Judicial and Arbitral Decisions, Validity and Nullity

Karin Oellers-Frahm

Content type: Encyclopedia entries

Article last updated: July 2015

Subject(s):
Appeals — International courts and tribunals, decisions — Practice and procedure of international organizations

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

A. Concept and Basic Problems

1. The question of validity and nullity of judicial and arbitral decisions is only one aspect of the general issue of validity and nullity in international law and raises the same problems as the general question regarding the juridical consequences of unlawful acts in international law (→ Nullity in International Law, → Treaties, Validity). These general aspects will not be treated in this article, which will be restricted to the particular aspect of validity and nullity of international judicial and arbitral decisions.

2. Arbitral and judicial decisions are, as a rule, final and without appeal (→ Judgments of International Courts and Tribunals; cf → International Courts and Tribunals, Appeals). This reflects the fact that, in international jurisdiction, there is, in general, only one first and last instance. This is due, inter alia, to the fact that in international law there is no mandatory jurisdiction and, consequently, no hierarchical court system as in national law. In particular, there were not even institutionalized courts and tribunals in the early days of international jurisdiction but only ad hoc arbitral tribunals which are functus officio once the award is rendered.

3. As in national law, not all court decisions in international law are perfect, and there may be some judgments so flawed in their logic or in the process by which factual and legal determinations were made that they should not be allowed to stand and should be set aside. It is a generally accepted view that international award and court decisions are inherently subject to annulment although this issue is primarily discussed and relevant in practice in arbitration. Annulment, even more than revision of judgments (Judgments of International Courts and Tribunals, Revision of) raises the conflict between, on the one hand, the rule that international judicial decisions and arbitral awards are final and without appeal (cf, eg, Art. 54 1899 Hague Convention for the Pacific Settlement of International Disputes ['1899 Hague Convention']); Art. 81 1907 Hague Convention for the Pacific Settlement of International Disputes ['1907 Hague Convention'] ; Art. 60 Statute of the International Court of Justice ['ICJ Statute']) and should definitively settle the dispute, and on the other, the fact that international decisions may also be defective and, thus, may damage the authority of international adjudication as well as the need for stability and predictability in international law. While there is general unanimity as to the principal reasons that may justify the annulment of an international judicial decision, there remains the intricate problem of finding a tribunal with the jurisdiction to entertain an annulment claim, because the tribunal or court which rendered the judgment is evidently not the right forum for examining such a claim, and a 'second instance' generally does not exist in international law, though with some exceptions, eg, international criminal courts.

B. Historical Development

4. The history of the practice of nullifying arbitral awards has its sources in the United States arbitration practice which is much richer than the European one. Whereas in Europe, recourse to arbitration in the 19th century was reluctant and took place on the basis of special agreements signed in respect of each particular case, the US had, between 1847 and the Hague Peace Conference of 1907, signed more than 200 general treaties of arbitration (→ Arbitration and Conciliation Treaties). In a series of such treaties, beginning in 1869, it was provided that the award could be challenged in the event of misclassification of documents or 'error of fact' resulting from the procedure or from the documents. In later treaties, errors of fact without any qualification were recognized as a ground for claiming nullity, and since 1907, there have been arbitration treaties allowing review for 'positive or negative' errors of fact.

5. Against this background, it is not surprising that the US representatives in the Hague Peace Conference of 1907 supported the establishment of a body that can verify the validity of awards. Although the existence of grounds for nullity of arbitral awards had already been recognized by the → Institut de Droit International in 1875 ([1877] 1 AIDI 84–7), no agreement could be reached in the → Hague Peace Conferences (1899 and 1907) on challenging the validity of an arbitral award, the reason being the difficulty in choosing the authority which should adjudicate upon the issue of validity.

6. In the context of the establishment of the → Permanent Court of International Justice (PCIJ), the question of nullity of decisions was only raised with regard to using the Court as the instance that will adjudicate upon the issue of validity of arbitral awards, not with regard to possible grounds for nullity of judgments of the Court itself. The same is valid for the discussions surrounding the creation of the ICJ. This is...
understandable as it would hardly be possible to find an instance that can review judgments of the ICJ unless the powers of the UN Security Council under Art. 94 (2) → United Nations Charter are regarded as a source of the power to review, which, however, seems problematic. Against this background, the discussion of validity and nullity today primarily concerns arbitral awards, and only rarely court judgments.

