

Matthias Scherer^{*}
**ICSID Annulment
 Proceedings Based
 on Serious Departure
 from a Fundamental Rule
 of Procedure**

(Article 52(1)(d) of the ICSID Convention)

Key words:
 ICSID Arbitration |
 ICSID Convention
 | Annulment of the
 Award | Ad hoc
 Committees | Article
 52(1)(d)

Abstract | *This paper analyses case law on Article 52(1)(d) of the ICSID Convention, according to which an award rendered by an ICSID tribunal can be annulled by an ad hoc Committee on the grounds of a serious departure from a fundamental rule of procedure. To be able to successfully invoke this ground before an ad hoc Committee, the applicant has to demonstrate both that the departure from a rule of procedure is serious and the rule fundamental. These requirements are cumulative. The decisions on annulment which were examined in this paper illustrate that ad hoc Committees interpret narrowly and with great care this ground of annulment because it is related to the principle of due process. An important hurdle to any request for annulment is the wide discretion which arbitral tribunals enjoy in the way they conduct the evidentiary proceedings. The ad hoc Committee in the Azurix case held that “it is only where the exercise of that discretion, in all the circumstances of the case, amounts to a serious departure from another rule of a fundamental nature that there will be grounds for annulment under Article 52(1)(d)”. This discretion as well as the professionalism and expertise of the arbitrators sitting in ICSID panels will continue to be the major obstacles for annulment requests on the basis of Article 52(1)(d).*

|||

Matthias Scherer, Partner, LALIVE (Geneva). Counsel and arbitrator in international arbitration proceedings. Member of the Arbitration Committee of the Swiss Chambers of Commerce, an associate member of the ICC Institute, a vice chair of the IBA Arbitration Committee, and serves as Editor of the journal of the Swiss Arbitration Association (ASA Bulletin) and Co-Editor of the Swiss International Arbitration Law Reports. Matthias features in the International Who's Who of Commercial Arbitration Lawyers since its inception in 2005.
 email: mscherer@lalive.ch

^{*} The author wishes to thank Mr Guillaume Aréou and Mr George Walker, Legal Interns at LALIVE for their assistance with the preparation of the paper.

- 12.01.** In 1965, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention” or the “Washington Convention”) entered into force and established the International Centre for Settlement of Investment Disputes (the Centre). The ICSID Convention affords investors of one Contracting State a framework for settling investment disputes with public entities of another Contracting State¹. Because each Contracting State undertakes to enforce within its territory the pecuniary obligations imposed by an ICSID award “as if it were a final judgment of that State”², awards rendered by arbitral tribunals under the aegis of the ICSID Convention are generally final and binding. Article 52 of the ICSID Convention provides for the annulment of an ICSID award under very limited circumstances. In legal systems that are respectful of human rights, the judiciary must abide by certain minimum procedural standards. Thus, Article 6 of the European Convention on Human Rights has spawned a wealth of case law on procedural rights of parties involved in court proceedings. It is not the purpose of this article to contribute to the debate whether the ECHR applies in international arbitration or not. Rather, our goal is to analyze how the ICSID Convention, which creates a self-standing legal system for disputes between States and investors, ensures that arbitral tribunals sitting under the aegis of ICSID respect fundamental rules of due process.
- 12.02.** A party that is dissatisfied with an award rendered by an ICSID Tribunal can file a request for annulment with the ICSID Secretary General. Article 52(3) of the ICSID Convention provides:

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

In a sense, *Ad hoc* Committees secure the integrity of the arbitration process. Yet they are not an appellate body and must not review the merits of the award³. An annulment request may invoke any combination

¹ Article 25 of ICSID Convention related to the jurisdiction of the Centre.

² Articles 53 to 55 of ICSID Convention.

³ In the decision on annulment in the case of *Soufraki*, the *Ad hoc* Committee enumerated three goals that ICSID annulment mechanism seeks to secure: the integrity of the tribunal, the integrity of the procedure and the integrity of the award. Then it stated that an *Ad hoc* Committee “is responsible for controlling the overall integrity of the arbitral process”. *Hussein Nuaman Soufraki v. The United Arab States*, ICSID Case No. ARB/02/7, decision on annulment of 5 June 2007, para. 24.

of five grounds set forth in Article 52(1), and in practice Claimants indeed rely on several of those grounds⁴. According to Professor Schreuer, claimants invoke three of those five grounds provided more frequently than the remaining two:⁵ that the tribunal has manifestly exceeded its powers (article 52(1)(b)); that there has been a serious departure from a fundamental rule of procedure (article 52(1)(d)); and that the award has failed to state the reasons on which it is based (article 52(1)(e)). The latter two grounds are of particular importance to the protection of due process in ICSID arbitrations.

