "frivolous",[224] which, according to the Committee means they must be "coherent".[225] Contradictory reasons might amount to a basis for annulment if they "completely cancel each other out and therefore amount to a total absence of reasons".[226]

Annulment should not be the result of the review if the reasons were not given for the *obiter dicta* part of award. In other words, "the failure to state reasons must leave he decision on a particular point essentially lacking in any express rationale; and … that point must itself be necessary to the tribunal's decision."[227] According to *El Paso v. Argentina* the award should not be annulled "if it is based on an alleged inaccuracy of the arbitral tribunal's reasoning or because

[219] *MINE v. Guinea*, Decision on Annulment, 22 December 1989, para 5.08
[220] ibid, para 5.09
[221] *Amco v. Indonesia*, Decision on Annulment in the Resubmitted Case, 3 December 1992, para 7.55
[222] ibid
[223] ibid
[224] *CDC v. Seychelles*, Decision on Annulment, 29 June 2005, para. 70
[225] ibid
[226] *Rumeli v. Kazakhstan*, Decision on Annulment, 25 March 2010, para 82
[227] *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, para 64

the reasons underlying its decisions were not convincing to the Party requesting the annulment...unconvincing reasons do not amount to a lack of reasons."[228] The task of the committee, according to the *El Paso* decision, is to confirm the existence of reasoning not its "correctness, content or adequacy".[229] In *Wena Hotels v. Egypt*, the *ad hoc* Committee noted that the reasons may be implied "provided they can be reasonably inferred from the terms used in the decision".[230] Thus, annulment should not be automatic if the reasons can be reconstructed from the original award by the committee.

One example of the decision where the *ad hoc* Committee arguably overstepped the limits of its powers is *Klockner I*. As noted earlier, in *Klockner I* the *ad hoc* Committee observed that the statement of reasons on which the award is based requires "… not just any reasons, purely formal or apparent, but rather reasons having some substance, allowing the reader to follow the arbitral tribunal's reasoning, on facts and on law.[231] The *ad hoc* Committee believed that reasons should be sufficiently relevant, which requires reasons capable of justifying the result reached by the Tribunal. They must be reasonably sustainable and capable of providing a basis for the decision.[232] In the annulment proceedings, the Claimant's criticism of the award was aimed not so much at the absence of reasons but at the reasons themselves.[233] More specifically, the *ad hoc* Committee was faced with a challenge of the Tribunal's application of the *exceptio non adimpleti contractus* in French civil law. Despite agreeing with the Tribunal on some points, the *ad hoc* Committee condemned the Tribunal for not examining all the conditions required under French law for the application of the *exceptio*. The *ad hoc* Committee, thus, deemed the reasoning not to be sufficient.

[228] *El Paso v. Argentina*, Decision on Annulment, 22 September 2014, para 217
[229] ibid
[230] *Wena Hotels v. Egypt*, Decision on Annulment, 5 February 2002, para 81
[231] *Klockner v. Cameroon*, Decision on Annulment, 3 May 1985, para 119
[232] ibid, para 120
[233] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), 365

It is evident from the *ad hoc* Committee's decision that they shifted to the substantive review of the award, developed their own understanding of the correct application of the law, reached a conclusion different from that of the Tribunal and, consequently, annulled the award: "[this conclusion does not] conform to the understanding the ad hoc Committee may have of this area of law ..."[234] The decision was severely criticized for being concerned not with the existence of reasoning but with its quality and correctness.[235] It is clear that the standard requiring the *ad hoc* committees to inquire into the sufficiency of reasons blurs the line between the appeal and annulment.

