

## *On the Reasoning of International Arbitral Awards*

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This article deals with the problem of international arbitration awards whose reasoning is unduly summary. The author, marking the distinction between investor-state and commercial arbitration, discusses the reasons for reasons in international arbitration. The annulment system of the ICSID Convention is briefly addressed, through the instance of the *Lucchetti* case, with particular focus on the extent of reasoning to be provided when declining or affirming jurisdiction—stressing the unacceptable character of arbitrators merely assuming jurisdiction in the absence of consent by one party. Finally, the author addresses the question whether a decision by an annulment committee on a failure to state reasons should be considered a review of form or of substance.

Among the many clichés published today that are critical of international arbitration—notwithstanding or perhaps because of its remarkable success—comparatively little attention seems to have been devoted to the following: it is alleged that many or most awards are too long, especially when drafted by professors!

Like most generalizations, this claim is of somewhat doubtful value, in particular in the domain of the settlement of international disputes; and this reminds me of one favourite quotation of mine, by the great English poet and painter William Blake who once said, ‘To generalise is to be an idiot!’—a sentence which is in itself, of course, a generalization.

Contrary to what some readers may be tempted to believe, the purpose of the present article is not to defend professors on that ground (assuming they deserve a defence). Nor is it to discuss in general justifications or pros and cons. It is much more limited: while conceding that some international awards (like some decisions of the ICJ or of other international jurisdictions) are undeniably prolix, this article examines, as a kind of ‘counter-generalization’, whether another and more dangerous characteristic of arbitral practice today may not be the frequency of awards whose reasoning is not only too short to be convincing but also insufficient from a quantitative as well as from a qualitative

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viewpoint—the latter often being the inevitable consequence of the former characteristic.

No attempt will be made here, or could reasonably be made within the limits of the present contribution, to analyse the concept of reasoning of awards in general or in comparative law, its justifications and philosophical, sociological or practical bases, etc. Nor is it proposed to discuss, via this subject the different and respective positions of the State judge, the international judge and the international arbitrator. In passing, it may suffice to note that the reasoning of decisions appears to have attracted increasing attention in recent decades in the vast literature on the prevention and the settlement of disputes.<sup>1</sup>

In his Dissenting and Concurring Opinion in the case *Mohsen Asgari Nazari v Islamic Republic of Iran* (of 24 August 1994), Judge Howard Holtzmann strongly criticized what he saw as ‘the Tribunal’s growing tendency to write Awards that are overly long and excessively detailed’.<sup>2</sup>

Somewhat analogous criticisms are levelled at arbitrators, in particular when they indulge in ‘*obiter dicta*’, over-conscious as they may happen to be of the pedagogical and/or diplomatic elements often involved in the arbitration process.

In favour of verbal (and procedural) economy, the rule recognized and practised in many jurisdictions may also be invoked, that the arbitrator (more or less like a State judge) is not bound to examine every and all the arguments raised by the parties and answer them all.

Reference should be made at this stage to two important studies by distinguished English practitioners, one Judge, Lord Bingham, in 1997,<sup>3</sup> and one barrister, Mr Toby Landau QC,<sup>4</sup> in 2008.

In the first, the learned Judge examined the main justifications for reasoned judicial decisions—most of which clearly exist also, ‘*mutatis mutandis*’ for arbitral awards, in particular: the right of the parties to know why they win or lose the case; the need for protection against arbitrariness by the decision maker; and (within limits) the need to allow for some (minimum) review of arbitral decisions by Courts. Subsequently, referring to the study of Sir Thomas Bingham (as he then was), Toby Landau QC presented to the ICCA Dublin Conference in 2008 a most convincing report. In a nutshell, the author forcefully criticized what he called ‘the fundamental misconception’ that the same considerations do apply and should govern both international commercial arbitration and international State-Investor arbitration. In spite of some obvious analogies, he writes that they ‘are in truth radically different’.

