Arbitral jurisdiction: exploring the boundaries of de novo review

Haersolte, J.J. van

Prof. mr J.J. van Haersolte-van Hof

Arbitral jurisdiction – exploring the boundaries of *de novo* review

Universiteit Leiden

Arbitral jurisdiction – exploring the boundaries of *de novo* review

Inaugural lecture given by

Prof. mr J.J. van Haersolte-van Hof

on the acceptance of her position as professor of

Civil Law

at Leiden University

on Monday 18 September 2023

Universiteit Leiden

1. Introduction

In this lecture I will explore the tension between two principles: the notion that arbitrators have the power and obligation to rule on their own jurisdiction, the so-called principle of "competence-competence"; and the right and obligation of national courts to review jurisdiction, in particular in set-aside or annulment proceedings.

In recent years, case law has developed in many jurisdictions addressing the tension between these two principles. While some 10 years ago, I recall a discussion amongst a panel of judges at the ICCA Miami 2014 Conference expressing doubts about the right of national courts comprehensively to review arbitral jurisdiction. Since then, decisions from a wide range of jurisdictions demonstrate that at least ostensibly, there is fairly broad consensus that court review should be comprehensive and not applied through the prism of the tribunal's decision. This concept is often referred to as *de novo* review.[1]

The scope of review by courts has been increasingly internationalized and harmonized, not in the least as the result of several successful international instruments, notably the New York Convention[2] and the UNCITRAL Model Law.[3] International case law is widely available and extensively referred to in both arbitration proceedings and subsequent court proceedings.

At the same time, the decisions in which courts review arbitral jurisdiction also demonstrate that while in name court review is *de novo*, in fact review is restricted. In practice the review is limited, due to features and requirements of national laws of civil procedure and evidence. Thus, in an increasingly internationalized setting, the knowledge of, and application of, national law is increasingly important.

This lecture does not seek to provide a comprehensive overview of every jurisdiction and every annulment case in which the concept of *de novo* review has been addressed.[4] Nevertheless, by reviewing a selection of notable, recent, decisions from numerous significant and diverse jurisdictions I will describe how courts have juggled their responsibility to review arbitral decisions on jurisdiction, while seeking to respect competence-competence and also doing justice to the demands of efficiency and effectiveness. This fairly compact overview, "around the world in 45 minutes", shows the wide range of instruments and modalities for potentially curbing a review, which in principle, is said to be fulsome and unrestricted.

As a second prong to this discussion, I will review several decisions from the International Centre for Settlement of Investment Disputes (ICSID) which have addressed the same principle, albeit in a slightly different legal setting. In the ICSID system, there is no national court control, and instead ICSID arbitration awards are subject to an internal review system. The grounds for annulment in the ICSID system are somewhat different from the grounds for setting aside contained, for example, in the UNCITRAL Model Law, even though there are significant similarities.[5] In addition, the review is internal and carried out by ICSID committees, rather than by national courts. This begs the question whether any differences in the standard of review as conducted by these committees is caused by the fact that they do not have the powers and responsibilities of national courts or whether they are attributable to the differences in the standard of review imposed by the ICSID Convention.

2. Review by national courts – current case law

Statutory framework

At the outset, it is useful to set out the regulatory and in particular, the statutory framework relevant for the discussion of the level of review. Obviously, national systems differ, which can make it difficult to draw valid and relevant comparisons.

One of the important features of international arbitration, however, is the considerable amount of harmonization worldwide. This is due in large part to the success of the New York Convention. The importance of the United Nations Commission on International Trade Law (UNCITRAL) for the unification and harmonization of arbitration law cannot be overestimated, and as the academic grandchild of Prof. Piet Sanders, I would be amiss not to refer specifically to the important role of Sanders in grandfathering the New York Convention.[6]

The New York Convention, which currently has 172 contracting states,[7] has had a profound effect on the law and practice of arbitration. Notably, because an equivalent instrument for the recognition and enforcement of court decisions and forum selection clauses does not exist.[8] In addition, it has nurtured and fostered a myriad of subsequent international legal instruments, markedly the UNCITRAL Model Law of 1985 and the UNCITRAL Arbitration Rules of 1976.[9] The UNCITRAL Model Law virtually repeats the grounds for refusal of enforcement of the New York Convention in its model for national arbitration legislation. Not only that, the grounds for the refusal of enforcement are aligned with the grounds for setting aside an award.[10] While the number of countries which have adopted the UNCITRAL Model Law is more limited than the number of countries that have acceded to or ratified the New York Convention, the number is significant.[11] Moreover, there are countries which have not adopted the UNCITRAL Model Law but instead have been inspired by the UNCITRAL Model Law (and/or the New York Convention).[12]

Harmonization requires more than a uniform base text. Again, the vision of Sanders, and subsequently the energy and stamina of his academic son Prof. Albert Jan van den Berg must be mentioned in this context. A compilation of national court decisions on the New York Convention was deemed useful, as this would reveal different interpretations and, by making them public, might lead to some degree of harmonization.[13] This resulted in the launch of the ICCA Yearbook in 1976, which provided practitioners with the kind of international resource that was unique at that time, long before electronic resources and the World Wide Web became mainstream.[14]

Article 34(2) of the UNCITRAL Model Law provides that an award may be set aside on the basis of a limited number of grounds only. Including, for example, if: (i) a party to the arbitration agreement was under some incapacity, (ii) the agreement is not valid, (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or, (iv) the award contains decisions on matters beyond the scope of the submission to arbitration.[15] Article 1065(1) of the Dutch Code of Civil Procedure similarly refers to the nonexistence of a valid arbitration agreement or a failure of the tribunal to comply with its mandate.[16] The English Arbitration Act 1996 is worded somewhat differently, but section 67 also provides for recourse to the court to challenge an award for lack of "substantive jurisdiction". This is defined in section 30 to include whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration in accordance with the arbitration agreement.[17]

2.1 Case law – a world tour

The Netherlands

I will start this high-level *tour d'horizon* with a Dutch case, *The Russian Federation v. Yukos Universal Limited (and others)* (*Hoge Raad*).[18] I will do so in some detail, because as we will see, this case is firmly on one side of the spectrum, with the Court interpreting its supervisory role liberally. It is obviously also a reflection of my personal interest and experience but justified given the importance of the Netherlands and in particular The Hague as a frequent seat for international arbitration, especially in investment disputes.[19]

Yukos Oil Company was one of the largest oil and gas companies in the Russian Federation. In the 1990s, Yukos was privatized. In the period from 2003 to 2006, the Russian Federation imposed several substantial tax demands on Yukos, and it was eventually declared bankrupt in 2006.

Three (former) major shareholders in Yukos (hereinafter "HVY") initiated arbitration proceedings against the Russian Federation. The seat of the arbitration, which was conducted on the basis of the UNCITRAL Arbitration Rules, was in The Hague. In its awards of 18 July 2014, the Tribunal ordered the Russian Federation to pay the three shareholders a total of approximately USD 50 billion in compensation.

