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Reconsidering ICSID Awards

Tai-Heng Cheng (New York Law School) · Wednesday, May 11th, 2011 · Institute for Transnational Arbitration (ITA), Academic Council

This blog post ventures preliminary views on current critiques about ICSID annulments, and sketches out a few ideas that may merit further exploration. Some recent annulment decisions questioned ICSID awards but did not annul them because the high standard for annulment was not met. There are states and investors who now worry that should they lose an ICSID arbitration, the award may contain errors that cannot be rectified, resulting in a legally binding award that is wrong or unfair. They also worry that that should they win an arbitration, the losing party will resist complying with the award after an *ad hoc* committee criticizes the award but refuses to annul it. Some scholars and practitioners have suggested that a solution to this problem is to revise the ICSID Convention to permit full-blown appeals that would lower the bar for annulment and permit an appellate body to overturn portions of awards that contain errors. Before such a radical change in the ICSID Convention is pursued, perhaps a simpler solution is to permit tribunals to reconsider their awards on a motion by either party after the award is rendered.

The annulment mechanism in ICSID arbitrations has long been the subject of study and critique. Article 52(3) of the ICSID Convention permits an *ad hoc* committee to annul an award only if at least one of the five grounds for annulment set out in Article 52(1) is met. These are: (a) the tribunal was not properly constituted; (b) it manifestly exceeded its powers; (c) an arbitrator was corrupt; (d) there was a serious departure from procedure; or (e) the tribunal failed to state reasons. Appraisals of the first wave of annulment decisions in the 1980s focused on their interpretation of the failure to state reasons as a ground for annulment. Some observers criticized the first annulment decision of *Klockner* for setting too low a bar for annulment when it interpreted the failure to state reasons to include the failure to state "sufficiently relevant" or "reasonably acceptable" reasons. Critics pointed out that this low standard would lead too easily to annulling an award, delaying finality, and increasing the costs of dispute resolution.

This criticism eventually subsided when subsequent annulment decisions raised the bar for annulment. Those decisions stated that awards that provided reasoning that took the reader from point A to point B would not be annulled for failure to state reasons, even if the reasoning was ultimately wrong.

Ironically, the next wave of criticism that presently threatens to engulf the whole ICSID arbitration system is in some ways a reaction against the high bar for annulment. As David Caron observed at his presentation at the New York Law School Global Law & Justice Colloquium in April 2011, some commentators have focused on *ad hoc* committees that criticized the awards but did not

annul the questionable portions of those awards because the high standard for annulment was not reached. For some critics, it is bad enough that tribunals made errors. It is worse that these errors cannot be corrected even after they are discovered.

The concern that an *ad hoc* committee cannot rectify an error when it sees one is in some senses overblown. ICSID arbitration is a privately-sponsored system of dispute resolution built on multiple layers of consent. It rests on the consent of ICSID states to the ICSID Convention, on the consent of host state and investors to contracts and investment treaties that provide for ICSID arbitration, and finally on the decision of investors to bring an ICSID arbitration when it gets into a foreign investment dispute with a host state.

In the first instance of consent, that is, among ICSID states, they decided that ICSID arbitration would not be subject to appeal but only annulment on narrow grounds. In other words, the state parties chose to create a structure of dispute resolution that allowed awards that were wrong on the law or even the facts to remain legally binding under international law. It should therefore come as no surprise that some annulment decisions question awards but do not annul them.

If host states later find themselves on the losing end of a badly-reasoned award without any ability to overturn the award, that is nothing more or less than what they bargained for when they signed the ICSID Convention.

The consent of ICSID states to the limited review of awards does not, however, fully neutralize the criticisms of investors who lost arbitrations and discovered that the *ad hoc* committee did not have the power to correct the errors it found in the award. After all, investors did not directly negotiate or become signatories to the ICSID Convention or investment treaties that stipulated ICSID arbitration as the forum for dispute resolution. Some investors and their lawyers should not now be "estopped" from complaining that the ICSID Convention favors rough justice that is quick and final over awards that get the law precisely "right" after more lengthy and costly proceedings.

Although investors were not the original negotiators of the ICSID Convention, they may now exert pressure to change the ICSID system by deciding not to bring ICSID arbitration where they have a choice of different forums, as provided for in some bilateral investment treaties and foreign investment contracts.

Investors and the international arbitration bar may now conclude that the antinomy that often exists as a practical matter between a quick decision and a correct decision should be resolved in ICSID arbitration in favor of the latter. Host states may decide they have changed their minds about the ICSID Convention and favor wider review of arbitral awards.

If this is the new consensus, amendment of the ICSID Convention may become necessary to permit greater latitude to correct awards. Some scholars and practitioners favor creating an appellate procedure with a standing appellate body that can harmonize ICSID jurisprudence, review the legal conclusions of awards *de novo*, and overturn awards that fall short of the annulment standard so long as they are wrong on the law.

Before creating an appeals process, however, perhaps a more modest change would be to simply permit either party to submit a motion to reconsider the award to the original arbitral. Currently, Article 50 of the ICSID Convention only permits parties to see clarification about the scope and meaning of the award. It does not permit the Tribunal to reconsider the award. However, ICSID states could revise the ICSID Convention to permit an arbitral tribunal to correct a clerical mistake

or a mistake arising from oversight or omission.

This change would be broader than the grounds for correcting awards under the rules of many private commercial arbitration institutions, which generally permit a tribunal to correct only clerical, typographical or computational errors in a final award. However, it would be no broader than the power of a U.S. federal district court to rectify its decision under Rule 60 of the Federal Rules of Civil Procedure.

Granting ICSID tribunals powers to revise their awards that are as wide as those that U.S. federal district court judges have to revise their decisions would give the parties a chance to draw to the tribunal's attention any errors they see in the award. It would permit the tribunal to revisit facts or law they missed in good faith and despite best efforts, and to help the parties understand portions of the award they found opaque. This procedural mechanism would reduce the errors in ICSID awards.

Permitting an ICSID tribunal to reconsider its award also offers several advantages over an appeals process. A motion to reconsider is likely to take less time, involve less briefing, and incur lower attorney's fees and arbitrator expenses than a full-blown appeal. Unlike an appellate body, the tribunal need not study the record and learn about the case from scratch. It also avoids delicate institutional questions about who to appoint to a standing appellate body to ensure that it is representative of the interests and perspectives of worldwide constituents in the ICSID system while maintaining a high quality of arbitrators, and about who should make those appointment decisions.

There are, of course, many policy and practical questions that would need to be answered before any change to the ICSID Convention is made. It is hoped that this brief blog post has helped to put on the table a proposal worthy of further study, that is, to allow the tribunal to reconsider its award on a motion of a party after the award is rendered.

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