<sup>1</sup> See eg H Ruiz Fabri and J-M Sorel (eds), *La Motivation des Décisions des Juridictions Internationales* (A Pedone, University of Paris I 2008); G-A Alvarez and WM Reisman (eds), *The Reasons Requirement in International Investment Arbitration* (M Nijhoff 2008).

<sup>2</sup> Cited by Gary B Born, *International Commercial Arbitration* (vol II, Kluwer) 2454, note 168.

<sup>3</sup> ‘Reasons for Reasons: Differences Between a Judgement and a Reasoned Award’ 16 *Arbitrator* 19.21.

<sup>4</sup> Under the title ‘Reasons for Reasons: The Tribunal’s Duty in Investor-State Arbitration’ in ICCA Congress Series N° 14, Dublin Conference, 2008 (Kluwer 2009) 187–205.

Whether or not one is prepared to fully subscribe to that view, one must at least admit that the importance and complexity of the questions raised in Investor-State settlement of disputes and the fact that public interest and the development of the country concerned are involved, 'are all dynamics that militate in favour of a very carefully and fully reasoned award', much more so than in what may be considered 'normal' in cases of commercial transactions!

Among the most frequent general errors to be observed in the present practice of Investor-State arbitral tribunals, Landau notes a tendency to *minimalism* in the expression of reasons and suggests that 'in the drafting of their awards, it is imperative that Investor-State tribunals cast off the commercial arbitration conception of their roles'.

This remark appears amply justified by recent developments, known among '*conoscenti*' if seldom published; it seems to be a fact that some busy and successful practitioners accept too many cases and are thus led either to delegate to assistants the drafting of the decision and/or, for lack of time, are satisfied with a brief award, containing only superficial reasoning.

As a sign (among others) of dissatisfaction among users of international arbitration, it is interesting to note the topic chosen by the Organisers of the 14th Geneva Global Arbitration Forum.<sup>5</sup> 'How to make awards in Investor-State arbitrations more acceptable to States?'

In the light of Landau's study, one answer immediately comes to mind: more careful and thoroughly reasoned decisions, taking into account the specificities of Investor-State relations, would certainly go some way towards diminishing the fears and hostility of a number of States regarding international arbitration and not only in Latin America or Asia.

Now, a theoretical or abstract discussion of the question 'How extensive must the reasoning be?'<sup>6</sup> in an award, if at all possible, appears bound to be fruitless or to lead to the obvious answer: 'it depends on the particular case'! Let us then turn to international arbitral practice and, more specifically, to a few awards that were the object of 'appeals' or, rather, set aside procedures on the grounds of insufficient or absent reasoning.

An obvious example is the ICSID arbitration mechanism. Article 52(1) of the Washington Convention of 1965 provides that either party may request annulment of an award on one of various grounds; including

... (e) that the award has failed to state the reasons on which it is based.<sup>7</sup>

It has been (rightly) observed that the various grounds for setting aside an award may coexist in a given case and have to be interpreted in the context of

<sup>5</sup> Messrs J Werner and (the late) Th Wälde.

<sup>6</sup> This is the title of an article by P Gillies and N Selvadurai, 'How Extensive Must the Reasoning Be?' (2008) 74 Arbitration 125–32. This article is mainly based on domestic legislation.

<sup>7</sup> The drafting is taken from Art 56 of the Statute of the ICJ and 95(1) of its Rules. The English text of Art 52(1) is more precise than the French text '*défaut de motifs*', owing also to the ambiguity of the word '*défaut*', which may be interpreted, *prima facie*, as meaning 'absence' as well as 'fault or deficiency'.

Article 52, section 5 and the Convention as a whole. In particular, Article 48(3) should be kept in mind, which states that:

The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based<sup>8</sup>.