7 In 1958, the → International Law Commission (ILC) Model Rules on Arbitral Procedure provided for 'Validity and Annulment of the Award' in Arts 35–7, taking up the grounds for nullity as developed in practice. The most effective regulation for challenging arbitral awards can be found in the field of commercial and in particular investment arbitration (→ Commercial Arbitration, International), eg. Art. 52 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) provides for a 6-month time limit, within which not only set the grounds for annulment but also provides for a review body (→ International Centre for Settlement of Investment Disputes [ICSID]; → Investment Disputes; → Investments, International Protection). Other commercial or investment arbitration treaties also provide for annulment of awards. However, the present article will only marginally refer to commercial and investment arbitration systems. In this context, however, it should be briefly mentioned that challenges to commercial arbitral awards before national courts, including mostly interpretation, revision, and appeal, and sometimes also annulment, are provided for not only in international instruments, but also at the national level. There are national provisions, for example, in the Arbitration Act 1996 (UK), Arts 442–50 Code of Civil Procedure (France), the Arbitration Act 1986 (Netherlands), the Arbitration Reform Act 1998 (Belgium), the Private International Law Act 1987 (Switzerland), and the Law of International Commercial Arbitration 1997 (Iran) which are all based on the 1958 UNCITRAL Model Law on International Commercial Arbitration (→ United Nations Commission on International Trade Law [UNCITRAL]). There are also quite a number of private international organizations which provide rules on enforcement and validity of international commercial arbitration. The most prominent among them are the → International Chamber of Commerce (ICC) in Paris founded in 1919, the American Arbitration Association in New York founded in 1926, the London Court of Arbitration created in 1893, and the Stockholm Chamber of Commerce created in 1917. On the international level, the most prominent instruments concerning enforcement (and thus, implicitly, validity) of commercial arbitral awards are the Convention on the Execution of Foreign Arbitral Awards (1927), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), and the European Convention on International Commercial Arbitration (1965) (→ Recognition and Enforcement of Foreign Judgments; → Recognition and Enforcement of Foreign Arbitral Awards).

C. Grounds for Nullity

1. Excess of Power/Lack of Jurisdiction

8 The most important ground for nullity of international acts in general, as well as of awards and decisions, is that of excess of power, which is not readily distinguishable from lack of jurisdiction (→ International Courts and Tribunals). The jurisdiction of an international court or tribunal is defined in the → compromis or arbitration or instituting treaty. Due to the principle of consensual jurisdiction in international law, the arbitrator or judge is expected to remain within the limits of the competence transferred upon him according to the Roman law principle: arbitrer nihil extra compromissum facere potest. Theoretically, lack of jurisdiction relates to the limits of the competence as defined in the underlying treaty or compromis while excess of power concerns the use of the competence conferred upon an international judge. However, this difference is of no relevance in practice, so excess of power and lack of jurisdiction as grounds for annulment can be treated together under the heading of excess of power.

