What are the grounds on which awards are most often set aside?

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Introduction

A. Preliminary remarks

The grounds for setting aside arbitral awards are set out in the law of arbitration at the place of arbitration, the “seat” which establishes the link between an arbitration procedure and a given legal order. A discussion of the subject that I have been invited to present to you, therefore, requires an examination of the law of arbitration of various countries and the practice of the courts that are called upon to review awards rendered under these laws.

Given the large number of countries that have an established arbitration practice and case law on setting aside awards, only a small selection is possible in the short time available to me. I have given priority to the law and court practice of France, Italy and, of course, Switzerland, with occasional excursions to other legal systems.

There is a growing trend in arbitration legislation to distinguish between domestic and international arbitration. In many countries where such a distinction is made, the grounds for application differ for domestic and for international arbitration, the latter being more restrictive than the former. I have limited myself to the setting aside of awards in international arbitration proceedings.

If one compares the grounds for setting aside arbitration awards, in particular those rendered in international proceedings, one observes a clear trend of conversion. The direction of this conversion is given by the UNCITRAL Model Law, and the New York Convention. For my presentation, I have adopted the main grounds for

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2 The qualification of "international" depends on each legal system. It generally depends either on the domicile of the parties at the time of the signature of the arbitration agreement (for example, Switzerland), or on the nature of the transaction at stake (for example, France) or both (Italy);

3 See for example, Italy, CCP, Article 829.2., which provides that the award can be annulled where the arbitral tribunal did not observe the rules of law; this legal provision is applicable only with respect to domestic arbitrations; Switzerland, The Intercantonal Arbitration Convention applicable to domestic arbitrations, Article 36 (f) which states that an award can be set aside if "it was based on findings which were manifestly contrary to the facts appearing on the file, or in that it constitutes a clear violation of law or equity".


5 The New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards;
setting aside, as they are provided for in the countries considered, and grouped them in the order of the UNCITRAL Model Law.

After the discussion of the principal grounds for setting aside of arbitral awards, I suggest addressing two other questions that are closely related to my principal subject, viz. (a) the stages of various levels of court review through which setting aside proceedings may be carried and (b) the possibility for the parties to waive their right of recourse against an award.

B. Are international awards often set aside?

The first observation to be made with respect to the issue of setting aside of international arbitral awards is that as a general rule of practice, the number of annulments is extremely low, compared with the number of awards rendered on the one hand, and the number of appeals lodged, on the other hand.

While it is difficult, if not impossible, to ascertain the number of awards rendered in a specific country, one can see for example that in France, since the modification of the law on international arbitration in May 1981 and until 1990 included, seventy four (74) actions for setting aside international arbitral awards were lodged with the Court of Appeal of Paris. Amongst them, twelve (12) awards were annulled, which represents a percentage of annulment of 16.2%.

We were not able to identify the number of actions lodged in the 90s, but can affirm that the general tendency in France is that the number of annulments of international awards is clearly decreasing.

In Switzerland, sixty-three actions for annulment have been brought since the entry into force of the Private International Law Act in 1989 which regulates international arbitration in its Chapter 12. Only three of the actions – i.e. less than 5% - succeeded and resulted in the annulment of the arbitral award.

I. Legal grounds for annulment and case law on admission

In the Uncitral Model Law and the legal systems which adopted it literally or with modifications, the review of the decision on the merits is excluded⁶. The grounds provided for in Article 34 of the Model Law and those in Article V of the New-York Convention can be circumscribed to the following main topics:

(i) The validity as to the form and substance of the arbitration agreement (hereunder, at I.1.);

⁶ See for example Italy, France, Switzerland;
GIOVANNINI / Grounds on which arbitral awards are most often set aside

(ii) The regularity of the constitution of the arbitral tribunal (hereunder, at I.2);
(iii) The arbitral tribunal's compliance with the mandate conferred to it by the parties (hereunder, at I.3.);
(iv) The public policy (hereunder, at I.4.).

