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Annulment: What Are the Rules on the Rules?

Mallory Silberman (Arnold & Porter LLP) · Monday, June 10th, 2013

Article 52(4) of the ICSID Convention identifies the provisions of the Convention that apply, *mutatis mutandis*, to annulment proceedings: "[t]he provisions of Articles 41–45, 48, 49, 53 and 54, and of Chapters VI and VII . . . ." While there is wide agreement that an annulment committee may neither "amend or replace the award by its own decision, whether in respect of jurisdiction or the merits" (Schreuer, *Commentary*, Art. 52, ¶ 10), nor "direct a tribunal on a resubmission how it should resolve substantive issues in dispute" (*MTD v. Chile*, ICSID Case No. ARB/03/9 (Decision on Annulment, 21 March 2007), ¶ 54 (Guillaume, Crawford, Ordoñez Noriega)), there does not appear to be consensus on the proper limits under Article 52(4) of an *ad hoc* committee's mandate. In other words, it is not clear whether Convention provisions that are not specifically set forth in Article 52(4) nevertheless are applicable in an annulment proceeding. Committees have addressed the scope and effect of Article 52(4) of the ICSID Convention in various contexts, and their treatment of that provision suggests that more than just the plain language of the Article is relevant to determining its scope.

In the first annulment proceeding in *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, for example, the respondent challenged the president of the *ad hoc* committee, Mr. Yves Fortier, claiming a conflict existed because one of Mr. Fortier's law partners had been engaged by a predecessor of the claimants to advise on certain taxation matters that were entirely unrelated to the ICSID arbitration. Article 57 of the Convention, governing arbitrator challenges, is not among the provisions listed in Article 52(4). Nevertheless, the two remaining members of the committee, Professors James Crawford and José Carlos Fernández Rozas, undertook to consider whether they were competent to decide the challenge. Despite acknowledging that "the catalogue of provisions incorporated by reference in Article 52(4) appears [to be] a considered one," the committee found itself empowered to entertain the challenge (although it then rejected it on the merits).

The committee noted that, unlike the closed list of Convention provisions found in Article 52(4), the corresponding Arbitration Rule (Rule 53) appears to extend *all* of the Arbitration Rules to an annulment proceeding. Since being amended in 1984, Arbitration Rule 53 states: "The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee." Because an earlier iteration of Arbitration Rule 53 had extended application of only certain, enumerated rules to annulment proceedings, the *Vivendi I* committee held that the plenary language adopted in 1984 served "to apply *all* the Arbitration Rules, so far as possible, to annulment proceedings . . . ." *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case

No. ARB/97/3 (Decision on the Challenge to the President of the Committee, 3 October 2001), ¶ 10 (Crawford, Fernández Rozas) (emphasis added).

Thus, while Article 52(4) of the Convention "does not refer to disqualification of the members of *ad hoc* Committees," the committee held that Arbitration Rule 53 nevertheless empowers a committee to evaluate arbitrator challenges. *Id.*, ¶ 3. According to the committee, this reading was consistent with the object and purpose of the Convention, as "*[a]d hoc* Committees have an important function to perform in relation to awards (in substitution for proceedings in national courts), and their members must be, and appear to be, independent and impartial." *Id.*, ¶ 11. Moreover, "the unanimous adoption of Arbitration Rule 53 [in 1984] can be seen, if not as an actual agreement by the States parties to the Convention as to its interpretation, at least as amounting to subsequent practice relevant to its interpretation." *Id.*, ¶ 12.

The committee in *Nations Energy Corporation* et al. *v. Panama* also adopted this reasoning. Although neither party questioned the committee's competence to entertain a challenge to the committee president, the remaining members of the committee nevertheless addressed the issue in their decision. Similar to the *Vivendi I* committee, the *Nations* committee held that Arbitration Rule 53 authorized the committee to evaluate the challenge. *Nations Energy Corporation* et al. *v. Panama*, ICSID Case No. ARB/06/19 (Decision on Proposal for Disqualification of Stanimir A. Alexandrov, 7 September 2011) (Irarrázabal C., Gómez Pinzón).

Despite the potentially far-reaching consequences of the *Vivendi I* and *Nations* approach to Convention Article 52(4) and Arbitration Rule 53, committees have not adopted it in other contexts.