- 12.03.** Ironically, only one annulment request has successfully demonstrated an ICSID tribunal's serious departure from a fundamental rule of procedure⁶, while the charge of failure to state reasons, despite its more limited ambit, has enjoyed success⁷. The rule against serious departure from a fundamental rule of procedure stems from the principle of due process⁸. It refers to a set of minimal standards of procedure⁹ in international law, limited to principles of natural justice, to which not all ICSID arbitration rules belong¹⁰. Article 52(1)(d) of ICSID Convention requires two cumulative conditions: To quote the *Ad hoc Committee* in *MINE v. Guinea* “[...] the text of Article 52(1)(d) makes [it] clear that not every departure from a rule of procedure justifies annulment; it requires that the departure be a *serious* one and that the rule of procedure be *fundamental* in order to constitute a ground of annulment”¹¹. A serious

⁴ CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, Cambridge: Cambridge University Press 933 (2nd ed. 2009) : “One of the most widely accepted strategic principles of litigation is to seek a remedy not by a single shot method but by a shrapnel tactic whereby a multitude of arguments is fired off simultaneously in the hope that at least one of them will score a hit. Although one of the grounds listed in Article 52 (1) [of the ICSID Convention] would be sufficient to cause the awards annulment, the applicants typically list several of them”.

⁵ CHRISTOPH H. SCHREUER, *supra* note 4, at 933: “The other three grounds [the tribunal manifest excess of powers (article 52 (1) (b), the serious departure from a fundamental rule of procedure (article 52 (1) (d) and finally the failure to state reason (article 52 (1) (e)) have been invoked in most cases to cover a large variety of perceived shortcomings in the awards under scrutiny”.

⁶ *Fraport AG v Republic of the Philippines*, ICSID Case No. ARB/03/25 (Annulment Proceedings), Decision of December 23, 2010, rendered after the completion of this paper and summarized in the post scriptum at the end. See also the decision in *Amco II* where a correction of an award was annulled (see below 12.05).

⁷ This ground of annulment was alleged 17 times and admitted in 5 decisions.

⁸ *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment of May 3, 1985, as published in 1 ICSID Rev. – FILJ 90, 117. (*Klöckner v. Cameroon*).

⁹ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment of February 5, 2002, para. 57. (*Wena Hotels v. Egypt*).

¹⁰ CHRISTOPH H. SCHREUER, *supra* note 4, at 979.

¹¹ *Maritime International Nominees Establishment (MINE) v. Government of Guinea (Guinea)*, ICSID Case No. ARB/84/4, Decision on Annulment of January 6, 1988, para. 4.06 (*MINE v. Guinea*); *CDC Group plc v Republic of Seychelles*, ICSID Case

departure from a rule of procedure is “both a quantitative and qualitative criterion”. Accordingly, the plaintiff bears the burden of proving that the “the departure [was] so substantial as to deprive [it] of the benefit or protection which the rule was intended to provide”¹² In *Wena Hotels v. Egypt*, the *Ad hoc* Committee imposed on the applicant “to identify the fundamental rule of procedure from which the Tribunal departed and it has to show that such departure has been serious. Furthermore, it added another, more debatable, threshold explaining that “the violation of such a rule must have caused the tribunal to reach a result substantially different from what it would have awarded had such rule been observed”¹³.

- 12.04.** In view of the foregoing, the next step would be to determine whether any factual findings support the alleged violation of a particular fundamental rule of procedure. Annulment requests often plead the lack of impartiality on the part of an ICSID Tribunal or failure to grant equal treatment to the parties, the right to be heard, meaningful deliberation, and the tribunal’s obligation to respect the rules that they themselves establish for the proceedings, including those governing evidentiary issues¹⁴. Herein, we analyse relevant *Ad hoc* Committee decisions. Given the scope of this article, not every argument in each case is reflected; the summaries do not purport to substitute a full reading of the reasoning, which could only be gleaned from the original source.
- 12.05.** A decision on annulment was rendered in relation to the “right to be heard” by the *Ad hoc* Committee of *Amco II*¹⁵. In this case, the *Ad hoc* Committee was faced with a situation where a “correction” was made by the initial tribunal in a Decision on Supplemental Decisions and Rectification of the Award. This “correction” was sought by the claimant and made by the initial tribunal without providing the Respondent with an opportunity to

No. ARB/02/14, Decision on Annulment of June 29, 2005, para. 48. (*CDC Group v. Seychelles*).

¹² *MINE v. Guinea*, para. 5.05; *CDC Group v. Seychelles*, para. 49; *Wena Hotels v. Egypt*, para. 58; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment of September 1, 2009, para. 234. (*Azurix v. Argentina*).

¹³ *Wena Hotels v. Egypt*, para. 56, 58; *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic of July 30, 2010, para. 71. (*Enron and Ponderosa v. Argentina*). This threshold is not reflected in the ICSID Convention. Arguably, it should suffice that a party can show that the serious departure of a fundamental procedural rule *could* (as opposed to *would*) have caused the Arbitral Tribunal to reach a different result., para. 56- For a critic of this decision (on other points) See Eric A. Schwartz, *Finality at What Cost? The Decision of the Ad Hoc Committee in Wena Hotels v. Egypt*, in ANNULMENT OF ICSID AWARDS 43, 76 (E. Gaillard & Y. Banifatemi eds., 2004).

¹⁴ CHRISTOPH H. SCHREUER, *supra* note 4, at 983.

