JUS MUNDI

Enforcement of ICSID Awards Around the World: A Guide

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Foreword from the Chief Editor

It is my privilege and pleasure to present to you this expansive work, a project borne out of the collective efforts of Group 1 from the Young International Council for Commercial Arbitration (Young ICCA) Mentoring Cycle, shedding light on the enforcement of International Centre for Settlement of Investment Disputes (ICSID) Awards worldwide.

The ICSID serves as a crucial pillar in the architecture of international investment dispute settlement. Its Awards yield significant impacts that reverberate across the international legal landscape. Our project embarks on a detailed exploration of the enforcement of these Awards, traversing through a diverse spectrum of 28 countries, an effort masterfully orchestrated by a group of passionate and talented young practitioners from various corners of the world.

Every analysis in this volume delivers unique insights into the legal traditions and enforcement mechanisms that characterize each country's approach towards the ICSID Awards. The authors' comprehensive comparative analysis underscores the fascinating interplay between international arbitration and local enforcement mechanisms, revealing the complex dynamics of our global legal ecosystem.

We express our deepest gratitude to these young practitioners for their significant contributions. Their diligence, intellectual rigor, and passion resonate in each chapter, providing the insightful and locally nuanced perspectives that form the bedrock of this project.

The coordination of this ambitious project was deftly managed by Ceyda Sıla Çetinkaya, Denise Jansen, Adebowale Aluko, and Peri Mikayelyan, whose unwavering dedication, exceptional organizational skills, and sharp editorial acumen navigated us through the complex intricacies of this international collaborative project. Special acknowledgment is owed to Svenja Wachtel, whose instrumental role in facilitating this collaboration with Jus Mundi has been invaluable to the fruition of this project.

Our heartfelt appreciation extends to Helene Maïo, Nayla Baly, and Clémence Prévot for their efforts and commitment that have greatly enriched this endeavor.

We invite you to delve into this collection, an illuminating study that sheds new light on the enforcement of ICSID Awards around the world. We believe it will serve as a valuable reference, not only for those actively engaged in the field of international arbitration, but also for anyone interested in the fascinating dynamics of global legal systems.

Finally, we thank you, the reader, for your interest and engagement in this work. We firmly believe that dialogue and shared knowledge form the backbone of our collective journey towards a deeper understanding of international investment arbitration and its nuanced complexities.

Georgios Andriotis - Chief Editor

Georgios Andriotis is the Director of Legal Publishing at Jus Mundi specializing in international law and arbitration. Prior to his current position, Georgios was an Associate in the International Arbitration and Public International Law Group of Shearman & Sterling LLP in Paris for more than six years and a Deputy Counsel at the ICC International Court of Arbitration.

Africa

Nigeria

Implementation of the ICSID Convention in Nigeria

1. Is there any model BIT in place in this country?

No. There is no model BIT in place in Nigeria at the moment.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force)

Yes, Nigeria is a party to the Washington Convention on the Settlement of Investment Disputes between State and Nationals of Other States, 1965 (the ICSID Convention). Nigeria became a signatory to the ICSID Convention on 13 July 1965, ratified the Convention on 23 August 1965, and the Convention came into force on October 14, 1966. Accessed the 3 July 2022, the Convention came into force in Nigeria with the promulgation of Decree No. 49 of 1967, International Centre for Settlement of Investment Disputes (Enforcement of Awards). (Off. Gaz. Extr. 105, Vol. 54, No. 30, 1967, p. A255) now International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, CAP 120, Laws of the Federation of Nigeria, 2004.

3. Has your country made a notification or designation upon signing, ratifying, or any time thereafter?

Notifications Concerning a Class or Classes of Disputes Which the Contracting State Would or Would Not Consider Submitting to the Jurisdiction of the Centre (Article 25(4))

Nigeria has not sent any notification to ICSID concerning the class or classes of disputes it would or would not consider submitting to the jurisdiction of ICSID.

Notifications on Exclusion of Territories (Article 70)

Nigeria has not sent any notification to ICSID excluding the application of the ICSID Convention in any territory within Nigeria.

Designations of Constituent Subdivisions or Agencies and Notifications Concerning the Approval by the Contracting State of Their Consent to ICSID Jurisdiction (Article 25(1) and (3))

The Nigerian National Petroleum Corporation was designated as a constituent subdivision or agency for the purpose of determining who a party is and disputes that can be brought under the jurisdiction of ICSID.

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention against your country?

According to ICSID's recent cases, there are five (5) reported investment treaty arbitrations conducted under the ICSID Convention that have been initiated against Nigeria. Four (4) have been concluded while the remaining one (1) is still pending. The four (4) concluded cases include:

- Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria
- Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria
- Guadalupe Gas Products Corporation v. Nigeria
- Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria

The only pending matter is:

- Eni International B.V., Eni Oil Holdings B.V. and Nigerian Agip Exploration Limited v. Federal Republic of Nigeria

Statistics

5. Are there any particular industries or investment sectors that have led to ICSID claims against Nigeria?

The only economic sector that has led to ICSID claims against Nigeria is the oil and gas sector. (*See* question no. 4 above)

6. Has your country complied with ICSID awards rendered against it?

No ICSID award has been rendered against Nigeria till date. Out of the four concluded ICSID matters instituted against Nigeria, three were discontinued pursuant to Rule 43 of the ICSID Arbitration Rules, while one (Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria) was decided in favor of Nigeria

7. What is the number of ICSID awards that have been enforced in Nigeria?

No ICSID award has been enforced in Nigeria till date.

Enforcement of ICSID awards in Nigeria

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

The Supreme Court of Nigeria has original jurisdiction to entertain requests for enforcement of ICSID awards. The International Centre for the Settlement of Investment Disputes (Enforcement of Awards) Act 1967 CAP I 20, Laws of the Federation of Nigeria, 2004 ('the ICSID Act') provides that an ICSID award shall be enforced in Nigeria as if it were an award contained in a final judgment of the Supreme Court if a copy of such an award, duly certified by the Secretary General of the Center is filed at the Supreme Court of Nigeria by the party seeking its enforcement in Nigeria.

For the court to be competent to entertain an application for the enforcement of an award, the court must have jurisdiction over the award debtor by the debtor being present in Nigeria or having assets sought to be enforced against which must be within Nigeria. To exercise jurisdiction, the court must be satisfied that the enforcement processes have been duly certified by the Secretary-General of the Centre aforesaid and filed in the Supreme Court by the party seeking its recognition for enforcement in Nigeria. See Article 54 of the ICSID Convention and Section 1(1) of the ICSID Act.

Procedural Rules

9. What is the procedure for the enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award (e.g., adversarial vs. *ex-parte*)

By section 1(1) of the ICSID Act, an ICSID award is enforced by filing a copy of the award duly certified by the Secretary General of the ICSID, at the Supreme Court. Upon such filing at the Supreme Court, an ICSID award shall have the same effect as if contained in a final judgement of the Supreme Court.

The implication of this procedure is that the Supreme Court does not conduct any proceeding for the purpose of determining the enforceability of an ICSID award as is the case with foreign or domestic arbitral awards issued pursuant to commercial arbitration proceedings. In essence the filing of the award at the Supreme Court automatically converts the award into a judgement of the Supreme Court which may then be enforced accordingly if the judgment debtor does not willingly comply with the award.

Because the rules envisaged under section 1(2) of the ICSID Enforcement of Awards Act are yet to be enacted, it has been argued by some scholars that it is likely, that the successful party will have to file an Originating Motion pursuant to Order 3 Rule 8 of

the Supreme Court Rules for the enforcement of the award. Order 3 Rule 8 provides that where in any enactment, provision is made for obtaining any relief whatsoever by application to the Court and no procedure is prescribed for obtaining such relief in the enactment or under these Rules, the plaintiff may initiate proceedings for such relief by originating motion. See for instance Emmanuel Ekpenyong 'Recognition And Enforcement Of International Centre For Settlement Of Investment Disputes (ICSID) Awards in Nigeria' 01 March 2018.

Filing a request to enforce an ICSID award pursuant to Order 3 Rule 8 of the Supreme Court in view of the non-existence of procedural rules under section 1(2) of the ICSID Enforcement of Awards Act may make the process adversarial as the respondent must be served with the originating motion. Such a respondent may then seek to participate in the proceedings by filing processes to resist the enforcement of the award.

It is important to note that although the ICSID Act provides that an ICSID award may be enforced by filing same in the registry of the Supreme Court, judgements of the Supreme Court are usually enforced at the lower courts, as the Supreme Court does not have bailiffs of its own for the purpose of enforcing judgements. For instance, section 8(2) of the Supreme Court Act provides as follows:

Any judgment of the Supreme Court shall have full force and effect in the Federation and shall be enforceable by all courts and authorities in any part of the Federation in like manner as if it were a judgment of the High Court of that part of the Federation.

Similarly, Order 8 Rule 17 stipulates that "any decision, including judgment, decree or order, given by the Court may be enforced by the Court or by any other court with subordinate jurisdiction which has been seised of the matter."

The next subject to consider is the various means by which a money judgment may be enforced.

A money judgment of the Supreme Court may be enforced by a writ of fi fa or garnishee proceedings. In enforcing a judgment by a writ of fi fa, the judgment

creditor applies for the issuance of the writ of fi fa by filing Form 3 in the First Schedule of the Sheriffs and Civil Process Act at the Registry of the court where the judgment is to be enforced. Once the writ is issued, the judgment creditor may enlist the service of the bailiffs of court who will enforce the judgement by the seizure and sale of the judgment debtor's physical assets. The proceeds of the sale are then applied towards the satisfaction of the judgment debt.

A money judgement may also be enforced by garnishee proceedings. Enforcement by garnishee proceedings entails the attachment of funds standing to the credit of the judgment debtor in the hands of a third party (garnishee). By this procedure, the judgment creditor files an ex-parte application for a garnishee order nisi to freeze funds standing to the credit of the judgment debtor in the hands of the garnishee(s). If the court grants the order nisi, a return date will be fixed for an inter partes hearing during which the garnishee(s) will be afforded an opportunity to explain why the order nisi should not be made permanent or absolute. If no satisfactory reason is given as to why the funds attached by the order nisi should not be paid over to the judgment creditor, the court will make order absolute and the garnishee will be obliged to pay over the attached funds to the judgment creditor.

10. What are the costs associated with the enforcement of an ICSID award?

To the best of our knowledge, the Chief Registrar of the Supreme Court has not designated a cost assessment regime for this type of filing yet.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

Since an ICSID award is likely to have been made against the Federal Government of Nigeria, a designated government of a state or a state-owned corporation such as the Nigerian National Petroleum Corporation which was designated as a constituent agency on 11 May 1978, the enforcement of an ICSID award in Nigeria is likely to be sought against government owned assets. Where the judgment creditor can identify

physical assets belonging to the government and employs a writ of fi fa against such physical assets, there may be no unusual challenges with the enforcement.

Where however a judgment creditor seeks to obtain an arbitral award sum through garnishee proceedings, practical obstacles such as the need to obtain the consent of the Attorney General of the Federation could arise. By section 84 of the Sheriffs and Civil Process Act, the consent of the Attorney General is required for the attachment, by garnishee proceedings, of money in custody or under the control of a public officer in his official capacity. Failure to obtain such consent renders the garnishee proceedings incompetent and liable to be set aside. See National Insurance Commission v Oyefesobi (2013) LPELR 20660(CA). Strangely the courts have taken the view that section 84 is not unconstitutional. See the cases of See Onjewu v KSMCI (2003) 10 NWLR (Pt 827) 40 and Government of Akwa Ibom State v Powercom (Nig)Ltd (2004) 6 NWLR (Pt. 868) 202. However, in CBN v Intersella 2018 7 NWLR (Pt. 1618) 294, it appears that the Supreme Court discountenanced the provisions of s.84(1) of the Sheriffs Act on the ground that the Attorney General of the Federation was the judgment debtor and had been sued in his capacity as such hence he could not have been expected to seek consent from himself.

It is arguable that it is unconstitutional for any law to place the validity of enforcement proceedings in the hands of a public official who is an agent of the party to such proceedings. Recently, the Supreme Court made an exception to the requirement of consent for funds held in the Central Bank of Nigeria by the government in CBN v Intersella on the ground that the Central Bank of Nigeria is not a public officer within the contemplation of section 84 of the Sheriffs Act. This decision was a departure from previous decisions of the superior court on the status of the CBN. See for instance CBN v Shipping Company Sara B.V (2015) 11 NWLR (Pt.1469) 130 at 135.

Section 84 of the Sheriffs and Civil Process Act may pose an obstacle in respect of the enforcement of money judgments arising out of arbitral awards involving government parties and may serve as a deterrent to investors who may view the aforementioned provision of the Act as conferring an undue advantage on the government and

government owned entities by shielding them from their obligation to satisfy judgment debts.

Another possible obstacle to the enforcement of an ICSID award is the defence of sovereign immunity. Article 55 of the ICSID Convention provides that the requirement of Article 54 which mandates member states to treat ICSID awards in like manner as final judgments of their national courts and enforce such awards accordingly, shall not invalidate any law relating to the immunity of the host state or any foreign government from execution.

While it is settled that the Nigerian government or any other government cannot rely on the defence of sovereign immunity where the dispute arises from the breach of a commercial agreement (see for instance African Reinsurance Corporation v. AIM Consult Ltd [2004] 11 NWLR (Pt 884) 223), it is arguable that where the dispute has arisen from the exercise of a sovereign act by a government or government authority and such a government or entity has not submitted to the arbitral proceedings, such a government or government entity, may raise the defence of sovereign immunity in resisting the execution of an ICSID award in Nigeria.

It is important to state that while the defence of sovereign immunity to investment arbitration awards has been rejected in some important jurisdictions such as the United Kingdom and the United States of America recently (see Micula and others v Romania [2020] UKSC 5; Ioan Micula v Government of Romania No. 19 – 7127 Judgment of the US Court of Appeals for the District of Columbia 19 May 2020), such a defence is yet to be tested in Nigerian courts in the context of investor-state arbitration. Having regard to the persuasive weight of English decisions in Nigeria, it is unclear if the Nigerian court will follow the reasoning of the English court in Micula v Romania or if it will stick to the traditional view that a sovereign state should not be impleaded in a foreign court in a non-commercial matter especially in relation to an investment arbitration award which arose from the exercise of a state's sovereign powers.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

By virtue of the procedure stipulated in the ICSID Enforcement of Awards Act, ICSID awards are enforceable once filed at the Supreme Court. Hence in theory, the successful party is not required to file an application for the recognition and enforcement of the award. Also, the Supreme Court does not convene to hear arguments in relation to the enforceability of the award. There is also no requirement for the other side to be notified that the award has been filed at the Supreme Court. Therefore, one may safely conclude that the party against whom the enforcement of an ICSID award is sought in Nigeria has no recourse against the award apart from the ICSID annulment mechanism in line with the underlying philosophy of the self-contained system of the ICSID Convention in accordance with the provision of Article 53 of the ICSID Convention.

By designating the Supreme Court of Nigeria as the judicial authority responsible for the enforcement of ICSID awards and stipulating that ICSID awards will be enforced in the same manner as a judgment of the apex court, the Nigerian government has gone an extra mile in ensuring the finality of ICSID awards and demonstrating a genuine commitment to the efficacy of the ICSID mechanism.

However, the procedural rules contemplated by section 1(2) of the ICSID Enforcement of Awards Act are yet to be enacted. In view of this, it is likely that a successful party may adopt the practical approach of filing an originating motion pursuant to Order 3 Rule 8 of the Supreme Court Rules in order to convert the award into a judgement of the Supreme Court. It may also be prudent to accompany such an application for summary judgement on the following grounds:

- by Articles 53 and 54 of the ICSID Convention, the party against whom the award is sought to be enforced cannot challenge the award except by way of ICSID annulment proceedings and that the court lacks the jurisdiction to review the award;

- by Article 54 of the ICSID Convention, the Supreme Court as the designated national court for the enforcement of ICSID awards has an obligation to enforce the judgement as though it were a final decision of the court.

By the Rules of the Supreme Court, the Originating Motion and such an application for summary judgement must be served on the party against whom enforcement is sought. Such a party may then raise a defence e.g., sovereign immunity to the enforcement of the award.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

In the ordinary course of events, this situation should not arise as the filing of the award at the Supreme Court automatically converts the award into a judgment of the Supreme Court, which is the highest Court in Nigeria. In the event that the Supreme Court refuses to enforce the award, there is no "judicial recourse" available.

14. Is there any recourse available against a leave for enforcement?

In the ordinary course of events, this situation should not arise as the filing of the award at the Supreme Court automatically converts the award into a judgment of the Supreme Court, without any requirement for the judgment creditor to seek leave.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

No rules have been made with specific regard to the execution of ICSID awards. However, the point had earlier been made that a money judgment of the Supreme Court may be enforced by a writ of fi fa or garnishee proceedings, subject to the limitations highlighted.

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

This issue has not yet arisen in Nigeria, but we are of the view that the general law relating to the non-application of state immunity to assets that are primarily used for commercial purposes should apply.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

Contributors:

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Goodness Ajinomoh is a Private Solicitor, Real Estate and Corporate Consultant, and Managing Partner at Cloudstone LP. He is also a Public Speaker and Connoisseur of Excellence who has written several books, and spoken to international communities, such as the United States Latino American Chamber of Commerce (USLACC) Africa, Ministry of Foreign Affairs, amongst others.

Adebowale Aluko holds an LLB from Obafemi Awolowo University, Nigeria and an LLM from the University of Cape Town, South Africa. He is a Nigerian qualified attorney. He worked in the litigation/arbitration practice at Aluko & Oyebode, a GAR 100 ranked law firm in Lagos, Nigeria for several years. He is currently undergoing a fellowship programme at the Permanent Court of Arbitration at the Hague, Netherlands.

Sudan

Implementation of the ICSID Convention in the republic of Sudan

1. Is there a model BIT in place in your country?

No, the State has not adopted any Model BIT.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates(signed, ratification, entry into force).

Yes, Sudan is a party to the ICSID Convention. Sudan signed the ICSID Convention on 15 March 1967 and ratified on 09 April 1973. The Convention entered into force in Sudan on 09 May1973.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Sudan has designated the General Petroleum Corporation on 19 November 1981 as a subdivision/agency for the consent of Sudan to ICSID Jurisdiction under Article 25(1) and Article 25(3) of the ICSID Convention

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSIDConvention initiated against your country?

There are two reported investment treaty arbitration conducted under the ICSID Convention initiated against the Republic of Sudan. Both cases have been concluded (by virtue of being discontinued).

Concluded Cases:

- PETRONAS International Corporation Ltd and Azhan Bin Ali v. Republic of Sudan (ICSID Case No. ARB/21/47)
- Michael Dagher v. Republic of Sudan (ICSID Case No. ARB/14/2)

5. Are there any particular industries or investment sectors that have led to ICSID claimsagainst your country?

The majority of the ICSID claims against Sudan have arisen out of Real Estate Projects; and the Information and Communication sectors.

6. Has your country complied with ICSID awards rendered against it?

No ICSID awards have been rendered against Sudan.

7. What is the number of ICSID awards that have been enforced in your country?

Since there are no ICSID awards rendered against Sudan, no ICSID award has yet been enforced in Sudan.

Enforcement of ICSID awards in the republic of Sudan

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

Khartoum Province Court is the competent court designated to decide on the request for the enforcement of ICSID Awards.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are therequirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

Sudan has not enacted any domestic law for the enforcement of ICSID awards. Hence, it is likely that the enforcement procedure of the ICSID award to be adopted in Sudan will be similar to the enforcement of foreign arbitral awards under the

Sudanese Arbitration Act 2016 ("2016 Act").

Article 47 of the 2016 Act prescribes certain documentation requirements for the execution of an award. An applicant must submit the following:

a. attachment of a copy of the Arbitration award;

b. end of the date of limitation for instituting the nullity request;

c. notification of the award debtor;

d. the award, or part of it, is not contrary to public order in Sudan. If a part of the award is incompatible with public order in Sudan, the court shall execute the part that is compatible with public order and discountenance the part which is incompatible with public order.

Article 48 of the 2016 Act states that an application for the execution of a foreign arbitral award shall not be made, before Sudanese courts, unless the following conditions are met:

a. the award, or order is passed by an Arbitration Tribunal or centre, was made in line with the rules of international arbitration prescribed by the law of the country, in which it has been passed, and it has been final (no appeal possible), in accordance with such law of the country where the award was made;

b. the opponents in the proceedings, in which the award was made, have been summoned and have been validly represented;

c. the award or order is not inconsistent with an award or order, which has been previously passed by Sudanese courts in respect of the same subject matter;

d. The award is not inconsistent with public order, or morals in Sudan.

e. The country where the award was made recognizes and executes Sudanese court judgements, and arbitral awards made in Sudan in its jurisdiction, or recognizes and executes the judgments under the Convention ratified by Sudan. (Requirement of Reciprocity)

10. What are the costs associated with the enforcement of an ICSID award?

Since, no ICSID award has been enforced in Sudan, it is yet to be seen if there is any cost associated with the enforcement of an ICSID award in Sudan.

11. What other practical considerations may affect the enforcement of an ICSID award in yourcountry?

Since, no ICSID award has been enforced in Sudan, it is yet to be seen if any practical considerations may affect the enforcement of an ICSID award in Sudan.