I.1. The validity as to the form and substance of the arbitration agreement

A. International Sources

Pursuant to Article 34.2.(a)(i) of the Uncitral Model Law:

"An arbitral award may be set aside by the court specified in Article 6 only if the party making the application furnishes the proof that:

(i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, the law of this State."

Article V.1.(a) of the New-York Convention provides for the same ground for refusal or recognition or enforcement of the awards if the party furnishes the proof to the competent authority that:

"The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the same agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

B. General Comment

It is widely admitted that the issue of capacity to enter into the arbitration agreement is governed by personal law for individuals and the place of domicile for legal entities. The validity as to form of the arbitration agreement is often governed directly by the law of the seat of the arbitration, either on the basis of Article 7 of the Uncitral Model Law, or in a modified form. One can see in this respect that

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7 See for example, Russia; France; Switzerland; Italy;
8 See for example Law of the Russian Federation on International Commercial Arbitration of 14 August 1993, Article 7.2.;
the New York Convention\textsuperscript{10} and the conditions contained therein with respect to validity as to the form of the arbitration agreement (Article II.2.) are frequently inserted in the national provisions on annulment of arbitral awards\textsuperscript{11}.

As to substance - which can include the issue of the arbitrability of the dispute (see hereunder, at I.4.), the issue of the validity of the international arbitration agreement is viewed differently. Switzerland has chosen to regulate this question by directly providing that the arbitration agreement is valid if it complies with the law chosen by the parties, the law applicable to the principal contract, or with Swiss Law\textsuperscript{12}. French law provides that the validity of the arbitration agreement is subject to the mandatory rules of French law\textsuperscript{13}.

The absence of a valid arbitration agreement is a ground for setting aside arbitral awards in almost all these countries which have adopted entirely or partially the Uncitral Model Law, such as Russia\textsuperscript{14}, Netherlands\textsuperscript{15}, Italy\textsuperscript{16}. France (which adopted its law mainly on the basis of the preceding case law), also treats the invalidity of the arbitration agreement as grounds for annulment\textsuperscript{17}. Switzerland includes this specific issue in the grounds relating to the lack of jurisdiction of the arbitral tribunal\textsuperscript{18} and, hence, the grounds for setting aside the award.

\textbf{C. Case-law}

The Italian legal system requires that the arbitration agreement be made in writing, understood in the sense of a formally executed text by all the parties concerned. An illustrative example is given by a decision of the Italian Supreme Court in 1997\textsuperscript{19}, whereby an arbitral award was declared as null and void due to the absence of an arbitration clause. The nullity of the award was declared notwithstanding the fact that both parties (including the Plaintiff in the arbitration proceedings) had proceeded without objection in the arbitration proceedings.

\footnotesize
\begin{itemize}
\item \textsuperscript{9} Switzerland provides for a rule of direct application, PILA, Article 178; France has excluded any connection in this regard with the lex fori: France, Cour d'appel de Paris, 20 January 1987, Société Bomar Oil N.V., Rev.Arb. 1987 pp.482 sq, note c. Kessedjian;
\item \textsuperscript{10} The New York Convention of June 10,1958 on the Recognition and Enforcement of Foreign Arbitral Awards;
\item \textsuperscript{11} Switzerland, PILA, Article 178.1;
\item \textsuperscript{12} Switzerland, PILA, Article 178.2;
\item \textsuperscript{13} France, Cour de Cassation, 20 December 1993, Comité populaire de la municipalité de Khoms El Mergeb v. Sté Dalico Contractors, JDI 1994 pp.432 sq;
\item \textsuperscript{14} Law of the Russian Federation on International Commercial Arbitration of 14 August 1993, Article 34.2. (1); The Netherlands Arbitration Act of December 1, 1986, CCP, Article 1065.1.(a);
\item \textsuperscript{15} The Netherlands Arbitration Act of 1 December 1986, CCP, Article 1065.1.(a);
\item \textsuperscript{16} Italy, CCP, Articles 838, 829.1.(1) and (4);
\item \textsuperscript{17} France, NCCP, Article 1502.1;
\item \textsuperscript{18} Switzerland, PILA, Article 190.2 (b); see Bull. ASA 1993 pp.68 sq (Switzerland, Tribunal fédéral, 13 October 1992, \textit{Etat X} v. \textit{sociétés Y et Z};
\item \textsuperscript{19} Italy, Corte di Cassazione, 25 January 1997, \textit{Massioni v. IAP Ancona}, Riv.Arb. 1997 pp.529sq;
\end{itemize}