9 Excess of power may appear in different forms; the most common one being when a decision is outside the compromis or underlying treaty, as, eg. in the Argentina-Chile Frontier Case ([1969] 38 LR 10; → Argentina-Chile Frontier Cases), the Honduras-Nicaragua Boundary Dispute of 1990 (F Sibeck (ed) Maténs Nouveau Recueil Général de Traitées (1985–1989) series II vol 35, 560) and the Chemical Tract Case between the US and Mexico of 1910 ([1911] 5 AJIL 782–833). Furthermore, an error relating to jurisdiction may render the decision defective based on the ground of excess of power. This may also occur in a case where jurisdiction is not exceeded but is not completely exercised, as, eg. in the Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Arbitral Award between Guinea-Bissau and Senegal Case), where Guinea-Bissau argued that the tribunal had not completely answered the questions specified out in the compromis (→ Maritime Boundary between Guinea-Bissau and Senegal Arbitration and Case (Guinea-Bissau v Senegal)). In the same line lies the Brčko Final Award (Dispute over Inter-Entity Boundary in Brčko Area (Sipetka v Bosnia and Herzegovina) where the tribunal, according to Dayton Accords of 1995 had to allocate the disputed area to either of the two entities by drawing the inter-ethnic boundary line. In the final award, however, a new institution, a multi-ethnic democratic government known as the ‘Brčko District of Bosnia and Herzegovina’ under the exclusive sovereignty of Bosnia-Herzegovina (as opposed to the Federation of Bosnia and Herzegovina) was created. An error in the comprehension or application of the law which the tribunal is directed to apply may also constitute an excess of power, as, eg. in The Chirchon Steamboat Co Case (United States v Venezuela). Finally, a serious departure from fundamental rules of procedure may be cited in this context as in the → Burumai Oasis Dispute and in the Arbitral Award between Guinea-Bissau and Senegal Case where it was argued that the majority decision was not really supported by the majority. However, the last cited ground is often distinguished from excess of power and listed as a special ground for nullity, as, eg. in the ILC Model Rules on Arbitral Procedure and Art. 52 ICSID Convention.

2. Essential or Manifest Error

10 An essential or manifest error of fact can hardly justify nullity of a decision but may give rise to revision or rectification unless the error was induced by fraud. An error of law, on the other hand, is difficult to establish because of the broad scope for interpretation inherent in a tribunal’s jurisdiction and the discretion of the judge or arbitrator to seek an adequate solution to the dispute. Although, in theory, cases can be imagined where an essential error of law can be found, there is no practice where nullity was invoked on the ground of an essential error of law.

11 This ground for nullity, therefore, is not even listed in the ILC Model Rules on Arbitral Procedure or the ICSID Convention, which instead refer to a serious departure from a fundamental rule of procedure or a failure to state the reasons for the decision (Art. 35 (c) ILC Model Rules on Arbitral Procedure; Art. 52 (1) (d)–(e) ICSID Convention) which, in fact, are more likely to occur, as, eg. in the Arbitral Award between Guinea-Bissau and Senegal Case.

3. Corruption of a Member of the Court or Tribunal

12 International judges, like national judges, are required to be impartial and objective (→ International Courts and Tribunals. Judges and Arbitrators). If this requirement is violated because of the corruption of a member of the tribunal, this constitutes a ground for nullity of the
award. Corruption is, however, not restricted to the payment of money, as, eg. in the Bucarini Oasis Dispute and the United States-Venezuela Claims Commission Act of Caracas (1866), but implies any action which impairs or is likely to impair the impartiality of a member of the court or tribunal (see also → Corruption: Fight against). In the case of deceit in the presentation of a case before the tribunal, revision of the judgment may be a valid alternative to annulment.

4. Invalidity of the Compromises or the Underlying Treaty

13 Traditionally, the invalidity of the instrument conferring jurisdiction on the court or tribunal has been counted among the grounds for nullity. This seems no longer acceptable because if it is advanced by a party and accepted by the tribunal in due time, that is, before the beginning of the proceedings, there will be no award, and if it is advanced after the award has been rendered, this will be regarded as belated and cannot affect the binding character of the compromise. Consequently, this reason is no longer cited in the ICSID Convention although it still appears in Art. 35 (d) ILC Model Rules on Arbitral Procedure.

5. Other Grounds

14 The grounds for nullity set out above are not exhaustive. Others can be cited such as the improper constitution of the arbitral tribunal provided for in Art. 52 (1) (a) ICSID Convention, as well as the failure to state the reasons upon which the award is based or a serious departure from a fundamental rule of procedure, which may, however, be subsumed under one of the ‘classical’ grounds for nullity.