The Russian Federation applied to the District Court of The Hague to set aside the awards on the basis that the Tribunal lacked jurisdiction. The Tribunal's jurisdiction was based on Article 45(1) of the ECT, which provides that each signatory to the ECT agrees to apply the Treaty provisionally, but only "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*".[20]

In determining its jurisdiction, the underlying Tribunal had considered two interpretations of the limitation clause: namely, whether it must be determined whether the *principle* of provisional application is contrary to Russian law (HVY's position), or whether an *individual provision* of the ECT (in this case Article 26) is contrary to Russian law (the Russian Federation's position). The Tribunal accepted HVY's position as the correct one.[21]

In the annulment proceedings, HVY argued in the alternative, for the first time on appeal, that the limitation clause concerns the question of whether the *provisional application* of one or more provisions of the ECT is incompatible with the law of a Contracting Party, because the legislation of that Contracting Party allows for the provisional application of a treaty in principle, but excludes certain treaty provisions or certain categories or types of treaty provisions from provisional application.[22]

The Court of Appeal held that:

> (iii) It is incompatible with the statutory system that the annulment court may only review whether the arbitral tribunal assumed jurisdiction on the correct grounds and may not find that there was jurisdiction on grounds not addressed by the arbitral tribunal for whatever reason (and wrongly so, in the court's opinion). It would be contrary to effective arbitral proceedings if an arbitral award had to be annulled because the arbitral tribunal used an incorrect argument for taking jurisdiction, when in fact jurisdiction does exist. (consideration[s] 4.4.3 – 4.4)
>
> (iv) The foregoing also means that, in principle, there is no objection if the defendant in the annulment proceedings asserts new arguments that could support the arbitral tribunal's finding that it has jurisdiction. HVY's alternative position with respect to the interpretation of the limitation clause will be considered when determining whether there was no valid arbitration agreement within the meaning of former art. 1065 (1) (a) CCP. (considerations 4.4.5 – 4.4.7)[23]

The Russian Federation then lodged an appeal in cassation with the *Hoge Raad*, which confirmed that annulment review is not limited to arguments raised before the Tribunal:

> On the basis of former art. 1052 (1) CCP, the arbitral tribunal may rule on its jurisdiction itself. However, if the arbitral tribunal finds that it has jurisdiction, that finding is not final. The last word on the jurisdiction of arbitrators lies with the court. This is connected with the fundamental character of the right of access to a court of law.

> If pursuant to former art. 1065 (1), opening words and (a) CCP, it is claimed that the arbitral award should be annulled because there is no valid arbitration agreement, the court should assess whether a valid arbitration agreement exists. This assessment should be made without restraint, and is not limited to the question of whether the arbitrators assumed jurisdiction on the correct grounds. The public interest in effective arbitration implies that the court should not annul the arbitral decision on the sole ground that the arbitral tribunal gave incorrect reasons for its decision that it had jurisdiction to hear the dispute. Therefore, the court is free to decide, on grounds other than those relied on by the arbitral tribunal, that it rightly considered itself competent to take cognizance of the dispute. After all, a different view would mean that a court that finds that the grounds relied on by the arbitral tribunal were insufficient to establish its jurisdiction, but notes that the arbitral tribunal did have jurisdiction on other grounds, would nevertheless have to annul the arbitral award. The consequence of this would be that, even though there is a valid arbitration agreement, the dispute would have to be decided by the ordinary court, unless the parties agree otherwise (former art. 1067 CCP). This would not be consistent with the parties' clear intention to submit their dispute to arbitration rather than to the court system.[24]

In short, the Dutch position is that in annulment proceedings, the court is free to review jurisdiction, at least in so far as this results in a positive finding of jurisdiction of the tribunal, regardless of whether the grounds relied on were invoked before the tribunal itself. There is no indication in the judgment of the court whether, and if so how, such review might be limited or managed. An indirect indication may be found elsewhere in the decision in relation to a different annulment ground regarding whether new allegations of corruption might justify review by the court. In that context, the *Hoge Raad* considered that expansion of an annulment ground is not unlimited and in particular, may be precluded by the concept of due process.[25]

Canada

In a closely related dispute, *Russian Federation v. Luxtona (Luxtona),*[26] the Canadian courts came to a similar conclusion, but not without some "to-ing and fro-ing". The Ontario Court of Appeal ultimately held that in an application to Ontario courts under the UNCITRAL Model Law concerning whether an arbitral tribunal had jurisdiction, the court must decide the jurisdictional question *de novo* and no deference is owed to the tribunal.

What makes the *Luxtona* case particularly interesting is that the Court reached this conclusion after considering the strong international consensus to that effect, and by reference to the "uniformity principle", which holds that it is "highly desirable" for Ontario's international arbitration regime to be interpreted coherently with that of other countries.[27]

The case is also interesting because it involves several (lower) court decisions which are not entirely consistent and also address, more explicitly than the Dutch courts, the question of fact-finding and evidence in court proceedings when reviewing arbitral jurisdiction.

As a preliminary point, it is noteworthy that the Ontario Court of Appeal confirmed that the standard of review is the same, whether the review takes place in the context of review of a tribunal's preliminarily ruling on jurisdiction or at the stage of setting aside proceedings once the award has been issued.[28]

In its application record, the Russian Federation filed evidence that was not before the Tribunal, including expert reports on Russian constitutional law and additional preparatory work documents obtained from the Energy Charter Secretariat.

Luxtona brought a motion to strike out the evidence that was not before the Tribunal. Justice Dunphy, the initial case management judge, dismissed the motion, finding that

the Court on an Article 16(3) application must decide the jurisdictional question *de novo*. Therefore, the Court could hear evidence that was not before the Tribunal.

Justice Dunphy was then reassigned, and Justice Penny took over as case management judge. In the context of an unrelated motion, he stated that he wanted to revisit Justice Dunphy's ruling regarding the new evidence and found that new evidence was not admissible on such an application unless it met the test for fresh evidence on appeal set out in *Palmer v. The Queen (Palmer)*.[29]

The Divisional Court then reversed Justice Penny's decision, and following that decision, the case went up to the Ontario Court of Appeal.

First, the Court rejected Luxtona's argument that the Divisional Court erred in not referring to the competence-competence principle, which it argued requires that parties be given strong incentives to put as much of the record before the tribunal as possible. Otherwise, in Luxtona's submission, the tribunal will not truly be able to rule on its own jurisdiction.

The Court considered that competence-competence serves two primary functions. First, it resolves a legal loophole whereby an arbitral tribunal that finds itself lacking jurisdiction would, *ipso facto*, lose its ability to make a ruling to that effect. And second, it promotes efficiency by limiting a party's ability to delay arbitration through court challenges to the tribunal's jurisdiction.[30] But, the Court added:

> [34] That is as far as the competence-competence principle goes. It does not require any special deference be paid to an arbitral tribunal's determination of its own jurisdiction. Competence-competence is best understood as "a rule of chronological priority" rather than as "empowering the arbitrators to be the sole judge of their jurisdiction".

Referring to the "uniformity principle" set out in Article 2A(1) of the UNCITRAL Model Law, the Court stressed the desirability that Ontario's regimes should be coherent with those of other countries, especially (but not exclusively) those that have also adopted the UNCITRAL Model Law. In that context it referred to English,[31] French,[32] and Singaporean case law[33] and concluded that "[b]*ecause the court retains the final say over questions of jurisdiction, it necessarily follows that the court must be, as a Singapore court put it,* 'unfettered by any principle limiting its fact-finding ability'"[34] and "*a court assessing an arbitral tribunal's jurisdiction is not limited to the record that was before the tribunal. Put another way, an application to set aside an arbitral award for lack of jurisdiction is a proceeding* de novo*, not a review of or appeal from the tribunal's decision*."[35]

Again referring to overseas case law, namely English case law,[36] which was moreover cited in one of the Singaporean decisions,[37] the Ontario Court of Appeal considered that this conclusion comes with a significant caveat that parties should not be encouraged "*to seek two evidential bites of the cherry in disputes as to the jurisdiction of arbitrators*".[38] Thus, while the Court considered that although it was not required strictly to apply the national law standard (the so-called *Palmer* test, developed in a criminal matter)[39], "*where a party has participated fully in the arbitration, its failure to raise a piece of evidence before the tribunal may be relevant as to the weight the court should assign that evidence*".[40]

The Canadian perspective is reflective of "international best practice" and similar to the Dutch approach. It establishes that *de novo* review is required when determining a tribunal's jurisdiction; deference is not made to the tribunal's decision as it is not an appeal. However, this does not give parties free reign to introduce new evidence unchallenged.