Such formalism is not applied in France or Switzerland. However, in a decision of May 1997 of the Tribunal cantonal of Zürich, (Switzerland) which related to the appointment, by this Court, of an arbitrator, the judicial authority stated that an arbitration clause which simply mentions that the arbitration proceedings must be addressed to a "Swiss arbitration Court", without specifying a place in Switzerland or an arbitral institution, was to be held as null and void.20

I.2. The regularity of the constitution of the arbitral tribunal

A. International Sources

Under Article 34.2 (a)(iv) of the Uncitral Model Law, an arbitral award may be set aside by the court if the party making the application can prove that:

"the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or,

Likewise, recognition or enforcement of the award shall be refused under the New York Convention if proof is brought that:

"The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place"

B. General comment

The irregular constitution of the arbitral tribunal as a general ground for the annulment of the arbitral award is provided for by many laws on arbitration.21

C. Case-law

The issue of irregularity in the constitution of the arbitral tribunal is rarely raised in annulment proceedings. However, case law shows that the issue can be of paramount importance.

21 Russian Act of 1993, Article 34.2.(1); The Netherlands Act of 1996, CCP, Article 1065; France, NCCP, Article 1502.2; Switzerland, PILA, Article 190.2.(a); Italy, CCP, Article 829.1.(2);
In the widely known French decision in the Dutco case\textsuperscript{22}, the arbitral award was annulled by the French Cour de Cassation on both grounds of violation of CCP Articles 1502.2 - Irregularity of the constitution of the arbitral tribunal - and 1502.5 (violation of international public policy, see below, at I.4.). In this case, BKMI, Dutco and Siemens had formed a joint venture containing an ICC Arbitration clause. Dutco initiated arbitration proceedings against the other two companies and appointed its arbitrator. The Defendants, BKMI and Siemens, alleging distinct interests in the proceedings, claimed that they each wanted to appoint their own arbitrator. The ICC International Court of Arbitration disregarded this request, considering that the ICC Rules allowed only the formation of an arbitral tribunal of one or three members. The Defendants were thus compelled by the ICC Court to jointly appoint an arbitrator, which was precisely the ground on which the French Cour de Cassation annulled the award.

Regarding the issue of independence of the arbitrator, the Court of Appeal of Paris – in a decision 3R of November 1997\textsuperscript{23} – annulled an arbitral award on the ground that both arbitrators were also acting as Counsel for the parties that had respectively appointed them. The Court held that, while the Plaintiff could not rely on the fact, known to it, that the arbitrator appointed by it was also its Counsel, the fact that the arbitrator appointed by the Defendant was (also) acting as Counsel was not known to it during the arbitration proceedings.

The Resignation, of an arbitrator after the closing of proceedings and before the arbitral award was rendered led to the annulment of the award by the Cour d’Appel de Paris, in the ATC-CFCO case of July 1997\textsuperscript{24}. Indeed, the Court held that the fact the award was rendered by a two-member tribunal only fell within the grounds for annulment under scrutiny here, namely the irregular composition of the arbitral tribunal.