D. Consequences of the Existence of a Ground for Nullity

15 If one of the grounds for nullity is present in an arbitral award or court decision, this fact alone does not necessarily render the award automatically null and void. It may do so, or it may only provide grounds on which one of the parties can allege its invalidity. What is clear, however, is the principle reflected in the Orinoco Steamship Co Case that there should be no unilateral right to assert the nullity of an award, but that nullity can only be found by an independent party. Furthermore, it appears both from the Orinoco Steamship Co Case and from the ILC Model Rules on Arbitral Procedure that nullity affecting part of the award does not necessarily invalidate the whole award, but that there is room for the application in this context of the doctrine of severability. And finally, there seems to be unanimity that claims of nullity have to be brought within a reasonable time, that failure to do so may result in an → estoppel as confirmed by the ICJ in → Case concerning the Arbitral Award Made by the King of Spain on 23 December 1908 (Honduras v Nicaragua) (‘Arbitral Award Made by the King of Spain Case’), a condition which is also laid down in the ILC Model Rules on Arbitral Procedure and which solves the conflict between legal security and the maintenance of defective judicial decisions in favour of legal security. This is in line also with the provisions concerning revision of international awards and decisions which, in general, provide for a certain time limit within which revision can be requested, for otherwise nullity can be and has in fact been claimed (Beagle Channel Arbitration) after the lapse of the time limit for revision (→ Beagle Channel).

E. Means of Annulment

16 Since there is no hierarchial judicial system in international law, the most problematic aspect of nullity concerns the question of the suitable machinery for determining the existence of a ground for nullity. There are several possibilities as to who shall determine the nullity.

17 The least desirable possibility which is, in principle, generally rejected, is that the party alleging nullity should be the judge of its own cause. This is not only inconsistent with the whole concept of international jurisdiction but would also mean that an award or decision is nothing more than a proposal becoming binding only by the subsequent consent of the parties, while international jurisdiction is based on the prior consent of the parties to accept the decision given by the court or tribunal. However, if there is no body that can decide on the claim of nullity, the party asserting nullity is, in fact, judge in its own case.

18 Another possibility is to empower the tribunal which rendered the award to determine the allegations of nullity. The inconvenience of this solution is evident because firstly, it seems improper to charge the tribunal with the examination of its own alleged faults, and secondly, this would require the consent of the parties which is not included in the original compromise—unless explicitly spelled out, which is, however, rather unrealistic—and would hardly be given by the winning party (eg, Orinoco Steamship Co-Case, Affaire Cerutti, Emeric Kulmánù c Etat roumain [Case of the Hungarian-Romanian Land Reform of 1927] (1928) 7 Décisions des Tribunaux Arbitraux Mixtes 168).

19 A third solution provides for an agreement to seise another tribunal to decide the issue. This seems desirable because it is consistent with the nature of international jurisdiction. However, this requires the consent of the winning party which will not be easily reached.

20 A fourth possibility consists in vesting the reviewing tribunal with compulsory jurisdiction. The fact that no such tribunal existed was the reason why the 1899 Hague Convention I and the 1907 Hague Convention I did not provide for rules on nullity. When the PCU was established, a proposal was made to empower it as a court of review for claims of nullity because the PCU was considered as a ‘higher authority’ and guarantor of impartial decisions. This proposal was not accepted. However, it was reflected in bilateral agreements which instituted the PCU as the body competent for claims of nullity. The ILC took up the idea again in ILC Model Rules on Arbitral Procedure Arts 35–7 providing that ‘the ICJ will be competent to declare the total or partial nullity of the award’ if the parties failed to agree upon another tribunal within three months. Although it is not contested that compulsory jurisdiction would be the most effective legal solution to the problem, it cannot overcome the basic principle of international adjudication, namely, the → consent of States: only in the case that the parties have agreed thereto can a tribunal or court review awards challenged by reason of nullity. Such agreement can be made ad hoc in the case of a dispute as to the validity or nullity of an award or in advance by empowering the ICJ or any other tribunal accordingly. In any case, however, consent is required. Whether the consent must explicitly concern the annulment of arbitral awards or whether such competence is included in ‘any question of law’ in an Art. 36 (2) ICJ Statute declaration was controversial. In the ‘Société Commerciale de Belgique’ case, the PCU held that it could not annul or confirm the arbitral award because it was ‘final and without appeal’ according to the arbitration clause and no special mandate for annulment had been given to the PCU by the parties. The ‘Société Commerciale de Belgique’ [Belgium v Greece] (Judgment) PCU Reg Series A8 No 78, 174). In contrast, the ICJ in the Arbitral Award between Guinea-Bissau and Senegal Case found that it had jurisdiction under Art. 36 (2) ICJ Statute since it was not seised to review the material decision by way of appeal or revision but simply with questions on the validity of the award.