¹⁵ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Supplemental Decisions and Rectification of the Award of October 17, 1990, 1 ICSID Rep. 638 (1993) (*Amco II*); Decision rejecting the parties’ applications for annulment of the Award and annulling the Decision on Supplemental Decisions and Rectification of December 17, 1992, 9 ICSID Rep. 3 (2006).

present arguments on that point. The *Ad hoc* Committee held that the granting of the “correction” violated a fundamental rule of procedure, even though the asserted correction was allegedly obvious¹⁶.

- 12.06.** Another decision on annulment arose out of a dispute between Klöckner and the Republic of Cameroon. In the underlying arbitration, Klöckner sought payment of the full price of a fertilizer plant it had constructed in Cameroon. On October 1983, a tribunal rendered an award that Klöckner considered to be systematically hostile to its cause. Alleging a violation of its due process rights, Klöckner challenged this award on three of the five Article 52(1) grounds, namely, the manifestly excessive use of power, the serious departure from a fundamental rule of procedure and the failure to state reasons. Klöckner argued that the tribunal had not truly deliberated, that it was obviously partial, and that it had failed to respect due process. In sum, Klöckner alleged it had not enjoyed the right to be heard.
- 12.07.** The *Ad hoc* Committee disagreed. Observing first that Klöckner had a very personal notion of deliberation, it found that Klöckner’s criticism lacked precision and substance and that the arbitral proceedings had in fact been conducted properly. It stated, “[Klöckner] had every opportunity to express itself and present its case”¹⁷. In this regard, the *Ad hoc* Committee mentioned that a tribunal is not obligated to hear the parties on the reasons it is going to rely on in its decision or bound to select among those arguments put forth by the parties¹⁸. Secondly, the *Ad hoc* Committee compared the final award’s substantial issues with those raised in the dissenting opinion and concluded that Klöckner failed to demonstrate the Arbitral Tribunal’s failure to deliberate properly. In view of the confidential nature of deliberations, it is of course difficult for an *Ad hoc* committee to assess the seriousness of the deliberations. Finally, the *Ad hoc* Committee noted that Klöckner did not set forth any criteria the Committee should use in order to assess what qualifies as an adequate deliberative process. For all these reasons, the *Ad hoc* Committee dismissed the allegation of serious departure from a fundamental rule of procedure, but nevertheless annulled the award on the grounds of excessive use of power and failure to state reasons.
- 12.08.** The *Maritime International Nominees Establishment (MINE) v. Government of Guinea* decision remains an important authority on the Article 52(1)(d) annulment ground. In 1984, MINE commenced arbitration against the Republic of Guinea. MINE alleged a breach of contract by the Guinea in the context of a bauxite transportation joint venture. MINE secured an award in its favour rendered on 6 January 1988. The Republic of Guinea sought the (partial) annulment of the performance dispute and the determination of damages. The Republic of Guinea considered that the award was tainted by a manifestly excessive use of power, a serious departure from a fundamental rule of procedure and a failure to state

¹⁶ *Ibid.*

¹⁷ *Klöckner v. Republic of Cameroon*, p. 117.

¹⁸ *Ibid.*, 128-29.

reasons. Specifically, the Republic of Guinea objected to the Arbitral Tribunal's use of a theory of damages that neither party had advanced, discussed or had the opportunity to discuss.

- 12.09.** Since the *Ad hoc* Committee annulled the award on the ground of failure to state reasons, it did not examine the alternative grounds for annulment advanced by Guinea, which included serious departure from a fundamental rule of procedure¹⁹. There exists a close link between these two grounds of annulment. In the case at hand, the Republic of Guinea alleged that the Arbitral Tribunal did not address at least two questions it raised in relation to the calculation of damages²⁰. Even if this claim were decided on the ground of the failure to state reason, one must admit that it also concerns the right to be heard. The *Ad hoc* Committee stated that "failure to address these questions [raised by the applicant] constituted a failure to state the reasons on which that conclusion was based"²¹. Guinea's submissions on calculation of damages were of such importance that their acceptance by the Arbitral Tribunal might have changed the outcome of the award. The Arbitral Tribunal had a duty to deliberate upon them even if they were to be ultimately dismissed. Finally, the *Ad hoc* Committee observed that "to the extent that the Tribunal purported to state the reasons for its decision, they were inconsistent and in contradiction with its analysis of damages theories"²².
- 12.10.** In *Vivendi Universal* (formerly *Compañía de Aguas del Aconquija*) *v. Argentine Republic*, the dispute concerned the provision of water and sewage services in the Argentine province of Tucumán. The province privatized those services. Then, a new successive provincial administration took steps which the investors regarded as undermining the concession contract. The concession contract ended and the investors requested arbitration. *Compañía de Aguas del Aconquija* alleged that measures taken by the provincial government were attributable to the Republic of Argentina under the terms of the Bilateral Investment Treaty concluded between Argentina and France. On 21 November 2000, the Arbitral Tribunal upheld its jurisdiction but dismissed claims on the merits. On March 2001, *Compañía de Aguas del Aconquija* filed an application requesting the partial annulment of the award. *Compañía de Aguas del Aconquija* argued that the Arbitral Tribunal analysis of Article 16 (4) of the Concession Contract was not "adequately canvassed in argument"²³. *Compañía de Aguas del Aconquija* also contended that the Arbitral Tribunal's decision arrived unannounced and, consequently, that it had no opportunity "to present arguments on the decision to dismiss

¹⁹ *MINE v. Guinea*, para. 6.109.