England

Effectively, by focusing on these Canadian decisions, we already continued our world tour beyond the boundaries of Canada. English case law was referred to extensively in the *Luxtona* decisions, in part because of the applicable uniformity principle. The *Dallah v. Pakistan (Dallah)* case has become the gold standard of *de novo* review, confirming that, although section 67 of the Arbitration Act 1996 does not state in so many words what the standard is, review will be conducted by way of a full rehearing.[41]

More recent case law continues to confirm this principle and has added some additional coloring. See, for example, the recent decision of the Court of Appeal in *National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Anor*:

> A section 67 challenge involves a rehearing (and not merely a review) of the issue of jurisdiction, so that the court must decide that issue for itself. It is not confined to a review of the arbitrators' reasoning, but effectively starts again; the decision and reasoning of the arbitrators is not entitled to any particular status or weight, although (depending on its cogency) that reasoning will inform and be of interest to the court ([referring to Dallah]).[42]

In the investment arbitration *GPF GP S.A.R.L v. Republic of Poland*[43] the Commercial Court reiterated the general principle that review should not be "*fettered by how arguments were advanced below*" but emphasized the fact that a section 67 application is a rehearing and *"does not mean that the court cannot control the evidence adduced*".[44]

More on England later, particularly regarding the recent Final Report from the Law Commission's Review of the Arbitration Act 1996 and the comments made with respect to amending section 67 of the Act.

Singapore

Singapore has already been mentioned and several Singaporean cases were referred to by the Ontario Court of Appeal in *Luxtona*. What is interesting about these cases is that they are far from straightforward, even the cases relied on by the Ontario Court of Appeal in support of the overarching general principle that review is *de novo* and therefore in principle unfettered.

In *AQZ v. ARA*, the Singapore High Court did – notionally – support a *de novo* review, but caveated this finding significantly by considering that this does not mean that all evidence will be allowed, "*turning every challenge into a complete rehearing*".[45] In this context, the Court referred to the Rules of Court dealing with the conduct of proceedings starting by a so-called Originating Summons, which contain quite granular guidance on the type of evidence that is and is not permissible. The decision sets out in some detail when and why, for example, the transcript of the underlying arbitration would be deemed adequate, or when additional oral evidence and/or cross-examination would be allowed.[46]

Another Singaporean case further illustrates that the formulaic reference to "*de novo*" does not necessarily translate into an unlimited review. In *Sanum Investments Ltd v. Lao People's Republic (Sanum)*,[47] the Court of Appeal overturned the decision of the Singapore High Court, which had ruled in favor of the Government of Laos in a challenge to the jurisdiction of a Singapore seated arbitral tribunal, hearing a claim of the investor Sanum under the PRC-Laos bilateral investment treaty (BIT).

What is interesting and potentially unsatisfactory about this case is that the Court addressed the standard for admitting new evidence in court review proceedings as a preliminary matter, before it addressed the standard of review. The lower court had applied a wider test but the Court of Appeal

considered that both parties accepted that a party which seeks to admit further evidence before the Court of Appeal when it considers the substantive appeal must satisfy the three conditions laid down in *Ladd v. Marshall*:[48] (a) the evidence could not have been obtained with reasonable diligence for use in the lower court; (b) the evidence would probably have an important influence on the result of the case; and (c) the evidence must be apparently credible.[49]

Applying this standard, the Court reviewed whether several intergovernmental *Notes Verbales*, which related to the territorial scope of the BIT and which had not been part of the record of the arbitration, were admissible in the court proceedings. It concluded that some, but not all, of the *Notes Verbales* were admissible.[50]

Only then did the Court address the scope of *de novo* review, and perhaps not entirely surprisingly at this stage, considered that not according deference "*does not mean that all that transpired before the Tribunal should be disregarded, necessitating a full re-hearing of all the evidence ... it simply means that the court is at liberty to consider the material before it, unfettered by any principle limiting its fact-finding abilities*".[51] But arguably, the "damage had already been done" because the material now before the Court included evidence which had not been before the Tribunal.

Given that the Court on its face upheld the *de novo* standard,[52] and that if anything the way in which domestic court rules on evidence, as laid down in *Ladd v. Marshall*, were applied resulted in the admissibility of evidence not used in the arbitration, it is not entirely clear why *Sanum* was invoked as support *against* the concept of *de novo* review, which is apparently what the appellant in *Luxtona* argued.[53]

The second observation about this case is that the Court, rightly in my view, as I will address later, rejected Sanum's contention that the allegedly unique context and circumstances of this case, and in particular the fact that this case involved an investor-state dispute concerning the application of principles of international law, dictated a different standard of review.[54]

Switzerland

We now go back to the European continent, for the last stop on this whistle-stop tour. In *Recofi SA v. Vietnam,* another BIT dispute, the Tribunal declined jurisdiction on the basis that the contracts underlying the claim, namely contracts for the sale of goods, did not constitute an investment.[55] The investor brought an application for annulment in the Swiss courts on the basis of Article 190(2)(b) of the Federal Act on Private International Law,[56] arguing that the Tribunal wrongly denied jurisdiction.

The Swiss Federal Supreme Court considered that while it will review jurisdiction, this does not turn it into a court of appeal. The Court will not go and search for the legal arguments in the award that might justify setting aside – it is for the applicant to draw the Court's attention thereto.[57]

Second, the Court considered that it would generally be bound by the facts contained in the award and the evidence gathered during the arbitration, even if the facts (or evidence) have been established in a manifestly inaccurate manner or in violation of the law, although it kept open the possibility that new facts or evidence might "exceptionally" be considered.[58]

Third, not only did the Court show deference to the Tribunal, in marked contrast to the decisions discussed earlier, it explicitly considered the reputation and experience of the arbitrators in question as a justification for not deviating from their interpretation of a provision of the BIT.[59]

Switzerland is therefore the most obvious outlier on the other side of the spectrum from the Netherlands, with potentially significant deference accorded to the underlying tribunal.

(Interim) conclusions and further developments

This world whistle-stop tour shows that despite the frequent and superficially consistent reference to *de novo* review, the precise meaning and scope of the standard is not uniform. Individual courts and justices come to very different conclusions, even when they ostensibly apply the same review.

Switzerland is on one side of the scale; the Netherlands and possibly Canada on the other. Singapore perhaps best evidences the tension and illustrates that the "proof of the pudding is in the eating". While in principle, the courts there favor *de novo* review, they claw back the court's space by disallowing "two evidential bites of the cherry" – even though in practice, application of national rules of evidence and procedure may result in a situation that significant new evidence is admitted.