I.3. The arbitral tribunal's compliance with the mandate conferred to it by the parties

A. International Sources

The violation of its mandate by the arbitral tribunal constitutes a ground for annulment of awards under Article 34.2 (iii) of the Uncitral Model Law if:

\textsuperscript{22} France, Cour de Cassation, 7 January 1992, Sociétés BKMI et Siemens v. société Dutco, Rev.Arb. 1992, pp 470 sq, and note P. Bellet;
\textsuperscript{24} France, Cour d’Appel de Paris, 1 July 1997, Agence Transcongolaise des Communications-Chemins de fer Congo Océan (ATC-CFCO) v. Compagnie minière de l’Ogooué (Comilog), Rev.Arb. 1998 pp 131 sq;
"the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside".

Likewise, the recognition or enforcement of an award shall be refused under the New York Convention (Article V.1 ©) if:

"The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced"

B. General comment

The principle of "ultra petita" or "infra petita" and more generally the violation of its mandate by the arbitral tribunal as a cause for annulment of the international arbitral awards is widely recognised.

C. Case law

The absence of reasoning or contradictions in the reasoning (see, for the analysis of this specific ground, hereunder, at I.4) can be held as violation by the arbitral tribunal of its mandate and thus can entail the annulment of the award. This principle was referred to by the Court of appeal of Paris in 1998 in the Forasol case 26, where the Court however pointed out that this ground for annulment does not include the power for the Court to discuss the relevance of the legal reasoning.

The qualification of a decision as an Order – and thus - failing to submit it to the International Court of Arbitration of the ICC for scrutiny as provided for in the ICC Rules 27, has been held as a violation of their mandate by the arbitral tribunal in the Brasoil case 28 discussed below (at I.4).

26 Italy, CCP, Article 829.4; France,NCCP, Article 1502.3; Switzerland, PILA, Article 190.2 ©;
28 Article 21 of the 1988 ICC Rules;
29 See hereunder, at FN N°39;
I.4. The public policy – including arbitrability of the dispute

A. International Sources

Uncitral Model Law (Article 34.2.(b) (i) and (ii)) provides that the court shall annul an award if it finds that:

"(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the award is in conflict with the public policy of this State"

Again, the Uncitral Model Law's provision corresponds to the ground provided for by the New York Convention (Article V.2 (a) and (b)) which reads as follows:

"Recognition and enforcement of an arbitral award may also be refused if the competent authority ... finds that:

"(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country"

for refusal of recognition or enforcement as follows:

B. General comment

Violation of Public policy is held as a ground for annulment in numerous countries. The concept of public policy in this context is generally international as opposed to the domestic concept of public policy. More specifically, in the Netherlands, the violation of public policy applies in the procedural sense (the fundamental notions of due process and fair trial) as well as in the substantive sense (including non-arbitrability). Italy adopted the concept of public policy limited to the respect of the principle of “auditor et altera pars”. However, there are some cases where international public policy principles were held relevant to the merits of the award scrutinised. France and Switzerland made the violation of due process

29 See Switzerland, PILA, Article 190.2 (e); Germany, CCP, Section 1041 (1) and Section 1044 (2); France, NCCP, Article 1502 (5); The Netherlands Arbitration Act, Article 1065.1 (e); Italy does not provide for the general concept of public policy as a ground for annulment of arbitral awards; however, the principles governing this legal concept can be equally found in other provisions as well as in the case-law; see in this respect, Riccardo Luzzatto, L'impugnazione del lodo arbitrale “internazionale”, Riv. Arb. 1997, pp. 19 sq, 33;
30 Germany, CCP, Section 1041 (1) and 1944 (2); France: the concept was adopted in the decision rendered by the Cour d'Appel de Paris, 27 October 1994, Lebanese traders distributors et consultants LTDC v. société Reynolds, Rev.Arb. 1994, pp.709 sq; Italy, see Riccardo Luzzato, op.cit., p.33 and FN N° 43;
31 Albert Jan van der Berg, op. cit., p. 31;
32 Italy, CCP, Article 829.8;
a specific and additional ground for annulment of the award, while it is commonly admitted that international public policy comprises both principles of fair justice regarding procedure (due process) and relating to the substance of the award.