21 A solution close to the one referred to under para. 20 above has been instituted by ICSID which provides for a special body within the ICSID arbitration system: in the case of an application for annulment, a three-person ad hoc committee is constituted which has the power to
annul the award in whole or in part (Art. 52 (3) ICSID Convention). However, this solution is feasible only within a self-contained system and not in cases of ad hoc inter-State arbitration.

22 A solution which is increasingly used in commercial arbitration, eg, Art. 34 UNCITRAL Model Law on International Commercial Arbitration, provides for recourse against an arbitral commercial award in municipal courts; a solution which is, however, inadequate for inter-State disputes.

23 Finally, a solution may be found through political means as in the case of the Orinoco Steamship Co Case and the Affaire Cerruti. Although such a solution is unsatisfactory because it is generally dominated by issues of power, it is nevertheless the only means remaining where consent for judicial settlement cannot be reached.

24 On the basis of the preceding remarks, it has to be stated that although there are recognized grounds for nullity, there is no authority in international law to test them, so that the party alleging nullity may act as a judge in its own case as in the Beagle Channel Arbitration as long as it is not willing to submit the question to a new arbitration or to the ICJ, a situation that is not at all satisfactory and which undermines again the damaging effect of the lack, or near lack, of courts with compulsory jurisdiction in international law.

F. Outlook

25 The prospect of annulment materially weakens the award as the final settlement of a dispute with the consequence that annulment proceedings must be closely controlled and only used in exceptional circumstances. As the example of ICSID shows, the elaborate provisions on annulment include the danger that claims for annulment will be too readily brought and annulment accorded even for minor defects, as in the Klöckner Industrie-Anlagen GmbH v United Republic of Cameroon case (1994) 2 ICSID Rep 95 and the → Amco v Indonesia Case. Nevertheless, with the consequences drawn from these cases in the Maritime International Nominees Establishment (MINE) v Republic of Guinea case ([1997] 4 ICSID Rep 79), it seems that the system now functions adequately. The number of requests for annulment has increased significantly to more than 53 by 2012 (ICSIID Background Paper on Annulment, Annex 1) [10 August 2012]. In the more recent proceedings emphasis was laid in particular on the limited grounds for annulment and the fact that annulment procedures do not constitute an appeal (Compania de Aguas del Aconquija SA and Vivenald Universal v Argentine Republic and Azurix Corp v Argentine Republic). Where no provision is made with regard to claims of nullity, submission to the ICJ would be the most convincing solution, which requires, however, the consent of the States concerned which has been present on only two occasions, namely, the Arbitral Award Made by the King of Spain Case and the Arbitral Award between Guinea-Bissau and Senegal Case. If general acceptance of the jurisdiction of the ICJ would increase, claims of nullity would be within the realm of the jurisdiction of the Court, as demonstrated by the Arbitral Award between Guinea-Bissau and Senegal Case, because there is no need for a ‘special’ submission concerning claims of nullity. Such claim is a dispute on ‘any question of law’ in the sense of Art. 36 (2) ICJ Statute because it concerns compliance with international rules on dispute settlement. To give special competence to the ICJ as the body for annulment would fit into the recent proposals to use the ICJ as a review body open to other courts and tribunals in order to maintain the unity and consistency of international law, a proposal which seems, however, not very promising. But such a solution would leave unanswered the question of claims of nullity of the decisions of the ICJ itself. Such claims may seem rather theoretical, however there have been voices arguing the nullity of the decision on jurisdiction in the → Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America), but without seeking a formal decision on that point. As already mentioned it is difficult to imagine another instance, if at all, in which the UN Security Council, a political organ, could decide on claims challenging ICJ decisions.

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