More than anything, all these cases show a struggle. Deference, no deference, or some deference? A bemusing difference is the weight allocated to the identity or profile of the arbitrators. The Swiss Federal Supreme Court explicitly referred to the fact that the interpretation of the concept of investment "*came from three arbitrators whose experience in this field and international reputation are acknowledged by both parties*" in support of its unwillingness to disagree with the opinion expressed by these "specialists".[60]

In *Dallah*, however, the English Supreme Court, rightly in my view, considered that the nature of its review was unaffected "*whatever the composition of the tribunal – a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's* 'eminence', 'high standing and great experience'."[61] In this sense, the comment apparently made to the Law Commission of England & Wales by the judiciary in the context of the consultation process on the reform of the English Arbitration Act that a court may gain some assistance from the tribunal's analysis of the jurisdiction issue, "*particularly if the arbitrators were experienced and well regarded*" is troubling.[62] Surely the point is whether the arbitrators in question had any right to contribute an opinion, not their general expertise or reputation – quite apart from the question how that is to be measured?

Before moving to the ICSID system, a few observations in relation to the ongoing reform of the English Arbitration Act 1996. The discussion above of English case law was brief, despite the abundance of case law and the frequent reference in other jurisdictions to English cases, particularly the *Dallah* decision. The reason for this brevity is that the situation in England is in flux. The potential review of section 67 is one of the key topics of discussion in this reform process, triggered by suggestions from "stakeholders" that the Arbitration Act 1996 should be reviewed.[63]

In early September of this year, the Law Commission issued its Final Report and draft bill, having previously issued two consultation papers, each of which addresses the standard of review pursuant to section 67. In favor of reform, the Law Commission identified two major concerns about the current approach of a "rehearing". First, the potential to cause delay and increase costs, and second, what is referred to as the "basic question of fairness"; the concern that a full review in the form of a rehearing would amount to granting a second bite at the cherry.[64]

In its First Consultation Paper, the Law Commission proposed boldly that section 67 be changed to state, in so many terms, that a challenge should be by way of an appeal and not a rehearing. This would effectively overrule the course set out in *Dallah*, which as discussed has become the hallmark of the level of review not only in England but in several other jurisdictions.[65] As a result, if this were changed, the repercussions would extend well beyond England.

Confronted with many and varied responses, the Law Commission changed its tune somewhat, proposing that deference be given to the decision of the tribunal and that the court should not decide the case afresh:[66]

(1) the court should allow the challenge where the decision of the tribunal on its jurisdiction was wrong;

(2) the court should not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;

(3) evidence should not be reheard, save exceptionally in the interests of justice.[67]

Furthermore, rather than providing for these changes to be codified in the legislation, the Law Commission proposes that they be implemented by means of rules of court.[68]

In its Final Report, the Law Commission further amended its proposal and dropped the first ground while retaining the second and third, redrafted as follows:

> Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has taken part in the arbitral proceedings:
>
> (1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence it could not have been put before the tribunal;
>
> (2) evidence will not be reheard, save in the interests of justice.[69]

Moreover, it recommended that rather than codifying these limitations in the act itself, legislation would confer the power to make rules of court to implement them.[70]

If this proposal becomes law, the impact will be significant, given that so many other jurisdictions have sought inspiration from English law. Whether they see *Dallah* as a codification of good practice or because in the particular legal system they are required to take heed to other jurisdiction's laws and in particular English case law (which is often the case for Commonwealth jurisdictions in particular).[71] For practitioners, the change will certainly not simplify the situation. How the rules of court may or may not be adopted remains to be seen, but a reference to secondary regulation is never helpful for external practitioners, quite apart from the question whether law reform by means of a mandate to the courts to adopt regulation is elegant and/or best practice in light of the *trias politica*.[72]

3. The ICSID system

The ICSID system provides for a tailor-made mechanism for the resolution of investor-state disputes. Not all such disputes are resolved by means of ICSID arbitration. As we have seen, several court decisions also involve (contractual) investor-state disputes, which are often conducted in accordance with the UNCITRAL Arbitration Rules.

The ICSID Convention enables a national of a Contracting State, an investor, and another Contracting State, the host state, to submit to ICSID arbitration if they fulfil the jurisdictional requirements of the Convention, laid down in Article 25 of the ICSID Convention.[73] Frequently, the agreement to arbitrate is not contained in an arbitration agreement in a contract, but rather consent is based on – yet another – treaty, such as a bilateral or multilateral investment treaty, which in turn refers to ICSID arbitration.[74]

The uniqueness and the attractiveness of the ICSID system is due to the stand-alone review and enforcement regime of the Convention.[75] Article 52 of the ICSID Convention provides that a party may request annulment of the award on the basis of a limited number of grounds, including that the tribunal manifestly exceeded its powers.[76] Crucially, rather than being reviewed by a national court, however, the request for annulment shall be reviewed by an *ad hoc* annulment committee appointed by ICSID, from the list of Members of ICSID's Panel of Arbitrators.[77]

ICSID's Updated Background Paper on Annulment for the Administrative Council of ICSID provides insight in the annulment mechanism as well as providing illustrations of potential annulment grounds.[78] The drafting history of the Convention shows that annulment was designed to confer a limited scope of review to safeguard against "*violation of the fundamental principles of law governing the Tribunal's proceedings*."[79] ICSID *ad hoc* committees have also affirmed the limited and exceptional nature of the annulment remedy,[80] and the fact that *ad hoc* committees are not courts of appeal and annulment is not a remedy against an incorrect decision.[81]

Article 52 of the ICSID Convention does not contain the equivalent of Article 34(2) of the UNCITRAL Model Law, and there is not an explicit reference to the lack of jurisdiction as a review ground, even though the Convention does codify the principle of competence-competence.[82] Instead, a review of jurisdiction is typically brought under the ground of manifest excess of powers laid down in Article 52(1)(b).[83]

Ad hoc committees have had to grapple with the meaning and impact of the qualifier "*manifest*" in jurisdictional matters. Generally, there is a reasonable consensus in the case law regarding the meaning of the manifest requirement as "easily perceived" or "obvious".[84] Some commentators are of the view, though, that the fundamental or foundational nature of jurisdiction implies that a decision on jurisdiction is an "everything or nothing" decision, and that consequently there is no scope for qualifying the review. In this view, there is or there is no jurisdiction; there is nothing in between, and committees may therefore assess the jurisdiction of tribunals on a *de novo* basis.[85]

The drafting history and ample case law, however, support the position that also in jurisdictional matters, in order to annul an award based on a tribunal's determination of the scope of its own jurisdiction, the excess of powers should be "manifest".[86] To quote Bishop & Marchili:

> In sum, the better position seems to be that ICSID committees do not have the authority to examine a tribunal's jurisdictional decision on a *de novo* basis, as if they were appellate courts or superior tribunals. Although a contrary position is understandable in light of the necessary jurisdictional (consensual) limits on arbitral power, nevertheless, the ICSID Convention has struck the balance in favor of finality, except for manifestly wrong assertions of jurisdiction.[87]

In addition to the limitation that jurisdictional review is not *de novo*, as the *ad hoc* committee in *Bernhard von Pezold v. Zimbabwe* considered, the annulment review is also limited to the record before the tribunal.[88] A few committees have referred to the possibility that in exceptional circumstances new evidence or even new arguments might be admitted,[89] but overall, the limitation to the record has been accepted as a general rule, following from the nature of annulment proceedings.