Substantial international public policy generally comprises principles like "pacta sunt servanda", interdiction of estoppel, good faith in transactions, compensation of damages and the like.

C. Case-law

1. Public policy relating to procedure and violation of due process

1.1. In General

The principle of due process generally comprises the equality of the parties and the right to be heard. It can constitute a distinct ground for annulment of the arbitral award, but is generally included in the concept of international public policy.

1.2. Case law

The principle of due process and specifically the requirement of equal treatment of the parties was given effect in France with the widely known Dutco case dealing with the constitution of the arbitral tribunal. In this multi-party arbitration case, where, as already mentioned, the problem related to the forced appointment of a single arbitrator by the Defendants whose interest were distinct and not compatible, the French Cour de Cassation annulled the award by stating that: "the principle of equality of the parties in the designation of the arbitrators is of public policy: one can waive this right only after the dispute has arisen". Likewise, the Court of Appeal of Paris found that it was contrary to international public policy for the parties to mislead the tribunal by filing forged documents.

Regarding the proceedings as such, the principle of due process has recently led to the annulment, by the Court of Appeal of Paris, of an international arbitral award.

33 France, NCCP, Article 1502.4; Switzerland, PILA, Article 190.2.(d);
34 See Pierre Lalive, Ordre public Transnational (ou réellement international) et arbitrage international, Rev.Arb. 1986, pp 329 sq;
36 Switzerland, PILA, Article 190.2.(d); France, NCCP, Article 1502.4; Italy, CCP, Article 829.1 (9);
In this case, Brasoil had filed a request for review of the arbitral award with the arbitral tribunal on the ground of the Defendant’s alleged fraud. The arbitral tribunal issued an Order denying the existence of this fraud, although the issue had not been discussed in a contradictory debate and despite the fact that Brasoil had not been given the opportunity to prove it. Moreover, the tribunal decided the matter “prima facie”, in violation of the agenda of the hearing which the parties and the tribunal had agreed would be limited to the mere admissibility of the request. The Court of Appeal, having ascertained these facts, held that in doing so, the arbitral tribunal violated the principle of contradictory proceedings (principe du contradictoire) and due process. The Court consequently annulled the award. Likewise, the Swiss Supreme Court annulled an arbitral award in 1990 on the grounds of violation of due process: in this case E., the Supreme Court recalled that due process and the right to be heard were of a formal nature: the fact that a relevant argument of fact was simply ignored by the arbitral tribunal in its award constituted such a violation and led to annulment. In another interesting decision of a Cantonal Court, the principle of the right to be heard was held as violated in the case where the arbitral tribunal withdrew an Order on evidence. This situation was also considered by the Cantonal Court as a violation of substantial public policy, examined hereunder.

In a very interesting decision Excelsior which actually dealt with the issue of enforcement in France of an Italian arbitral award, the Court of Appeal of Paris refused the enforcement on the grounds of violation of due process. The decision of the Court of Appeal, upheld by the French Supreme Court, was based on the fact that one of the arbitrators, who was sitting simultaneously in two parallel arbitration proceedings, had communicated false information to the arbitration tribunal sitting in Italy of a nature to influence its decision relating to its jurisdiction.

2. Public policy relating to the merits

2.1. In General

Violation of public policy as a ground for annulment of the award must affect the result of the award at the time when the action for setting aside is filed.

40 Switzerland, Tribunal fédéral, 25 April 1995, E.v.G., Tribunal arbitral CCI de Zürich, ATF 121 III 331, JdT 1996, pp 611 sq;
41 Switzerland, Tribunal cantonal de la République et Canton de Neuchâtel, Chambre des affaires arbitrales, 23 September 1999, C.SA v. C., Bull. ASA 1999, pp. 565 sq: the Cantonal Court acts here in lieu of the Supreme Court, as provided for in PILA, Article 191.2.;
2.2. Case-law

Frequently invoked in setting aside proceedings, the violation of public policy as recalled here above is rarely admitted by the courts. For instance, between 1981 and 1990, the ground was invoked before the Court of Appeal of Paris not less than forty-six times, but only in two cases did it lead to the annulment of the award.