After *Klockner*, there were some positive developments in the annulment practice under the relevant ground. The culmination was the decision on annulment in *Vivendi I* where the *ad hoc* Committee summarized the best practices of its predecessors related to annulment under the "failure to state reasons" ground: "...it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons...Provided that 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 in terms of Article 52(1)(e)".236 However, the cited decision could not replace the flawed standard developed in *Klockner I*, and even in post-*Vivendi* annulment proceedings sufficiency of reasoning continued to be used by the Tribunals. For example, the *ad hoc* Committee in *Soufraki v. UAE* noted that insufficient or inadequate as well as contradictory reasons can give rise to an annulment.[237] Even though the application for annulment was declined in that case, the very existence of the sufficiency standard is disturbing as one never knows if the *ad hoc* committee in

[234] *Klockner v. Cameroon*, Decision on Annulment, 3 May 1985, para 171
[235] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), 368
[236] *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, paras 64-65
[237] *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, paras 122-126

the application of this standard will cross the line between the annulment and appeal or will restrict itself to the narrow review of the award.

One of the most cited examples of the troubling application of the discussed ground for annulment is the *ad hoc* Committee's decision in *Mitchell v. Congo*.[238] It found the award to be incomplete and obscure as regards the existence of an investment. It held that the award was tainted by a failure to state reasons in the sense that the inadequacy of the reasons affected the coherence of the reasoning. In *Mitchell*, the Tribunal adhered to a broad interpretation of "investment" which included the services provided by a law firm within the notion of investment as, according to the tribunal, even projects of shorter duration and with more limited benefit to the host State's economy can qualify as investments.[239] To the contrary, he *ad hoc* Committee disagreed with the finding that a contribution to economic development is not an element of the concept of investment. Thus, the Committee held that "without providing the slightest explanation as to the relationship between the 'Mitchell & Associates' firm and the DRC",[240] the tribunal did not have any adequate reasoning in order to reach the conclusions it reached. This influenced the coherence of the reasoning and the award shall be annulled. The annulment of this award illustrates how easy the *ad hoc* committee can substitute its findings for those of the tribunal if the standard for the annulment is vague and unclear.

It was observed that "… among the various grounds for nullity listed in Article 52(1), the failure to state the reasons on which the award is based is probably one of the more delicate to apply and also the more interesting."[241] Mainly due to the fact that it is not easy to determine where

[238] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 663
[239] *Mitchell v. Congo*, Decision on Annulment, 1 November 2006, para 24
[240] ibid, para 40
[241] Pierre Lalive, 'One the Reasoning of International Arbitral Awards' (2010) 1(1) Journal of International Dispute Settlement 55, 58

the line between the annulment and appeal should be drawn. Some Committees have developed the "sufficiency of reasoning" standard which requires the examination of the reasoning of the tribunal and can introduce an appeal in disguise into the ICSID system. The competing and more appropriate standard is the one that requires the Committee simply to check the presence of reasoning to ascertain that the conclusions set out in the award did not come from nowhere. The very existence of competing standards is already regrettable since nobody can be certain as to which one the Committee would prefer to apply and how far it will go into the examination of the merits of an award.

3.4.2. Domestic set aside proceedings

The domestic courts seem to have developed a standard beneficial in terms of preservation of the finality of an award. The courts of the Netherlands on several occasions have been confronted with the claims to set the awards aside for failure to state reasons and have elaborated the standards applicable to this ground for review. In *Chevron and Texaco v. Ecuador*, Ecuador contended that the awards were not sufficiently reasoned. The proceedings concerned a conflict over a concession agreement of 1964 between Ecuador and Texpet for oil extraction and exploitation in the Amazon territory, which expired on 6 June 1992.[242] In the early 1990s Texpet lodged seven court cases in Ecuador, based on alleged breaches of the concession agreement by Ecuador, but the court did not rule on those claims for almost ten years. Chevron and Texpet were arguing those claims qualify as "investments" within the meaning of the BIT. The Tribunal agreed, accepted the jurisdiction and ruled against Ecuador.[243] Ecuador tried to set the award aside based, amongst other things, on the fact that the arbitral tribunal failed to take into account a multitude of

[242] Jozua van der Beek and Louis Berger, 'Dutch Supreme Court's first decision about Bilateral Investment Treaty' (*bureau Brandeis*, 06 October 2014) <https://www.bureaubrandeis.com/dutch-supreme-courts-first-decision-about-bilateral-investment-treaty/?lang=en> accessed 28 March 2019
[243] ibid