12. In what way can a party against whom enforcement of an ICSID award is sought to defend itself with a view to preventing enforcement?

Since, no ICSID award has been enforced in Sudan, it is yet to be seen if Sudan will allow the opposition to the enforcement of the ICSID award on public policy grounds. However, since the ICSID award is treated as a foreign award, the requirement for enforcing a foreign arbitral not being against the Public Order of Sudan should be equally applicable to the ICSID awards. This indicates that the State may be able to prevent enforcement of the ICSID award in Sudan on public policy grounds.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

Under Article 49 of the 2016 Act, no order passed by the competent court to execute or not execute the arbitration award can be appealed.

14. Is there any recourse available against a leave for enforcement?

See question no. 13 above.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

Since, no ICSID award has been enforced in Sudan, it is yet to be seen whether the ICSID award can be enforced under the 2016 Act or the Code of Civil Procedure 1983. However, under Article 41 of the 2016 Act, an arbitration award shall automatically be executed, or upon a written request to the competent court, with attached an

authentic copy of the original award.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

The Sudanese Courts have not yet dealt with the defence of state immunity in relation to the execution of the ICSID award.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

There are no other unaddressed aspects.

Contributor:

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He is an Accredited Tribunal Secretary empaneled with HKIAC and ACICA. He holds the position of *Vice Chairperson of the Young Member's Group* at AIADR. He is the co-founding chair of India Very Young Arbitration Practitioners (India VYAP) and ArbChat. He was also announced Winner of first-ever Arbitration Shark Tank at ICCA Congress 2022 Edinburgh and Winner of Wolter Kluwer Arbitration Blog Quiz at ICCA Congress 2022 Edinburgh.

APAC Region

Australia

Implementation of the ICSID Convention in Australia

1. Is there a model BIT in place in your country?

Yes, there is an Australian Model Investment Promotion and Protection Agreement (IPPA). By way of example, this model text can be seen in the Australia-Uruguay IPPA.

2. Is your country a party to the ICSID Convention? If so, please include the relevant date (signed, ratification, entry into force).

Yes, Australia signed the ICSID Convention on 24 March 1975. Australia subsequently ratified the ICSID Convention on 2 May 1991, and the convention later entered into force on 1 June 1991.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Yes, Australia has since made two designations. On 2 May 1991, Australia designated, pursuant to Articles 25(1) and (3) of the ICSID Convention, that each of its states and territories (being New South Wales, Victoria, South Australia, Queensland, the Northern Territory and the Australian Capital Territory) were each a "constituent subdivision or agency" of Australia. Moreover, Australia has designated, pursuant to Article 54(2) of the ICSID Convention, that the Supreme Courts of each of the aforementioned states and territories are each "competent for the recognition and enforcement of awards rendered pursuant to the convention." (See ICSID publication, "Contracting States and the Measures Taken By Them (May 2022)".

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

Nil. Four reported investment treaty arbitrations have been instigated against Australia. Two were instituted under the UNCITRAL Rules: Philip Morris Asia Limited v. The Commonwealth of Australia, and Power Rental Asset Co Two LLC (AssetCo), Power Rental Op Co Australia LLC (OpCo), APR Energy LLC v. the Government of Australia. Two were commenced under the AANZFTA: Zeph Investments Pte. Ltd. v. Commonwealth of Australia (II) (Zeph II), and Zeph Investments Pte. Ltd. v. Commonwealth of Australia (III) (Zeph III).

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

No ICSID claims have been made against Australia. For the two investment treaty arbitrations initiated against Australia under the UNCITRAL Rules:

- the economic sector in Philip Morris was manufacturing - in particular, the manufacture of tobacco products; and
- the economic sector in APR Energy was administrative and support service activities. In particular, rental and leasing activities.

For the two investment treaty arbitrations initiated against Australia under the AANZFTA, Zeph II and Zeph III, the economic sector was mining. In particular, metal ores.

6. Has your country complied with ICSID awards rendered against it?

No ICSID awards have been rendered against Australia. Of the four investment treaty arbitrations initiated against Australia under either the UNCITRAL Rules, or the AANZFTA, only one - Philip Morris - has concluded, and it was concluded in favor of the State. No trends can therefore be discerned.

7. What is the number of ICSID awards that have been enforced in your country?

There have been two ICSID awards enforced in Australia. The first was in the case of Lahoud v The Democratic Republic of Congo [2017] FCA 982 where both an award and a decision on a request for annulment were enforced. . The authors are not aware of the enforcement of any other awards at the time of writing but note that there are several enforcement applications pending before the Federal Court against Spain brought by investors including Eiser Infrastructure Services Luxembourg S.a.r.l. and Energia Termosolar B.V., Blasket Renewable Investments LLC, 9Ren Holding S.a.r.l., Watkings Holding S.a.r.l, and NextEra Energy Global Holdings B.V. (see Federal Court file numbers NSD602/2019, NSD2169/2019, NSD365/2020, NSD449/2020 and NSD415/2023).

Enforcement of ICSID awards in the republic of Australia

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

The courts competent to decide on a request for enforcement are (a) the Supreme Court of each State and Territory of Australia; and (b) the Federal Court of Australia: see International Arbitration Act 1974 (Cth) s 35(1) and (3) (International Arbitration Act). See also ICSID, Contracting States and Measures Taken By Them for the Purpose of the Convention (ICSID/8-E, September 2021).

Procedural rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

Background

Part IV of the International Arbitration Act incorporates the ICSID Convention into Australian law and deals with the enforcement of ICSID awards. Section 33 provides that, subject to the remainder of Part IV of the International Arbitration Act, Parts II through VII of the ICSID Convention have the force of law in Australia. Section 35 of the International Arbitration Act, which reflects Article 54 of the ICSID Convention, deals with 'recognition' of ICSID awards and provides that an award may be 'enforced' in the Federal Court of Australia or the Supreme Court of a State or Territory as if the award were a judgment of that court.

The position in Australia regarding the meaning of the terms 'recognition', 'enforcement' and 'execution' as they appear in ICSID Convention and are applied under Australian law was recently clarified by the High Court of Australia in Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l. & Anor [2023] HCA 11. The High Court clarified that the words are used separately and with different meanings as follows:

a. Recognition is the obligation on the court to recognize an ICSID award as binding;

b. Enforcement refers to the court's obligation to enforce any pecuniary obligations imposed by the award as if the award were a final judgment of a court in Australia; and

c. Execution is the means by which a judgment enforcing an ICSID award is given effect, which will often involve measure taken against property of the judgment debtor.

The High Court further opined that despite linguistic divergence, there is no real difference between the English text and the French and Spanish texts of the ICSID Convention in respect of the distinction between recognition and enforcement, on the one hand, and execution on the other. The High Court upheld the orders below and

concluded that they were properly characterized as orders for recognition and enforcement.

Procedure

In practice, proceedings to recognize and enforce an ICSID award have generally been brought before the Federal Court. Accordingly, this section focuses on the procedural requirements before the Federal Court.

As noted above, Article 54 of the ICSID Convention has the force of law in Australia, such that a party can obtain recognition or enforcement of an ICSID award by furnishing the Federal Court with a copy of the award certified by the Secretary-General of ICSID. More detailed requirements are then set out in rule 28.49 of the Federal Court Rules 2011 (Cth), which provides that an originating application must be filed in accordance with Form 58 (available on the Federal Court website). The application must be accompanied by an affidavit, in the form of Form 59 (see r 29.02), stating:

- the extent to which the award has not been complied with, at the date the application is made; and
- the usual or last-known place of residence or business of the person against whom it is sought to enforce the award or, if the person is a company, the last-known registered office of the company.

Rule 28.49 further provides that the application may be made without notice, that is, without serving or advising the other party of the application to be made to the Court. The Federal Court's Commercial Arbitration Practice Note of 21 December 2021 sets out the procedure to be followed in such a case, including the application of a duty of candor to an award creditor seeking to enforce an award *ex parte*. This duty requires an applicant who has filed an *ex parte* application to draw all relevant facts to the court's attention, including any that would support an argument against granting the relief sought: Federal Court of Australia, Commercial Arbitration Practice Note (last accessed 4 September 2022). This was demonstrated in the case of Lahoud v The

Democratic Republic of Congo [2017] FCA 982 at [28] where, in an *ex parte* application for an enforcement of an ICSID award, the applicant raised a potential argument of immunity under section 9 of the Foreign State Immunities Act 1985 (Cth). Immunity is discussed further in the response to Question 16 below.

As noted in the answer above, applications to recognize and enforce an ICSID award may also be brought in the Supreme Court of any of Australia's eight States and Territories. While the procedure may vary slightly from court to court, it will generally follow a similar process to that outlined above. For example, in Queensland, r 365L of the Uniform Civil Procedure Rules 1999 (Qld) sets out almost identical requirements to those for the Federal Court, though mandating the use of its own Form 137M for the application. As an example of procedure in the New South Wales Supreme Court, a summons and supporting affidavit were filed in February 2012 seeking recognition and enforcement of an investment treaty award obtained in an UNCITRAL arbitration by White Industries Australia Limited against India, though those proceedings were discontinued in March of the same year: see Mark Mangan, 'Investment Treaty Arbitration: Australia' (last accessed 4 September 2022).

10. What are the costs associated with the enforcement of an ICSID award?

The following fees apply to the filing of a document by which a proceeding in the Federal Court is commenced, which would include an application to recognize or enforce an ICSID award: $4,450 in the case of a corporation (including a publicly listed company and any other corporation) and $1,530 in any other case: s 101, Part 1, Schedule 1 of the Federal Court and Federal Circuit and Family Court Regulations 2022. Of course, there would also be other costs such as legal fees.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

As an exception to the usual position in Australia, section 37 of the International Arbitration Act provides that in an application for the enforcement of an ICSID award, a party may be represented by a duly qualified legal practitioner from any legal

jurisdiction of the party's choice and that legal practitioner is not thereby taken to have breached any law regarding the practice of law in Australia.

Rule 28.50 of the Federal Court Rules 2011 provides that where a party seeks to rely on a document in a language other than English, a certified English translation must be provided to the Court and any other party to the proceeding.

The Federal Court of Australia Commercial Arbitration Sub-Area (which despite the name also covers investment arbitration) sets out useful information on the procedure before the Federal court, including links to the required forms mentioned above (last accessed 4 September 2022).

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

In accordance with the ICSID Convention there is very limited ability to resist enforcement of an ICSID award. Section 33 of the International Arbitration Act, which reflects Article 53(1) of the Convention, states that an award is binding and is not subject to any appeal or to any remedy other than in accordance with the ICSID Convention.

If the party against whom enforcement is sought is a foreign state, it may be able to claim immunity from the proceedings. The extent to which foreign immunity applies, i.e., whether a foreign state is immune from both recognition and enforcement proceedings, as well as proceedings for execution, or can be taken to have waived its immunity to any or all such proceedings by accession to the ICSID Convention, was the subject of the appeal to the High Court in the Kingdom of Spain case. In that case, the High Court concluded that Spain had waived immunity from recognition and enforcement by virtue of its accession to the ICSID Convention, but not execution. The question of foreign state immunity is discussed further in the answer to Question 16 below.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

As discussed above, under s 35 of the International Arbitration Act, the Supreme Court of each State and Territory, as well as the Federal Court of Australia, are designated as competent courts for the purposes of Article 54 of the ICSID Convention. Accordingly, a decision by any such court refusing enforcement of an ICSID award can be appealed in accordance with the standard appeal processes of the respective court. In the Federal Court of Australia, which is the most popular forum for enforcement applications, a decision refusing to enforce an ICSID award could be appealed to the Full Court of the Federal Court of Australia by filing a notice of appeal within 28 days of the judgment, stating:

- whether the whole judgment or all of the orders, or only part of the judgment or some of the orders, are appealed from;
- briefly but specifically, the grounds relied on in support of the appeal; and
- the judgment or orders the appellant wants instead of the judgment or orders appealed from: see rules 36.01-36.03 of the Federal Court Rules 2011.

Similar processes exist in the State and Territory Supreme Courts whereby a judgment of the trial division can be appealed to the Court of Appeal of that jurisdiction.

In the case of both a Full Court of the Federal Court decision or a decision of a State/Territory Court of Appeal, special leave may be sought to the High Court of Australia though this is only granted on limited grounds such as whether the issue is of public importance or there are conflicting decisions: see section 35A of the Australian Judiciary Act 1903.

An example of the full appeals process is demonstrated in the ongoing efforts of investors to enforce an ICSID award against the Kingdom of Spain, which was heard first by a single judge of the Federal Court of Australia and then appealed to three judges sitting as the Full Court of Federal Court. Subsequently, Spain sought, and was granted, special leave to appeal to the High Court. In April 2023, the High Court unanimously dismissed the appeal, as discussed in the answer to Question 9 above.

14. Is there any recourse available against a leave for enforcement?

Where leave to enforce an ICSID award is granted, the same appeals process applies as in the case where such leave is refused – see the answer to the preceding question.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

The execution of an ICSID award in Australia, having been recognized as enforceable as if it were a judgment of the court, can be sought through the procedure known to Australian courts as 'enforcement'. This is an action whereby a judgment creditor can compel compliance with a judgment or order of the court. Enforcement of a judgment will often be carried out *ex parte*, imposing a duty of candor on the applicant to raise with the court any issue that may be relevant as to why enforcement should not be issued.

A party seeking enforcement of a Federal Court judgment must file a 'Request for Enforcement'. This should be accompanied by appropriate supporting documentation, such as an affidavit setting out:

- the judgment (or part thereof) sought to be enforced, exhibiting a copy of the judgment;
- confirmation that the judgment has not been satisfied (or paid, as the case may be);
- each order or thing that is sought, stated briefly but specifically;
- whether there are any known proceedings or challenges to enforcement;
- important information to assist the enforcement procedure (e.g., the nature and location of assets); and
- any other relevant and important matters, such as urgency (or other timing issues) and whether any special orders are sought (e.g., suppression or confidentiality orders) and the reasons why.
- In fact, a party seeking enforcement in the Federal Court has the same remedies for enforcement of that judgment as exist in the Supreme Court

of the State or Territory in which the Federal Court judgment is made. Accordingly, the requirements for the supporting documentation and the procedure generally will be determined by the processes in place in that particular State or Territory, though this will usually be similar to what is set out above.

- A judgment can be enforced, for example, by the following means:
- writ / warrant for seizure and sale of property;
- order for possession of land or delivery of goods;
- charging order (e.g., charge over shares or money in a financial institution); or
- redirection / attachment / garnishee of debts or earnings / instalment order.

It should be noted that the authors are not aware of any examples of execution of an ICSID award in Australia. The orders made in Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l (No 3) [2021] FCAFC 112 were deliberately expressed to be orders 'recognizing' the judgment as distinct from 'execution' and notably did not include any order compelling payment from Spain in respect of the pecuniary obligations of the award. These orders were upheld on appeal, with the High Court confirming that they were properly characterized as orders for recognition and enforcement. It remains to be seen whether the investors in this case will seek execution. Similarly, although decided some years earlier, the orders in Lahoud v The Democratic Republic of Congo [2017] FCA 982 are largely consistent with this approach, having granted leave to have the awards recognized by the Court and enforced as if they were judgments of the Court. This would then have enabled the applicants to seek execution following the process set out above but this does not seem to have eventuated.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

The Foreign States Immunities Act 1985 (Cth) (FSIA) provides foreign states with general immunity from the jurisdiction of Australian courts (s 9). One exception to this general immunity is where a foreign state has submitted, by agreement, to the jurisdiction (ss 10(1), 10(2)).

In Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l. & Anor [2023] HCA 11, the High Court of Australia held that the ICSID Convention was a treaty amounting to an 'agreement' (as applied in s10) capable of evincing a Contracting State's submission to Australian jurisdiction. However, the High Court of Australia also held the ICSID Convention only evinced submission (and therefore waiver of foreign state immunity) in relation to proceedings for recognition and enforcement of ICSID awards. Without more, Contracting States will enjoy immunity from the execution of ICSID awards in Australia.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

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China

Implementation of the ICSID Convention in China

1. Is there a model BIT in place in your country?

No. There is no official version of the Chinese model BIT published or endorsed by the Chinese government. However, references to the Chinese model BIT are frequently seen in scholarly writings (see for example, Norah Gallagher & Wenhua Shan (eds), Chinese Investment Treaties: Policy and Practice, Oxford University Press, 2009, Appendices II to IV; Shen Wei, Decoding Chinese Bilateral Investment Treaties, Cambridge University Press, 2021).

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Yes. China is a Member State of the ICSID Convention. The relevant dates are as follows:

- Signature: 9 February 1990
- Deposit of Ratification: 7 January 1993
- Entry into Force: 6 February 1993

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Yes. Upon the deposition of ratification, China made a notification in relation to Article 25(4) of the ICSID Convention:

'[P]ursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization.'

On 26 August 2022, China designated Hong Kong Special Administrative Region ("HKSAR") as a constituent subdivision and made the notification in accordance with Articles 25(1) and (3) of the Convention.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention against your country?

Six ICSID arbitrations have been filed against China.

Concluded Cases:

- Goh Chin Soon v. People's Republic of China (ICSID Case No. ARB/20/34)
- Macro Trading Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/20/22)
- Ansung Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25)
- Ekran Berhad v. People's Republic of China (ICSID Case No. ARB/11/15)
- AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China (ICSID Case No. ADM/21/1) (Note: While this case was administered by ICSID, the award was not rendered pursuant to the ICSID Convention in accordance with the parties' agreement.)

Pending Cases:

- Hela Schwarz GmbH v. People's Republic of China (ICSID Case No. ARB/17/19)

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

Construction has been the major sector where ICSID claims against China has been made (three out of five cases). One case concerns service and trade sector (Ekran

Berhad v. People's Republic of China), while industry for the last case remains unclear (Hela Schwarz GmbH v. People's Republic of China).

6. Has your country complied with ICSID awards rendered against it?

No adverse awards have been rendered against China.

7. What is the number of ICSID awards that have been enforced in your country?

Zero.

Enforcement of ICSID awards in China

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

Public record indicates that China has not designated any competent court or authority for the enforcement of ICSID awards pursuant to Article 54(2) of the ICSID Convention. Accordingly, it is unclear which is the organ for receiving the authenticated copy of the ICSID award for the purpose of triggering the enforcement process. Given that Article 54(1) of the ICSID Conventions provides that the pecuniary obligation of the ICSID award shall be enforced as if it were a final judgment of the court, it may be possible to argue that absent any specific rules on the enforcement of ICSID awards, references can be made, mutatis mutandis, to the rules governing the enforcement of judgments before Chinese courts. Article 231 of the Civil Procedure Law of the People's Republic of China ('Civil Procedural Law') provides for the general principles on the competence court for enforcement of judgments, that is, a judgment shall be enforced by the first-instance court or the same-level court as the first-instance court where the assets for enforcement is located. China maintains a four-level court system, which comprises the basic-level court, the city-level intermediate court, the province-level higher court and the

Supreme People's Court ('SPC'). An ICSID award will be regarded as a judgment of which level of the court remains unclear.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?) Note: Please refer to the national laws, code articles, and relevant case law.

Procedure for Enforcement of ICSID Awards in China

As highlighted in Question 8, China has not promulgated specific rules on the enforcement of ICSID Awards, including any procedure thereof. Absent such rules, the procedure for enforcement of judgments may be considered as a relevant point of reference.

First, the applicant must submit the application for enforcement to the competent Chinese court. The application, according to Article 18(1) of the SPC's Rules on Several Issues on Enforcement by People's Courts (for Trial Implementation) ('Enforcement Rules') must be drafted in Chinese, shall specify the following:

- The details of the ICSID award of which enforcement is sought, including but not limited to the case number, the parties and the reliefs granted;
- The monetary amount to be enforced, plus interest or the method of calculation of interest;
- Information on the Respondent's assets, e.g., bank account, location of movable or immovable properties, shares etc.
- Second, pursuant to Article 16 of the Enforcement Rules, the court shall register the case, provided that the following conditions are satisfied:
- The ICSID award has taken effect;
- The applicant is the right-holder in the ICSID award;

- The debtor has not fulfilled its obligation under the ICSID award within the time limit stipulated in the award;
- The court has jurisdiction over the enforcement case.

Third, the court shall issue a notice of enforcement to the respondent requesting the latter to fulfil the obligations stipulated in the ICSID award and to pay interest for late performance, if any.

Fourth, if the respondent fails to performance the obligations in accordance with the notice of enforcement, the court shall undertake enforcement measures to recover the amount requested, which will then be transferred to the applicant by the court.

Requirements

First, the enforcement process is conducted on an adversarial, rather than *ex parte*, basis. The court, after registering the enforcement case, shall send a notice of enforcement to the respondent requesting the latter to fulfil the obligations stipulated in the ICSID award and pay the interest for any delay in performance. Pursuant to Article 232 of the Civil Procedural Law, the respondent has the right to file written objections to the court if it considers that the enforcement activities are in contravention of law. Nevertheless, the provision fails to specify the grounds for such an objection, thus creating some uncertainties in this respect.

Second, the time limit for application for enforcement: According to Article 246 of the Civil Procedural Law, the application for enforcement must be filed within two years of the deadline for payment stipulated in the ICSID award.