The first of these two cases decided in 1988\(^45\) concerned the issue of arbitrability. The Court of Appeal of Paris annulled the award on the basis that the arbitral tribunal disregarded the principle belonging to the international public policy order that no claims (poursuites) can be brought against a bankrupt (redressement judiciaire) individual or legal entity person.\(^46\) In the second case decided on 5 April 1990, the arbitral award was set aside on the ground that it had ignored the rules relating to control of investments\(^47\).

During a later period, the Court of Appeal of Paris held on September 30, 1993 stated that an agreement for the purpose of bribery was contrary to public policy\(^48\). Also in 1993, the Court of Appeal of Paris held that there is "a general principle of international public policy of implementation of the agreements in good faith"\(^49\). This was applied in the Swiss case already mentioned (above, at 1.2.) where the Cantonal Court held that the withdrawal of the Order on evidence by the tribunal also constituted a violation of the principle of "pacta sunt servanda" applicable not only to the parties but also to the arbitral tribunal.

B. Other legal grounds for annulment of arbitral awards

(i) **Lack of reasoning of the award**- absent in the UNCITRAL Model Law- is held as a ground for annulment of the arbitral awards in some countries such as the Netherlands\(^50\), France\(^51\) Italy\(^52\). In Italy, the reasoning must be


\(^{45}\) Rev.arb. 1989, pp.473 sq, note P. Ancel;

\(^{46}\) This principle was recalled in France, Tribunal de Grande Instance de Paris, 2 February 1996, *Société Intertradex France v. société Romanian Shipping Company*, Rev. Arb. 1998, pp.577 sq;


\(^{48}\) *European Gas Turbine*, quoted;


\(^{50}\) The Netherlands Arbitration Act 1986, CCP Articles 1065.1.(d) and 1052.2;

sufficient and not inconsistent or contradictory. In a decision of January 26, 1998, the Italian Supreme Court specifically identified the ground as resulting from either a total absence of reasoning or insufficient reasoning for identifying the ratio decidendi. The Swiss Supreme Court held, in a decision of February 1999 that – as a matter of public policy - an arbitral award must not contain intrinsic contradictions. However, the Court does not seen inclined to set aside an award for defective reasoning.

(ii) Contradictory awards: the Italian Civil Code of Procedure contains an express provision stating that if an award is in contradiction with an earlier award having the force of res judicata, a subsequent award may be set aside.

II. Waiver and consequences

In certain legal systems, the parties can waive the right to appeal on some or all grounds, e.g.:

- In Germany: the old German Code Civil of Procedure provided that the only ground that could be waived in advance of an award was the appeal for lack of reasons, regardless of the nationality of the parties. The reform of 1986 does not address the issue, but German case law states that - besides the waiver mentioned - the right to appeal cannot be waived by the parties. It also states that Art.24.2 of the ICC Rules relates solely to internal appellate procedures to a second arbitral tribunal.

- French law does not acknowledge the institution of waiver in the context of international arbitral awards.

- In contrast, Swiss Law provides that, when neither party has a domicile, a place of habitual residence, or a place of business in Switzerland, the parties may, by an express declaration, exclude all or some of appeals against the arbitral award. Such a waiver must be express and most make it clear that the parties were aware of the rights of appeal which they
waive. The waiver does not prevent the parties from resisting enforcement under the New York Convention.

It is worth emphasising that US Courts have held that the waiver does not prevent a party from resisting enforcement under the New York Convention.

III. Degrees of jurisdiction

A. In General

As a matter of principle, the choice of the seat of the arbitration determines the judicial control of the awards. The choice of the seat therefore determines not only the grounds of annulment, but also the number of levels of appeal.