The significance of this limitation has been demonstrated in several recent annulment cases involving *intra*-EU claims, where parties, typically respondent states, have sought to introduce new documents, including case law of the Court of Justice of the European Union, not forming part of the

original record, largely because they were not yet in existence at that time. Interestingly, some of these materials have been presented as either new legal authorities, and/or instead, as new factual exhibits. Overwhelmingly, committees have held that regardless of the nature and putative importance and relevance of these new materials, they should not become part of the annulment review. An illustrative decision is *Antin v. Spain*, where the *ad hoc* committee held that a tribunal's decision should be evaluated based on the "*arguments and evidence*" raised before the tribunal.[90]

Where does this lead us in relation to the review of arbitral jurisdiction in the ICSID system? Clearly, a much more limited review. The review is limited both conceptually, and because of the restriction to the underlying record. The theoretical possibility alluded to in cases such as *Sempra Energy International v. Argentine Republic* that exceptional circumstances might justify a more fulsome review, has not been applied in practice.

4. Conclusion

Let us go back to the beginning – around the world in 45 minutes. Whereas in the 1970s the proliferation of decisions combined with uniform or similar standards led to harmonization, we seem to have come to the end of an era. The overview of recent cases reviewing arbitral jurisdiction shows a more diffuse picture. While superficially there is still considerable cross-referencing of foreign decisions, these references are somewhat haphazard and formulaic.

Nature of the cases

Is there something in the nature of the cases reviewed, which may help us understand their meaning and impact? An interesting feature is that a significant number of decisions, including court decisions, relate to investment disputes. However, there is nothing to suggest that intrinsically, investment disputes justify a different review standard, or that this renders them unique or exceptional. In fact, as we have seen in Singapore, the Court of Appeal rejected the notion that review in an investor-state arbitration concerning the application of principles of public international law should be different. Rather, as a corollary of the principle that the tribunal's ruling of jurisdiction is to be reviewed *de novo*, the Court held that no deference was to be accorded to the Tribunal's findings.[91]

The mere fact that a court is called upon to interpret international law rather than national law should not make any difference to its standard of review.[92] True, for some lawyers and courts international law may be less familiar, but that does not in and of itself justify different treatment. With the proliferation of investment disputes, many lawyers and courts have had no choice but to immerse themselves in international law, and there is a host of sophisticated and informative cases, as this overview shows. The abundance of court decisions involving investment disputes seems to reflect the proliferation of this type of dispute, as well as a reflection of the likely impact and value of the disputes.

New facts

If not the nature of the cases, is there another trait or characteristic of the cases reviewed that will help us understand the ongoing developments and help establish the boundaries of review? Many cases reviewed discuss the permissible evidence and seek to impose limitations on the review of jurisdiction by means of a limitation of the admissible evidence and thus facts. In doing so, the cases "speak the local language", *i.e.*, they build on mechanisms and features of evidence and procedure that are specific to the jurisdiction involved. For example, referring to the transcript of a hearing[93] as a tool to curb review will not come natural to a continental judge. We have also seen that the standards used may derive from different areas of law, including criminal law.[94]

New law

An interesting question which has not (yet) been clearly, if at all, addressed, is whether a different standard of review may be appropriate if the review is based on new law, rather than on new facts and/or arguments. In the sparse ICSID cases that might have triggered an exploration of this question, the argument of new legal development has only arisen in a specific context, the so-called *intra*-EU exception.

In essence, investors and states fundamentally disagree on the scope, significance and meaning of European law, as opposed to, or potentially as forming part of, international law. In several annulment proceedings, host states have invoked new legal developments[95] to buttress their position, generally without success.[96] Unfortunately, these cases do not provide much structural insight into the question of the position of new law in the review of jurisdiction, for two reasons.

First, and as many tribunals and committees have held, new developments in European law are unlikely to be attributed much significance if the starting point is that European law is deemed irrelevant for the interpretation and decision-making in the particular case.[97]

Second, the documents that states have frequently sought to introduce include not only (case) law but documents of an unclear nature, such as the "*2019 Declaration of the Member States of 15 January 2019 on the legal consequences of the* Achmea *judgment and on investment protection*".[98] Whether deliberate or not, the precise nature of these documents has been fudged in many cases by the applicants who have tried to submit them, not furthering the potential debate on whether in principle, development of new law may justify a more fulsome review.[99]

In the absence of a system of precedence in international arbitration, it is difficult to imagine that new law would generally justify *de novo* review if this were otherwise unavailable. Then again, there might be exceptional situations where this is warranted. The Vienna Convention on the Law of Treaties embodies the principle that a conflict with *ius cogens* or peremptory norms of general international law render a treaty void.[100] Conceivably, the development of new such norms would be an example where *de novo* review might be called for. Given the difficulties of classifying norms as peremptory anyhow, the emergence of new such norms relevant for decision-making in international investment arbitration may be too far-fetched to make this an example of much value. In addition, as will be discussed below, the review in ICSID annulment proceedings is – even – more limited than in court proceedings.

New grounds and arguments

Potentially the most far-reaching review allows applicants to submit new arguments. Interestingly, few cases address this possibility explicitly. Rather the emphasis is on deference to the tribunal's findings (or not) and potentially revisiting the tribunal's findings.[101] At the same time, the key theme of most cases and the general debate is a reluctance to accommodate a second bite of the cherry.[102]

The Dutch *Yukos* case was previously described as an outlier as the Court reviewed jurisdiction based on a third way of interpreting the relevant treaty provision, which had not been entertained in the underlying arbitration by either of the parties. As I explained in a case note on this case,[103] while ostensibly this decision suggests unrestricted liberty to reargue and reposition oneself, this freedom is compensated by various levels of checks and balances imposed by general concepts of the law of civil procedure, and in particular the limitations of appeal and appeal in cassation before the Supreme Court.

Just to name one significant aspect, this case involved the interpretation of the ECT, and the interpretation of a particular

provision thereof pursuant to Russian law. This resulted in questions concerning the characterisation of international law as opposed to foreign law, with the latter being considered neither fact nor law as a matter of Dutch private international law, and subject to different rules of decision-making by the courts and different standards of review in appeal and appeal in cassation.[104] These are limitations and refinements not visible in the statutory law, and not easily identifiable from any particular case or (arbitration) textbook.

If one compares this approach to the Law Commission's proposal in the Final Report, we see a very different type of regulation. Review will also be restricted, but based on an upfront limitation that the court will not entertain new grounds of objection, or new evidence, unless it was not possible with reasonable diligence to put them before the tribunal. The Law Commission supports this proposal by explaining that the prohibition of new evidence is analogous, and finds precedent in, similar contexts in the case law. For example, limiting new evidence on appeal in court proceedings – the same *Ladd v. Marshall* case referred to by the Court of Appeal in Singapore.[105] Here too, therefore, it is case law that shapes the limitations of review, with this limitation found in a case from the 1950s.[106]

The circle is round and ultimately therefore, the range of outcomes may not be as significant as a first reading suggests. Is the glass half-full or is the glass half-empty?

Conclusion

Let me go back to the beginning. Arbitration exists as a stand-alone system parallel to court adjudication; generally, the system is best served by a hands-off approach of the courts, possibly labeled as giving "deference" to arbitration and arbitrators. This is different, however, for review of jurisdiction. Fundamentally, any system which delegates the ultimate review of jurisdiction to arbitral tribunals is based on shaky ground. Even the expertise and repute of the arbitrators in question is not sufficient to overcome the Von Münchhausen trilemma.[107]

Obviously, it matters whether a party has taken part in the initial arbitral proceedings or not. If not, the question of review or rehearing does not arise in the first place.[108] It is less clear to me that conceptually it can or should make a difference whether the court's review results in an extension or limitation of arbitral jurisdiction (as the Dutch Supreme Court held in *Yukos*).[109]

It is the nature of the review and the reviewer and not the nature of the grounds of review that dictate the level and scope of review. There is a fundamental difference between review by national courts and the internal review within the ICSID system. Annulment committees are part of the very same system as the tribunal whose decision they review. There is no conceptual reason not to give meaning to the qualifier "manifest" if and when committees review jurisdiction under the aegis of the "manifest excess of powers" ground. That is not to say that ICSID annulment cases do not provide interesting and potentially relevant source material; rather the findings cannot be extrapolated one-on-one.