Ecuador's essential defenses. The court of first instance stressed that its powers were limited in the set aside proceedings and that it will only set aside awards that lack reasoning in their entirety or in which reasoning is so poor that it has to be equated with lack of reasoning. How explicit the reasoning should be also depends on the nature of the argument seen in light of the entire dispute, but more or less explicit reasoning is required when addressing a party's essential defenses.[244] After the examination of the award, the Court concluded that all the defenses advanced by Ecuador were addressed more or less explicitly and that such reasoning definitely did not rise to "no reasoning at all" standard.[245] The Court of Appeal upheld that judgment and the Supreme Court dismissed the appeal in cassation.[246]

Same approach was taken by the District Court of The Hague with respect to the award in *Adria* case. In that case, Adria entered into two joint venture agreements with the state-owned Croatian Lottery to invest in gambling business in Croatia, part of Yugoslavia at that time. After the war of independence started in 1991, the ventures suffered a downturn and so, three years later, the Croatian Lottery terminated the joint venture agreements. Adria commenced legal proceedings in Croatia and was granted (and actually received) EUR 4,500,000. However, Adria was not satisfied with this amount and commenced an arbitration. The Tribunal ruled that it had jurisdiction over certain claims, however, not all of them that were presented by Adria. In the end, Adria was not satisfied with the Tribunal's ruling and applied to set the award aside. One of its arguments was that the Tribunal did not provide sufficient reasoning for its decision on jurisdiction. Similarly

[244] ibid

[245] Stan Putter, 'NETHERLANDS: Ecuador loses set-aside action' (*Global Arbitration Review News*, 17 May 2012) <https://www.eversheds-sutherland.com/documents/global/netherlands/English/Ecuador_loses_set_aside_action.pdf> accessed 28 March 2018

[246] Jozua van der Beek and Louis Berger, 'Dutch Supreme Court's first decision about Bilateral Investment Treaty' (*bureau Brandeis*, 06 October 2014) <https://www.bureaubrandeis.com/dutch-supreme-courts-first-decision-about-bilateral-investment-treaty/?lang=en> accessed 28 March 2019

to *Chevron and Texpet* case, the Court held that arbitral awards cannot be set aside as a result of the absence of adequate reasons, only absence of any reasons would suffice. If the reasons are given but no convincing explanation for the relevant decision can be found among these reasons, the court can equate this to the absence of any reasons. Importantly, the Dutch court held that an incorrect interpretation of applicable legal rules is insufficient for the purposes of setting aside the arbitral award for failure to state reasons.[247] Thus, Dutch domestic courts have a consistent practice of conducting a limited review of arbitral awards and not setting them aside easily.

In *Metalclad v. Mexico*, the Supreme Court of British Columbia dealt with the question of relation between failure to state reasons and the need to address every argument presented by the parties. In this respect, the Court noted that while the tribunal must give reasons for its decision, it is not reasonable to require the tribunal to answer every argument which was made in connection with the questions before the tribunal.[248] The tribunal can explicitly or implicitly deal with each argument. In addition, the failure to state reasons may only result in annulment if it reflects a serious defect in the arbitral procedure.[249] Thus, the Canadian court introduced the requirement of seriousness which must be satisfied before the award can be set aside on this ground. This is a positive development that might preclude the courts from setting the awards aside for some minor drawbacks contained in the reasoning. In *Metalclad*, a failure to explicitly deal with all of Mexico's arguments did not reach the required level of seriousness and the award was not set aside on this ground.