B. National legal systems

In the Netherlands, the law expressly provides that, if the parties so agree, an appeal (in the technical sense, i.e. complete review of facts and law) to a second arbitral tribunal is admissible. (In other legal systems, the possibilities of such an appeal would seem to be self-understood). Annulment proceedings must be brought before the District Court. The decision of the District Court can in turn be appealed to the Court of Appeal and the Supreme Court. In other jurisdictions, like in France, the setting aside of the proceedings can be brought before two distinct jurisdictions, namely the Court of Appeal and the Supreme Court. In Switzerland, the legislator provided for a single jurisdiction - the Federal Supreme Court (Tribunal fédéral) - unless the parties have opted for a single cantonal instance. In that case, no further appeal to the Swiss Supreme Court is admissible.

IV. Conclusion

A. The present trend: the right to be heard

While various grounds are regularly invoked for setting aside arbitral awards, the present trend is clearly that annulments are granted mainly on the grounds of

60 USA, Bergesen v. Joseph Muller Corp., 710 F. 2d. 928 (2d Cir, 1983);
61 The Netherlands Arbitration Act 1986, CCP, Article 1050;
62 The Netherlands Arbitration Act 1986, CCP, Article 1064.2
63 The Netherlands Arbitration Act 1986, Article 1070 a contrario; Albert Jan van der Berg, op. cit., p.31;
64 France, NCCP, Article 1505; Italy;
violation of the right to be heard, be it an independent ground for annulment or part of procedural public policy.

We have seen that the concept comprises in particular (i) the right of a party to present fully its case (ii) the protection against contradictory orders to the detriment of a party, (iii) the right to reasons that makes it possible to understand the ratio decidendi.

B. Concerns of the Future

The suitability and attractiveness of a country as a seat for international arbitration depends to a large degree on the extent to which awards are subject to review by the Courts. Since some time already there is a general trend to restrict the review by the courts; but, as the developments in Belgium have shown, there are limits to this restrictive trend. There seems to be an absolute minimum of control that is indispensable for the proper functioning of the international arbitration process. This gives rise to two more general questions or groups of questions. It is with these questions that I wish to close:

The first group of questions concerns the scope of review and control that is necessary or desirable. Should the control be limited to the grounds provided by the UNCITRAL Model Law and the New York Convention, essentially limited to ascertaining that the arbitral tribunal has the jurisdiction and that it observes the rules of due process? Many of us who have practised international commercial arbitration for some time, have come across cases where even well-reputed arbitrators have rendered awards which appear to be blatantly wrong or grossly unfair. In individual cases such awards can be very frustrating for the parties involved and their counsel. In such cases one wishes to have available the means to correct such grave injustice.

Should this lead us to the conclusion that some review of the merits of the decision should be admitted? One may have doubts that this would be the solution. The risk is high that allowing a review of the merits in some cases of extreme injustice, would open the flood-gates, introducing new delays not only in the cases that were wrongy decided but also in many others where the award displeases the losing party. And then, who knows whether the court that reviews the award on the merits makes a decision that meets the requirements of justice and fairness better than the arbitrators did?

The second question that I would like to leave with you relates to the choice of the place of arbitration. Now that a comparison of many arbitration laws shows a convergence in the grounds for setting aside, does it make a difference, with respect to the critical issue of the review by the courts, whether one selects one country as the place of arbitration rather than another? I think it still does. But the difference lies no longer in the field of the grounds for appeal but in procedural aspects of the
appeal process. How long does it take? How many layers of appeal have to be exhausted until the finality of the award is achieved at last? What is the qualification and the competence of the courts that decide the review of the award and what is their understanding of and experience in international commercial arbitration?

These questions cannot be answered by a mere look at the legislation. They require detailed factual enquiries and assessment and, to a certain extent, are a matter of judgement. That may be the subject for another conference.

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