This is not the place to enter into the permanent and controversial debate ‘Finality or Correctness of international awards?’ (which value should have priority?) or to examine in any detail the ‘case law’ of the various ICSID ‘*Ad hoc* Committees’. Suffice to say that in the present writer’s submission: (i) Article 52 of the Convention and its grounds of annulment should be interpreted (in accordance with the principles of the Vienna Convention) ‘effectively’ and not restrictively (nor, of course extensively); (ii) it manifests that the Washington Convention of 1965 would not have been ratified by so many States without its ‘annulment system’<sup>9</sup>; and (iii) there is probably no subject of greater importance (in the whole domain of international arbitration) than finality or annullability of decisions—and the success of the ICSID arbitration system as a whole<sup>10</sup> demonstrates that it has established an acceptable balance between the binding and final character of awards in State-Investor disputes and the need to maintain some remedies against possibly unjust and unacceptable arbitral decisions.

What should be stressed here is 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. But it may not be easy to draw the line between grounds for appeal (a revision of the merits) and an annulment procedure properly speaking. And parties opposing annulment are prompt to argue, as a kind of inevitable ‘leit-motiv’, that the claimant, whether State or Investor, is in fact lodging an appeal in disguise.

As aptly remarked by C Schreuer, in his leading commentary on the Washington Convention, the place of ‘*défaut de motifs*’ within Article 52 is far from entirely clear.

What is clear enough, be it said in passing, is that, as a consequence of elementary logic, the result of a (real) contradiction in reasons must be held to be an absence of reasons. But the main and difficult problem is the following:

Is it sufficient, in order to comply with the condition of Article 52(1) (lit e) and escape annulment, that an award is based on purely formal, inconsistent

<sup>8</sup> Here again it is interesting to compare the English and the French versions: the latter states that ‘*la sentence doit répondre à tous les chefs de conclusion et doit être motivée*’.

<sup>9</sup> P Lalive, ‘Concluding Remarks’ in E Gaillard and Y Banifatemi (eds), *LAI Conference on Annulment of ICSID Awards* (Juris Publishing, Huntington, NY 2004) 297–313.

<sup>10</sup> It is amusing, in retrospect, to recall the alarming comments of some writers (eg MW Reisman and A Redfern) after the first annulment decision by an *Ad hoc* Committee in the *Klückner v Cameroun Case* (3 May 1985, 2 ICSID Rep 95 (1994), comments predicting ‘the breakdown of the ICSID system’ or a ‘loss of its appeal’.

and even patently unsatisfactory or inadequate reasons? Clearly, a positive answer might lead arbitral practice dangerously near the notion of appeal or revision of the award. On the other hand, the requirement of a reasoned award must make sense and cannot be satisfied by an artificial or clearly inadequate set of reasons<sup>11</sup>:

It is hardly surprising that the various decisions of ICSID “*Ad hoc* Committees”, unfavourable or favourable to (partial or total) annulment, do not as yet compose a clear general picture or provide one authoritative interpretation of Article 52(1) (lit. e).

Against this background, it is now possible to apply Landau’s ideas about ‘Reasons for reasons’ to Investor-State arbitration. A concrete and most interesting example is offered by the Dissenting Opinion of a distinguished English arbitrator and counsel, Sir Frank Berman, in the ICSID *Lucchetti* case,<sup>12</sup> who defined the concept of ‘failure to state reasons’ as follows:

... the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law..... the requirement to state reasons is satisfied as long as the award enables one to follow how the Tribunal proceeds from Point A to Point B and eventually to its conclusion, even if it made an error of fact or law.

What is especially significant in this case is that the Arbitrators had rejected the claim on the basis of lack of jurisdiction (*ratione temporis*) and that, later, a majority of the Members of the *Ad hoc* Committee had then dismissed a request for annulment based on a failure to state reasons. The dissenting Arbitrator was not convinced and insisted on the duty of arbitrators, especially when they decline jurisdiction, to fully explain their reasons:

When a tribunal chooses to non-suit a Claimant at the initial stage... the grounds for doing so must be clear and strong, and in particular... they must be clearly explained, so as to enable the Claimant (not to mention other consumers of the ICSID system) to understand what the tribunal has done and why..... if a tribunal chooses to decline jurisdiction without adequately explaining the reasons why, then one is at once within the area of annulable error – if not on the basis of an excess of powers [Art. 52(1) lit. b)], then at least on the basis of a failure to give reasons.