Finality has its boundaries. Time limits, grounds for appeal and appeal in cassation all serve to streamline recourse to the courts. Efficiency and effectiveness are laudable and relevant concepts. Most of all, abuse should not be allowed and encouraged.

Our whistle-stop tour shows that terminology is not everything: invoking the so-called *de novo* standard of review does not in and of itself resolve the question: deference, no deference, or some deference? The tour also shows that while we should continue to strive for harmonization, there are limits. The success of the New York Convention was at least in part attributable to its succinctness. What we want to avoid is additional and impenetrable layers of regulation. Query

whether granular, secondary regulations such as court rules will further the goal of fostering international arbitration. Then again, case law which builds on a complex framework of unspoken requirements and limitations only known to experienced litigators specializing in Supreme Court litigation is also unsatisfactory.

Either way, realistically, to practice and teach arbitration, it is not or no longer, if it ever was, sufficient to be versed in the law of arbitration. Arbitration and national rules of civil procedure are intrinsically interwoven. It may be that further harmonization of arbitration can only be achieved by the much more daunting process of harmonization of the law of civil procedure. For now, I thank the University of Leiden for enabling me to conduct research and to teach arbitration as part of the overarching system of civil law, as it properly should be.

Notes

1. Hearing *de novo* is defined in B. A. Garner, *Black's Law Dictionary* (11th edn., 2019), pp. 866 - 867 as "*A reviewing court's decision of a matter anew, giving no deference to a lower court's findings*" or "*A new hearing of a matter, conducted as if the original hearing had not taken place*".
2. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, entered into force 7 June 1959 (New York Convention).
3. 2006 UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law).
4. In principle, I will focus on annulment review and not address review in the context of enforcement proceedings, nor other types of court proceedings such as applications to the court as a preliminary point, for the court to determine the jurisdiction of the tribunal. An exception is made for cases where the difference in standard is discussed explicitly as part of the discussion of the scope of annulment review.
5. For example, Article 52(1)(a) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, entered into force 14 October 1966 (ICSID Convention) provides that a party may request annulment of the award if "*the Tribunal was not properly constituted*" and Article 34(2)(a)(iv) of the UNCITRAL Model Law provides that an award may be set aside if "*the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties*".
6. See P. Sanders, *The History of the New York Convention* in A. J. van den Berg, *ICCA Congress Series No. 9 (Paris 1998)*: *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (1999), pp. 11-14.
7. Of the 172 contracting states, 24 are signatories, see: New York Arbitration Convention, *Contracting States, https://www.newyorkconvention.org/countries* (last accessed 5 September 2023).
8. There is the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention) (Hague Convention) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Recast Brussels Regulation). However, the former is limited as: the number of parties is minimal, it is quite specific, and has many exclusions. The latter has limited territorial scope, applying only to EU member states.
9. See also, J. van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Applications by the Iran-U.S. Claims Tribunal* (1991).
10 Sanders (1999), p. 13.
11. As noted on the United Nations Commission On International Trade Law website, 40 jurisdictions have "*legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006*", https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed 30 August 2023).
12. As noted on the United Nations Commission On International Trade Law website, "[l]*egislation based on or influenced by the Model Law has been adopted in 87 States in a total of 120 jurisdictions*", https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed 30 August 2023).
13. Sanders (1999), pp. 13-14.
14. P. Sanders, *ICCA Yearbook Commercial Arbitration 1976* (1976). Since then, numerous international resources have become available, including the website "1958 New York Convention Guide", which was developed by Shearman & Sterling and Columbia Law School, in cooperation with UNCITRAL, 1958 NY Convention.

org. See also the United Nations Commission On International Trade Law "CLOUT" database containing information on court decisions and arbitral awards relating to UNCITRAL texts https://uncitral.un.org/en/case_law (last accessed 25 August 2023).

15. UNCITRAL Model Law, Art. 34(2).
16. Article 1065, paragraph 1, of the Dutch Code of Civil Procedure.
17. Arbitration Act 1996, s. 67 provides in pertinent part that: "*(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court – (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.*" Section 30 defines substantive jurisdiction as; "*(a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement*."
18. Supreme Court The Netherlands 5 November 2021, ECLI:NL:HR:2021:1879.
19. A.J. van den Berg, *Hoe Gastvrij Is Nederland Voor De Internationale Arbitrage?* (1990), pp. 20-22.
20. Energy Charter Treaty, opened for signature 17 December 1994, entered into force 16 April 1998.
21. Court of Appeal The Hague 18 February 2020, ECLI:NL:GHDHA:2020:234, para. 4.4.1.
22. Court of Appeal The Hague 18 February 2020, ECLI:NL:GHDHA:2020:234, para. 4.4.2.
23. Supreme Court The Netherlands 5 November 2021, ECLI:NL:HR:2021:1879, para. 5.2.1.
24. Supreme Court The Netherlands 5 November 2021, ECLI:NL:HR:2021:1879, para. 5.2.7.
25. Supreme Court The Netherlands 5 November 2021, ECLI:NL:HR:2021:1879, para. 5.1.14, referring to art. 130 of the DCCP.
26. *Russian Federation v. Luxtona Limited*, 2023 ONCA 393 (*Luxtona* CoA); see also M. Seers, *Ontario – Courts must decide arbitral jurisdiction de novo – #748*, 21 June 2023, https://arbitrationmatters.com/ontario-courts-must-decide-arbitral-jurisdiction-de-novo-748/#more-6017 (last accessed 30 August 2023).
27. *Luxtona* CoA, para. 35.
28. This issue is not uncontroversial. Article 16(3) of the UNCITRAL Model Law provides that: "*[i]f the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days of having received notice of that ruling, the court [at the seat] to decide the matter, which decision shall be subject to no appeal*". The Court of Appeal held that nothing in the language of Article 34(2)(a)(i) or (iii) of the UNCITRAL Model Law suggests that the nature of the proceeding under those Articles is any different than one under Article 16(3). Citing G. B. Born, *International Commercial Arbitration*, (3rd edn., 2021), p. 1191, the Court in *Luxtona* CoA at para. 52 held that "*the provisions should be interpreted harmoniously, since the grounds for setting aside a jurisdictional award under Article 34(2)(a)(i) also apply under Article 16(3)*".
29. *Palmer v. The Queen,* [1980] 1 S.C.R. 759 (*Palmer*).
30. *Luxtona* CoA, para. 31.
31. *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (*Dallah*), a unanimous decision of the United Kingdom Supreme Court, in which Lord Collins wrote, at para. 84, that competence-competence "*is no doubt a general principle of law*." However, he also wrote, "*it does not follow that the tribunal has the exclusive power to determine its own jurisdiction* […] *Nor does it follow that the question of jurisdiction may not be reexamined by the supervisory court of the seat in a challenge to the tribunal's ruling on jurisdiction*."
32. The Court of Appeal noted that the Supreme Court in *Dallah* at para. 89 referred to the decision of the French Cour de cassation in the *Pyramids* case (*République Arabe d'Egypte c. Southern Pacific Properties*

Ltd, Civ. 1ére, 6 January 1987, No. 84-17.274) where the French court held that the court's role in assessing the tribunal's jurisdiction is [translation] "*to examine as a matter of law and as a matter of fact all circumstances relevant to the alleged defects*" [Emphasis in the original].