10. What are the costs associated with the enforcement of an ICSID award?

An applicant for enforcement of ICSID awards before Chinese courts will generally incur the following types of fees:

- Application fee: The application fee to be fixed by the court according to the amount to be enforced. The general practice is that the applicant does not

need to pre-pay the application fee, which will instead be charged from the amounts actually recovered by the applicant.

- Legal costs: The applicant shall bear its own legal costs. There is no losers-pay principle in China.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

It is emphasized that there is no mechanism specifically designed for enforcing an ICSID award in China. Against this backdrop, the practical difficulty of enforcing ICSID awards in China cannot be overstated in the absence of any specific legislation (procedural and substantive) at present. Apart from that, China does not have a state immunity law. Provisions dealing with state immunity are scattered in different sources of law, which will pose additional practical obstacles for Chinese courts in dealing with the enforcement of ICSID awards.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

Despite the provision of Article 54(1) of the ICSID Convention, China's current legal framework has not yet provided any mechanism specifically designed for enforcing an ICSID award. It is thus unclear whether there is a ground for a party to prevent the enforcement of an ICSID award in China. There have been no applications for enforcement of any ICSID awards (whether involving China or not) brought in China so far.

For theoretical purposes and depending on the nature of what an ICSID award might be considered under Chinese law - a judgment made in China, the following grounds may be brought to oppose the enforcement of such an award under Chinese law:

- Chinese courts may refuse to enforce an ICSID award if such award exceeds the two-year limit to apply for enforcement according to Article 246 of the Civil Procedure Law.

- It is also possible that the party may initiate trial supervision procedure and prevent the enforcement of an ICSID award based on the grounds established in Article 205 of the Civil Procedure Law.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

It is unclear whether there is a recourse for a party to oppose to a decision to enforce an ICSID award in China because there is no available mechanism specifically designed for ICSID award under the current legal system of China.

14. Is there any recourse available against a leave for enforcement?

It is unclear whether there is a recourse available against a leave for enforcement of an ICSID award in China because there is no available mechanism specifically designed for ICSID award under the current legal system of China.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

No. China has not yet established any rule with regard to the execution of an ICSID award.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Public record shows that no courts in mainland China having dealt with the enforcement of an ICSID award.

There is no state immunity law in China. While China is a signatory to the United Nations Convention on Jurisdictional Immunities of States and Their Property (2005), which is widely acknowledged as endorsing a restrictive approach to state immunity, the Convention has not yet come into force in China.

China's consistent position is that a state and its property shall enjoy absolute immunity from jurisdiction and from execution. This position is exemplified in the Standing Committee of the National People's Congress Regarding the First Paragraph of Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China in FG Hemisphere Associates LLC v. Democratic Republic of the Congo.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

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Hong Kong

Implementation of the ICSID Convention in the Hong Kong special administrative region

1. Is there a model BIT in place in your country?

No, there is no model BIT in place in Hong Kong.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Hong Kong is not itself a party to the ICSID Convention. However, China designated Hong Kong to the ICSID on 26 August 2022 pursuant to Article 25 of the ICSID Convention. (available here)

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

No, Hong Kong has not made any such notification or designation.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

There are no investment treaty arbitrations, ICSID or otherwise, against Hong Kong.

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

Not applicable.

6. Has your country complied with ICSID awards rendered against it?

Not applicable.

7. What is the number of ICSID awards that have been enforced in your country?

There do not appear to be any ICSID awards enforced in Hong Kong.

Enforcement of ICSID awards in the Hong Kong special administrative region

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

Pursuant to sections 2 and 84 of the Hong Kong Arbitration Ordinance, the Court of First Instance of the High Court is the competent court to decide on a request for enforcement.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

There is no enforcement procedure specific to ICSID awards in Hong Kong. However, the Hong Kong Arbitration Ordinance sets out the enforcement mechanisms for arbitral awards. Pursuant to sections 85 and 88 of the Hong Kong Arbitration Ordinance, the party seeking to enforce an arbitral award must produce:

- The duly authenticated original award or a duly certified copy of it;
- The original arbitration agreement or a duly certified copy of it; and
- If the award or agreement is not in either or both of the official languages, a translation of it in either official language certified by an official or sworn translator or by a diplomatic or consular agent.

10. What are the costs associated with the enforcement of an ICSID award?

As the enforcement of an award in Hong Kong involves filing an application at the Court of First Instance of the High Court, it is likely that the costs of commencement of a matter as provided for in the High Court Fees Rules will apply. Pursuant to section 1 of the First Schedule, the party may need to pay HKD 1,045 upon commencement of a case or matter.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

There are none.

12. In what way can a party against whom enforcement of an ICSID award is sought to defend itself with a view to preventing enforcement?

There are no rules specific to defending the enforcement of ICSID awards. However, pursuant to sections 86 and 89 of the Hong Kong Arbitration Ordinance, enforcement of an arbitral award may be refused if the person against whom it is invoked proves:

- That a party to the arbitration agreement was under some incapacity;
- That the arbitration agreement was not valid under the law to which the parties subjected it or under the law of the country where the award was made;
- That the person was not given proper notice of arbitrator appointment or was otherwise unable to present his case;
- That the award deals with issues outside the scope of the arbitration;
- That the composition of the arbitral authority or procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place; or
- That the award has not yet become binding on the parties or has been set aside by the competent authority.

The same sections also allow enforcement of an award to be refused where the award is in respect to a matter not capable of being arbitrated under the law in Hong Kong,

or it would be contrary to public policy to enforce the award.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

There are no provisions specific to the ICSID Convention.

14. Is there any recourse available against a leave for enforcement?

There are no provisions specific to the ICSID Convention.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

There are no specific rules in Hong Kong with regard to the execution of an ICSID award.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

There have been no court decisions dealing with this issue.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

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India

Implementation of the ICSID Convention in India

1. Is there a model BIT in place in your country?

India adopted a model BIT in early 2016 with an aim to provide appropriate protection to foreign investors while also maintaining a balance between the investor's rights and the government's obligations in India.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

India is not a signatory to the ICSID Convention. The Indian Council for Arbitration recommended to the Indian Ministry of Finance in 2000 that India should avoid becoming a signatory to the ICSID Convention on the basis that the Convention's rules for arbitration are more favorable to the developed countries and there was no scope for a review of the award by an Indian court even if it violates India's public policy. The commentators note that this may be the underlying reason for the low number of investment claims against India since 2000. However, India has not made any specific statements regarding its absence from the ICSID Convention.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

As stated above, India is not a signatory to the ICSID Convention.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

There have been no reported investment treaty arbitrations conducted under the ICSID Convention as India is not a signatory to the Convention.

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

India has not been a party to the ICSID Claims given its non-membership of ICSID. However, there is now a sizable body of investor-state disputes involving host-state control measures in the telecommunications sector, namely measures by which host-states seek to seize control over operators' assets, operations, or allocated spectrum, either directly or indirectly. Despite abundant front-end safeguards available to India, it has been a Respondent State in investor-state disputes often arising in telecommunication, mining and quarrying, real estate, automotive and oil and gas sectors among others outside the ICSID Convention.

6. Has your country complied with ICSID awards rendered against it?

Since India is not a signatory to the ICSID Convention, no investor has pursued a claim against India under the ICSID Convention. As a result, there are no ICSID awards rendered against India.

White Industries was the first unfavourable investment award rendered against India, and the Indian Government complied with the award and paid approximately AUD 4 million to the investors. As elaborated in detail below, the enforcement regime of investment awards suffers from legal uncertainty in India. Investors are wary of pursuing enforcement of investment treaty awards against India before Indian courts. The current trend given the enforcement regime in India has been for investors to pursue Indian assets situated abroad. For instance, Cairn Energy holds an award from the Permanent Court of Arbitration for approximately USD 1.2. billion against India. Cairn Energy has approached courts in the United States, United Kingdom, France, the Netherlands, Canada, UAE, Singapore, Japan and Cayman Islands for the enforcement of the award.

7. What is the number of ICSID awards that have been enforced in your country?

As stated above, since India is not a signatory to the ICSID Convention, investors have not pursued their claims against the Indian Government under the ICSID Convention.

Enforcement of ICSID awards in the India special administrative region

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

Since India is not a signatory to the ICSID Convention, it has not designated any court or authority for the purposes of recognition or enforcement of an ICSID award.

For awards under the ICSID Additional Facility Rules (or any other rules), they would be enforceable under the (Indian) Arbitration and Conciliation Act, 1996 (Act) — which governs arbitrations and related court proceedings in India. Part II of the Act governs the enforcement of 'foreign awards' in arbitrations seated outside India, pursuant to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention)—to which India is a signatory.

Under section 2(e) of the Act, the competent court to decide on a request for enforcement of a 'foreign award' is a High Court having jurisdiction to decide the questions forming 'subject-matter of the arbitral award'.

Applying this test, Indian courts have held that for monetary awards, jurisdiction lies with the court where the assets of the award debtor are located:

i. In Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc, the Supreme Court of India held that this would mean a High Court 'within whose

jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought' (¶97).

ii. In Brace Transport Corporation of Monrovia Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia, 1995 Supp (2) SCC 280, the Supreme Court of India held that in cases where the subject matter of the award is money, the territorial jurisdiction will vest with the court within whose territorial limits the money can be realised.

iii. Similarly, in Trammo DMCC v. Nagarjuna Fertilizers, 2017 SCC OnLine Bom 8676, the Bombay High Court found that it had jurisdiction to enforce a foreign award in question because, inter alia, the bank accounts of the award-debtor were located within its territorial jurisdiction.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

As noted above, India is not a signatory to the ICSID Convention and there is no separate mechanism for the enforcement of ICSID awards under Indian law.

More generally, the position on whether investment treaty awards can be enforced under the Act is unclear under Indian law. As noted above, India is a signatory to the New York Convention. In ratifying the New York Convention, India made the following reservation:

> *'In accordance with* Article I *of the Convention, the Government of India declare that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State, party to this Convention. They further declare that they will apply the Convention only to differences arising out of legal relationships,*

whether contractual or not, which are considered as commercial under the law of India.' (emphasis added)

This reservation is codified in section 44 of the Act. Indian courts have adopted a broad definition of the term 'commercial' under section 44. For example, in R.M. Investments & Trading Co. vs Boeing Co, (1994) 4 SCC 541, the Supreme Court of India noted that (¶ 12):

'it has to be borne in mind that the "Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction." The expression "commercial" should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today.'

Likewise, the explanation to section 2(1)(c) of the Commercial Courts Act, 2015 states that:

'A commercial dispute shall not cease to be a commercial dispute merely because–

it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;

one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;'

Given that investment treaty disputes typically arise out of transactions involving a monetary investment made by the investor in a State entity or project, it is arguable that that they are commercial in nature.

However, as explained below, Indian courts have so far taken inconsistent views on whether investment treaty awards can be said to arise from a 'commercial' relationship:

In Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures, 2014 SCC OnLine Cal 17695, the Calcutta High Court considered a request for grant of an anti-arbitration injunction from a State, seeking to prohibit an investor from proceeding with arbitral proceedings under the 1997 India-France BIT. The Court granted this injunction and restrained the investor from continuing the arbitral proceedings against the State. The Court did not consider the question of whether the Act was applicable to investment treaty arbitrations.

In Union of India v. Vodafone Group plc, the Delhi High Court considered a similar request for grant of an anti-arbitration injunction. The Court in refusing the ant-arbitration injunction, noted that 'investment arbitration disputes are fundamentally different from commercial disputes as the cause of action (whether contractual or not) is grounded on State guarantees and assurances (and are not commercial in nature) ... As the present case is not a commercial arbitration, the Act, 1996 shall not apply'. (¶¶ 144-145) The Delhi High Court also distinguished the above decision in Louis Dreyfus on the basis that the Court had not considered this question in its analysis.

This ruling was also followed by the Delhi High Court in Union of India v. Khaitan Holdings (Mauritius). In this case, the Court again rejected the State's request for grant of an anti-arbitration injunction and observed that 'In Vodafone Judgment (supra), a Learned Single Judge of this Court has clearly observed that arbitration proceedings under BITs are not governed by the Act as they are not commercial arbitrations.' (¶ 29).

Therefore, there is a disagreement among the High Courts as to whether the Act (including enforcement provisions) would apply to investment treaty arbitrations and the Supreme Court has not yet considered this question. Therefore, the question of whether investment treaty awards can be enforced under Indian law is unclear.

In this regard, a few recent BITs executed by India comprise a provision stating, 'A claim that is submitted to arbitration under this Chapter shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.' (Art. 27.5, India-Belarus BIT 2018; see also, Art. 27.5 of India-Kyrgyzstan BIT 2019). While this could assist in the enforcement of such awards under the Act, it is yet to be seen how much weight courts give to this provision while assessing whether the relationship is 'commercial' under Indian law. Further, the absence of this provision in other BITs may militate against the enforcement of awards issued under such treaties.

That said, if the enforcement of investment treaty awards under the Act is allowed, the following procedure would have to be followed:

- Filing an arbitration petition for the enforcement and execution of the investment treaty award under Part II of the Act. Under section 47 of the Act it is required that the successful party also provide: (a) the original award or a duly authenticated copy; (b) the original arbitration agreement or a duly certified copy; and (c) such evidence as may be necessary to prove that the award is a foreign award;
- Once the petition is filed, the award-debtor can file an objection on the grounds set out in S. 48 of the Act (which are materially similar to Art. V of the New York Convention). These proceedings will be adversarial in nature;
- Once the award is recognized as a decree of an Indian Court, under the Act, it can then be executed against assets of the award-debtor in the same manner as a decree of a court, in accordance with provisions under the CPC.

This is addressed in greater detail in Questions 12-14 below.

10. What are the costs associated with the enforcement of an ICSID award?

As noted above, there is no specific legal regime for the enforcement of ICSID awards or investment treaty awards under Indian law. However, to the extent enforcement is

permitted under the Act, the primary costs associated with enforcement would be court fees.

The court fees for a petition to enforce a foreign award under the Act varies under the local rules of each High Court—it could be a flat fee or *ad valorem* (based on the quantum of the award but subject to caps). The fees typically range between INR 500-5000 (i.e., approx. USD 6.30-63.00)

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

The relevant considerations have been addressed above.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

As stated above, since India is not a signatory to the ICSID Convention, the Article 54 route for automatic enforcement of an investment award is unavailable for the enforcement of investment awards. Therefore, an award creditor must resort to the recognition and enforcement mechanism provided under the 'New York Convention Awards' chapter under Part II of the Act. This is assuming that an investment award qualifies as a 'foreign award' under the Act.

Section 48 of the Act provides for conditions for enforcement of the New York Convention awards or foreign awards. It reads as follows:

> *'48. Conditions for enforcement of foreign awards.—(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the Court proof that—*
>
> *(a) the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.'

A comparative reading of section 48 and Article V of the New York Convention shows that section 48 mirrors Article V, barring a few modifications carried out to address domestic issues. Section 48, like Article V, is divided in two parts. Sub-section (1) lists the grounds for refusal of enforcement which the resisting party bears the burden to prove. Sub-section (2), which is slightly modified when compared to paragraph 2 of Article V of the New York Convention, provides for two grounds for a court to refuse enforcement: one, the subject matter of the arbitration is not arbitrable in India; and two, the award violates the public policy of India.

Sub-section 1 has been interpreted and applied by Indian courts in a fairly consistent and straight-forward manner, which, broadly aligns with the international approach for enforcement of foreign awards. The approach to sub-section 2 has however been different. Historically, the Indian courts' interpretation and application of the 'public policy of India' ground has been severely criticized by arbitration practitioners,

domestic and international, for one primary reason: the term has been interpreted widely to license domestic courts to conduct a merit-based review of an award. To remedy this, the legislature added two explanations to section 48(2) of the Act, which are discussed below.

Notwithstanding the legislative clarification which is evidently borne out of India's intention to be pro-arbitration, issues surrounding enforcement of a foreign award are far from foreclosed despite numerous decisions elaborating the prevalent legal position.

Section 48(1) of the Act provides for the following grounds on which enforcement of a foreign award 'may' be refused, provided the resisting party furnishes proof to that effect.

- The parties to the arbitration agreement were under some in capacity under the law applicable to them;
- The arbitration agreement is not valid or enforceable under the applicable law;
- The resisting party was not given proper notice of the arbitrator's appointment or the arbitration proceedings or was otherwise unable to present his case;
- The award deals with matters beyond the terms of reference of the arbitration;
- The award decides matters not submitted to arbitration;
- The arbitral tribunal was not constituted as per the parties' agreement, or, failing such agreement, as per the law of the seat of the arbitration; or
- The award has not yet become binding or has been set aside or suspended by the primary or review court at the seat of the arbitration.

These grounds are to be read narrowly, as recognised by the Supreme Court of India ("Supreme Court") in its recent decision of Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd. Justice Rohington Nariman, writing for the court, relied on Ssangyong Engg. & Construction Co. Ltd. v. NHAI and Vijay Karia v. Prysmian Cavi E Sistemi SRL to reiterate that 'the grounds contained in Sections 48(1)(a) to (e) are not to be construed expansively but narrowly.' (Gemini Bay, at 786, 802). The underlying rationale, explained in Vijay Karia is to give a resisting party only 'one bite

at the cherry', being the challenge to the award at its seat and to be consistent with the envisioned purpose of the New York Convention: 'to ensure that a person who belongs to a Convention country, and who, in most cases, has gone through a challenge procedure to the said award in the country of its origin, must then be able to get such award recognised and enforced in India as soon as possible.'

In Gemini Bay, the Supreme Court was faced with an argument that a poorly reasoned award violated principles of natural justice and therefore, it must not be enforced under Section 48(1)(b). The Supreme Court, rejecting this argument, held:

> *'Section 48(1)(b) does not speak of absence of reasons in an arbitral award at all. The only grounds on which a foreign award cannot be enforced under Section 48(1)(b) are natural justice grounds relatable to notice of appointment of the arbitrator or of the arbitral proceedings, or that a party was otherwise unable to present its case before the Arbitral Tribunal, all of which are events anterior to the making of the award.'*

In Vijay Karia, the appellant argued that the phrase 'unable to present its case' referred to the broader concept of natural justice which required the arbitrator to decide every material issue and give supporting reasons. Failing that, the award would be vulnerable. The Supreme Court deprecated this broader reading of 'unable to present its case' under section 48(1)(b) and restricted it to apply only in cases where:

i. the party was not given an opportunity to 'deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party;' or

ii. 'additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award unenforceable on the ground that a party has been unable to present his case.' (Vijay Karia, at 84)

Like the reading of the provision, the role of a court under Section 48(1) is also circumscribed. The provision does not acquiesce a court to examine the merits of the award for deficiencies. What it does allow, as expressed by the Calcutta High Court in Devi Resources Limited v. Ambo Exports Limited, 2019 SCC Online Cal 7774 (Division Bench), is for the court to:

> *'broadly see if there was an apparent arbitration agreement under which arbitrable disputes were submitted in the reference, that a fair procedure was adopted in the course of the reference and the award-debtor had a reasonable opportunity to present its case and, finally, that the matters in issue have received the consideration of the arbitral tribunal. Thus, it is, in a sense, the decision-making process that is looked into and not the decision itself and unless the relevant award sought to be enforced appears to be irrational and unreasonable to the meanest mind, the court will allow its enforcement.'*

Part II of the Act does not elaborate on the phrase 'furnishes to the Court proof'. It does not say whether the resisting party can rely on evidence outside the record of the arbitral tribunal to challenge enforcement. Therefore, to better understand the envisioned legislative position, one must turn to section 34 that is contained in Part I of the Act, a provision in *pari materia* to section 48, which provides for an application to set aside an India-seated arbitration award.

Prior to an amendment in 2019, section 34 of the Act, allowed a court to set aside an award if the party challenging the award' furnishe[d] proof that' the award violated one of the grounds listed in the provision. Since the provision was not clear on the width of the meaning of 'proof', the courts were routinely faced with challenges to the award based on new evidence which was not part of the arbitration record.

To restrict the scope of the challenge, buttress finality of a concluded arbitration, deter recalcitrant parties from forcing courts to re-appraise evidence, restrict the party challenging the award to the evidence on record, and be pro-arbitration, the Arbitration and Conciliation Amendment Act, 2019 replaced the words' furnishes proof that' with 'establishes on the basis of the record of the arbitral tribunal'. This amendment remedied the issue in the context of challenges to domestic arbitration awards.

For some reason, the legislature did not correspondingly amend section 48(1). This inaction compelled the courts to step in and clarify the issue in the context of challenges to enforcement of foreign awards. The Supreme Court, once again, in Gemini Bay, at 785 relied on the amendment to Section 34 to read into Section 48(1) the amendment to section 34. It justified its reading of 'furnishes to the court proof' to be restricted to evidence in the record of the arbitration based on the underlying object of speedy disposals of challenges to enforcement of awards, which object is common to section 34 and section 48 (Gemini Bay, at 786).

Section 48(1)(c) of the Act allows a resisting party to challenge enforcement if the award deals with or decides matters beyond the terms of 'the submission to arbitration'. The phrase beyond 'scope or terms of submission to arbitration' in sub-section 48(1)(c) refers to matters that are 'excepted matters ... or are otherwise outside the scope of the arbitration agreement.' (Gemini Bay, at 797, 798).

