LALIVE

Insight | 14 May 2024

Annulment under the ICSID Convention – what's new?

Author

Teresa Queirós
Senior Associate
London

ICSID's latest Background Paper on Annulment shows that various procedural tools are available to *ad hoc* committees – but success rates remain low.

Annulment – one of the few post-award remedies available to parties under the ICSID Convention – is described by ICSID as "an extraordinary recourse intended to uphold fundamental legal principles in ICSID procedures".[i]

In March 2024, ICSID published the third edition of its Background Paper on Annulment (the "Updated Paper"). This surveys the drafting history of the ICSID Convention's annulment provisions, details how the process works in practice and highlights trends in annulment proceedings.[ii]

The Updated Paper covers developments between 16 April 2016 and 31 December 2023 and shows that, although annulment is increasingly sought, success rates remain low.[iii]

- To date, only 5 per cent of challenges have led to the annulment of an award (whether in full or in part) and rates of annulment have fallen.[iv]
- At the same time, *ad hoc* committees are increasingly using procedural tools at their disposal (such as ruling on the manifest absence of legal merit of applications or issuing costs awards) to manage unmeritorious applications.

***I. Ad hoc* committee strikes down part of annulment application at early stage in proceedings.**

Earlier this year, the *ad hoc* committee in *Nachingwea v. Tanzania**[v]*** dismissed part of Tanzania's annulment application on the grounds that it was manifestly without legal merit, within the meaning of Arbitration Rule 41(5).[vi] The committee will now only consider whether the award should be annulled on the ground that the tribunal seriously departed from a fundamental rule of procedure (Art. 52(1)(d) ICSID Convention).[vii]

This is the first time an *ad hoc* committee has partially upheld objections under Arbitration Rule 41(5), which provides that a party may, no later than 30 days after the constitution of the *ad hoc* committee (or tribunal), file an objection that a claim is manifestly without legal merit.[viii] It remains to be seen how often applications under Arbitration Rule 41(5) will succeed in annulment proceedings, given that this is "an exceptional remedy against an exceptional remedy".[ix]

Annulment respondents should take note of this decision, since it could prove to be a powerful procedural tool in the right context, with the potential for saving costs and time in annulment proceedings.

II. Unsuccessful annulment applicants more likely to bear costs.

The principle of 'costs follow the event', while not adopted by all *ad hoc* committees, appears to be guiding a sizable number of decisions on costs in annulment proceedings:

- A majority of *ad hoc* committees have decided that unsuccessful annulment applicants should bear all or a majority of the costs of proceedings.[x]
- In over 40 per cent of unsuccessful annulment applications, *ad hoc* committees ruled that the applicant should bear a portion or all costs of the respondent on annulment.[xi]

While many *ad hoc* committees have not adopted a losing party pays approach, parties should be aware of this possibility when deciding whether to apply for annulment and when responding to an annulment application.

III. Manifest excess of powers most frequently invoked ground for annulment.

A tribunal's manifest excess of powers is still the most invoked – and most successful – ground for annulment. That said, this is by no means an easy course, and there have only been 12 instances of full or partial annulment granted up to the end of 2023.[xii]

A tribunal's "failure to state reasons" and its "serious departure from a fundamental rule of procedure", are also frequently involved grounds – also with low success rates.[xiii]

***IV. Eiser* annulment decision prompts closer look at expert connections.**

The 2020 *Eiser ad hoc* committee famously annulled the underlying award because of undisclosed connections between one of the arbitrators and an expert appearing in the case. The committee found that this failure to disclose connections meant that the tribunal was improperly constituted and amounted to a serious departure from a fundamental rule of procedure.[xiv] Spain's "right of defence and fair trial" was affected, since this lack of disclosure deprived it:

- "of the opportunity to challenge the arbitrator based on these disclosures"; and
- "from seeking the benefit and protection of an independent and impartial tribunal which the right to challenge is intended to provide".[xv]

This decision has already had an impact. The 2024 IBA Guidelines on Conflicts of Interest in International Arbitration now expressly refer to an arbitrator's connections to an expert as a factor that could give rise to doubts about an arbitrator's impartiality and independence. This could arise both where an arbitrator: (i) has been associated with an expert in a professional capacity; and (ii) is instructing an expert in the arbitration in another matter where the arbitrator acts as counsel.[xvi]

V. Stay of enforcement increasingly invoked, but nearly half of applications rejected.

While parties are increasingly applying for a stay of enforcement under Article 52(5) of the ICSID Convention, to date just over half of such requests have been granted by an *ad hoc* committee. In half of the decisions granting a stay, this was granted on the condition of a type of financial security or a written undertaking to that effect.

In addition*, ad hoc* committees have not been shy about terminating stays if the stipulated conditions are not satisfied – this happened in just under half of all cases where a conditional stay was granted.[xvii]

References

[i] See ICSID news release dated 11 March 2024, available at: https://icsid.worldbank.org/news-and-events/news-releases/icsid-publishes-

updated-background-paper-annulment#:~:text=Annulment%20is%20one%20of%20a,legal%20principles%20in%20ICSID%20procedures.

[ii] *Ibid*.

[iii] 79% of all annulment proceedings were started in the last 13 years. Updated Paper, 34.

[iv] The Updated Paper notes that, out of 434 ICSID awards rendered up to 31 December 2023, 194 annulment proceedings have been instituted, with 102 decisions refusing annulment, 42 proceedings discontinued and only 23 awards annulled (7 in full and 16 in part). Updated Paper, 117.

[v] LALIVE acted for the Nachingwea U.K. Limited, Ntaka Nickel Holding and Nachingwea Nickel Limited in the underlying ICSID arbitration.

[vi] Updated Paper, 52.

[vii] *Nachingwea U.K. Limited, Ntaka Nickel Holding Limited and Nachingwea Nickel Limited v. United Republic of* Tanzania, ICSID Case No. ARB/20/38, Decision on Claimants' Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 2 February 2024 ("***Nachingwea***"), 162. The committee dismissed grounds brought under Art. 52(1)(b) (manifest excess) and (e) (failure to state reasons).

[viii] Updated Paper, 52.

[ix] *Nachingwea*, 61.

[x] Updated Paper, 72.

[xi] Ibid, and graphics on page 32.

[xii] Updated Paper, 90.

[xiii] Updated Paper, 107 and 114.

[xiv] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment ("*Eiser* "), 253.

[xv] *Eiser*, 241.

[xvi] 2024 IBA Guidelines on Conflicts of Interest in International Arbitration, Section (3), 3.3.2 and 3.3.6.

[xvii] Updated Paper, 63 and footnote 113.