For the majority of the *Ad hoc* Committee,<sup>13</sup> the award [did] ‘not give a full picture of the various elements which should be taken into account for treaty

<sup>11</sup> E Gaillard, although maintaining (erroneously in my opinion) the view that the *Klöckner/Cameroun* annulment ‘added to the conditions of the Convention’—a view duplicated without analysis by subsequent writers—does concede that the origin of the difficulty lies in the style and technique of the ICSID Convention and its use of flexible standards (*notions cadres*) to be interpreted and applied by a plurality of non-permanent ‘*Ad hoc* Committees’—*La Jurisprudence du CIRDP*, Pedone 2004, 197.

<sup>12</sup> *Industria Nacional de Alimentos SA (Lucchetti) v the Republic of Peru*, Decision on Annulment, 5 September 2007.

<sup>13</sup> Composed of Justice Hans Danelius, President and Prof Andrea Giardina.

interpretation under the Vienna Convention' (N° 129). However, relying on the Annulment Decision in the case *MINE v Guinea*,<sup>14</sup> it did 'not find in the Tribunal's reasoning any contradiction or lack of precision such as to leave a doubt about the legal or factual elements upon which the Tribunal based its conclusion' and was 'satisfied that [it] examined all Lucchetti's arguments and . . . dealt with them in the Award to such an extent and in such a manner as could reasonably be required'.

This is precisely where the dissenting Member disagreed. For him, the 'real question' was whether the arbitrators 'adequately explained what they were doing in the interpretative process' and this 'with the very particular care needed from a Tribunal proposing, on the basis of the interpretative outcome, to decline jurisdiction altogether'.

It is, regrettably, impossible here to do justice to the thorough analysis that Berman's Dissent offers of the required tools of treaty interpretation, which should be used by an arbitral tribunal called upon to decide on its own jurisdiction under a BIT. Suffice to say that the Dissent carefully distinguishes its approach from the determination of a 'correct' interpretation (which 'would amount to an appeal, not annulment'). But Sir Frank Berman insists on the 'particular duty of caution' of the arbitrators to follow the various steps of 'a properly conducted interpretative process'.

Berman's conclusion is unambiguous: the award whose annulment was requested under Article 52(1) (lit e) ICSID Convention 'failed to meet . . . the accepted standard of reasoning' as 'enunciated in the Annulment Decision in *MINE v Guinea*', ie that the award must enable the reader 'to follow the reasoning of the Tribunal on points of fact and law'.

Of particular interest are the final comments in the Dissenting Opinion, to the effect that 'every "crucial element" in an ICSID Tribunal's decision has to be the subject of finding by the Tribunal'. And if it happens to be a factual element in dispute between the parties, then

the finding has to be the result of a proper fact-finding procedure; and . . . *the elements and steps in this procedure must be spelled out in the Award.*

As already mentioned above, Berman's Dissenting Opinion emphasizes the particular duty of ICSID arbitrators to spell out their reasons *when they deny jurisdiction*, as was done in the *Lucchetti* case.<sup>15</sup> But the same duty clearly exists, in this writer's submission, in the 'converse' situation, ie when the arbitrators decide *to assume jurisdiction* notwithstanding the (respondent) State's objection.

In other words, in Investor-State arbitration and especially in the case of ICSID arbitration, it is submitted that Sir Frank Berman's considerations and

<sup>14</sup> Decision on Annulment, 22 December 1989, ICSID Case N° ARB/84/4.

<sup>15</sup> See the Dissent, para 17, in fine: 'If the Claimant's facts can't simply be assumed for the purpose of upholding jurisdiction, then surely it follows that the Respondent's facts can't simply be assumed for the purpose of denying it'.

arguments in favour of a special duty of the Arbitrators to justify their decision 'adequately' and 'with the very particular care needed' are valid and convincing also, and indeed *a fortiori*, when they affirm a jurisdiction *denied* by the State and neglect to explain how they reach such a conclusion and why.