In cases where the award travels beyond the terms of the submission, the award would be set aside. In other cases, where a substantial part of the arbitration award falls within the confines of the submission to arbitration, the courts were eager to salvage these parts rather that set aside the entire award, in the interest of efficiency. However, since there was legislative basis permitting severability, their hands were tied. To provide such a basis, the legislature added a proviso which reads 'provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced.'

Section 48(1)(e) of the Act provides that enforcement of an award maybe refused if the award has not yet become binding, has been set aside, or has been suspended at the place of arbitration. This provision is to be read with section 48(3) of the Act. Through this provision, a court can refuse to accept the objection on this ground and dismiss the enforcement application and, in turn, adjourn the decision to a more appropriate time. For example, the court may adjourn the decision till after the suspension of the award is lifted or confirmed at the seat of the arbitration. Section 48(3) also empowers the court to order the objecting party to furnish security while the application for enforcement is pending to protect the interest of the award creditor.

Section 48(2) of the Act provides for two grounds on which enforcement of a foreign award may be refused: if the subject matter of the difference is not capable of settlement by arbitration under Indian law, i.e., the subject matter of the dispute is not arbitrable, and if the award is contrary to the public policy of India.

Subject matter arbitrability, or 'arbitrability', is not defined in any statute in India. As such, it is the judicial determinations that are controlling on this point. One of the first comprehensive decisions on arbitrability was Booz Allen & Hamilton v SBI Home Finance Ltd in which the Supreme Court authoritatively listed the following categories of disputes that could not be settled through arbitration (Booz Allen, at 546, 547):

- disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
- matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
- guardianship matters;
- insolvency and winding-up matters;
- testamentary matters (grant of probate, letters of administration and succession certificate); and

- eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

To the above list, the Supreme Court in A. Ayyasamy v. A. Paramasivam & Ors., (2016) 10 SCC 386, 401, 402 added:

- Patent, trademarks and copyright matters;
- Anti-trust and competition matters;
- Bribery and corruption; and
- Matters involving issues of allegations of fraud.

This discussion on subject matter arbitrability was settled in Vidya Drolia v. Durga Trading Corpn. In this decision, the Supreme Court articulated a fourfold test to determine whether or not the subject matter of an arbitration is arbitrable (at 72):

- When the cause of action and subject matter relates to actions in rem that do not pertain to subordinate rights *in personam* that arise from rights in rem
- When cause of action and subject matter affects third-party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate.
- When cause of action and subject-matter relates to inalienable sovereign and public interest functions of the State.
- When the subject matter is expressly or impliedly non-arbitrable as per certain mandatory statutes.

The Supreme Court explained that the above categories were not compartmentalized, and the above test must be applied holistically.

In regard to arbitrability of disputes involving allegations of fraud, Vidya Drolia confirmed its earlier decision in Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd by endorsing the two-step test to determine arbitrability of fraud:

- does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void?

- do the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain?

The court approvingly quoted Avitel to explain the parameters of the above test. It stated:

> *'The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus, necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof but questions arising in the public law domain.'*

The court concluded that 'allegations of fraud can be made a subject-matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause itself, is not arbitrable.

The New York Convention is silent on the meaning of 'public policy'. Likewise, the Act is silent too. Prior to the Act, 'public policy' was long thought to be 'capable, on proper occasion, of expansion or modification.' (Central Inland Water Transport Corpn. v. Brojo Nath Ganguly). However, under the new arbitration regime, courts have shirked from introducing new heads of public policy or expanding the existing ones. For instance, the Supreme Court in Pasl Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd (quoting Zoroastrian Coop. Housing Society Ltd. v. Registrar of Coop. Societies) observed, in the arbitration context, that although 'theoretically it was permissible to evolve a new head of public policy in exceptional circumstances, such a course would be inadvisable in the interest of stability of society.'

'Public policy' in the context of foreign awards was initially construed narrowly. In Renusagar Power Company Ltd. v. General Electric Company, the Supreme Court rejected the idea of international public policy and interpreted 'public policy' under Section 7(1)(b) of the Foreign Awards Act, 1961 (the predecessor to Part II of the Act) to mean 'public policy' as applied by courts in India. It did adopt a narrow view. It restricted public policy to the following three categories:

i. the fundamental policy of Indian law;

ii. the interests of India; and

iii. justice or morality.

Hence, for a court to refuse enforcement of an award, the opposing party was required to show something more than the violation of Indian law. (Darius Khambata, Challenge and Enforcement of Awards: The Brooding Omnipresence of Public Policy, in Arbitration in India, Dushyant Dave, Martin Hunter, et al. (eds), Wolters Kluwer, 2021.). This expression of public policy was consistently cited, referred to, or restated in similar terms till the trend of the narrow reading of 'public policy' in cases of foreign awards was interrupted by the Supreme Court's decision in Venture Global Engg v. Satyam Computer Services Ltd. Through this decision, the Supreme Court imported the domestic reading of public policy under section 34 (application for setting aside domestic arbitral awards) to section 48. Public policy under Section 34 of the Act was interpreted to compose of an additional ground, patent illegality.

The Supreme Court in ONGC Ltd v. Saw Pipes Ltd, explained 'patent illegality' to mean an award based on an erroneous proposition of law or was contrary to the terms of the contract. Therefore, the combined reading of these two decisions meant that the domestic concept of 'public policy', which included the patent illegality ground, effectively allowed enforcing courts to sit on appeal over a foreign award and re-appraise its merits to review whether the award was based on an incorrect reading of the law or violated terms of the contract. The width of the meaning given to public policy allowed for a rather muddled and telescopic application. This position,

essentially a merit-based review, was inconsistent with the mandate under Article V of the New York Convention. It prevailed till 2013.

In 2013, the Supreme Court restored the narrow reading of public policy under section 48(2) of the Act in Shri Lal Mahal v. Progetto Grano Spa. The Supreme Court decided that 'the expression "public policy of India" must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in Renusagar' (at 448). To restrain courts from ever reverting to the broader construction of public policy, the legislature amended, not only section 48(2) of the Act, but also section 34(2).

The Arbitration and Conciliation Amendment Act, 2016 introduced explanations to section 48(2) to legislatively rein in the unruly horse of 'public policy'. The explanations provide:

'Explanation 1 – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if –

i. the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

ii. it is in contravention with the fundamental policy of Indian law; or it is in conflict with the most basic notions of morality or justice.

Explanation 2 – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.'

Explanation 1 to Section 48(2) statutorily restricts public policy to the following:

i. fundamental policy of India; and

ii. most basic notions of morality and justice

The explanation not only relegated the meaning of 'public policy' to the Renusagar position (See Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131,

¶¶ 34 – 42) but also deleted the ground' interests of India' recognized in Renusagar. More recently, the Supreme Court in Gemini Bay had the occasion to revisit the meaning of 'public policy' in the context of foreign awards. First, it acknowledged that the amendments to Section 34 and Section 48 removed the 'patent illegality' ground from the ken of 'public policy'. It no longer obtained. As a result, perversity of an award, which formed a part of patent illegality, was also done away with. (Gemini Bay, at 797; Also see EIG Mauritius Ltd. v McNally Bharat Engineering Company Limited). This is re-affirmed by Explanation 2. Second, it laid down a marker for an objection on this ground to be successful. In response to the argument that the challenged award provided for damages without any basis, the Court drew from Ssangyong Engg., (the leading decision on the scope of challenging a domestic award) to hold 'that it is only in exceptional cases which involve some basic infraction of justice, which shocks the conscience of the court that such a plea can be entertained.' (Gemini Bay, at 809).

Following the amendment, the courts have illustrated the ambit of 'public policy':

- 'public policy of India' is held to mean 'the fundamental policy of Indian law (PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Tuticorin.
- Mere contravention of a substantive law of India that is not linked to public importance does not qualify as a violation of the public policy of India (Ssangyong Engg., at 170, 171; Vijay Karia, ¶ 93 (violation of the Foreign Exchange Management Act, 1999 was not held to be a violation of the public policy of India); Sleepwell Industries Co. Ltd. v. LMJ International Ltd., (2017) SCC Online Cal 12109, ¶ 110 affirmed in LMJ International Ltd. v. Sleepwell Industries, (2019) 5 SCC 302);
- 'that violation of public policy includes drastic serious national policy matters such as trading in elephant tusks from India and the sale of peacock meat from India. Mere improper admission of evidence by the Arbitrator...cannot amount to a violation of public policy. It is settled law in India that the Arbitral Tribunal is the sole judge of the weight, materiality and credibility of the evidence and there can

be no-evaluation of evidence at the enforcement stage.' (Nobel Resource Ltd. v. Dharni Sampada.

- An award based on inadmissible evidence is considered to be a challenge to the procedural defects in the award which does not fall within the meaning of 'public policy'. (Vijay Karia, at 97, 99; Nobel Resource, at ¶ 23); and
- Failure to decide a material issue that goes to the root of the matter or failure to decide the counter-claim entirely would offend the basic notion of justice and would be held to violate the public policy of India. (Vijay Karia, ¶¶ 84, 86; Campos Brothers Farms v. Matru Bhumi Supply Chain Pvt. Limited¶ 56). However, '[i]f read as a whole, the ... award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counterclaims of the parties, enforcement must follow.' (Vijay Karia, at 84)

Despite the weight of authority, in NAFED v Alimenta, the Supreme Court possibly strayed from its path. In this decision, a dispute arose between the parties following Alimenta's inability to supply groundnuts stemming from the action of the executive branch of the Indian government in executive prohibiting its export. As such, Alimenta did not have the requisite permission under India's export policy to execute the supply. The dispute culminated in an award which granted damages to Alimenta. NAFED resisted enforcement of the award. Amongst others, it argued that as the award granted damages to Alimenta without addressing India's restriction on the export of groundnuts, it 'flout[ed] the basic norms of justice.' That is, it was against the public policy of India within the meaning of Section 7(i)(a)(ii) of the Foreign Awards Act, 1967 (since the award was issued in 1989, before the Act, Section 7 of the Foreign Awards Act, 1967 governed enforcement).

The Supreme Court accepted the above objection and refused enforcement. In its opinion, the requirement to seek the government's permission to export is a part of the public policy of India. It opined so on the basis that 'parties were aware of [the requirement] and contracted that in such an exigency as provided in Clause 14 [refusal of permission], the Agreement shall be cancelled for the supply which could

not be made.' As such, it decided that 'it would be against the fundamental public policy of India to enforce such an award, any supply made then would contravene the public policy of India relating to export for which permission of the Government of India was necessary.' It decided so without adding how or why enforcing a supply contract without permission from the Indian government would be against its fundamental public policy.

One way of looking at this decision is that the Supreme Court considered India's import and export policies to be within the ken of the fundamental public policy of India; though it did not offer any basis for such a finding. Another way of looking at this decision would be that the Supreme Court refused to enforce an award as it failed to consider a contractual provision (Clause 14) and its cancelling effect on the contract. Put differently, the Supreme Court's approach translates into the reviewing court interfering with the arbitral tribunal's reading of the contract. It appreciated the provisions of the contract between the parties, did not agree with the finding in the award, which arguably ignored one such provision, and refused enforcement. Essentially, it conducted a merit-based review of the award. This decision departs from the Vijay Karia decision where the Supreme Court held, 'the interpretation of an agreement by an arbitrator being perverse is not a ground that can be made out under any of the grounds contained in Section 48(1)(b). Without therefore getting into whether the Tribunal's interpretation is balanced, correct or even plausible, this ground is rejected.' Whether, and to what extent, NAFED will influence the decisions to come is questionable considering it was passed under the earlier legal regime.

Section 48 of the Act was amended in 2016 with effect from 23 October 2015. As discussed above, the amendment ensured that the grounds of resisting enforcement of a foreign award are construed narrowly. Despite the positive impact of the amendment and the provisions being label 'explanations', the explanations have been held to apply only to court proceedings filed after 23 October 2015, and not retrospectively. This was decided by the Supreme Court in Union of India v. Vedanta Ltd. After reviewing the purpose underlying the amendments and the findings of the

246 Report of the Law Commission on the Amendments to the Arbitration and Conciliation Act 1996, the court held that '[s]ince the amendments have introduced specific criteria for the first time, it must be considered to be prospective, irrespective of the usage of the phrase "for the removal of doubts.' (Vedanta Ltd., at 68, 70). As a result, the amendments to section 48 will only apply to proceedings filed after 23 October 2015.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

Section 50 of the Act provides for Appealable Orders. It reads:

> *'50. Appealable orders: (1) An appeal shall lie from the order refusing to—*
>
> *(a) refer the parties to arbitration under Section 45;*
>
> *(b) enforce a foreign award under Section 48;*
>
> *to the court authorised by law to hear appeals from such order.*
>
> *(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.'*

Section 50(1)(b) stipulates that an order that refuses enforcement of a foreign award can be challenged by way of an appeal. The appeal can be filed before a division bench of the appropriate 'court' under section 5 and section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court Act, 2015 ("Commercial Courts Act"). The Supreme Court's decision in Arun Dev Upadhyaya v. Integrated Sales Service Ltd., (2016) 9 SCC 524, 537 points to this conclusion. The court was faced with the issue whether an appeal filed under Clause 15 of the Letters Patent of the Bombay High Court challenging an order passed by the Single Judge of the Bombay High Court refusing enforcement of the award against some of the

respondents was maintainable. The Supreme Court held that it was. It relied on a combined reading of sections 5 and 13 of the Commercial Courts Act and Section 50 of the Act to hold that the Letters Patent Appeal was maintainable and '[i]t has to be treated as an appeal under section 50(1)(b) of the Act and has to be adjudicated within the said parameters.' Arun Dev was recently affirmed in Noy Vallesina Engg. SpA v. Jindal Drugs Ltd.

To better appreciate the remedies available against an order refusing to enforce a foreign award, it is necessary to understand the prevailing appellate procedure and court system. In India, the High Courts of Bombay, Calcutta, Madras, and Delhi exercise original jurisdiction ("the Chartered High Courts"), that is, they act as courts of first instance. In other states, lower courts act as courts of first instance. If an order made by a High Court acting as the first court is to be appealed, the appeal has to be filed before a larger bench of that High Court. Such an appeal is called a Letters Patent appeal. If the first order has been made by a lower court acting as the first court, the appeal has to be filed before the High Court exercising supervisory jurisdiction over that lower court.

If a foreign award is sought to be enforced in a territory over which a chartered High Court exercises original jurisdiction, an application under section 48 has to be filed before that High Court. In other cases, an application under section 48 also has to be filed directly before a High Court, and not a subordinate court exercising original jurisdiction over that territory, by virtue of section 2(e)(ii) of the Act. This provision allows for such a section 48 application to be filed before a High Court instead of the appropriate subordinate court exercising original jurisdiction in that territory. In both cases, the appeal challenging a refusal to enforce a foreign award would lie before the Commercial Appellate Division of the appropriate High Court, under section 13 of the Commercial Courts Act or the particular Letters Patent, as the case may be. This would be the 'first' appeal. Section 50(2) bars a 'second' appeal. That is, an order passed by the appellate court cannot be challenged. However, the bar under section 50(2) does not extend to appeals that may be filed before the Supreme Court.

The definition of 'right to appeal to the Supreme Court' under section 50(2) was discussed in Shin-Etsu Chemical Co. Ltd. (2) v. Vindhya Telelinks Ltd. The legal principles that emerged from the discussion deserve mention.

- section 50(1)(a) does not provide an independent right of appeal to the Supreme Court. (Shin-Etsu, at 20);
- '[t]he right to appeal to the Supreme Court referred to and excluded from the bar contained in Section 50(2) of the Act, refers to appeals under Article 132 or 133(1) [of the Constitution of India] against any judgment, decree or final order of the High Court, if the High Court certified under Article 134-A [of the Constitution of India] ....' (Shin-Etsu, at 21); and
- the right to appeal to the Supreme Court does not refer to the Supreme Court's discretion to grant special leave to appeal from any order, judgment, or decree, made by any court or tribunal in India under Article 136. This is because Article 136 of the Constitution of India does not provide a 'right' of appeal. (Shin-Etsu, at 21).

Articles 132, 133(1) and 136 of the Constitution of India read as follows:

> *'132. Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.— (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under Article 134-A that the case involves a substantial question of law as to the interpretation of this Constitution.*
>
> *(2) ...*
>
> *(3) Where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided.*

Explanation: For the purposes of this article, the expression "final order" includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case

133. Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters. — (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under Article 134-A: (a) that the case involves a substantial question of law of general importance; and

(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

136. Special leave to appeal by the Supreme Court — (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.'

From the above, an order refusing to enforce a foreign award can be challenged as follows:

- an appeal may be filed under the relevant provision under the Letters Patent in case the first order is made by a single judge of a chartered High Court (for instance, in the case of an order made by the Single Judge of the Bombay High Court, an intra-court appeal assailing that order can be filed under Clause 15

of the Letters Patent). This would be akin to the generic appeal provision under section 13 of the Commercial Courts Act;

- if the order is made by a single judge of any other High Court's Commercial Division, an appeal may be filed under section 13 of the Commercial Courts Act;
- there is no second appeal against an order made by the appellate court refusing to enforce or enforcing the foreign award;
- the above bar does not extend to an appeal that may be filed before the Supreme Court under Article 132 or Article 133(1) of the Constitution of India;
- an application may be filed to seek special leave appeal an order made by the appellate court under Article 136 of the Constitution of India. This remedy is not a 'right' but subject to the Supreme Court's discretion; and
- 'though the existence of an alternative remedy does not take away the jurisdiction of the Supreme Court under Article 136, it would not grant leave and entertain appeals against orders/judgments/decrees of the District Court or courts subordinate thereto, if remedy by way of appeal or revision to the High Court or other court or forum is available.' (Shin-Etsu, at 22).

14. Is there any recourse available against a leave for enforcement?

Section 50 does not provide for an appeal against an order that enforces a foreign award as elaborated by the Supreme Court in Kandla Export Corpn. v. OCI Corpn. In this decision, Kandla Export appealed an order that rejected its challenge to the first court's enforcement of the foreign award on the grounds that section 50 of the Act does not provide for such an appeal and, considering the conscious exclusion, Kandla Export cannot rely on Section 13 of the Commercial Courts Act to file an appeal independent of Section 50. The Supreme Court affirmed the Division Bench's order. After analyzing, Feurst Day Lawson v. Jindal Exports, Arun Dev, the text of section 50, and the objectives of the Act and the Commercial Courts Act, it held that an appeal under Section 13(1) of the Commercial Courts Act would only lie if section 50 provided for it. Such an 'appeal has to be adjudicated within the parameters of section

50 alone. Concomitantly, where section 50 excludes an appeal, no such appeal will lie' (at 733).

This aligns with the Supreme Court's finding in Noy Vallesina where it espoused the principle that a special act, which is a self-contained code would prevail over a general statute. A natural corollary of this would be that a general right provided under the general law cannot be used to circumvent the special, self-contained code. It held as follows:

> *'the Arbitration Act is a self-contained code and exhaustive ... [which] carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". Therefore, a letters patent appeal [against an order enforcing a foreign award] would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded.'*

Notwithstanding the above, section 50(2) clarifies that the bar to appeal does not affect or take away any right to appeal to the Supreme Court. Therefore, an order enforcing an arbitral award can still be assailed under Articles 132 and 133(1) of the Constitution of India. In addition, the resisting party can petition the Supreme Court seeking special leave to challenge an order enforcing a foreign award under Article 136 of the Constitution of India. That said, the probability of success is extremely low based on observations made by the Supreme Court in Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd where it cautioned that Article 136 of the Constitution of India 'should not be used to circumvent the legislative policy' which does not provide for an appeal from an order enforcing a foreign award. It went to define the parameters of an Article 136 challenge in the following words:

> *'this Court should be very slow in interfering with such judgments and should entertain an appeal only with a view to settle the law if some*

new or unique point is raised which has not been answered by the Supreme Court before, so that the Supreme Court judgment may then be used to guide the course of future litigation in this regard. Also, it would only be in a very exceptional case of a blatant disregard of Section 48 of the Arbitration Act that the Supreme Court would interfere with a judgment which recognises and enforces a foreign award however inelegantly drafted the judgment may be.'

15. What are the rules in India with regard to the execution (after the enforcement) of an ICSID award?

The Act's purpose and the underlying objective to be pro-enforcement is evinced in Section 49 which treats an enforceable award as 'deemed to be a decree' of the court that grants enforcement. As such, the Act does not contemplate a dichotomy between enforcement and execution of a foreign award. Put differently, in the words of the Supreme Court in LMJ International Ltd v Sleepwell (supra, at 319), 'the scheme of Section 48 of the Act does not envisage piecemeal consideration of the issue of maintainability of the execution case concerning foreign awards, in the first place; and then the issue of enforceability'. This decision aligns with the Supreme Court's decision in Feurst Day, where the court rejected the argument that the enforcing party must file separate proceedings for execution after the court enforces the foreign award. The Telangana High Court in Keytrade v Nagajuna Fertilizers, 2018 SCC Online Hyd 2147 built on Feurst Day to elaborate (at paragraph 44) that ss. 47 to 49 contemplate one proceeding; and:

'in [this] one proceeding there may be different stages; in the first stage the Court may have to decide about the enforceability of the Award and with regard to the requirement of the said provisions and once the Court decides that the foreign award is enforceable, it can proceed to take further effective steps for execution of the same; and there arises no question of making foreign award a rule of Court/decree again.'