[247] Juliette Luycks and Stana Maric, 'Judicial review for quashing arbitral awards' (*International Law Office*, 06 December 2012) https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Netherlands/Clifford-Chance-LLP/Judicial-review-for-quashing-arbitral-awards#

[248] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) Journal of International Arbitration 621, 666

[249] ibid

Failure to state reasons is one of the grounds where the fear that different tests can apply in different jurisdictions materializes. Contrary to a high level of deference towards the arbitral award showed by the Dutch courts, the Belgian court in *Eureko v. Poland* stated that reasons for an arbitral award must meet the same standards as court judgments. They must be "complete, precise, clear, and adequate".[250] The requirement of adequacy clearly does not fit into the concept of limited review which the domestic courts are supposed to adhere to. It may lead the court to consider the substance of the arguments, which is an inappropriate activity in the system of investment arbitration. However, apart from this decision the domestic courts have many times correctly stated that only the absence of reasoning can mandate the setting aside. Since it is not very likely that the award will be rendered without any reasons at all, the standard applied by the domestic courts is not expected to produce many annulment decisions. Comparison of the practice of the domestic courts against the confusing annulment practice of the *ad hoc* committees, indicates that if the applicant seeks predictability and consistency in the application of the grounds for annulment, it might consider courts to be a better option.

3.5. Conclusion

The overview of the ICSID annulment practice and domestic courts setting aside decisions reveals that in both systems the reviewing bodies acknowledge their limited role in the process of review. In every decision they declare the inappropriateness of the reconsideration of the merits of an award and state that their role is limited only to ensuring the integrity of the process. Nevertheless, the principles declared on the paper do not always correspond to how the *ad hoc* committees and the courts conduct their review.

[250] ibid

In ICSID proceedings the award is being reviewed in much details, the committees usually point out the mistakes the tribunals made even if they are not annulling the award. This might undermine the binding nature of the award in the same manner as the actual annulment since it justifies non-compliance with the award by the losing party (or at least does not provide reasons to comply with it). Also, it looks like not all the standards developed and employed in the ICSID annulment system are consistent with each other. For example, there exist several interpretations of the "failure to state reasons" ground, one very restrictive while the other quite intrusive into the merits of an award. Even though the latter does not enjoy much popularity and dates back to 1985, it was still employed in 2007. We believe that this is one of the biggest danger that the award can face when reviewed by the *ad hoc* committee – there is no hierarchy or binding precedent in ICSID proceedings, so the outcome is dependent on who sits on the committee, which standard they personally prefer and how badly they want to annul the award they believe to be flawed. This mainly concerns two of the most sophisticated grounds for annulment – manifest excess of powers and failure to state reasons, where it is simply hard to draw a line between identifying the most serious and obvious drawbacks in the award that do not allow it to exist and proceeding to correct every mistake the tribunal made as if the committee is an appellate body.

Quite surprisingly, the courts despite employing more intrusive standards of review show a great deference to the arbitral awards. Surprisingly, because there is no strong wording in the Model Law (unlike in the ICSID Convention) like "manifest" excess of powers, "serious departure" from a "fundamental" rule of procedure. Nevertheless, the courts respect the choice of the parties to submit their dispute to an independent international body, as well as the expertise of the arbitrators and thus, refuse to conduct a very detailed review. Indeed, the courts sometimes

also render some controversial decisions, but it is evident how much importance is attached to the principle of the limited review innumerous jurisdictions.

The most important difference identified in the standard of review between the two systems relates to jurisdictional errors. In the ICSID system de novo review standard does not exist, unlike in the jurisdictions based on the Model Law. However, as noted earlier, the ICSID committees sometimes proceed to such review while the courts, despite having this standard, are really careful in its application and are hardly willing to set an award aside.

The less controversial ground is that of procedural violations, which reads as "serious departure from a fundamental rule of procedure" in the ICSID Convention and corresponds to Article 34(2)(a)(ii) – inability to present one's case and Article 34(2)(a)(iv) - "incorrect" procedure in the Model Law. Only evident and flagrant violations will justify the annulment of an award. Both systems are consistent in not annulling under this ground too frequently and only when the award was rendered through an obviously unfair procedure.

Christoph Schreuer in 2011 stated that the risk of annulment of an ICSID award is now higher than that of a non-ICSID award.[251] This statement is justifiable even today as the statistics displayed in Chapter 2 show that the courts are annulling less awards.