33. *AQZ v. ARA*, [2015] SGHC 49 *(AQZ)*, at para. 57; *Insigma Technology Co. Ltd. v. Alstom Technology Ltd.*, [2008] SGHC 134, at para. 22, aff'd [2009] SGCA 24). The Ontario Court of Appeal also referred to *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd*, [2015] SGHC 15, which was relied on in support of the proposition that the Divisional Court was wrong to say that there was a strong international consensus in favour of *de novo* review. The Ontario Court of Appeal, dismissed this proposition because the weight of international authority supported the Divisional Court's view. The Singaporean position will be further discussed below.
34. *Luxtona* CoA, para. 38.
35. *Luxtona* CoA, para. 40.
36. *Electrosteel Castings Ltd v. Scan-Trans Shipping and Chartering Sdn Bhd*, [2003] 2 All E.R. (Comm) 1064, para. 23 (Q.B.).
37. *AQZ*.
38. *Luxtona* CoA, para. 41 citing *Electrosteel Castings Ltd v. Scan-Trans Shipping and Chartering Sdn Bhd,* [2003] 2 All E.R. (Comm) 1064, para. 23 (Q.B.).
39. *Palmer*.
40. *Luxtona* CoA, para. 42.
41. *Dallah,* para. 26: "*there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under s.67 of the Arbitration Act 1996, just as he would be entitled under s.72 if he had taken no part before the arbitrator.*"
42. *National Iranian Oil Company v. Crescent Petroleum Company International Limited and Crescent Gas Corporation Limited,* [2023] EWCA Civ 826, para. 25.
43. *GPF GP S.A.R.L v. Republic of Poland,* [2018] EWHC 409 (Comm) (*GPF*).
44. *GPF,* paras. 70-71.
45. *AQZ*, para. 49.
46. *AQZ,* paras. 50-54.
47. *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic,* [2016] SGCA 57 (*Sanum* CoA).
48. *Ladd v. Marshall,* [1954] 1 WLR 1489 (*Ladd*).
49. *Sanum* CoA, para. 27.
50. *Sanum* CoA, paras, 34, 112-113.
51. *Sanum* CoA, para. 43 quoting Prakash J in *AQZ v. ARA,* [2015] 2 SLR 972, para. 57.
52. *Sanum* CoA, para. 41.
53. *Luxtona* CoA, paras. 43-44.
54. *Sanum* CoA, paras. 40-41.
55. *Recofi SA v. Socialist Republic of Vietnam,* 4A_616/2015 of 20 September 2016 (*Recofi*).
56. Federal Act of 18 December 1987 on Private International Law, (LDIP; RS 291).
57. *Recofi*, para. 3.1.
58. *Recofi,* para. 3.1.2.
59. *Recofi,* para. 3.4.1.
60. *Recofi,* para. 3.4.1 translated to English.
61. *Dallah*, para. 30.
62. Law Commission, Review of the Arbitration Act 1996 Final Report (Final Report), para. 9.68.
63. Law Commission, Review of the Arbitration Act 1996 First Consultation Paper (First Consultation Paper), para. 1.5.
64. First Consultation Paper, paras. 8.29-31.
65. The Law Commission itself sees this slightly differently, because technically *Dallah* did not involve section 67 and it was a case in which a party had not participated in the arbitral proceedings. See Law Commission, Review of the Arbitration Act 1996 Second Consultation Paper (Second

Consultation Paper), para. 3.120.

66. Second Consultation Paper, para. 3.108.
67. Second Consultation Paper, para. 3.6.
68. Second Consultation Paper, para. 3.124. In stating (or conceding) that after all, a measure of deference to arbitrators can be justified, the Law Commission considered that this might be "[a]*ll the more so, perhaps, if the arbitrator is chosen by the parties or has conspicuous expertise*", Second Consultation Paper, para. 3.61.
69. Final Report, para. 9.97.
70. Final Report, paras. 9.96-9.97.
71. For example, see *Luxtona* CoA, para. 35 referencing the "uniformity principle".
72. J. Ott, *Trias Politica (Separation of Powers),* in A.C. Michalos, *Encyclopedia of Quality of Life and Well-Being Research* (2014), pp. 6742-6743.
73. Article 25 of the ICSID Convention prescribes the scope of jurisdiction of the Centre, imposing, *inter alia*, that the dispute involves an investor and relates to an investment, concepts which are defined in the Convention and developed in case law and literature, see S. W. Schill, *Schreuer's Commentary on the ICSID Convention*, (3rd edn, 2022).
74. See for example Article 28 of the Canada Model Bilateral Investment Treaty (2021) which provides that consent to the submission of a claim to arbitration shall satisfy, among other things, Chapter II of the ICSID Convention.
75. Section 5 of the ICSID Convention addresses the interpretation, revision and annulment of awards and section 6 addresses the recognition and enforcement of ICSID awards, requiring Contracting States to recognize such awards as binding and enforceable and enforce pecuniary obligations imposed by such awards as if it were a final judgment of court of that state.
76. Article 52(1)(b) of the ICSID Convention. As will be noted below, the grounds for annulment contained in Article 52 are not identical to the grounds contained in the UNCITRAL Model Law or the New York Convention. Nevertheless, despite the different wording, the grounds for review are not dissimilar.
77. ICSID Convention, Art. 52(3).
78. ICSID*, Updated Background Paper on Annulment for the Administrative Council of ICSID*, 5 May 2016 (ICSID Background Paper).
79. ICSID Background Paper, para. 71 quoting the preliminary draft ICSID Convention 1963.
80. ICSID Background Paper, para. 72.
81. ICSID Background Paper, paras. 73-74.
82. ICSID Convention, Art. 41.
83. S.W. Schill, *Schreuer's Commentary on the ICSID Convention* (3rd edn., 2022), pp. 1268-1309; See ICSID Background Paper, paras. 75-89. The ICSID Background Paper provides examples of where there may be an excess of powers if a tribunal concludes that it has jurisdiction when in fact jurisdiction is lacking or limited in scope, or the inverse, when a tribunal rejects jurisdiction when jurisdiction exists, para. 87.
84. R. D. Bishop and S. M. Marchili, *Annulment under the ICSID Convention* (2012), paras. 6.25-6.34 (discussing that while most commentators and prevailing ICSID practice illustrates that the term "*manifest*" should be interpreted as meaning easily perceived or obvious, two committees noted that the excess must also be material to the outcome of the case).
85. See Bishop & Marchili, paras. 6.53-6.57 and the literature quoted there. Bishop & Marchili also explain that the structure of the Convention militates against subjecting jurisdictional decisions to a complete reassessment, as confirmed by several *ad hoc* committees, paras. 6.59-6.65.
86. ICSID Background Paper, para. 88. See also Bishop & Marchili, para. 6.59 ("*the '*manifes*t' requirement under Article 52(1) of the Convention makes no exception regarding jurisdictional issues. According to Aron Broches,* '[a]*n* ad hoc Committee constituted to rule on a request for annulment may not substitute its view for that of