²⁰ CHRISTOPH H. SCHEREUER, *supra* note 4, at 989.

²¹ *MINE v. Guinea*, para. 6.99.

²² *Ibid.*, para. 6.105.

²³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2002, para. 82.

their claim on the merits”²⁴. The *Ad hoc* Committee found no arbitral case law supporting Compañía de Aguas del Aconquija’s allegations. While the *Ad hoc* Committee agreed that the initial tribunal’s approach may well have surprised the parties, it did not find that there had been any departure from a fundamental rule of procedure, let alone a serious departure. On the contrary, it considered that “the parties had a full and fair opportunity to be heard at every stage of the proceedings”²⁵. Thus, according to *Vivendi v. Argentina Ad hoc* Committee, the failure to anticipate and address an argument that persuades a tribunal cannot form the basis of a successful annulment claim.

- 12.11.** A more recent annulment decision invoking the rule against serious departure is *CDC Group v. Seychelles* rendered on 29 June 2005. The dispute arose out of two loan agreements and their related sovereign guarantees made by Seychelles. The Respondent, the Republic of Seychelles, agreed to guarantee *loans* that CDC made to Public Utilities Corporation, a public electric power company. When the latter did not perform its obligations in a timely fashion, CDC sought payment from the Republic of Seychelles which in turn failed to respect its obligations. CDC Group submitted its request for ICSID arbitration and garnered an award in its favour. Dissatisfied with the award, the Republic of Seychelles sought annulment on three of the Article 52(1) grounds.
- 12.12.** The Republic of Seychelles alleged that the Arbitral Tribunal lacked impartiality and did not conduct proper deliberations. Under that theory, the tribunal allegedly failed to answer the questions presented by the parties, to follow the rule of evidence, and to issue a timely award. As for the charge of partiality, the tribunal was accused of committing that violation “when it heard argument on whether or not testimonial evidence needed to be heard at the preliminary hearing because whether the witnesses should be called to testify on its behalf before the Arbitrator was entirely for the Republic”²⁶.
- 12.13.** The *Ad hoc* Committee pointed out first the weakness of this argument in that the Republic of Seychelles did not object to the improper conduct prior to the tribunal rendering its award²⁷. The *Ad hoc* Committee concluded that the record demonstrated that Sir Anthony “served as an unbiased and independent sole arbitrator”²⁸. Furthermore, it dismissed the alleged lack of deliberation. The Republic of Seychelles had based that allegation on the fact that the Arbitral Tribunal did not consider relevant matters and pieces of evidence. But the Committee analysed this claim under Article 52(1)(e) and came to the opposite conclusion. The Republic of Seychelles’s objection amounted to a mere difference in point of view.

²⁴ *Ibid.*, para. 84.

²⁵ *Ibid.*, para. 85.

²⁶ *CDC Group v. Seychelles*, para. 49.

²⁷ *Ibid.*, para. 53.

²⁸ *Ibid.*, para. 54.

Regarding the claim that the Arbitral Tribunal considered irrelevant matters and ignored relevant ones, the *Ad hoc* Committee stated, “again, the Republic [of Seychelles] cites no authority for the proposition that such an error necessitates annulment”²⁹.

- 12.14.** On 20 February 2004, an ICSID Arbitral Tribunal rendered an award in a case brought by Repsol, acting on behalf of a consortium, against Petroecuador seeking amounts owed for services performed according to the terms of an oil exploration and production contract with the Republic of Ecuador. The award ordered Petroecuador to pay substantial damages. Petroecuador alleged before the *Ad hoc* Committee that the Arbitral Tribunal manifestly exceeded its powers and that it breached a fundamental rule of procedure. It argued that the tribunal’s acceptance of Repsol’s standing to represent the consortium constituted a serious departure from a fundamental rule of procedure. In its award, the tribunal had highlighted “the lack of evidence to support Petroecuador’s argument that Repsol did not have the power to represent the other companies comprising the consortium. Furthermore, the Tribunal considered that all those companies ratified the actions of Repsol through letters signed by their legal representatives”³⁰. The *Ad hoc* Committee found no clear evidence of a serious departure from a fundamental rule of procedure³¹.
- 12.15.** The allegation of serious departure from a fundamental rule also surfaced in *MTD Equity v. the Republic of Chile*. In that case, MTD and its subsidiaries negotiated two foreign investment contracts with the Chilean Foreign Investment Commission for the development of a self-sufficient township in the city of Pirque, Chile based on a Malaysian model. When the government of Chile subsequently asserted the inconsistency of the project with its urban development policy, MTD filed a request for arbitration. With an award on 25 May 2004, a tribunal held not only that Chile had breached its obligations, but also that MTD had failed to adequately protect itself from inherent investment project risks.
- 12.16.** The Republic of Chile challenged the award on three of the five grounds set out in Article 52(1). It argued that, when finding a breach of the fair and equitable treatment obligation, the Arbitral Tribunal did not “consider or otherwise respond to abundant evidence presented by the Parties with respect to material issues in dispute”³². Noting that Chile had developed this line of argument neither in its reply nor during oral arguments, the *Ad hoc* Committee nevertheless analysed it as a potential failure to give the reasons, ultimately concluding that the tribunal’s reasoning was sufficiently clear³³.