The combined effect of section 49 and section 50 of the Act is illustrated in the Bombay High Court's decision in Smart Timing Steel Limited v National Steel & Agro Industries Limited, 2016 SCC Online Bom 15490. In this case, Smart Timing filed a petition for enforcement of the foreign award, a direction for the respondent to disclose assets, and execution of the award. As Agro Industries failed to make out any ground to successfully challenge enforcement, the Bombay High Court granted the reliefs.

Once the award is enforceable, it becomes a 'decree' of that court. (Saraf & Jhunjhunuwala, Law of Arbitration and Conciliation, p. 875, 9th ed., 2022). It must thereafter be executed as such, in accordance with the principles of Order XXI of the Indian Code of Civil Procedure, 1908 ("Code"). This chapter contains 106 rules that provide for a detailed and exhaustive mechanism for enforcement of a decree.

As per s. 51 of the Code, a decree can be enforced in the following manners:

- by delivery of any property specifically decreed;
- by attachment and sale or by sale without attachment of any property;
- by arrest and detention in prison;
- by appointing a receiver; or
- in any other manner as the nature of the relief granted may require.

In cases of a money decree, it is executed by rote by attaching and selling or selling without attaching any property of the judgment-debtor. For such decrees, the proviso to s. 51 clarifies that execution is not by way of arrest and detention unless:

- the judgment debtor has dishonestly parted/transferred the property in bad faith;
- the judgment debtor is likely to abscond with the aim of obstructing or defeating the execution;
- the judgment debtor has the resources to pay the decreed amount but refuses or neglects to pay; or

- the decree is for a sum for which the judgment debtor was obliged to account for under a fiduciary duty.

It bears mention that at the stage of execution of the decree which follows enforcement of a foreign award, the executing court cannot entertain objections on the merits of the matter. (Vijay Karia, ¶ 112)

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Indian courts have not had occasion to consider the application on the law on state immunity in the execution of an investment treaty award.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

All aspects relevant to the Indian regime have been discussed above.

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Japan

Implementation of the ICSID Convention in Japan

1. Is there a model BIT in place in your country?

As of December 2022, there is no model BIT in place in Japan.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Japan is a party to the ICSID Convention (signed on 23 September 1965, ratified on 17 August 1967, and entered into force on 16 September 1967).

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Japan has made a designation of the competent court or other authority for purposes of recognizing and enforcing awards rendered pursuant to the ICSID Convention (see also Question No. 8).

As of December 2022, Japan has not made any other notifications or designations.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

As of January 2022, no investment treaty arbitrations conducted under the ICSID Convention have been brought against Japan. However, Japan reportedly faces an investment treaty arbitration administered by ICSID but conducted under the UNCITRAL Arbitration Rules. See, IA Reporter, 'Identity of Hong Kong-based investor bringing first treaty-based claim against Japan is revealed; names of arbitrators also come to light', 3 March 2021.

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

No claims based on the ICSID Convention have been brought against Japan (see also Question No. 4). However, the pending UNCITRAL investment arbitration against Japan reportedly relates to the renewable energy sector.

6. Has your country complied with ICSID awards rendered against it?

As of January 2022, no ICSID awards have been rendered against Japan.

7. What is the number of ICSID awards that have been enforced in your country?

As of January 2022, no ICSID awards have been enforced in Japan.

Enforcement of ICSID awards in Japan

Competent court or authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

In accordance with Article 54(2) of the ICSID Convention, Japan has designated the competent court for the purposes of recognizing and enforcing awards rendered pursuant to the Convention as:

i. the summary court or district court designated in the arbitration agreement; or

ii. in the absence of any such designation, the summary court or the district court having jurisdiction over:

   a) the defendant's place of domicile or residence;

   b) the place where the subject matter of the claim, or the security therefor, or any attachable property of the defendant is located.

In the database of ICSID Member States, Japan, the designation does not specify

which court 'summary court' refers to. If it has a meaning analogous to the definition of that term in the Japanese Court Act, a 'summary court' is a court that has jurisdiction over civil cases where the disputed sum does not exceed JPY 1,400,000.

However, due to the absence of any domestic legislation that implements the ICSID Convention, it remains unclear whether and how the designation above will operate in practice. As detailed below, if the Japanese Arbitration Act ('Arbitration Act') were applicable to an enforcement procedure for an ICSID award, the following courts would have jurisdiction, in accordance with Articles 46(4) and 5(1) of the Arbitration Act:

- the district court determined by agreement of the parties;
- the district court with jurisdiction over the seat of arbitration (applicable only if the seat of arbitration is limited to an area over which only one court has jurisdiction);
- the district court that has jurisdiction over the place where the respondent in the enforcement procedure is located (if a company or other entity, the location of its principal office or business premises); and
- the district court that has jurisdiction over the location of the subject matter of the claim or the attachable property of the debtor.

If two or more courts have jurisdiction under the Arbitration Act, the case will likely fall within the jurisdiction of the court that first received the application for enforcement.

While the ICSID designation and the English translation of the Arbitration Act use different wording, the foregoing demonstrates that the competent courts under the Arbitration Act are largely the same as those designated by the Japanese government pursuant to the ICSID Convention. However, the district court with jurisdiction over the seat of arbitration does not come into play in terms of enforcement of an ICSID award, as there is no legal seat of arbitration in ICSID arbitrations.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

Overview

In the interim and for the purposes and convenience of this chapter, the authors consider that the words 'enforcement' and 'execution' express different concepts from one another, although the corresponding Japanese language uses only one term ('shikkou'). Specifically, the authors define the term 'enforcement' as obtaining an entitlement to compel compliance with an obligation, and 'execution' as an actual exercise of compulsory power, for example, seizure of the debtor's property, as this interpretation enables a more targeted response to the subsequent questions.

Article 54(1) of the ICSID Convention provides that '[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.' Article 98(2) of the Constitution of Japan mandates that treaties entered into by Japan are to be observed faithfully. Hence, Article 54(1) of the ICSID Convention suggests that Japan shall enforce, in its territory, pecuniary obligations imposed pursuant to an ICSID award in the same manner as a final and binding judgment of a Japanese court.

Under Japanese law, a final and binding judgment of a domestic court is enforceable without any further procedures to confirm its enforceability. A final and binding judgment of a Japanese court constitutes a 'title of obligation' ('saimu meigi' in Japanese) pursuant to Article 22(i) of the Civil Execution Act. A title of obligation is an official document indicating the existence, scope, creditor, and debtor of a claim that is planned to be realized by compulsory execution. If a debtor does not comply with a final and binding judgment voluntarily, the creditor may file a petition with the execution court seeking a certificate of execution ('shikkou bun' in Japanese), and

then compulsorily execute the judgment, for example, by way of attaching the debtor's property.

Accordingly, a reasonable interpretation would be that the pecuniary obligation under the ICSID award shall constitute a 'title of obligation' without the need for any further enforcement procedure. See, Michiko Yokoshima, 'Recognition and Enforcement of ICSID Arbitral Award: the procedure and the effectiveness (in Japanese)', Sophia University Law Review.

However, it should be noted that Japan has no national law establishing the procedure for the enforcement of an ICSID award, and the authors are not aware of any official statements by the Japanese government or courts, or any precedents, which support an interpretation that Article 54(1) of the ICSID Convention renders a pecuniary obligation under an ICSID award automatically enforceable in Japan. It therefore remains to be seen whether a procedure to confirm the enforceability of pecuniary, and more broadly non-pecuniary, obligations under an ICSID award is indeed unnecessary. The authors do not take a definitive view on this point. However, for the sake of a thorough response, the authors nevertheless describe below the procedures that usually are required to enforce an arbitral award, including a non-ICSID award, in accordance with, for example, the New York Convention.

The successful party to an arbitration who seeks to secure compliance with the award in Japan must undertake the following two steps if the unsuccessful party resists or refuses to fulfill its obligation:

i. 'Enforcement' (governed by the Arbitration Act): the winning party shall file a petition with the competent court seeking a decision to approve enforcement ('enforcement decision', 'shikkou kettei' in Japanese) pursuant to Article 46(1) of the Arbitration Act. This is because, unlike a final and binding judgment of a Japanese court, an arbitral award per se does not qualify as a 'title of obligation', unless the winning party obtains a final and binding enforcement decision from a Japanese court. The rationale behind this system is that an arbitral award emanates from two parties' agreement to arbitrate, and not from an established

national judicial system, like a court judgment; therefore, the Arbitration Act requires a court's authorization before executing an arbitral award by judicial means.

ii. 'Execution' (governed by the Civil Execution Act): upon obtaining a final and binding enforcement decision, the award qualifies as a 'title of obligation' based on Article 22, item (vi)-2 of the Civil Execution Act. However, if the unsuccessful party still attempts to circumvent its obligation under the arbitral award, the successful party shall file another petition with the execution court, asking its court clerk to grant a certificate of execution in accordance with Article 26 of the Civil Execution Act. If the certificate is granted, the successful party may move on to compulsory execution, for example, via a procedure to seize the property of the losing party after carrying out the relevant procedures under the Civil Execution Act. The procedures to 'execute' an arbitral award are identical to that of a final and binding judgment of a Japanese court as set out above.

See, Hiroki Aoki & Takashi Ohno, 'Global Arbitration Review Know How Challenging and Enforcing Arbitration Awards: Japan': 'The Arbitration Act is the applicable law for recognition and approval for enforcement of arbitral awards. Once a party obtains a court order approving the enforcement, it may execute the award through the procedure stipulated in the Civil Execution Act, which provides measures for the execution of civil court decisions and arbitral awards.'

It bears repeating that an 'enforcement' procedure is not required if pecuniary obligations imposed pursuant to an ICSID award are enforceable automatically in Japan. Considering so seems sensible based on a literal interpretation of Article 54(1) of the ICSID Convention and the self-contained nature of ICSID arbitration. This position renders the answer to all of questions No. 9 through 14 'not applicable'. However, the authors have not identified any Japanese national laws, official government statements, or court precedents in support of that interpretation. Commentators might contend that courts will not enforce an ICSID award automatically, and will require an applicant to undergo the procedure to obtain a final

and binding enforcement decision, but the position remains unsettled, given that there have yet to be any attempts to enforce ICSID awards in Japan. Therefore, the authors will explain the details of the 'enforcement' procedure for the sake of completeness, as it is impossible to rule out the possibility that such a procedure may be required, either partially or fully, in practice.

Response to the question

Articles 46(10) and 44(5) of the Arbitration Act confirm that the proceedings to obtain an enforcement decision from the court are adversarial. These articles provide that the competent court may not render a decision on the petition to seek an enforcement decision unless it holds either a hearing or an interrogation, which both parties can attend.

The Arbitration Act does not establish detailed rules regarding these proceedings, for example, the necessity for or timing of a round of written or oral pleadings or evidence. The courts have discretion to determine these matters, in consultation with the parties.

10. What are the costs associated with the enforcement of an ICSID award?

Article 3(1), Attachment 1, item 8-2 of the Act on Costs of Civil Procedure provides that the cost of filing an application for an enforcement decision pursuant to Article 46(1) of the Arbitration Act is JPY 4,000.

Generally, the costs are borne by the unsuccessful party. "Court costs" include: fees that are paid by affixing a revenue stamp to the complaint or any other written petition, postal fees for sending documents, and travel expenses, daily allowances, and similar costs for witnesses. Court costs do not include all expenses necessary for conducting a trial; for example, they do not include attorney fees.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

Article 46(2) of the Arbitration Act states that to file an application for an enforcement decision, an applicant must submit the following documents in addition to a written application:

i. a copy of the written arbitral award;

ii. a certification proving that the contents of the copy are the same as the original; and

iii. a Japanese translation of the written arbitral award (unless the award is written in Japanese).

If the applicant retains a lawyer, and the lawyer files the application on behalf of the client, the applicant must submit a power of attorney.

All submissions must be drafted in Japanese. If a party wishes to submit evidence written in a foreign language, it must be submitted with a Japanese translation. There are few requirements regarding the form of the translation, which does not have to be translated by a certified translator. There are no statutory limitations on the length of the submission or documentation.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

If the court that hears the application for an enforcement decision is going to verify the enforceability of an ICSID Award in accordance with the Arbitration Act, the party against whom the enforcement of an award is sought theoretically may defend itself by arguing the existence of any of the following, by reference to Articles 46(8) and 45(2) of the Arbitration Act, each of which is consistent with the grounds in the UNCITRAL Model Law on International Commercial Arbitration:

i. the arbitration agreement is not valid, due to the limited capacity of a party thereto;

ii. the arbitration is not valid, on grounds other than the limited capacity of a party, pursuant to laws and regulations designated by agreement of the parties as those that should apply to the arbitration agreement (or, if no designation has been made, the laws and regulations of the country where the seat of the arbitration is located);

iii. the party did not receive the notice required under the laws and regulations of the country where the seat of arbitration is located (or if the parties have reached an agreement on matters concerning provisions unrelated to public order in the laws and regulations, that other agreement) during the procedure for appointing arbitrators or during the arbitration procedure;

iv. the party was unable to present a defense during the arbitration procedure;

v. the arbitral award contains a decision on matters beyond the scope of the arbitration agreement or a petition made during the arbitration procedure;

vi. the composition of the arbitral tribunal or the arbitration procedure is in violation of the laws and regulations of the country where the seat of arbitration is located (or if the parties have reached an agreement with respect to provisions unrelated to public order in the laws and regulations, that other agreement);

vii. according to the laws and regulations of the country where the seat of arbitration is located (or if the laws and regulations applied to the arbitration procedure are laws and regulations of a country other than the country that is the seat of arbitration, that other country) the arbitral award is not final and binding, or the arbitral award has been set aside or its effect has been suspended by a judicial body of that country;

viii. the petition filed in the arbitration procedure is concerned with a dispute that may not be subject to an arbitration agreement pursuant to Japanese laws and regulations; and

ix. the content of the arbitral award is contrary to public policy in Japan.

In the event of enforcement of an ICSID award, those grounds that reference the seat of arbitration may not be applicable, or must be modified, as the seat of arbitration is not relevant to ICSID arbitrations. Also questionable is whether other grounds, such as the one based on Japanese public policy, can be invoked against enforcement of an ICSID Award in reality, as this would go against the otherwise self-contained ICSID regime. These uncertainties stem from the lack of any domestic legislation implementing the ICSID Convention and any relevant court precedents. The absence of such authorities precludes the drawing of any conclusions in this regard.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

Decisions of district courts concerning applications for an enforcement decision can be appealed to a high court within two weeks of the date of notification of the decision in accordance with Articles 46(6) and 7 of the Arbitration Act.

A decision of the high court may be further appealable to the Supreme Court of Japan, if the high court grants leave to appeal to the Supreme Court, where the matter involves important legal issues, or where there is a claim that the decision is contrary to earlier decisions of the Supreme Court of Japan (or, in the absence of which, earlier decisions of high courts), pursuant to Article 337(1)(2) of Civil Procedure Act. Appeal to the Supreme Court from a high court decision as a matter of right is limited to claims for violation of the Constitution of Japan in accordance with Article 336(1) of the Civil Procedure Act.

14. Is there any recourse available against a leave for enforcement?

The court's decision to grant an enforcement decision can be appealed to higher courts based on the applicable procedural laws (see also Question No.13).

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

Japan has no national law that establishes specific rules pertaining to the execution of an ICSID award. However, the Civil Execution Act and Civil Execution Rules provide

a general framework for the execution of judicial judgments that qualify as titles of obligation, including arbitral awards with a final and binding enforcement decision.

Article 25 of the Civil Execution Act provides that compulsory execution shall be implemented on the basis of an authenticated copy of the title of obligation attached to a certificate of execution. Further, Article 26 of the same act provides that a certificate of execution shall be granted, upon petition, by a court clerk of the court in which the record of the case exists.

Execution procedures differ depending on the type of judgment or award and the assets to be seized. If the judgment or award imposes a pecuniary obligation, it can be executed against subject assets in the following ways. For immovable property and movable property, the execution court administers proceedings, and the court will dispose of the assets, with the assistance of a bailiff, at an auction. For receivables, the execution court can issue an order, the effect of which is to transfer the receivables from the original creditor, the respondent, to the petitioner. See, Akihiro Hironaka & Yui Takahata, 'Global Arbitration Review Know How Litigation: Japan'.

Execution of a non-pecuniary obligation includes compulsory execution of delivery of assets, execution by substitution, and indirect compulsory execution.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Japan has no specific legislation that governs recognition or enforcement of arbitral awards against foreign states. However, the Act on the Civil Jurisdiction of Japan with respect to a Foreign State sets out general rules on the submission of foreign states to Japanese courts and execution of judgments against foreign states.

Article 4 of the Act provides that sovereign states have immunity from the civil jurisdiction of Japan, including jurisdiction for purposes of execution of judgments. An exception is provided in Article 5(1) such that a foreign state may provide express consent to submit to the jurisdiction of Japan's courts through treaties or international agreements. Although there is no precedent, a foreign state's accession to the ICSID Convention could arguably amount to consent to the jurisdiction of Japanese courts but this would not extend to consent to the execution of judgments.

Articles 17 and 18 of the Act provide some circumstances in which sovereign states cannot enjoy immunity from execution:

i. when the state expressly consented to the execution of a provisional order or civil execution against property held by the state by such methods as treaties or other international agreements and arbitration agreements; or

ii. when the property held by the state is in use, or intended for use, by the state exclusively for purposes other than for non-commercial purposes by the government of the relevant state.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

Contributors:

Masaki Kawasaki (Associate at Nishimura & Asahi, admitted to practice law in Japan)

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Singapore

Implementation of the ICSID Convention in Singapore

1. Is there a model BIT in place in your country?

No.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Yes. Singapore signed the ICSID Convention on 2 February 1968, and ratified it on 14 October 1968. Subsequently, the ICSID Convention entered into force in Singapore on 13 November 1968.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

No.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

Zero.

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

Not applicable.

6. Has your country complied with ICSID awards rendered against it?

Not applicable.

7. What is the number of ICSID awards that have been enforced in your country?

No ICSID awards have been enforced in Singapore. This is not surprising considering that Singapore has not yet been a respondent in any ICSID arbitration.

However, in July 2022, the Singapore High Court dismissed a first of its kind action in Singapore by a judgment creditor seeking to enforce a State's liabilities against the State-owned entity's ("SOE") assets. OI European Group B.V., a Dutch subsidiary of US bottle maker Owens-Illinois, had prevailed against Venezuela in an ICSID arbitration, and sought to enforce the award against the Venezuelan SOE's assets in Singapore. The High Court dismissed the enforcement action that was based on the claim that the Venezuelan SOE was an alter ego / extension of the State. It found that the SOE's constitution, internal structure, accounts, and delegation of roles were indicative of it having a separate legal personality from the State. The Court accordingly held that the ICSID award could not be enforced against the SOE's assets. [Source: https://globalarbitrationreview.com/article/venezuelan-state-entity-dodges-icsid-enforcement-in-singapore]

Enforcement of ICSID awards in Singapore

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

Pursuant to Section 4 of the Arbitration (International Investment Disputes) Act 1968, the General Division of the High Court is the competent court to decide on a request for enforcement.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?) Note: Please refer to the national laws, code articles, and relevant case law.

Pursuant to Section 4 of the Arbitration (International Investment Disputes) Act 1968, a person seeking recognition or enforcement of an ICSID award shall apply for registration in the General Division of the High Court. In addition to the pecuniary obligations imposed by the award, the award shall be registered for the reasonable costs of and incidental to registration. If at the date of the application for registration the pecuniary obligations imposed by the award have been partly satisfied, the award shall be registered only in respect of the balance, and accordingly if those obligations have been wholly satisfied, the award shall not be registered.

Section 5 of the Arbitration (International Investment Disputes) Act 1968 states that once registered, the award is enforced similarly to a judgment of the General Division of the High Court.

However, Section 3 of the Arbitration (International Investment Disputes) Act 1968 provides that Sections 4 and 5 (above) shall bind the Government but not so as to make an award enforceable against the Government in a manner in which a judgment would not be enforceable against the Government.

10. What are the costs associated with the enforcement of an ICSID award?

The costs associated with enforcement can be found in the Fourth Schedule of the Singapore Rules of Court 2021, which took effect on 1 April 2022.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

Since no ICSID awards have been enforced in Singapore yet, the practical considerations that may affect their enforcement in Singapore are not clear. That said,

it is worth noting that Singapore is a well-known pro-arbitration jurisdiction with a robust enforcement regime for both domestic and foreign arbitral awards.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement in Singapore?

Not applicable.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

Not applicable.

14. Is there any recourse available against a leave for enforcement?

Not applicable.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

Pursuant to Section 5 of the Arbitration (International Investment Disputes) Act 1968, once an ICSID award is registered, it is executed similarly to a judgment of the Singapore High Court.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

There is no clear answer to this question as courts in Singapore are yet to deal with this issue in relation to the execution of ICSID awards. However, Section 11 of the State Immunity Act 1979 provides that when the State has agreed in writing to submit a dispute to arbitration, it is not immune as respects proceedings in the courts in Singapore which relate to the arbitration. It is noteworthy that this section is subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

Contributor:

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Western and Central Asia

Armenia

Implementation of the ICSID Convention in Armenia

1. Is there a model BIT in place in your country?

No, Armenia does not have a model BIT.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Armenia is a party to the (date of signature and deposit of ratification: 16 September 1992; entry into force: 16 October 1992).