The conclusion is therefore that the ICSID *ad hoc* committees appear to be stricter then the domestic court judges when it comes to review of an award. Professor Fernandez-Armesto reproduced in his article a quote by Alan Redfern dating back to 1987: "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

[251] Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 Law and Practice of International Courts and Tribunals 211, 211

an elaborate and expensive game of snakes and ladders."[252] On the contrary, in the domestic review, the judge will be a professional civil servant who did not have much experience in international investment law and arbitration, and the case at hand might even be the only instance in the judge's professional career when he or she is confronted with this type of situation.[253] The difference is that on the committees, the "eminent arbitrators" certainly have their own point of view on the largely controversial issues of international investment law which might make it difficult for them to accept another interpretation or point of view expressed in the award.

[252] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 136 citing Alan Redfern, 'ICSID – Losing its Appeal?' (1987) 3 Arb. Int'l 98
[253] Juan Fernandez-Armesto, 'Different systems for the annulment of investment awards' (2011) 26(1) Foreign Investment Law Journal 128, 136

CONCLUSION

Both ICSID annulment procedure and that of domestic courts share the limited and exceptional nature of review. They have a common purpose – to ensure that the award was rendered in a fair manner and the integrity of the proceedings was not undermined. Neither the annulment nor setting aside is aimed at correcting the substantive deficiencies or errors in the decision of the arbitral tribunal.

Apart from the shared purpose, annulment fundamentally differs from setting aside. It is performed by *ad hoc* committees, non-permanent bodies appointed without the participation of the Parties by the Chairman of the ICSID Administrative Council, independently of any national jurisdiction. Setting aside, on the other hand, is conducted by the judges of the domestic courts who are the civil servants of a particular State. Annulment proceedings before ICSID *ad hoc* committees are conducted in accordance with the procedure established by the ICSID Convention, while the setting aside follows the procedural rules of each specific country and those rules vary from jurisdiction to jurisdiction. The grounds for review differ to certain extend in two systems: the Model Law Article 34 contains broader list of grounds as either explicitly or implicitly it incorporates all the grounds present in the ICSID Convention and prescribes several more, such as non-arbitrability and violation of public policy. Both under the ICSID system and outside it is possible to stay the enforcement proceedings before the annulment or setting aside decision is rendered. However, the say ordered by the *ad hoc* committee prevents the enforcement in the territory of any Contracting State to the ICSID Convention, in non-ICSID proceedings the enforcement is only prevented in the territory of the court ordering the stay.

Figures show that the number of the awards set aside or annulled by the domestic courts and the *ad hoc* committees is almost even – it is 14 percent of the non-ICSID awards and 18 percent

of the awards rendered by ICSID tribunals. Domestic courts, however, seem to be more deferential to the decisions of the tribunals, which is evidenced by the number of the awards upheld– 53 awards, which constitutes 63 percent of all the awards subject to judicial review, as opposed to only 37 percent of the awards upheld by the *ad hoc* committees.

The standards of review, in our opinion, cannot explain the difference. The courts, indeed, have a more intrusive standard of review but at the same time, they show great deference to the arbitral awards. In the meantime, in ICSID proceedings the award is being reviewed in much details, the committees usually point out the mistakes the tribunals made even if they are not annulling the award. The standards applied by the *ad hoc* committees are not very precise and vary from one annulment decision to another. One of the biggest dangers in the ICSID system is that due to the absence of precise and defined standards of review the outcome is dependent on who sits on the committee, which standard they personally prefer and how badly they want to annul the award they believe to be flawed. The most important difference in the standard of review between the two systems relates to jurisdictional errors. In the ICSID system *de novo* review standard does not exist, unlike in the jurisdictions based on the Model Law. The less controversial ground is that of procedural violations. In both systems the reviewing bodies will only annul the award under this ground is the violation is evident and flagrant.

One of the possible explanations for the differences in the annulment practice is that the members of the *ad hoc* committees are recognized experts in international investment law that certainly have their own point of view on its largely controversial issues. The domestic courts judges, however, do not have much experience in international investment law and arbitration and consider the expertise of the arbitrators to be important.

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