²⁹ *Ibid.*, para. 78.

³⁰ *Repsol YPF v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on Annulment of January 8, 2007, para. 77.

³¹ *Ibid.*, para. 82.

³² *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment of March 21, 2007, para. 56.

³³ *Ibid.*, para. 57.

- 12.17. In addition, the Republic of Chile claimed that the Arbitral Tribunal had ignored Chile's fundamental principle of separation of powers. The *Ad hoc* Committee recognized the distinction between actions taken by different Chilean public officials but disagreed that the tribunal had erred in this way³⁴. The *Ad hoc* Committee stressed that, in its award, the tribunal placed considerable emphasis on, and referred four times to, the "unity of State" in making its assessment under the most favoured nation provision of the governing bilateral investment treaty. It explained, "what the Arbitral Tribunal emphasized is the inconsistency of action between two arms of the same government *vis-à-vis* the same investor even when the legal framework of the country provides for a mechanism to coordinate"³⁵. Thus, as an active party rather than a passive one, Chile, and not the investor, had a duty to ensure the coherence of actions taken by its various public officials³⁶.
- 12.18. Similarly, *Industria Nacional de Alimentos, S.A. (previously Empresas Lucchetti S.A.) and Indalsa Perú S.A. (previously Lucchetti Perú S.A.) v. the Republic of Peru* also concerns an urban zoning decree issued by local authorities. Lucchetti was the owner of property in the City of Lima where it constructed a plant near a protected wetland. On 18 August 1997, the local municipality issued a stop work order to Lucchetti followed by Decree 259 on 16 August 2001 revoking Lucchetti's operating licence. In the preamble of the Decree, it is stated that Lucchetti failed to observe zoning and environmental regulations applicable to the construction of the plant. On December 2002, Lucchetti filed a request for arbitration under the ICSID Convention.
- 12.19. The Arbitral Tribunal rendered its award on 7 February 2005 concluding that it had no jurisdiction *ratione temporis* to hear the merits of the dispute. Lucchetti sought to annul the award on the following grounds: manifest excess of power, serious departure from a rule of procedure and failure to state reasons. According to Lucchetti, the Arbitral Tribunal exceeded its power "by disregarding [its] offer to prove that the stated reasons for Decree 259 [which was the cause of the annulment of the licence granted to *Lucchetti*] were mere pretexts"³⁷. Lucchetti concluded that it had not been given a full opportunity to be heard and also alleged that the tribunal, by its reasoning, violated the presumption of innocence and the requirements of due process. Lucchetti claimed "that it was deprived of a fair opportunity to demonstrate the untruthfulness of the Municipality of Lima's assertions, notably by the Tribunal's refusal to allow it to file a full

³⁴ *Ibid.*, para. 89.

³⁵ *Ibid.*, para. 87.

³⁶ *Ibid.*, para. 87-88.

³⁷ *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment of September 5, 2007, para. 47.

Memorial on the Merits before the Tribunal proceeded to a decision on the Preliminary Objections”³⁸.

- 12.20.** The *Ad hoc* Committee opined, “there is no doubt that what Lucchetti referred to as the Municipality of Lima’s subjective assertions did become a crucial element in the Tribunal’s ultimate decision”³⁹ and affirmed that if Lucchetti did not have the opportunity to be heard it would have amounted to a serious departure from a fundamental rule of procedure. However the *Ad hoc* Committee found that Lucchetti had full opportunity to present its case including its argument that the reasons given by Decree 259 were false⁴⁰. The argument of a violation of the presumption of innocence also failed because “the Tribunal did not examine the issue of the alleged illegalities but founded its conclusions on other elements in the preamble to Decree 259”⁴¹. The Committee dismissed Lucchetti’s claims of serious departure from a fundamental rule of procedure and found that the Arbitral Tribunal gave sufficient reasons to explain its conclusion.
- 12.21.** *Rumeli Telekom and Telsim Mobil v. the Republic of Kazakhstan* concerned the alleged expropriation of Rumeli and Telsim’s shares in a Kazakh company. These two companies had won the bid for licence to the second largest mobile telephone network in Kazakhstan. An Arbitral Tribunal seized by the two investors concluded that the Republic of Kazakhstan breached its obligations under the Bilateral Investment Treaty. The Republic filed a timely annulment request invoking three of the Article 52(1) grounds. The allegations regarding the serious departure from a fundamental rule of procedure were diverse. The Republic of Kazakhstan alleged that the Arbitral Tribunal lacked impartiality and that it breached the right of Respondent to be heard. It also argued that the Arbitral Tribunal did not take pertinent evidence into account and had not deliberated. The *Ad hoc* Committee concluded that the Arbitral Tribunal is “the judge of the probative evidence”⁴². The Committee had no power to weigh the evidence brought before the Arbitral Tribunal. In the end, there were no annulable elements in the award regarding Article 52(1)(d) and Article 52(1)(e).
- 12.22.** One of the most recent *Ad hoc* Committee decisions regarding a serious departure from a fundamental rule of procedure was handed down on 14 June 2010. It concerned the annulment request brought after the *Helnan International v. The Arab Republic of Egypt* award. The initial dispute arose after Egypt’s Ministry of Tourism downgraded the Hotel Shephard’s ratings. An arbitration conducted in December 2004 under

³⁸ *Ibid.*, para. 120.