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Pursuant to Article 54(2) of the ICSID Convention, Armenia has designated the Court of Cassation of the Republic of Armenia as the competent court for the purpose of enforcing ICSID awards in Armenia.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

There have been four investment treaty arbitrations initiated against Armenia under the ICSID Convention, of which one was ongoing, two were concluded, and one was pending annulment as of 27 February 2023.

Pending arbitration case:

- Sanitek S.a.r.l., Sari Haddad and Elias Doumet v. Republic of Armenia (ICSID Case No. ARB/21/17)

Concluded case:

- Global Gold Mining LLC v. Republic of Armenia

Annulment case:

- Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia (arbitration)

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

No, all four cases relate to different industries (waste management, real estate construction, railway and highway construction, mining).

6. Has your country complied with ICSID awards rendered against it?

There has been no ICSID award rendered against Armenia.

7. What is the number of ICSID awards that have been enforced in your country?

There has been no enforcement action of ICSID awards before Armenian courts.

Enforcement of ICSID awards in Armenia

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

As stated above, pursuant to Article 54(2) of the ICSID Convention, Armenia has designated the Court of Cassation of the Republic of Armenia as the competent court for the purpose of enforcing ICSID awards in Armenia.

The competence of the Court of Cassation is set forth under the Law of the Republic of Armenia on "Enforcement of Judicial Acts" entered into force on 01 January 1999 (also the "Enforcement Law"). According to Article 18(14) of the Enforcement Law "If an international agreement on the establishment of an international court with the membership (participation) of the Republic of Armenia or its regulations provide for the enforcement of judgments or decisions of that court, the writ of execution shall

be issued by the Court of Cassation of the Republic of Armenia immediately after submitting the application by the claimant or his/her/its authorized representative, except for the cases when the given international court has issued the respective writ of execution in accordance with its regulations, which is binding for the Republic of Armenia". Therefore, the single requirement with respect to the competence of the Court of Cassation for the purpose of enforcement is that the underlying judgement or decision shall only require enforcement/execution (not recognition) in Armenia pursuant to the international agreement on the establishment of an international court or the regulations of that court. It is worth noting that Article 18(14) only refers to "international court" and not to "arbitration", however, other related articles state "arbitration" as well. For instance, Article 17(4) stipulates that "The writ of execution shall be issued based on the judgments or decisions of the international court (arbitration) operating with the membership (participation) of the Republic of Armenia". In view of the foregoing, and taking into account that the ICSID Convention is an international agreement establishing the International Center for Settlement of Investment Disputes, Articles 18(14) and 17(4) of the Enforcement Law shall apply to ICSID awards.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

Under Armenian law, the requirements with respect to the request for enforcement of an ICSID award specifically are not defined. Article 327 of the Civil Procedure Code of the Republic of Armenia only stipulates the requirements in connection with the request for recognition and enforcement on the basis of foreign arbitral awards, *i.e.* awards rendered in the territory of foreign states and international commercial arbitral awards. In particular, such request shall contain:

i. the name of the court where the request is submitted;

ii. the name, place and composition of the foreign arbitration that rendered the award;

iii. the claimant's name (business name), place of residence (business);

iv. the debtor's name (business name), place of residence (business);

v. the year, month, date and number of the arbitral award (if any);

vi. the request of the applicant to recognize and enforce the foreign arbitral award;

vii. list of attached documents.

The request for recognition and enforcement of a foreign arbitral award shall be accompanied with the original arbitral award or its duly certified copy as well as the original arbitration agreement or its duly certified copy.

It is noteworthy, however, that the above conditions are designed for so-called non-ICSID awards that require both recognition and enforcement and may not be applied with respect to the request for enforcement of an ICSID award by analogy. Furthermore, the request for recognition and enforcement of non-ICSID awards is not addressed to the Court of Cassation, which is the case for requests for enforcement of ICSID awards. The associated costs differ in two cases, as well. Therefore, it is questionable whether the Court of Cassation may return/refuse the request for enforcement of an ICSID award should one of the above documents be missing or require documents outside of this list.

With respect to the request for enforcement of an arbitral award that only requires enforcement, the Enforcement Law provides in its Article 18(14) that the interested party*, i.e.* the claimant shall file an application requesting issuance of a writ of execution before the Court of Cassation of the Republic of Armenia. The list of accompanying documents, however, is not provided in the Enforcement Law, either.

10. What are the costs associated with the enforcement of an ICSID award?

According to Article 22(1)(12) of the Law of the Republic of Armenia "On State Duty", claimants are exempted from paying state duty at courts for applications on issuance of a writ of execution for the enforcement of an arbitral award.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

Parties to the enforcement proceeding: The parties to enforcement proceedings are the claimant and the debtor.

The claimant may be a physical or legal person, the Republic of Armenia or a community, a foreign State or an international organization, in whose favor or for whose benefit the writ of execution is issued. The State Revenue Committee acts as claimant on behalf of the Republic of Armenia within the enforcement/execution proceedings in civil, administrative, and criminal cases regarding the confiscation of judicial (administrative) expenses for the benefit of the state budget, unless the judicial act provides that such expenses are subject to collection in favor of a particular state body (Article 7 of the Enforcement Law). The Law is unclear about whether the State Revenue Committee shall also act on behalf of the state within the enforcement of international arbitral awards, including ICSID, since it only specifies civil, administrative and criminal cases. Given that the amounts due to Armenia under an ICSID award are directed towards the state budget, the Court of Cassation may recognize the State Revenue Committee as a valid claimant.

The debtor to the enforcement proceeding may be a physical or legal person, the Republic of Armenia or a community or a foreign state, which, according to the writ of execution, is obliged to perform certain actions or refrain from performing them.

Timeframe to apply for the writ of execution: Article 23(1)(2) of the Enforcement Law provides that "The application for obtaining a writ of execution shall be submitted within one year, unless otherwise prescribed by law, starting from the day when the arbitral tribunal rendered an award". The law does not prescribe a different term to

submit the application for obtaining a writ of execution with respect to ICSID awards, meaning that the general one-year term shall apply.

Enforcement v. Annulment: If the unsuccessful party to an ICSID arbitration institutes an annulment proceeding, the question arises whether the annulment process shall stay the enforcement or whether the enforcement shall proceed anyway.

The starting point is that the claimant to the enforcement proceeding is bound to request the writ of execution within one year starting from the date of the award pursuant to Article 23(1)(2) of the Enforcement Law. If the claimant fails to act within the timeframe and prefers to wait till the end of the annulment proceeding or till a decision on the matter of stay of enforcement, assuming there is one, he/she/it might risk skipping the one-year term. In theory, requesting the writ of execution after the one-year term is possible if one successfully argues that the annulment proceeding/stay of enforcement impeded any prior enforcement action. In this scenario, however, the claimant will have to demonstrate that the annulment proceeding/stay of enforcement was "a valid reason" for skipping the set term. Hence, this option is more complicated and unpredictable. Particularly, the risk is that the Court might refuse to restore the deadline given that the claimant had the possibility to apply within the time limit and then avail itself of stay/delay options described below.

Stay: Article 37(6) of the Enforcement Law provides that "The enforcement officer shall stay the enforcement proceeding when the court has rendered a decision on stay of the enforcement of the proceeding". The problem with this provision is that nowhere in the Enforcement Law is stated whether "the court" refers to the court having issued the writ of execution, or it could also mean the arbitral tribunal, annulment committee or ICSID pursuant to Article 52(5) of the ICSID Convention. Furthermore, should the Enforcement Law purport "the court" to be the one having issued the writ, the grounds on which the stay decision may be made are not specified.

Delay: Article 22(1) of the same Law provides that "Upon the application of the claimant or the debtor, the court having issued the writ of execution shall have the right to delay or defer the enforcement of the judicial act, to change the manner of and procedure for its enforcement". Accordingly, pursuant to Article 36(1)(2) "Enforcement actions shall be delayed in case of existence of circumstances hindering the performance of enforcement actions, until the elimination of those circumstances upon the decision of the court, as prescribed by Article 22 of this Law". The annulment proceeding/stay of enforcement by ICSID or annulment committee can be considered as "a circumstance hindering the performance of enforcement actions" and thus motivate the delay of enforcement.

To sum up, in case the enforcement claimant faces an annulment proceeding/stay order, the reasonable option would be to submit the application for obtaining the writ of execution within the one-year timeframe in order not to risk skipping the deadline, and thereafter stay or delay the enforcement proceeding based on the ongoing annulment proceeding/order of stay by ICSID or annulment committee.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

Armenian laws do not provide for grounds for opposition of the enforcement of ICSID awards which are final and binding for the Republic of Armenia pursuant to Article 54(1) of the ICSID Convention.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

The Court of Cassation which is the designated competent authority for the purpose of enforcement of ICSID awards in Armenia is the highest judicial body, the decisions of which are not subject to appeal. In any case, if the Court of Cassation finds that there are drawbacks in the application on issuance of the writ of execution, it is likely to return the application to the claimant by requesting additional/missing information rather than refusing it. In the unlikely scenario when the Court refuses to issue the

writ of execution the grounds for which are not provided under Armenian law with respect to ICSID awards, the claimant may institute proceedings before the European Court of Human Rights.

14. Is there any recourse available against a leave for enforcement?

There is no recourse available against a leave for enforcement of ICSID awards given that the Court of Cassation is the highest judicial body in Armenia, the decisions of which are not subject to appeal.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

Legal framework: The execution of ICSID awards is governed by the same law that applies to the enforcement, i.e. the Law of the Republic of Armenia on "Enforcement of Judicial Acts". The competent authority in charge of the execution is the Enforcement Service (Article 3(1) of the Enforcement Law).

Basis for execution: The execution is performed on the basis of the writ of execution. In case the Enforcement Service finds that the writ does not meet the requirements set forth under Article 21 of the Enforcement Law (for instance, the writ does not contain the name of the court having issued the writ, the case based on which the writ was issued, date of the decision subject to enforcement, required information about the parties, and the like), it shall return the writ to the Court of Cassation under Article 31. After eliminating the defects, the Court may re-submit the writ to the Enforcement Service.

Executory measures: Based on the writ of execution, the Enforcement Service exercises executory measures specified by the Enforcement Law or the writ, such as confiscation of the debtor's property through arrest and liquidation; confiscation of the debtor's salary, pension, stipend, and other types of income; confiscation of certain items specified in the writ of execution from the debtor and handing them over to the claimant, etc. (Articles 4 and 5 of the Enforcement Law).

Timeframes: As a general rule, the execution of judicial acts shall be concluded within 2 months. However, in certain cases prescribed by law or other legal acts, the execution shall be performed in an urgent manner (Article 34 of the Enforcement Law). Given that the Court of Cassation shall issue the writ of execution for an ICSID award "immediately after submitting the application by the claimant or his/her/its authorized representative" pursuant to Article 18(14) of the Enforcement Law, the Court may state in the writ that the execution by the Enforcement Service shall likewise be performed immediately/urgently.

Completion of the execution: Article 41 sets out the circumstances in which the responsible official of the Enforcement Service terminates the execution. Such instances include the impossibility of identifying the location of the debtor or his/her/its property necessary for the execution despite the measures taken by the official and (or) the claimant; lack of property or income subject to confiscation; insufficiency of the debtor's property to cover the claimant's request, etc.

Dismissal of proceedings: Article 42 sets out the circumstances in which the responsible official of the Enforcement Service dismisses the execution proceeding. Such instances include the actual execution of the writ or cessation of the obligation deriving therefrom on another legal basis; signing of a settlement agreement between the claimant and the debtor that has been approved by the court; death of the claimant or the debtor where the duties prescribed by the writ are non-transferrable; annulment of the judicial act on the basis of which the writ of execution was issued; bankruptcy of the debtor; dissolution of the debtor- or claimant-legal entity, etc.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Armenia does not have a dedicated law on state immunity. The issue is governed by international law instruments and principles. There is no judicial practice in this

respect given that there has been no enforcement action arising from ICSID awards rendered against Armenia.

By contrast, if the enforcement/execution is sought against a foreign state having assets in Armenia, the issue is governed by the Civil Procedure Code of the Republic of Armenia. In its relevant part, Article 432 of the Code stipulates that the confiscation of the property belonging to a foreign state located in the territory of the Republic of Armenia is allowed only with the consent of the competent authorities of the relevant state, unless otherwise stipulated by international treaties of the Republic of Armenia.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

Contributor:

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Kazakhstan

Implementation of the ICSID Convention in Kazakhstan

1. Is there a model BIT in place in your country?

There is no model BIT in Kazakhstan. Nevertheless, the Ministry of Justice drafts and publishes Model Investment Contracts, which are mandatory for all foreign investors in Kazakhstan.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

The Republic of Kazakhstan acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) on 23 July 1992, by signing it. The deposit of ratification was on 21 September 2000, and the ICSID Convention entered into force on 21 October 2000.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Kazakhstan has not made any notifications or designations upon ratifying the ICSID Convention.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

There are 14 cases in which Kazakhstan acts as a respondent. Of those 14 cases, one is still pending.

Pending cases:

- AS Windoor v. Republic of Kazakhstan

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

Most cases relate to the energy sector, particularly oil, gas & mining, and electric power. Some cases were related to the financial sector and pharmaceuticals. For instance, oil, gas & mining: 7 cases (50%), energy: 2 cases (14.5%), construction: 2 cases (14.5%), other cases: 1 case (7%), finance: 1 case (7%) ICT: 1 case (7%).

6. Has your country complied with ICSID awards rendered against it?

In total, there are only three ICSID awards made against Kazakhstan. There is no publicly available information on these three cases. However, Kazakhstani courts have complied with ICSID awards issued in favor of the State. For instance, by the ruling of the Specialized Inter-district Economic Court of the East-Kazakhstan Region dated 2 November 2017, the Ministry of Justice's application for the recognition and enforcement of the award in ICSID case No. ARB /10/16 AES Corporation v. the Republic of Kazakhstan was enforced.

7. What is the number of ICSID awards that have been enforced in your country?

According to the publicly available information, two awards – AES v. Kazakhstan and Caratube v. Kazakhstan – have been enforced by Kazakhstan's courts. In both cases, however, the awards were in favor of the respondent State.

Enforcement of ICSID awards in Kazakhstan

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

A party, in whose favor an award has been made shall apply for the recognition and enforcement of the arbitral award in the court of the seat or residence of the award debtor or, if the seat or residence of the award debtor is unknown, in the court of the

award debtor's property. Such applications shall be considered by the district and equivalent courts.

An application for recognition and enforcement of an arbitral award shall be made in writing and shall be signed by the award creditor or his representative.

Consideration of an application for enforcement an arbitration award shall be held in open court session, with the award debtor being notified of the time and place of consideration of the application. The judge shall consider the given application individually within fifteen working days from the date of receipt of application.

In addition, according to art. 501 of the Civil Procedure Code of the Republic of Kazakhstan (hereinafter – the "CPC") an arbitral award may be submitted for enforcement in Kazakhstan within three years from of its entry into force.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

Under Article 54 of the ICSID Convention, each Contracting State shall recognize an arbitral award made under this Convention as binding and perform the financial obligations set out in the award within its territory as if it were a final judgment of a court of this state. The party applying for recognition or enforcement in the territory of a Contracting State shall submit to the competent court a copy of the award certified by the Secretary-General.

As described in the previous section, an application for the recognition and enforcement of a foreign arbitral award shall be filed by the award creditor with the court of the seat or residence of the award debtor. If the seat or domicile of the award debtor is unknown, the application shall be filed at the seat of the debtor's assets.

The application for recognition and enforcement of a foreign court decision and foreign arbitral award shall be submitted in writing and signed by the award creditor or his/her representative.

The recognition procedure is adversarial. The parties are encouraged to participate the proceedings. The court notifies the award debtor that it has received an application for enforcement of the arbitral award, and the place and time of its consideration in the court hearing.

The award creditor shall also be notified about the place and time of the court hearing on his application. Failure of the award debtor or award creditor to appear at the court hearing shall not be an obstacle to the consideration of the application unless the award debtor has filed a request for postponement of the hearing on the application, stating the valid reasons for his inability to appear at the court hearing.

When considering an application for the enforcement of an arbitral award, the court shall not review the merits of the arbitral award.

Based on the results of the court's consideration of the application, the court shall decide either to issue a writ of execution or to refuse to issue such a writ. The court's decision to issue a writ of execution is immediately enforceable.

Pursuant to art. 254 of the CPC, the enforcement of an arbitral award is carried out by a bailiff, also known as a court enforcement officer, in accordance with national legislation on enforcement proceedings.

10. What are the costs associated with the enforcement of an ICSID award?

The costs associated with the enforcement of an ICSID award are likely to include court fees, translation, and notarization fees. For example, the applications for a writ of execution to enforce an arbitration award is five monthly notional units, which is equal to KZT 16,250 (USD 35). The monthly notional unit is subject to change from year to year.

In addition, the application and all supporting documents must be written in Kazakh or Russian. Any documents submitted in a language other than Kazakh or Russian must be translated into Kazakh or Russian and notarized.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

According to Art. 253 of the CPC, if the arbitral award is not performed voluntarily, the party to the arbitral proceedings in whose favor the arbitral award was rendered (the award creditor) has the right to apply to the court for enforcement.

An application for enforcement must meet certain requirements set forth in the CPC. For example, the application must contain

- The full name of the court to which the application is made;
- The full name of the award creditor, date of birth, place of residence, individual identification number and, if the award creditor is a legal entity, its full name, location, business identification number and bank details; the name of the representative and his address, if there is a representative;
- The full name of the Award Debtor, its place of residence, individual identification number (if known to the Award Creditor), and, if the Award Debtor is a legal entity, its full name, location, bank details (if known to the Award Creditor) and business identification number (if known to the Award Creditor). The claim must include the award debtor's telephone number and e-mail address, if known to the award creditor;
- Circumstances on which the award creditor bases its claim and the content of any evidence supporting those circumstances;
- The value of the application, if the application is subject to valuation, and the calculation of the amounts claimed or disputed;
- A list of the documents attached to the application.

The application shall be signed by the claimant or his representative, if he is authorized to sign the application. If the application is submitted as an electronic document, it shall be certified by the electronic digital signature of the claimant or his representative. The application shall be signed by the award creditor or his/her representative if authorized to sign the application. When the application is filed as an electronic document, it shall be certified by the electronic digital signature of the applicant or his/her representative.

The application for the issuance of a writ of execution shall be accompanied by:

- The original or a copy of the arbitration award. A copy of the arbitral award shall be certified by the chairman of the arbitral tribunal, and a certified copy of the arbitral award shall be notarized;
- An original or certified copy of the arbitration agreement.

A petition to enforce an arbitral award may be filed not later than three years after the deadline for voluntary enforcement expires. However, the court shall have the right to restore the time limit for filing an application for the issuance of a writ of execution if it recognizes the reasons for missing the specified time limit as valid.

12. In what way can a party against whom enforcement of an ICSID award is sought to defend itself to prevent enforcement?

The court has the right to refuse to enforce an arbitral award if the other party against whom enforcement is sought proves that

- the arbitration agreement is invalid under the law of the state to which the parties have subjected it, and in the absence of such an indication, under the law of the Republic of Kazakhstan;
- the arbitral award is made on a dispute not covered by the arbitration agreement or does not fall within the terms of the arbitration agreement, or contains rulings on issues that are beyond the scope of the arbitration agreement, as well as due to the lack of jurisdiction of the arbitral tribunal over the dispute

- a court has declared a party to the arbitration agreement legally incompetent or of diminished capacity;
- the party against whom the award is made was not duly served with notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case to the arbitral tribunal as the tribunal may deem appropriate;
- there is an enforceable judgment or arbitral award in a dispute between the same parties on the same subject matter and on the same grounds, or there is a decision by a court or arbitral tribunal to terminate the proceedings in connection with the withdrawal of the claim by the claimant;
- the award was made possible by a criminal act established by an enforceable court decision;
- the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the law;
- the award has not yet become binding on the parties or has been set aside or its enforcement has been stayed by a court of the country under whose law it was made.

In addition, the party against whom enforcement is sought may argue that enforcement of such an award is contrary to the public policy of Kazakhstan or that the dispute on which the award was made is not subject to arbitration under local laws.

13. Is any recourse available against a decision refusing to enforce an ICSID award?

There is an appeal procedure against a decision to refuse enforcement of an ICSID award. Such decisions may be appealed to a higher court. According to Art. 429 CPC, a party may file a petition for appeal against the decision of the court of first instance.

The petition must be submitted to the court that made the first decision, with copies of the documents attached to the number of persons involved in the case. Upon receipt of the petition, the judge of the first instance shall forward the case to the appellate court.

On the basis of the results of the consideration of the appeal, the appellate court shall make a decision to

- leave the court's decision unchanged and the petition unsatisfied;
- annul the court's decision in whole or in part and remand the case to the court of first instance for reconsideration;
- reversing the judgment in whole or in part and deciding the case on its merits;
- amend the judgment.