Why '*a fortiori*'? For two main reasons: First, if an arbitral tribunal, quite erroneously, declines its jurisdiction (as was done in the *Lucchetti* case in the view of the dissenting arbitrator), it remains open to the parties or one of them to resort to other methods of settlement than the ICSID system (like UNCITRAL, ICC, etc). In the 'converse case', the only juridical remedy left open to the State is the annulment procedure of Article 52 of the Washington Convention—a procedure that must be effectively interpreted and applied, contrary to the restrictive and erroneous tendency advocated by some.

A second, and much more decisive, reason is a consequence of the fundamental role of *consent* in arbitration generally, and especially of consent by the State in the unique (and) 'revolutionary' ICSID arbitration system.

In any case, and whatever the doctrinal or philosophical preferences of commentators regarding the finality (absolute or relative?) of international arbitral awards, one thing should remain largely beyond dispute: the decision to assume jurisdiction when the latter is denied by the State is of such capital importance that it must be fully reasoned and justified. As stated by the Report of the Executive Directors of the World Bank at para 23, 'Consent of the parties is the cornerstone of the jurisdiction of the Centre'. And in the absence of existing and proven consent, the arbitrators could hardly be said to have 'assumed' jurisdiction but, more correctly, would appear to have *created* or usurped it.

At this stage, it is appropriate to recall the 'revolutionary character' of the 1965 Washington Convention, clearly emphasized for instance by Paul Reuter.<sup>16</sup>

When explaining the reasons for their decision to assume jurisdiction, the arbitrators should of course keep in mind the risk of future set-aside proceedings. Similarly, members of an *Ad hoc* Committee when interpreting and applying Article 52(1) (lit e), regarding the failure to state reasons, should be aware not only of the concept 'reasons for reasons' outlined above and analysed by Sir Frank Berman. They should be particularly aware of the exceptional caution required when verifying State's consent to ICSID jurisdiction—a consent that implies a significant surrender of (judicial) sovereignty in favour of foreign persons, more precisely in favour of investors who are 'nationals of another Contracting State' (Article 25 of the Convention).

<sup>16</sup> In his introduction and Report to the Dijon Conference of CREDIMI in 1968, Pedone (ed.), *Investissements étrangers et Arbitrage entre Etats et Personnes Privées*, 1969, 10, 'Ce qu'il ne faut jamais oublier, c'est que l'introduction des particuliers dans un contentieux international a toujours des caractères révolutionnaires par rapport aux structures traditionnelles du droit international'.

As a practical illustration, I would like to conclude the present study by a reference to a recent annulment procedure, unpublished to date, when an arbitral tribunal (composed of experienced arbitrators) appears to have contented itself, unanimously, with a succinct award clearly falling below the standards of 'adequate reasoning' expected by both Messrs Landau and Berman.

Reduced to essentials, the relevant facts were the following: a concession contract had been granted by a State X to a Company Z (governed by the law of State X). The contract, equally governed by the law of X, contained an ICSID arbitration clause specifying that Company Z, although a national of the Contracting State X, 'should be treated as a national of another Contracting State for the purpose of this Convention' (Article 25(2) (lit. b), notwithstanding the strong evidence that Company Z was effectively controlled by nationals of the State. The Tribunal had assumed jurisdiction on the basis of the (unexplained) finding that an addition or 'aggregation' of several shareholders proved that the stock capital of Company Z was in majority under 'foreign control'.

Curiously enough, the Award contained no analysis of the notion of 'foreign control' and merely affirmed that such control was, *in casu*, that of 'nationals of other Contracting States' without any verification or specification. In the reasoning, the award entirely omitted to ascertain which foreign nationality was in fact involved, nor did it examine whether such 'foreign nationality' (assuming it to exist) was or was not the nationality of 'another Contracting State'.