³⁹ *Ibid.*, para. 121.

⁴⁰ *Ibid.*, para. 123.

⁴¹ *Ibid.*, para. 124.

⁴² *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment of March 25, 2010, para. 104.

the aegis of the Cairo Regional Centre for International Commercial Arbitration “terminated the Management Contract on the ground that it was impossible to execute, and that both parties were responsible for failing to execute the contract”⁴³. Helnan thereafter initiated arbitration under the ICSID mechanism. The Arbitral Tribunal decided that it had jurisdiction but dismissed all of the claims on their merits. Helnan sought annulment of the award on three grounds relying first on the fact that the tribunal founded its reasoning upon an issue not submitted by either party. Secondly, Helnan challenged the tribunal’s conclusion that “the ministerial decision to downgrade the hotel [...] cannot be seen as a breach of the Treaty by Egypt”⁴⁴. According to Helnan, the tribunal did not support this conclusion and failed to observe a fundamental rule of procedure by neglecting to refer to Helnan’s submissions on that issue in the final award. The *Ad hoc* Committee responded with a very limited analysis under Article 52(1)(d) simply stating that Helnan’s claim for annulment was not persuasive and that its arguments in fact had been plainly considered by the Arbitral Tribunal⁴⁵.

12.23. Lastly, we review two cases concerning awards rendered against the Republic of Argentina caused by its severe economic crisis of 2001. In *Azurix v. Argentina*, the dispute arose in the water services sector whereas *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentina* concerned the transportation and distribution of gas. In an effort to minimize the effects of the crisis, the Argentine government enacted an emergency law that eliminated the government’s right to denominate transactions in US dollars and to peg pesos to dollars one-to-one. In the aftermath of this crisis, *Enron* and *Azurix* were two of many ICSID claimants alleging that Argentina breached its contractual and treaty obligations. The ICSID tribunals in both disputes concluded that Argentina had indeed breached its treaty obligations including the principle of fair and equitable treatment.

12.24. The Republic of Argentina sought annulment of the awards on multiple grounds. In the *Azurix* case, Argentina argued that the tribunal had dismissed the evidence it presented consequently violating Argentina’s rights of defence and equality⁴⁶. The *Ad hoc* Committee stated that the ICSID Convention provides arbitral tribunals with discretion to grant or deny a party’s request. Thus, Argentina’s allegation did not amount, in and of itself, to a serious departure from a fundamental rule of procedure. The Committee held, “it is only where the exercise of that discretion, in all the circumstances of the case, amounts to a serious departure from another rule of a fundamental nature that there will be grounds for annulment

⁴³ *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment of June 14, 2010, para. 6.

⁴⁴ *Ibid.*, para. 28.

⁴⁵ *Ibid.*, paras 35, 38.

⁴⁶ *Azurix v. Argentina*, para. 211.

under Article 52(1)(d) of the ICSID Convention⁴⁷. On the question of the tribunal's refusal to admit certain requests presented by Argentina, the Committee said "it is not the case that a party has the right to demand any evidence at any time without justification. Even where a request is timely, precise and justified, the tribunal may in its discretion reject the request"⁴⁸. Ultimately, the Committee dismissed in its entirety Argentina's request to annul the *Azurix* award.

- 12.25.** The *Enron and Ponderosa v. Argentina* annulment decision made similar conclusions regarding the allegation of serious departure from a fundamental rule of procedure. Enron and Ponderosa argued that the tribunal's admission of a witness statement and an expert report over the objections of Argentina constituted a breach of Article 52(1)(d) of the ICSID Convention. Argentina claimed further that the initial tribunal's decision to close the proceedings in a manner that deprived the Respondent of any further opportunity to challenge any member of the tribunal constituted likewise violated the rule against serious departure from a fundamental rule of procedure. The *Ad hoc* Committee rejected Argentina's argument because it was not clear whether or on what basis Argentina would have raised the challenges it was allegedly precluded from making. Nor was it clear why Argentina had not made such challenges before the proceedings closed⁴⁹. The *Ad hoc* Committee considered "that no tenable basis has been advanced by Argentina for suggesting that the way that the Tribunal exercised its discretion in the circumstances was inconsistent with any principle of equality of the parties or right of defence or fair treatment"⁵⁰.

Post-scriptum

- 12.26.** After the completion of the present paper, the decision of the *Ad hoc* Committee in *Fraport AG v Republic of the Philippines*⁵¹ became public. The Committee annulled the award in the underlying proceedings on the basis of Article 52(1)(d) of the ICSID Convention. It found that the Arbitral Tribunal had failed to grant the right to be heard to Fraport in relation to certain evidence produced by the Philippines at a very late stage in the proceedings.
- 12.27.** Given space constraints, it is not possible here to provide a sufficiently detailed overview of the facts of the case to undertake a proper analysis of the decision. Nevertheless, in a nutshell, the Arbitral Tribunal had decided that the Fraport's investment was not made in compliance with

⁴⁷ *Azurix v. Argentina*, para. 210.