14. Is there any recourse available against a leave for enforcement?

According to Art. 127 of the Law of the Republic of Kazakhstan on Enforcement Proceedings, the decision and actions (inaction) of a court bailiff on enforcement of an enforcement document or refusal to perform such actions may be appealed to court by the creditor or debtor of the award. The appeal shall be lodged with the court in accordance with the procedure established by the legislation of the Republic of Kazakhstan on administrative proceedings.

As of July 1, 2021, an appeal against actions (inactions) of a bailiff in the execution of enforcement documents shall be filed with a specialized interdistrict administrative court in the order of administrative and judicial proceedings. In this regard, a person whose rights have been violated by the actions (inactions) of a private bailiff should file a complaint with the administrative court.

15. What are the rules in your country concerning the execution (after the enforcement) of an ICSID award?

There are no specific rules governing the enforcement of ICSID awards. For the enforcement of foreign arbitral awards, there are only general rules set forth in the CPC and the Law on Enforcement Proceedings and the Status of Bailiffs.

According to Art. 37 of the Law on Enforcement Proceedings and the Status of Bailiffs, a bailiff shall commence enforcement proceedings on the basis of an enforcement document at the request of the award creditor.

The application shall be signed by the award creditor or his representative. A representative shall attach to the application a power of attorney or other document certifying his authority. In order to secure enforcement, the application may contain a request for the attachment of the award debtor's property.

Upon receipt of a writ of execution that meets the requirements of Kazakh legislation, a bailiff shall commence enforcement proceedings and issue a corresponding decision within three business days.

When initiating enforcement proceedings, a bailiff shall agree (contract) with the creditor of the writ of execution on the terms and conditions of executing the writ of execution and explain the rights and obligations of the creditor of the writ of execution.

Simultaneously with the commencement of enforcement proceedings, a bailiff shall take measures to ensure the fulfillment of the enforcement documents, as well as through a check in the state automated information system of enforcement proceedings shall reveal the existence of other enforcement proceedings against the debtor, notify the claimant in case of their discovery and explain the order of priority for the satisfaction of his claims under the law.

Following the execution, the debtor shall be obliged to fulfill the obligations towards the creditor by notifying the bailiff.

A bailiff takes the following measures to ensure the execution of enforcement documents:

- seizure of the debtor's money and property held in banks, organizations performing certain types of banking operations, and insurance organizations;
- seizure of the debtor's movable property in his possession or in the possession of other natural persons or legal entities;
- seizure of the debtor's immovable property in the debtor's possession or in the possession of other natural persons or legal entities;
- prohibiting the debtor from performing certain acts, including prohibiting the bodies of the legal entity from making decisions, as well as suspending decisions on alienation of movable and immovable property, property and non-property rights, securities and shares in the authorized capital and property of the legal entity;
- to prohibit the debtor from using his property, including money, or to order its use within the limits established by the court bailiff;
- sealing the debtor's property
- seizure of ownership documents;
- prohibiting other persons from transferring property, including money, to the debtor or performing other acts with the debtor.

Where necessary, several types of enforcement may be used.

Pursuant to Art. 39, the execution of enforcement documents by a bailiff shall be completed within a maximum of two months from the commencement of the enforcement proceedings.

The term of the enforcement proceedings shall not include the period during which

- the execution of the enforcement documents has been suspended, postponed or paid in instalments on the specified grounds;

- the award debtor has been granted the right to sell the seized property independently.

State Immunity

16. How do courts deal with the Law on state immunity when the execution of an ICSID award is sought?

Kazakhstan's authorities have resisted enforcement of adverse awards on numerous occasions, but have shown great willingness to settle subsequent cases.

For example, Kazakhstan invoked state immunity against enforcement of the AIG Award in ICSID Case No. ARB/01/6 when the claimants sought enforcement against the National Bank of Kazakhstan. The parties subsequently settled the award. The same applies to the Rumeli case, ICSID Case No. ARB/05/16, where Kazakhstan applied for annulment of the award, but then agreed to settle the dispute.

According to paragraph 2 of Article 1102 of the Civil Code, in civil legal relations with a foreign element, the Republic of Kazakhstan shall enjoy immunity in respect of itself and its property from the jurisdiction of courts of another state, including judicial immunity, immunity from execution of a judgment and immunity from execution of a judicial act, unless otherwise provided:

- in an international treaty of the Republic of Kazakhstan
- in a written agreement that is not an international treaty of the Republic of Kazakhstan;
- by a statement in court or a written notice in a particular case.

As Kazakhstan has ratified the ICSID Convention and under the Civil Code, Kazakhstan does not enjoy state immunity when enforcement of an ICSID award is sought.

Miscellaneous

17. Are any (other) unaddressed aspects relevant in your country?

After the enforcement of an arbitral award, the costs of the enforcement proceedings shall be recovered from the debtor of the award for the benefit of the persons or organizations who incurred such costs.

Pursuant to art. 113 of the Law on Enforcement Proceedings and the Status of Enforcement Bailiffs, the costs of enforcement proceedings are the budget funds spent on their organization and implementation, the funds of the parties to the enforcement proceedings, the enforcement bailiff, and other persons and organizations engaged by the enforcement bailiff in the enforcement proceedings.

Expenses for the execution of enforcement measures include funds spent on

- identifying, inspecting and valuing the property of the judgment debtor;
- organizing and carrying out seizure and confiscation of the judgment debtor's property, transportation and storage of such property
- organizing the sale of the seized property;
- payment of interpreters, specialists and other persons involved in accordance with the established procedure for the performance of executive acts;
- transfer (sending) of the recovered amounts to the award creditor by mail;
- bank charges related to the payment of the recovered amounts from the judicial officer’s cash control account and current account, which are intended for keeping the recovered amounts in favor of the judgment creditor;
- search for the judgment debtor;
- advance payment to the judgment creditor;
- bailiff's travel expenses for performing enforcement actions by all types of public transportation - urban, suburban and local (except for taxis), including payment of bailiff's travel expenses;

- other necessary actions in the process of execution of the writ of execution;
- other payments to persons engaged by the bailiff in the execution process.

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Türkiye

Implementation of the ICSID Convention in Türkiye

1. Is there a model BIT in place in your country?

Türkiye's Model BIT 2016 was adopted on 1 January 2016 and replaced Türkiye's Model BIT 2009. However, the text is not accessible.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Türkiye is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (the ICSID Convention or the Convention). Türkiye signed the ICSID Convention on 24 June 1987. The deposit of ratification of the Convention was made on 3 March 1989. The Convention entered into force on 2 April 1989.

On ratifying the Convention, Türkiye declared that:

> *"With respect to Article 64 of the Convention, the Government of Turkey is of the opinion that the disputes which may arise from the interpretation and application of the Convention can be solved through meaningful negotiations between the parties to the dispute, without the need of having recourse to third party settlement."*

Statistics

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Türkiye has indeed made designations regarding Articles 25(1), 25(3) and 54(2), and one notification regarding Article 25(4) of the Convention.

In addition, the government of Türkiye expressed concern over Article 64 when ratifying the Convention. The government of Türkiye declared that disputes that may arise from the Convention could be solved through negotiations, without a third-party settlement.

The Turkish Electricity Generation and Transmission Corporation (TEİAŞ) and Petroleum Pipeline Corporation (BOTAŞ) have been designated as constituent subdivisions or agencies, and notifications regarding their consent to ICSID's jurisdiction have been made, according to Articles 25(1) and (3) on 8 October 1998.

Türkiye has designated appropriate courts per Article 54(2) to recognize and enforce awards issued in accordance with the Convention:

> "The commercial court of first instance ('asliye ticaret mahkemesi') belonging to the subject place, as designated in the written agreement between the parties, and in case of absence of such agreement, the commercial court of first instance having the jurisdiction over the place of the losing party's domicile, if not, residence, or, in the absence of both, over the place of the subject property of the claim, or in places where a commercial court of first instance does not exist, the civil court of first instance ('asliye hukuk mahkemesi') of the subject place."

Pursuant to Article 25(4) of the Convention, Türkiye made the following notification on 3 March 1989:

> *"I also have the honour to hereby notify, pursuant to Article 25 (4) of the 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' concerning classes of disputes considered suitable or unsuitable for submission to the jurisdiction of the Centre that only the disputes arising directly out of investment activities which have obtained necessary permission, in conformity with the relevant legislation of the Republic of Turkey on foreign*

capital, and that have effectively started shall be subject to the jurisdiction of the Center. However, the disputes, related to the property and real rights upon the real estates are totally under the jurisdiction of the Turkish courts and therefore shall not be submitted to jurisdiction of the Center."

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

The number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against Türkiye is sixteen (16). Four (4) cases are pending, and the rest have been concluded.

Pending cases:

- Enel, S.p.A. v. Republic of Türkiye (ICSID Case No. ARB/21/61)
- Alamos Gold Holdings Coöperatief UA and Alamos Gold Holdings B.V. v. Republic of Türkiye (ICSID Case No. ARB/21/33)
- Akfel Commodities Pte. Ltd. and I-Systems Global B.V. v. Republic of Türkiye (ICSID Case No. ARB/20/36)
- Westwater Resources, Inc. v. Republic of Türkiye (ICSID Case No. ARB/18/46)

Concluded cases:

- Cascade Investments NV v. Republic of Türkiye (ICSID Case No. ARB/18/4)
- Nabucco Gas Pipeline International GmbH in Liqu. v. Republic of Türkiye (ICSID Case No. ARB/15/26)
- Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi (ICSID Case No. ARB/14/35)
- Tulip Real Estate and Development Netherlands BV v. Republic of Türkiye (ICSID Case No. ARB/11/28)
- Alapli Elektrik BV v. Republic of Türkiye (ICSID Case No. ARB/08/13)

- Saba Fakes v. Republic of Türkiye (ICSID Case No. ARB/07/20)
- Europe Cement Investment and Trade S.A. v. Republic of Türkiye (ICSID Case No. ARB(AF)/07/2)
- Libananco Holdings Co. Limited v. Republic of Türkiye (ICSID Case No. ARB/06/8)
- Cementownia "Nowa Huta" S.A. v. Republic of Türkiye (ICSID Case No. ARB(AF)/06/2)
- Motorola Credit Corporation, Inc v. Republic of Türkiye (ICSID Case No. ARB/04/21)
- PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Türkiye (ICSID Case No. ARB/02/5)
- Ipek Investment Limited v. Republic of Türkiye (ICSID Case No. ARB/18/18)

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

Of all sixteen (16) ICSID claims against Türkiye, there are seven (7) claims in the electric power & other energy sector, five (5) claims in the oil, gas & mining sector, two (2) claims in the information & communication sector, one (1) claim in the services & trade sector, and one (1) claim in the construction sector.

6. Has your country complied with ICSID awards rendered against it?

Türkiye's track record is as follows:

- Eight (8) cases were decided in favor of Türkiye.
- One (1) case was decided in favor of the investor.
- One (1) case was discontinued.
- Two (2) cases were settled.
- Four (4) cases are pending.

Therefore, there was only one case where Türkiye was subject to an adverse award; this case was initiated by PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi. In that particular case, Türkiye complied with the award without any enforcement proceedings (totaling USD 9 million). (Source: Ziya Akinci, 'Turkey' in Julien Fouret (ed), Enforcement of Investment Treaty Arbitration Awards (Globe Law and Business 2015) (No. 11) 464.)

7. What is the number of ICSID awards that have been enforced in your country?

Zero.

Enforcement of icsid awards in Türkiye

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

As regards the recognition and enforcement of ICSID arbitral awards in the territories of Türkiye pursuant to Article 54(2), Türkiye communicated its designation of a competent court on 1 February 2017 as follows:

"The commercial court of first instance ('asliye ticaret mahkemesi') belonging to the subject place, as designated in the written agreement between the parties, and in case of absence of such agreement, the commercial court of first instance having the jurisdiction over the place of the losing party's domicile, if not, residence, or, in the absence of both, over the place of the subject property of the claim, or in places where a commercial court of first instance does not exist, the civil court of first instance ('asliye hukuk mahkemesi') of the subject place."

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

In line with Article 54 of the ICSID Convention, Türkiye, as an ICSID Convention signatory, undertakes to recognize an award rendered pursuant to the ICSID Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a Turkish court. As such, the party seeking enforcement should refer to the competent court in Türkiye with a copy of the award certified by the Secretary-General of ICSID.

However, compared to the majority of its counterparts, Türkiye did not designate only one court or one authority as the competent body for enforcing an ICSID award. As per Türkiye's method for determining designated authority, depending on the specifics of the dispute, different types of courts situated in different parts of Türkiye can act as competent courts for enforcement actions. Accordingly, a party seeking to enforce an ICSID award in Türkiye should determine the competent court as follows:

- First, the party should resort to the commercial court of first instance belonging to the subject place, as designated in the written agreement between the parties.
    - In the absence of such agreement, the party should resort to the commercial court of first instance with jurisdiction over the place of the losing party's domicile, if this is not possible, their residence, or, in the absence of both, over the place of the subject property of the claim.
    - Alternatively, in places where a commercial court of first instance does not exist, the party should resort to the civil court of first instance of the subject place.
    - In terms of the procedure applicable to enforcement proceedings, Article 382 of the Turkish Civil Procedure Code outlines the cases that can be run as *ex parte* and provides that, among other things, cases where the relevant

parties cannot raise any claims are subject to an *ex parte* procedure. Accordingly, just as the parties of a final judgment rendered by a local court can no longer raise any claims, parties of an ICSID award of the same nature cannot raise any claims. As such, even though to the best of our knowledge no appeal court decision has touched upon this issue yet, the enforcement of an ICSID award should be subject to an *ex parte* procedure.

10. What are the costs associated with the enforcement of an ICSID award?

Judicial costs are calculated as per the Turkish Code of Court Fees, which initially required parties to pay a proportional fee to be calculated based on the amount ruled in the judgment. However, this provision was amended in 2016 with the Law Amending Related Codes for the Improvement of the Investment Environment, explicitly declaring that proportional fees are no longer applicable to arbitral awards. Accordingly, the enforcement of arbitral awards, including ICSID awards, should be subject to a fixed fee of TRY 80.70 (for 2022, updated annually).

On that note, it should be noted that, despite the clear wording of the law, it has been observed in practice that some courts are still ruling proportional fees (e.g., Court of Appeal, 11th Circuit 2020/5959 E. 2021/3966 K. dated 22 April 2021; Court of Appeal, 19th Circuit 2017/4228 E., 2018/1042 dated 28 February 2018).

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

As mentioned above, the party seeking enforcement should refer to the competent court with a copy of the award certified by the Secretary-General of ICSID. In line with Article 223 of the Turkish Civil Procedural Code, foreign language documents should accompany their Turkish translation. Although the law does not necessarily require a translation approved by a sworn translator, it provides that either upon the opposing party's request or ex officio the court may require a translation approved by a sworn translator. As such, to avoid any potential delay, it is more beneficial to provide a translation approved by a sworn translator with the request for enforcement.

If the enforcement of an award is against an investor, there is no difference in the procedure explained above. After the enforcement decision of the commercial courts of first instance, the execution proceedings shall be conducted according to the provisions of the Enforcement and Bankruptcy Law of Türkiye. On the other hand, if the enforcement of an award is against Türkiye and Türkiye refuses to pay despite it being recognized by the competent courts, the investor shall enforce the award by writ of execution. However, it is not possible to seize public properties according to Article 82(1) of the Enforcement and Bankruptcy Law of Türkiye. Although differentiating between public properties and state-owned properties that are subject to private law is quite difficult, Governmental Decree No. 233 regulates the state-owned enterprises that are subject to private law. In the same manner, the decree allowed for seizures of state-owned enterprises by annulling the provision prohibiting the seizure of state-owned enterprises.

Finally, if the enforcement of an award is against a third contracting state, as per Article 49(1) of the International Private Law and Procedure Law of Türkiye, that state cannot enjoy jurisdictional immunity for legal disputes arising out of private law issues (e.g., an investment subject to an ICSID award). The Court of Cassation ruled that it was permissible to seize foreign nations' assets other than solely property, including bank accounts used or planned to be used for the fulfillment of diplomatic missions or consular posts.

(Source: Dikran Zenginkuzucu, Türkiye: Ratification of the ICSID Convention and the Enforcement of ICSID Arbitral Awards, 2018, p. 216-217, https://www.researchgate.net/publication/327973999_Türkiye_Ratification_of_the_ICSID_Convention_and_the_Enforcement_of_ICSID_Arbitral_Awards, accessed on 5 September 2022.)

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

Some scholars argue that since ICSID awards are treated as final judgments of a local court, in cases where local law provides a legal remedy for final judgments of its courts, such as retrial or revision of decision, ICSID awards shall also be subject to the same legal remedies. (Source: Nuray Ekşi, ICSID Hakem Kararlarının Tanınması Tenfizi ve İcrası, 1st edition, Beta Basım Yayım, Istanbul, 2009, p. 91).

Under Turkish law, final judgments can be subject to one further review – retrial. This remedy is also applicable to arbitral awards insofar as they comply with the nature of the arbitration. However, it should be stressed that retrial is an extraordinary legal remedy that can only be resorted to under very exceptional circumstances listed in limb b,c,e,f,g,h,ı and i of Article 375 of the Turkish Civil Procedure Code (with reference to Article 443 of The Turkish Civil Procedure Code). These circumstances are as follows:

- The judge, who is prohibited from hearing the case or whose challenge has been upheld by the authority, has handed down the decision or participated in the deliberations.
- The case has been heard and decided in the presence of persons who are not attorneys or representatives.
- After the decision is rendered, it is proved that the witness whose statement was taken as the basis for the decision made false statements.
- It is proved that the expert or translator deliberately misrepresented the matter on an issue upon which the judgment was based.
- It is proved by confession or written evidence that the winning party has falsely sworn an oath that was taken as the basis of the decision.
- The winning party has committed a fraudulent act affecting the decision.

- After the finalization of the judgment, in the second lawsuit with the same parties, a judgment contrary to the previous one was rendered, and this second judgment became final.
- It has been determined by the final decision of the European Court of Human Rights that the decision was rendered in violation of the European Convention on Human Rights or its annexed protocols, or the appeal against the decision to the European Court of Human Rights is dismissed as a result of an amicable solution or a unilateral declaration.

However, to the best of our knowledge, retrial of an ICSID award has never been tested before Turkish courts.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

Pursuant to Article 90 of the Turkish Constitution, international agreements duly put into effect carry the force of law. As such, provisions of the ICSID Convention shall be applied and complied with by Turkish courts as any other national act [Source: Salih Tuygun, Execution of Arbitral Awards Rendered as per ICSID Convention (ICSID Andlaşması Uyarınca Verilen Hakem Kararlarının İcra Edilmesi), Güncel Hukuk Yayınları, Istanbul, 2007, p. 75.] As Turkish courts are expected not to refuse to a duly submitted enforcement application of an ICSID award, there is no recourse procedure put in place. However, as no enforcement case was brought before the Turkish courts, the courts' reactions are unknown for the time being.

14. Is there any recourse available against a leave for enforcement?

Turkish legislation does not provide any recourse procedure against a leave for enforcement.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

Once the competent court designated to enforce the ICSID award issues a certificate of execution, it is treated as a final local court judgment and will be subject to the

relevant provisions of the Enforcement and Bankruptcy Law of Türkiye. Under the Enforcement and Bankruptcy Law of Türkiye, the execution of court judgments is subject to a special, creditor-friendly procedure called "execution with judgment."

Compared to a regular execution proceeding initiated without a judgment, parties can initiate the execution proceeding in any execution office in Türkiye. The request for execution should include the date, number, and a summary of the judgment (i.e., ICSID award). Once the proceeding is initiated, it can only be suspended under very limited circumstances, namely, when:

i. the debt is already paid,

ii. the debt is postponed and

iii. the debt is time-barred.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

To the best of our knowledge, Turkish courts have never assessed a case where the losing state raised a state immunity objection to the execution of an ICSID award. Having said that, without prejudice to international agreements, Article 32 of the Enforcement and Bankruptcy Law of Türkiye allows parties to initiate execution proceedings against foreign states. However, this does not prevent foreign states from raising state immunity objections. In Turkish doctrine, it is generally accepted that Türkiye adopts the restrictive approach where foreign states can only claim immunity over their assets dedicated to public service and not over their commercial assets. As such, it would be prudent to expect Turkish courts to adopt the same approach in the case of a potential execution of an ICSID award.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

Not available for the moment, to the best of the contributors' knowledge.

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Uzbekistan

Implementation of ICSID Convention in Uzbekistan

1. Is there a model BIT in place in your country?

Uzbekistan has not adopted a model bilateral investment treaty (BIT) at legislative level. Uzbekistan has 49 signed BITs 45 out of which are in force and effective [The International Investment Agreements Navigator of the UNCTAD's Investment Policy Hub, Uzbekistan].

Provisions of BITs signed by Uzbekistan vary from country to country. For example, the BIT signed between Uzbekistan and Singapore defines an investor as "...a) a natural person deriving his status as a citizen of either Contracting Party ...", whereas the BIT signed between Malaysia and Uzbekistan defines an investor as "...(i) any natural person possessing the citizenship of or permanently residing in the territory of a Contracting Party ...". It can be noted from the above-mentioned BITs that residents of Malaysia may acquire an investor status in Uzbekistan, whereas only citizens of Singapore can be admitted as investors in Uzbekistan.