Such absence of discussion and of reasons (on a question initially admitted by the Award as 'fundamental') was particularly criticized by State X. This was all the more so since, in the concrete circumstances of the case, this issue had a definite relationship with another basic condition of the functioning of the ICSID arbitration system, that of Rule I (3) of the Arbitration Rules: 'The majority of the arbitrators shall be nationals of States other than the State party to the dispute *and of the State whose national is a party to the dispute...*'.

*In casu*, it appears that, if the Investors were not nationals of State X, then, under the Tribunal's theory, they were likely to be shareholders of one of the 'foreign investors' supposed to control Company Z, ie to be of *French* nationality. This nationality was equally that of all three arbitrators—a circumstance which, inevitably, raised the question of the validity of the Tribunal's composition! This is not the place to analyse this unusual problem which, although it may seem rather marginal, could perhaps justify the suspicion that it had influenced the superficial and perfunctory reasoning of the arbitrators, in particular regarding the identification of the 'foreign' investors.

To sum up, it would seem apparent that, in this case, the reasoning provided by the Arbitral Tribunal, acceptable though it might have been in international commercial arbitration, did not satisfy the requirements mentioned by Landau

or by Sir Frank Berman and indeed the requirements of arbitral ethics in Investor-State arbitration (particularly within the ICSID system). Reference need only be made, once again, to the famous *dictum* of Lord Hewart, slightly adapted: ‘Arbitral Justice’ should not only be done; ‘it should be seen manifestly and undoubtedly to be done’. In the apt formula of an experienced French practitioner:

It can hardly be disputed that jurisdiction must be strictly reviewed as it protects consent, the cornerstone of investment arbitration.<sup>17</sup>

In the case summarized above, the arbitrators thought it sufficient to accept and affirm jurisdiction on the basis of a rather short and rapid examination— notwithstanding State X’s repeated objections and denials, and notwithstanding evidence pointing to ‘local nationality’ of the Investors (or, in the alternative, to some undefined foreign nationality).<sup>18</sup>

Accordingly, the question arose for Counsel for the Respondent State, whether the main argument for annulment of the award should be ‘manifest excess of power’ (Article 52(1) (lit b)) rather than the ‘failure to state reasons’ (Article 52 (1) (lit e)), or, of course, both.

Without opening a debate on a controversial and much discussed topic,<sup>19</sup> it is perhaps interesting to note here in passing that when, as in the previous case, arbitrators ‘assume’ jurisdiction in the absence of consent by one party, it seems incorrect to speak of ‘excess of power’ since ‘*ex hypothesi*’, no such power ever existed. The terms ‘usurpation’ of power would seem more accurate.

A last remark of fact adds a curious element to the picture: *after* the rendering of the award, the Tribunal Chairman thought it advisable to publish, in a legal periodical, an article explaining the reasons of some parts of ‘his’ award. The propriety of such a course (unusual in arbitration practice or history) may be the subject of a variety of opinions. However that may be, this fact may be interpreted as an (involuntary) confession of an insufficiently reasoned award!

## Conclusions

The limited purpose of the preceding observations was not to present to the reader any balanced or complete account of the practice of ICSID *Ad hoc*

<sup>17</sup> Philippe Pinsolle, ‘Manifest Excess of Power and Jurisdictional Review of ICSID Awards’ (2005) 2 TDM 28–30 <<http://www.transnational-dispute-management.com/>>

<sup>18</sup> Making it impossible, as already said, to verify whether Art 25 (2) lit b, *in fine*, was really complied with.

<sup>19</sup> As quite rightly noted by Prof G Kaufmann-Köhler (E Gaillard and Y Banitafermi (eds), *Annulment of ICSID Awards: The Foundation of a New Investment Protection Regime in Treaty Arbitration* (IAI, Juris Publishing 2004) 198). ‘Whatever the basis for jurisdiction, treaty or contract, the requirement of manifestness appears inappropriate in the context of jurisdiction. A tribunal either has jurisdiction or it does not; there is nothing in between. In other words, any exercise of jurisdictional power without proper jurisdiction is a manifest excess of power’.