⁴⁸ *Ibid.*, para. 218.

⁴⁹ *Enron and Ponderosa v. Argentina*, para. 206-12.

⁵⁰ *Ibid.*, para.193.

⁵¹ *Fraport AG v Republic of the Philippines*, ICSID Case or ARB/03/25 (annulment proceedings), Decision of 23 December 2010, chapter IV.B, para. 119-247.

Philippine law and hence did not fall within the scope of the tribunal's jurisdiction under the BIT. The arbitrators found that Fraport had violated the Philippines anti-dummy laws (ADL) by secretly controlling a Philippines entity through undisclosed shareholder agreements. The tribunal heavily relied on documents produced by the Philippines after the closure of the proceedings, in particular a decision of the Philippine prosecutor dismissing a criminal complaint based on the ADL. The Philippines asserted that the prosecutor had access to two documents only, and that he had notably not seen the secret shareholder agreements or other records evidencing Fraport's violation of the ADL. Fraport responded that while they obviously did not know what documents the Prosecutor had access to; he did have access to many more than just the two documents. The arbitral tribunal invited the Philippines to submit evidence as to the prosecutor's file, stressing that this request was not a decision to reopen the proceedings and that the tribunal "merely seeks to complete the evidentiary record which the parties have constituted [with their submissions]". The State filed some 1900 pages of new documents, asserting that that they constituted the entirety of the prosecutorial record. Fraport responded that this was still not the full record. The Philippines admitted as much but added that any omission was unintentional and that they would supplement their production if any additional responsive documents are located. At this stage, the tribunal directed the parties to "cease and desist from sending any further letter to the Tribunal" and then closed the proceedings for good.

- 12.28.** In the award, which was issued a few months later, the tribunal relied, *inter alia*, on the evidence from the prosecutor's file to conclude that Fraport had violated the ADL. It also found that there was no evidence that the prosecutor had seen the critical shareholder agreements.
- 12.29.** The Ad hoc Committee ruled that the tribunal's finding that Fraport had infringed the ADL was an essential part of its decision to decline jurisdiction. According to the Committee, the tribunal could have arrived at a different conclusion had it found that the prosecutor had access to the secret shareholder agreements. It also noted that the evidence from the prosecutor's file on which the tribunal relied had been produced after the hearing and had not been considered by the parties' experts on Philippine law.
- 12.30.** The Committee found that a party's right to be heard – consisting of the opportunity to adduce evidence and argument on its claim and in rebuttal of those of its opponents – constituted a fundamental rule of procedure, as recalled in Article 35(c) of the Model Rules on Arbitral Procedure adopted by the International Law Commission in 1952, on which the drafters of the ICSID Convention relied. Accordingly, the tribunal must afford both parties the opportunity to make submissions if new evidence is received and considered by the tribunal to be relevant. A failure by the tribunal to do so cannot be excused by the fact that both parties were equally disadvantaged.

12.31. The Committee therefore concluded that the tribunal ought not to have considered the new evidence in its deliberations without granting both parties the opportunity to make submissions. According to the Committee, the tribunal should have reopened the proceedings under Rule 38(2) of the ICSID Arbitration Rules. Consequently, the Committee annulled the award on the ground that a serious departure from a fundamental rule of procedure had occurred. It added that a party may lose its right to seek annulment of an award on this ground if it did not raise an objection during the proceedings. However, the Committee concluded that in the case before it, Fraport had not waived its right to invoke the ground for annulment since there had been no decision by the tribunal to which Fraport could object. The tribunal had not communicated whether it needed further clarifications as to the prosecutorial record and had explicitly instructed the parties to refrain from further submissions. (It might however be argued that in such circumstances, the parties should have made a pre-emptive objection to preserve their right to rely on Article 52(1)(d)).

| | |

Summaries

FRA [*Procédure d'annulation CIRDI fondée sur un écart grave par rapport à une règle de procédure fondamentale (Article 52(1)(d) de la Convention CIRDI)*]

Cet article analyse la jurisprudence relative à la Clause 52(1)(d) de la Convention CIRDI, selon laquelle une sentence rendue par un tribunal CIRDI peut être annulée par une Commission ad hoc au motif d'une divergence majeure par rapport à une règle de procédure fondamentale. Pour pouvoir invoquer efficacement ce motif devant une Commission ad hoc, le demandeur doit démontrer que ladite divergence par rapport à une règle de procédure est à la fois grave et fondamentale. Il s'agit d'exigences cumulées. Les décisions d'annulation qui ont été étudiées dans cet article illustrent le fait que les Commissions ad hoc interprètent de façon stricte et minutieuse le motif d'annulation dans la mesure où celui-ci est lié au principe de traitement équitable. La grande liberté d'appréciation dont les tribunaux arbitraux bénéficient dans leur conduite des procédures probatoires constitue un obstacle majeur aux requêtes en annulation. Dans l'affaire Azurix, la Commission ad hoc a soutenu que « ce n'est que lorsque l'exercice de cette liberté d'appréciation, à tous les niveaux de l'affaire, se traduit par une divergence majeure par rapport à une autre règle fondamentale, qu'il existe des motifs capables de justifier l'annulation en vertu de la Clause 52(1)(d) ». Cette liberté d'appréciation, tout comme le professionnalisme et l'expertise des arbitres siégeant aux panels CIRDI, continueront à être les principaux obstacles aux demandes d'annulation fondées sur la Clause 52(1) (d).