the Tribunal as if it were an appellate and hierarchically superior body, which it is not'. *He added:* 'It may annul the award only if the Tribunal's decision on competence was manifestly wrong'." (Footnotes omitted). Recent cases include: *Perenco Ecuador v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment 28 May 2021, para. 94: "*Under the principle of* compétence de la compétence*, a tribunal is the judge of its own competence and has the power to determine whether it has jurisdiction under the parties' arbitration agreement. ICSID annulment proceedings do not avail for a* de novo *review of jurisdiction. That would be tantamount to an appeal. As explained by Prof. Schreuer,* "the stability of the system could be threatened if an *ad hoc* committee could simply substitute its view on jurisdiction for that of the tribunal' (footnote omitted); *Blue Bank international & Trust (Barbados) Ltd v. Venezuela*, ICSID Case No. ARB/12/20, Decision on Annulment 22 June 2020, para. 182 (Spanish original) ("*Although the* Kompetenz-Kompetenz *principle does not preclude that the tribunal's decision on its own jurisdiction be reviewed and the alleged duty of deference cannot be understood is a limitation in that sense either, the Committee is of the opinion that, to the extent that the decision on jurisdiction is reasonable, and furthermore, considering the limited nature of the annulment remedy, the Committee cannot make a* de novo *review of the Tribunal's decision on jurisdiction.*") (free translation); *UP and CD Holding v. Hungary*, ICSID Case No. ARB/13/35, Annulment Decision 11 August 2021 (*UP and CD Holding v. Hungary*), para. 166 ("*Regarding the overall approach to determine whether there is a manifest excess of powers, the Tribunal notes that its task is not to make an appeal type, or much less a* de novo*, review of the Award on the issue at hand. In this sense, the Committee agrees that: [*I*]t is no part of the Committee's functions to review the decision itself which the Tribunal arrived at, still less to substitute its own views for those of the Tribunal, but merely to pass judgment on whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention*.")

87. Bishop & Marchili, para. 6.67.
88. *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID ARB/10/15, Annulment Decision 21 November 2018, para. 239: "*The function of an ICSID* ad hoc committee *is not to review the factual findings of an ICSID tribunal or its decision on the merits, but to determine whether any of the annulment grounds in Article 52 has been established. Nor is an ICSID annulment proceeding a retrial and accordingly it is based on the record before the tribunal*." (footnote omitted).
89. *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Decision 29 June 2010, para. 74; *UP and CD Holding v. Hungary* ("*The Committee agrees that, as a general rule and in light of the nature of an annulment proceeding, it is not authorized to entertain evidence or arguments which were not put forward before the Tribunal. It also agrees that 'it cannot exclude' that there could be some instances where a Committee may need to review or address new evidence or arguments. Looking at the grounds for annulment invoked and the claims put forward, the Committee sees no basis to depart from the general rule. Thus, the Committee will analyze all claims put forward by the Parties based solely on the evidence on the record and arguments presented to the Tribunal*." (footnotes omitted), para. 159.
90. *Infrastructure Services Luxembourg (Antin) v. Spain*, ICSID Case No. ARB/13/31, Annulment Decision 30 July 2021 (*Antin*), para. 159 ("*Thirdly, the Committee notes that the Tribunal's decision should be evaluated on the basis of the arguments and evidence raised before the Tribunal. As the Claimants have pointed out, Spain relies significantly on documents that post-date the Award (e.g. a 2018 European Commission communication, a 2019 declaration by EU Member States; a 2020 opinion by the Advocate-General of the European Court of Justice). In the Committee's view, it would not be appropriate to*

impugn the Tribunal's Award on the basis of authorities or documents rendered post-Award.") (footnotes omitted).

91. *Sanum* CoA, paras. 40-41.
92. A different matter is to what extent national courts will apply customary international law, which is subject to debate, in particular in the United States (G. Born, *Customary International Law in United States Courts* (2017), 92(4) Wash. L. Rev. 1641). More problematic and more relevant is the (perceived) reluctance of U.S. courts to engage with international law, see for example, G. Born, *Customary International Law in United States Courts* (2017), 92(4) Wash. L. Rev. 1641, pp. 1650-1653. U.S. federal courts have also increasingly marginalized both international law and the role of American courts in resolving international disputes.
93. *AQZ,* paras. 50-54.
94. See for example, *Palmer*.
95. See for example: Judgment of the Court of Justice of the European Union of 6 March 2018, *Slowakische Republik v. Achmea BV,* C-284/16.
96. See for example: Cosmo Sanderson, *Italy challenges solar award,* 22 January 2021, https://globalarbitrationreview-com.ezp.sub.su.se/article/italy-challenges-solar-award (last accessed 6 September 2023) and Jack Ballantyne, *Spain fails to halt enforcement of intra-EU award in London,* 25 May 2023, https://globalarbitrationreview-com.ezp.sub.su.se/article/spain-fails-halt-enforcement-of-intra-eu-award-in-london (last accessed 6 September 2023).
97. See for example, *Antin*.
98. Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union.
99. Illustrative in this respect is the *Antin* case, where Spain not only sought to introduce new case law of the Court of Justice of the European Union, but also the "*Declaration of the Member States of 15 January 2019 on the legal consequences of the* Achmea *judgment and on investment protection*" the precise nature and scope of which is obscure, as well as the separate "Commitments of Finland, Luxembourg, Malta, Slovenia and Sweden", and the additional Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union.
100. Vienna Convention on the Law of Treaties, opened for signature on 1969, entered into force 27 January 1980, Art. 53.
101. See for example, *Sanum* CoA, paras. 40-41.
102. Final Report, para. 9.18.
103. J. van Haersolte-van Hof, *Yukos-arbitrage – Vernietiging en herroeping, toetsing bevoegdheid en nog veel meer* (2022) TVA 2022/27, pp. 51-59.
104. L. Strikwerda and S.J. Schaafsma, *Inleiding tot het Nederlands internationaal privaatrecht* (2019), p. 35 (explaining that foreign law is neither fact nor law). Pursuant to the Dutch Civil Code, Article 10:2 courts of first and second instance should apply foreign law *ex officio* and pursuant to Article 25 of the Code of Civil Procedure they should supplement legal grounds based on foreign law. However, pursuant to 79(1) of the Code of Judicial Organization there is no possibility to review foreign law in cassation. International law is not subject to these limitations.
105. *Ladd*.
106. *Ladd*.
107. See *Baron Münchausen pulls himself out of a mire by his own hair*: Münchhausen trilemma, https://en.wikipedia.org/wiki/M%C3%BCnchhausen_trilemma (last accessed 25 August 2023).
108. Final Report, para. 9.18.
109. Supreme Court The Netherlands 5 November 2021, ECLI:NL:HR:2021:1879, para. 5.2.7.

Professor Dr Jacomijn van Haersolte-van Hof

Jackie van Haersolte-van Hof has been the Director General of the LCIA since 1 July 2014. She regularly sits as arbitrator and has handled cases under the ICC, LCIA, UNCITRAL Rules, as well as those of the Netherlands Arbitration Institute (NAI) and UNUM. She is on the ICSID roster of arbitrators and was and is a member of several ICSID Annulment Committees, including as President. She is a professor of civil law, in particular arbitration law, at Leiden University and a member of GAR's editorial board.

Previously, she practised as counsel and arbitrator in The Hague at her GAR 100 boutique HaersolteHof which she set up in 2008 after three years as counsel in the international arbitration group at Freshfields Bruckhaus Deringer in Amsterdam. Before that she was at De Brauw Blackstone Westbroek and Loeff Claeys Verbeke.

Universiteit Leiden