In *Libananco v. Turkey*, for example, the annulment applicant filed a request for provisional measures, requesting that the committee reinstate prior orders by the tribunal that prevented the respondent from engaging in "illicit espionage." *Libananco Holdings Co. v. Turkey*, ICSID Case No. ARB/06/8 (Decision on Applicant's Request for Provisional Measures, 7 May 2012), ¶ 6 (Rigo Sureda, Danelius, Silva Romero). Article 47, on provisional measures, is not among the provisions listed in Article 52(4) of the Convention as applying directly to annulment proceedings. The committee noted that "[t]he fact that Article 52(4) of the ICSID Convention does not refer to Article 47 of the Convention provides considerable support for the view that the Committee has no such competence. Moreover, it is at least doubtful whether the general reference in Article 44 of the ICSID Convention to the Arbitration Rules, as read together with Rules 39 and 53 of the Arbitration Rules, is sufficient to provide the Committee with such competence despite the absence in Article 52(4) of a reference to the specific Article dealing with provisional measures." *Id.*, ¶ 15. However, the committee found it unnecessary to decide the issue given that the applicant had failed to demonstrate that the requested measures were necessary.

In *Victor Pey Casado and President Allende Foundation v. Chile*, the annulment respondents introduced their own annulment claim nearly two years into an annulment proceeding initiated by Chile (the annulment applicant). Had this claim been considered a "counter-claim" for annulment, the committee might have considered whether counter-claims — governed by Article 46 of the Convention and therefore not expressly covered by Article 52(4) — are admissible in annulment proceedings. However, the committee dismissed the claim on other grounds, stating that it had "no hesitation in ruling that it cannot entertain the Claimants' application which is time-barred." *Victor Pey Casado and President Allende Foundation*, ICSID Case No. ARB/98/2 (Decision on Annulment, 18 December 2012), ¶ 346 (Fortier, Bernardini, El-Kosheri).

The cases suggest that while committees in some circumstances will not view Article 52(4) as the "final word" on the scope of their powers, the *Vivendi I* and *Nations* approach based on a broad reading of Rule 53 is not without limit. The precise contours of these provisions remain uncertain, however, and it would not be surprising if future *ad hoc* committees are asked to interpret them in other contexts.

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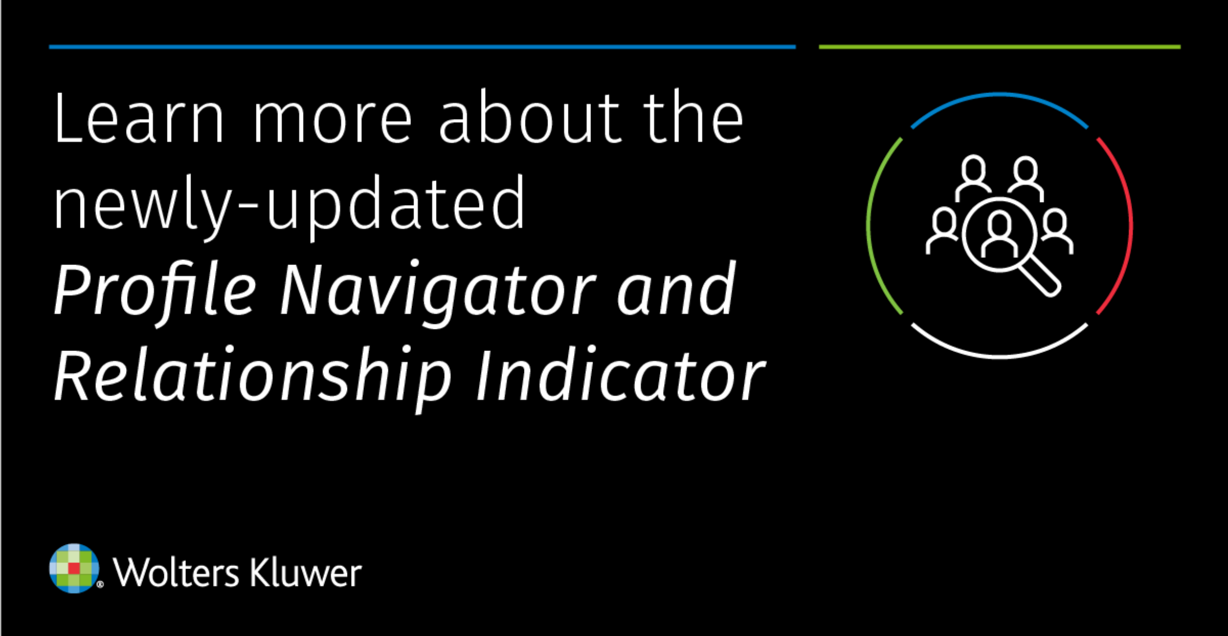

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