CZE [*Řízení o zrušení rozhodčího nálezu před střediskem ICSID z důvodu významného odklonu od základního procesního pravidla (Článek 52 odst. 1 písm. (d) Úmluvy ICSID)*]

Toto pojednání analyzuje rozhodovací praxi související s článkem 52 odst. 1 písm. (d) Úmluvy o řešení sporů z investic mezi státy a občany druhých států (Úmluva ICSID), podle níž může být rozhodčí nález vydaný tribunálem ICSID zrušen výborem jmenovaným ad hoc z důvodů významného odklonu od základního procesního pravidla. Pokud se má navrhovatel úspěšně dovolat tohoto důvodu ke zrušení rozhodčího nálezu před výborem jmenovaným ad hoc, musí prokázat, že předmětný odklon od procesního pravidla je závažný a současně že předmětné procesní pravidlo je zásadní. Tyto požadavky musejí být splněny kumulativně. Rozhodnutí o zrušení rozhodčího nálezu, kterými se tento článek zabýval, prokazují, že ad hoc výbory vykládají tento důvod ke zrušení rozhodčího nálezu úzce a velice opatrně, neboť přímo souvisí s právem na spravedlivý proces. Důležitou překážkou jakékoli žádosti o zrušení rozhodčího nálezu je široká diskreční pravomoc, již mají rozhodčí tribunály k dispozici v rámci vedení důkazního řízení. Ad hoc výbor v případě Azurix rozhodl, že „pouze v případě, kdy uplatnění takovéto diskreční pravomoci s ohledem na všechny okolnosti případu dosahuje závažného odklonu od jiného základního procesního pravidla, budou dány důvody ke zrušení rozhodčího nálezu dle ustanovení článku 52 odst. 1 písm. (d).“ Tato diskreční pravomoc jakož i profesionalita a odbornost rozhodců, kteří jsou členy panelů ICSID, budou i nadále hlavními překážkami pro úspěch žádosti o zrušení rozhodčích nálezů dle článku 52 odst. 1 písm. (d).

|||

POL [*Postępowanie o uchylene orzeczenia ICSID w przypadku poważnego odstępstwa od podstawowej zasady proceduralnej (artykuł 52(1)(d) Konwencji ICSID)*]

Niniejsza praca zajmuje się analizą orzecznictwa ICSID w zakresie artykułu 52(1)(d) Konwencji ICSID. Na mocy wspomnianego postanowienia, orzeczenie ICSID może zostać uchylone przez komitet ad hoc, jeżeli nastąpi poważne odstępstwo od podstawowej zasady proceduralnej. Komitety ad hoc opowiadają się za stosunkowo wąską wykładnią niniejszego artykułu i, jak dotąd, żaden z nich nie uchylil orzeczenia ICSID na jego podstawie. Wynika z tego, że, aby powód mógł z powodzeniem odwołać się do tej podstawy przed komitetem ad hoc, musiało wcześniej nastąpić poważne uchybienie w stosunku do prawa do bycia wysłuchanym w procesie arbitrażowym.

DEU [*ICSID Annulment Proceedings based on serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention)*]

Der vorliegende Artikel untersucht die Rechtsprechung von ICSID ad hoc Komitees im Rahmen von Artikel 52(1)(d) des ICSID Übereinkommens. Gemäss dieser Vorschrift kann ein ICSID Schiedsspruch wegen Abweichung von grundlegenden Prozessregeln aufgehoben werden. Bis zum heutigen Tag hat noch kein ICSID ad hoc Komitee einen Schiedsspruch aufgrund

einer Verletzung von Artikel 52(1)(d) aufgehoben. Es kann daraus gefolgert werden, dass nur eine schwerwiegende Verletzung des rechtlichen Gehörs eine Aufhebung nach sich ziehen kann.

- RUS** [**Дела об аннулировании решений ICSID (Международного центра по урегулированию инвестиционных споров) с принятием во внимание серьезного отклонения от основополагающей процессуальной нормы (статья 52(1)(d) Конвенции ICSID)**]
В настоящей статье анализируется прецедентное право ICSID из статьи 52(1)(d) Конвенции ICSID. Согласно этому положению решение ICSID может быть аннулировано специально созданным Комитетом в случае серьезного отклонения от основополагающей процессуальной нормы. Комитеты, которые создаются специально для таких случаев, истолковывают эту статью достаточно узко, и на сегодняшний день ни один подобный Комитет не аннулировал решение ICSID на таком основании. А это значит, что для возможности сослаться заявителем на такое основание при обращении в специально созданный Комитет должен быть выявлен факт серьезного нарушения права быть выслушанным на арбитражном процессе.