Committees regarding the review and annulment of awards—an arbitral practice that can hardly be described as constituting a consistent ‘case law’ on annulment. It was rather to emphasize what is, or should be, obvious to all lawyers—the fundamental importance of the reasoning of international awards. This requires, if arbitral justice is to be ‘seen manifestly done’, a fairly detailed and thorough analysis of the ‘reasons on which the award is based’ (Article 52 (1) (lit e) Washington Convention)—especially since the Award must ‘deal with every question submitted to the [arbitral] Tribunal’ (Article 48 (3) of the Convention).

The specific nature of Investor-State arbitration, particularly under the ICSID Regime, greatly increases the importance of a careful (and possibly lengthy) explanation of the reasons on which the decision is based, as convincingly advocated, in recent times, by T Landau or Sir Frank Berman.

It is hardly necessary to point out that the recommendations of Messrs Landau and Berman must be adapted to and reconciled with the circumstances of each case, as well as with the necessity of what may be called ‘Arbitral Diplomacy’.<sup>20</sup> In this regard, *Erasmus*’ wisdom is worth remembering: ‘*Toute vérité n’est pas toujours bonne à dire! Ce qui importe principalement, c’est la façon de la proclamer*’.

This, however, does not diminish the arbitrators’ duty to explain the ‘reasons on which their decisions are based’ in a clear and straightforward manner, so that the parties will be able to understand them, as stated for instance by the *Ad hoc* Committee in the *MINE v Guinea* case. The Decision notes, interestingly, that in the ICSID Convention scheme, annulment under Article 52 is a limited, but also ‘the only remedy against unjust awards’.<sup>21</sup> It adds that the minimum requirement just mentioned ‘is in particular not satisfied by either contradictory or frivolous reasons’. This last qualification seems to imply at least some examination of the degree of relevance or adequacy of the reasons mentioned in the award. This is perhaps in contradiction with another statement in the same *MINE* decision, where the *Ad hoc* Committee stresses that ‘the *adequacy* of the reasoning is not an appropriate standard of review’ because it would almost inevitably (*sic!*) draw the Committee into the domain of appeals.<sup>22</sup>

The language of other ICSID decisions appears clearer and more demanding, rightly it is submitted. For instance, in the *Klöckner* case,<sup>23</sup> the ground of Article 52(1) (lit e) was considered as established ‘in the absence of

<sup>20</sup> Cf P Lalive, ‘De la Diplomatie Arbitrale’ in *Studi in Onore di Umberto Lanza* (vol I, Editoriale Scientifica, Naples 2008) 393 pp, 399.

<sup>21</sup> Para 4.05.

<sup>22</sup> In a Decision on Annulment issued on 19 October 2009, an *Ad hoc* Committee (including Justice Danelius—who was in the majority in the *Lucchetti* case—see n 13, above) rejected challenges—based on manifest excess of power and failure to state reasons—to an award rendered in favour of Ecuador (ICSID Case N° ARB/03/6).

<sup>23</sup> Cf ICSID N° ARB/82/1, Decision on Annulment 3 May 1985, ICSID Review (1986) 126.

a statement of reasons that are “sufficiently relevant”, that is reasonably sustainable and capable of providing a basis for the decision’.

It has been argued by some that an *Ad hoc* Committee called upon to decide whether there was a ‘failure to state the reasons on which the award was based’ was limited to a review of *form*. The authors of ICSID Conventions were supposed to have intentionally excluded any review of *substance*. This view is highly questionable and in any case hardly consistent with the demand for transparency in Investor-State arbitration and for explicit and readily intelligible reasoned awards.

To conclude, the international arbitrators of today and of tomorrow—whether in ‘institutional’ or *Ad hoc* arbitrations—would be well-advised to avoid any complacency in the decision-making process, especially when drafting reasoned awards. They should not rely on their (long) experience, if any, of commercial cases but always keep in mind their exceptional duties and responsibilities in the settlement of Investor-State international disputes (ICSID and non-ICSID).