2. Is Uzbekistan a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

On 7 May 1993, the then-functioning parliament of Uzbekistan - the Supreme Council took a resolution on the accession to the ICSID Convention. The resolution came into legal force on 15 November 1993, and Uzbekistan signed the ICSID Convention on 17 March 1994, deposited its ratification notice on 26 July 1995.

3. Has Uzbekistan made a notification or designation upon signing, ratifying or any time thereafter?

Uzbekistan has accepted the ICSID Convention "as it is", and has not made any notifications or designations at the stages of signature and/or ratification and/or thereafter.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against Uzbekistan?

The number of reported investment treaty arbitrations conducted under the ICSID Convention, Regulations and Rules in which Uzbekistan acts as a respondent accounts for 9 cases. 7 cases out of 9 arbitrations have been concluded and 2 cases are pending to the date of this report:

Concluded cases:

- Spentex Netherlands, B.V. v. Republic of Uzbekistan (ICSID Case No. ARB/13/26)
- Güneş Tekstil Konfeksiyon Sanayi ve Ticaret Limited Şirketi and others v. Republic of Uzbekistan (ICSID Case No. ARB/13/19)
- Federal Elektrik Yatırım ve Ticaret A.Ş. and others v. Republic of Uzbekistan (ICSID Case No. ARB/13/9)
- Vladislav Kim and others v. Republic of Uzbekistan (ICSID Case No. ARB/13/6)
- Mobile TeleSystems OJSC v. Republic of Uzbekistan (ICSID Case No. ARB(AF)/12/7)
- Metal-Tech Ltd. V Republic of Uzbekistan (ICSID Case No. ARB/10/3)
- Newmont USA Limited and Newmont (Uzbekistan) Limited v. Republic of Uzbekistan (ICSID Case No. ARB/06/20)

Pending cases:

- Mehmet Zeki Obuz and others v. Republic of Uzbekistan (ICSID Case No ARB/21/32)
- Bursel Tekstil Sanayi Ve Diş Ticaret A.Ş., Burhan Enuştekin and Selim Kaptanoğlu v. Republic of Uzbekistan (ICSID Case No. ARB/17/24).

5. Are there any particular industries or investment sectors that have led to ICSID claims against Uzbekistan?

The disputes administered under the ICSID Convention, Regulations and Rules with the involvement of Uzbekistan as a respondent vary in terms of industrial or economic sector, ranging from oil, gas and mining, gold extraction to construction and telecommunications to retail and food products.

6. Has Uzbekistan complied with ICSID awards rendered against it?

The ICSID Case Database indicates that 7 out of 9 cases initiated against Uzbekistan have been concluded and the last two cases are being administered under ICSID Convention and ICSID Arbitration Rules. 5 out of the 7 concluded cases have been discontinued on various grounds. The ICSID arbitral tribunals rendered awards only on 2 cases - upon administration of the case Metal-Tech v. Uzbekistan and the Spentex v. Uzbekistan. However, in both cases the arbitral tribunal rendered an award on lack of jurisdiction over the dispute and claims.

7. What is the number of ICSID awards that have been enforced in Uzbekistan?

As it has been reported, only in 2 cases with the involvement of Uzbekistan as a respondent, the ICSID tribunal rendered an award, yet on lack of jurisdiction. Thus, none of the awards taken by the ICSID tribunal reached the recognition and enforcement stage in Uzbekistan. However, to note that in both occasions the question of the legality of the investment was raised on the basis of corrupt actions of the claimants in Uzbekistan. In the Metal-Tech v. Uzbekistan the arbitral tribunal concluded that "...the Tribunal lacked jurisdiction over the claims and counterclaims before it." The arbitral tribunal questioned a legality requirement of the investments and came to the conclusion that "...corruption is established to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant's investment in Uzbekistan. As a consequence, the investment has not been "implemented in accordance with the laws and regulations of the Contracting Party

in whose territory the investment is made" …", "… Article 1(1) of the BIT defines investments to mean only investments implemented in compliance with local law. …the present dispute does not come within the reach of Article 8(1) and is not covered by Uzbekistan's consent. This means that this dispute does not meet the consent requirement set in Article 25(1) of the ICSID Convention. Accordingly, failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute".

The award reached in Spentex v. Uzbekistan is not published officially on the ICSID Case Database. Yet, it has been reported that "…the tribunal held that an eleventh-hour payment of USD 6 million to consultants made on the eve of the public tender gave rise to a presumption that the funds were intended as a bribe for public officials, even though the parties had not identified a particular recipient of the alleged bribe." [https://www.dechert.com/content/dam/dechert%20files/knowledge/publication/2018/11/ISA19_Chapter-2_Arbitration_of_Corruption_Allegations.pdf; last visited 2 September 2022], and "Tribunal expresses disquiet the claims would have to be dismissed pursuant to the legality doctrine…" [Marc Bungenberg, Markus Krajewski, Christian J. Tams, Jörg Philipp Terhechte, Andreas R. Ziegler. European yearbook of international economic law 2020. Springer Nature, 2021, p.118].

Enforcement of ICSID awards in Uzbekistan

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

In 2018, Uzbekistan adopted its Code of Economic Procedure (CEP). In accordance with the CEP, recognition and enforcement of international arbitral awards is conducted by the state courts of general jurisdiction, more specifically, by the Court of the Republic of Karakalpakstan, courts of 12 regions, and Tashkent city court.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in Uzbekistan? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

The Chapter 33 of the CEP set forth rules for recognition and enforcement of arbitral awards and foreign judicial decisions.

Uzbekistan has implemented, to a large extent, provisions arising out of its obligations from being a signatory to the ICSID Convention. For example, Article 254 of the CEP clearly states that at consideration of the case, the state courts shall not reconsider an arbitral award on merits, which implies application of res judicata principle or finality effect of arbitral awards, and is line with Article 54 (1) of the ICSID Convention.

Pursuant to Article 249 of the CEP, a limitation period applies to recognition and enforcement of arbitral awards: an applicant can seek for recognition and enforcement of an arbitral award within 3 years from the moment when an arbitral award came into force. Recognition and enforcement of an arbitral award should be sought in the court at the place of a debtor's actual location, in the court at the place of a debtor's residence, or, alternatively, in the courts at the place of the debtor's registered office if the debtor's location or residence place is unknown.

Pursuant to Articles 250, 252 of the CEP, an applicant should submit the following set of documents to enforce an arbitral award in Uzbekistan:

i. a written application on recognition and enforcement of an arbitral award duly signed by the applicant or its representative;

ii. an arbitral award or its copy certified by a competent authority of a foreign state or Uzbekistan;

iii. an original arbitration agreement or its copy certified by a competent authority of a foreign state or Uzbekistan;

iv. a document on partial execution of an arbitral award, if the award has previously been executed in the territory of a foreign state;

v. a document confirming prompt and duly notification of a debtor on the time and place of arbitral proceedings if the debtor did not appear in the arbitral proceedings;

vi. a power of attorney or other document certifying the powers of the representative/s;

vii. a document confirming the service to the debtor of the application for recognition and enforcement of an arbitral award;

viii. a payment document of state duty and postage;

ix. duly certified translation of the documents in paras. (2)-(6).

An application for recognition and enforcement of an arbitral award is conducted at the court session, in an adversarial manner i.e., with the participation of parties and party representatives, within a time limit not exceeding 6 (six) months. However, non-participation of a party shall not cause a stay or suspend the proceedings if that party has been served with the proper notification on the time and place of the proceedings.

The grounds for refusal of the recognition and enforcement of arbitral awards reflects the grounds for refusal provided in Article 1 para. 1. (a)-(e) of the New York Convention. Under Article 256 of the CEP, the recognition and enforcement of the award may be refused in full or partially in the following cases:

i. parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement is not valid under the law to which parties have subjected it or, failing any indication thereon, under the law of the country where the arbitral award was made;

ii. a party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

iii. the arbitration award has been made on a dispute which is not provided for or does not fall under the terms of the arbitration agreement or arbitration clause in the agreement, or contains resolutions on the issues that extend beyond the scope of the arbitration agreement or the arbitration clause in the agreement, except for cases where resolutions on the issues covered by the arbitration agreement or clause therein may be separated from those not covered by such an agreement or a clause;

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

v. the award has not yet become binding on parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;

vi. the dispute was resolved by an incompetent foreign arbitration.

Recognition and enforcement of an arbitral award may also be refused in the following cases:

i. subject matter of a dispute is not capable of settlement by arbitration under Uzbekistan laws;

ii. recognition or enforcement of an award would be contrary to the public policy of Uzbekistan;

iii. imitation period to seek recognition and enforcement of an arbitral award is lapsed.

In accordance with Articles 257-258 of the CEP, upon consideration of the application on recognition and enforcement of arbitral awards, the court issues a ruling and grants a writ of execution. The court ruling may be appealed at an appellate or cassation instance.

10. What are the costs associated with the enforcement of an ICSID award?

At legislative level, an applicant seeking for recognition and enforcement of an arbitral award should make payment for the state duty in the amount of 660,000.00 UZS (approximately 57.00 USD) (the Law No ZRU-600 of Uzbekistan "On State Duty" dated 6 January 2020). Indirect costs may include the costs for translation of documents to present to court, payment to the legal consultants to represent a party in the state courts and others.

11. What other practical considerations may affect enforcement of an ICSID award in Uzbekistan?

Uzbekistan does not have a recorded case history on recognition and enforcement of ICSID awards. Moreover, Uzbekistan has made court awards available in public domain since 2018. However, one of the most common grounds parties rely on at stage of recognition and enforcement of awards is the absence of a duly served notifications on the time and place of proceedings [emphasis added]. Moreover, an applicant should be mindful of the limitation periods and procedural terms under Uzbekistan laws.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

The current legislation of Uzbekistan does not provide for the definition of public policy or its grounds to be applicable, nonetheless, recognition and enforcement of an arbitral award may be refused on public policy grounds under the CEP. The ICSID case history of Uzbekistan indicates that 5 cases with the involvement of Uzbekistan are discontinued, in the remaining 2 cases the arbitral tribunal found that the arbitral tribunal lacked jurisdiction to resolve the dispute.

Moreover, under Article 37 of the CEP, the state courts of Uzbekistan retain exclusive jurisdiction, among others, on the following substantive matters:

i. claims for recognition of ownership over immovable property, disputes about immovable property, including to vindicate property (to reclaim

immovable property in detinue by the owner or legitimate holder) or, to bring a negatory action (to eliminate violations of the rights of the owner or other legitimate holder not related to deprivation of ownership), and other claims for rights to immovable property - the court at the location of immovable property;

ii. claims against the carrier/transportation company arising from contracts for the carriage/transportation freight and cargoes - the court at the location of a transportation company;

iii. claims on corporate disputes - the court at the location of a legal entity.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

At legislative level, the grounds provided for the refusal to enforce arbitral awards are exhaustive. A party seeking an enforcement of an award in Uzbekistan should be mindful of the procedural rules and limitation periods.

14. Is there any recourse available against a leave for enforcement?

As stated above, the Uzbek courts shall not reconsider the case on merits. Provided all procedural terms are followed by a party seeking enforcement, the party should be a granted with a court ruling on enforcement of an arbitral award and a writ of execution.

15. What are the rules in Uzbekistan with regard to the execution (after the enforcement) of an ICSID award?

The Uzbek law "On the Execution of Courts Acts and Acts of Other Authorities" (the Law on the Execution of Court Acts) provides for provisions on execution of a writ issued in accordance with the court ruling on enforcement of arbitral awards. The execution of the court ruling is conducted by the Bureau of Enforcement at the Uzbekistan General Prosecutor Office.

The execution process under the Uzbek legislation is carried out in the following stages:

i. presentation of a writ of execution to the Bureau of Enforcement at the Uzbekistan General Prosecutor Office (Bureau);

ii. initiation of execution proceedings;

iii. execution proceedings;

iv. end of execution proceedings;

In accordance with Article 27 of the Law on the Execution of Court Awards, the writ may be executed within 3 (three) years from the date of entry into force of the respective court ruling.

Pursuant to Article 23 of the Law on the Execution of Court Awards, a writ of execution on court ruling for enforcement of an arbitral award may be submitted to the Bureau by court or the recoverer (the applicant seeking execution). The Bureau shall take a resolution on initiation of the execution proceedings and grant to the debtor a time limit not exceeding 15 days to execute the writ in a voluntary manner.

Under Article 30 of the Law on the Execution of Court Awards, the Bureau shall conduct execution proceedings in a time limit not exceeding 2 months after the time set forth for a voluntary execution is lapsed.

The forcible enforcement measures include the following:

i. foreclosure on the debtor's funds and other property;

ii. foreclosure on the debtor's funds and other property held by other persons;

iii. foreclosure on the debtor's accounts receivable, including the amounts due to the debtor under the enforcement document in which he acts as a recoverer;

iv. foreclosure on individual property rights belonging to the debtor;

v. foreclosure on wages, scholarships, pensions and other types of income of the debtor;

vi. withdrawal from the debtor and transfer to the recoverer of certain items specified in the enforcement document.

The Chapters 4-8 of the Law on the Execution of Court Awards stipulates the provision for each of the enforcement measures. Articles 35, 37 of the Law on the execution of court awards provides for grounds on which execution proceeding may be suspended or ended.

The execution proceedings may be suspended by the state courts in the following cases:

i. appeals of the debtor or the recoverer to the court with an application for deferral or instalment of the writ of execution;

ii. in cases when the debtor is on a long business trip;

iii. in cases when the debtor is being treated in an inpatient medical institution;

iv. receipt of a complaint against the actions (resolutions) of the Bureau;

v. contestation of the results of property evaluation.

The execution proceedings may be terminated by the state courts:

i. upon the death of the recoverer or debtor;

ii. in case of loss of the possibility of execution of the writ of execution;

The Bureau may also terminate the execution proceedings if the debtor and recoverer sign a mediation agreement on the settlement of the writ.

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

The matter of the state immunity is not stipulated in Uzbekistan at legislative level. On the contrary, it is implied that the Uzbekistan government, entering into

commercial relationships in a broad sense, including investments, waive its right to the state immunity.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

Article 26 of the ICSID Convention allows for a contracting party to set rules on the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the ICSID Convention. The 2020 Law "On investments and Investment activity" adopted in Uzbekistan (Investment Law) takes this approach and requires the exhaustion of judicial remedies. Article 63 of the Investment Law establish a 4-tier dispute resolution clause:

i. negotiations;

ii. mediation;

iii. settlement in the state courts;

iv. arbitration — a) only if the negotiations, mediation and court cannot resolve the dispute; and b) there is an international agreement of Uzbekistan and / or an agreement concluded between an investor and Uzbekistan providing for an appropriate and valid arbitration clause.

However, on the other hand, the BITs signed by Uzbekistan allow investors to submit their dispute to arbitration without seeking for judicial remedies, and Article 2 of the Investment Law admits the prevailing authority of international treaties of Uzbekistan which establish other rules than provided by Uzbek legislation. In this clash of the provisions provided in the international treaties of Uzbekistan (considering the fact that BITs are international treaties) and the Investment Law, and Article 26 of the ICSID Convention, the interpretation of those provisions will be dependent upon an arbitral tribunal or a judge before whom a dispute is brought.

Contributor:

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Europe

France

Implementation of the ICSID Convention in France

1. Is there a model BIT in place in your country?

The French model BIT, entitled "Draft agreement between the Government of the French Republic and the Government of the Republic of (...) on the reciprocal promotion and protection of investments", was issued in 2006.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

France is a party to the ICSID Convention.

- Date of signature: 22 December 1965
- Date of ratification: 21 August 1967
- Date of entry into force: 20 September 1967

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

France has not made a notification or designation upon signing or ratifying.

Note: the above statement excludes ad hoc designations or notifications pursuant to Article 25(1) and (3) of the Convention.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

As of January 2022, there is one reported investment treaty arbitration initiated under the ICSID Convention against France: Erbil Serter v. French Republic The case concluded pursuant to ICSID Arbitration Rule 45, which states that, in case of failure of the parties to act, the proceedings will be terminated. Since the tribunal was not

constituted for a lack of an arbitrator to preside it, the Secretary-General issued a procedural order in 2018 noting the discontinuance of the proceedings.

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

The only investment treaty arbitration under the ICSID Convention against France arose from the transportation industry. The subject matter was a ship hull design.

6. Has your country complied with ICSID awards rendered against it?

There have been no ICSID awards rendered against France.

In Serter v. France, the arbitration proceedings were discontinued pursuant to ICSID Arbitration Rule 45. Only party-appointed arbitrators had been designated. Therefore, the tribunal was not constituted. The case concluded before any award or decision was rendered.

7. What is the number of ICSID awards that have been enforced in your country?

Only two publicly available ICSID awards have been enforced in France:

S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo,

The *Tribunal de grande instance* of Paris ordered the exequatur of the award with the caveat that the execution was ordered by the tribunal. Thus, ensuring that the executed assets were not protected by immunity of execution. Although this caveat was later deleted by the Court of appeal, the exequatur was upheld.

Société Ouest Africaine des Bétons Industriels v. Senegal,

In this case, the *Tribunal de grande instance* of Paris granted the exequatur of an ICSID award. Senegal appealed the decision before the Court of appeal, which decided in favor of the state. Later, the Cour de cassation reversed and annulled the appeal specifying that (1) the autonomous enforcement regime under the ICSID

Convention excluded the remedies to an exequatur provided in the "Code de procédure civile"; and (2) there is no need to return the case to the Court of appeal.

Enforcement of ICSID awards in France

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

The *Tribunal Judiciaire* where the enforcement is to take place is the authority that has jurisdiction. In the case of ICSID awards, since the seat of arbitration is not in France, the enforcement proceeding is initiated at the *Tribunal Judiciaire* of Paris. (Source: Article 1516 of the Code de procedure civile of 1 January 1976 (Code of Civil Procedure).)

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

The enforcement of arbitral awards in France is governed by Article 1516 of the "Code de procédure civile" (Code of Civil Procedure), which also applies to the enforcement of ICSID awards.

Pursuant to Article 1516 of the "Code de procédure civile", for an arbitral award to be enforced in France, the party seeking enforcement must obtain an "ordonnance d'exequatur" (enforcement order). Exequatur proceedings are not adversarial.

If the award was rendered abroad, the *Tribunal Judiciaire* of Paris has jurisdiction to issue enforcement orders. If the award was rendered in France, the *Tribunal Judiciaire* of the place where the award was made has jurisdiction.

The application for exequatur shall be filed by the most diligent party with the Court Registrar. The applying party should provide the original or duly authenticated copies of the below documents:

- the original award, and
- the arbitration agreement.

If these documents are in a language other than French, a translation is required. (Source: Articles 1515 and 1516 of the Code de procédure civile of 1 January 1976 (Code of Civil Procedure).

10. What are the costs associated with the enforcement of an ICSID award?

The costs to enforce an ICSID award mainly include:

- the costs for translation of the award (if needed) for the application for exequatur;
- the attorney fees to submit the application for exequatur;
- the bailiff's costs for enforcement;
- the attorney fees for enforcement.

The amount of the cost of enforcement depends on the nature of the enforcement measures, the nature and location of the debtor's assets and the potential difficulties to identify such assets.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

Book IV, Title II of the "Code de procédure civile", which governs international arbitration, includes certain formal requirements that awards should have. The code applies to ICSID awards as well. From these formalities, it is considered that they must be in writing. In practice, the application to enforce an award is a plain, handwritten note on the first page of the award requesting it.

Since French law does not have specific rules that govern the recognition and enforcement of arbitral awards against foreign states, the general principles for international arbitration apply to ICSID arbitrations. Formal requirements are not strictly applied in international arbitration and parties may depart from them.

Finally, Article 813 of the "Code de procédure civile", requires that, for the enforcement of an award, applicants must be admitted to practice in France.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

As a signatory of the ICSID Convention, French courts have acknowledged that the investment arbitration regime instituted therein is an autonomous and simplified system. The remedies to the recognition and enforcement of ICSID awards are limited to those available under the ICSID Convention (Société Ouest Africaine des Bétons Industriels v. Senegal).

Nonetheless, claims on sovereign immunity can be raised against the enforcement of an ICSID award. Although French law considers that consent to arbitration precludes a State from raising jurisdictional immunity, immunity from execution can be alleged. For instance, in Abou Lahoud v. DR Congo, the investor requested the forced sale of a property intended to house the diplomatic staff of the DR Congo. This is further discussed below.

Additionally, pursuant to Article 1514 of the "Code de procédure civile", a party may seek to avoid the recognition and enforcement of an award by alleging that:

a. the existence of the award has not been established; or

b. the award is manifestly contrary to public order.

A third defense may also be raised. An interested party may allege that an intra-EU ICSID award is at issue, thus preventing its enforcement. The CJEU has stated that arbitration agreements contained in investor-State dispute settlement provisions in intra-EU investment agreements are incompatible with EU law. Therefore, French courts are required to set aside national and international laws and obligations that are incompatible with EU law, and they are bound by the case law of the CJEU.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

In SOABI v. Senegal, the French Cour de cassation held that the autonomous enforcement regime under the ICSID Convention excluded the remedies provided in the "Code de procédure civile". After this clarification, the scenario where a French court refuses to enforce an ICSID award is theoretical.

In the scenario where a French court (wrongly) renders a decision refusing to enforce an ICSID award, the award creditor may lodge an appeal within one month of service. (Source: Articles 1523 and 1525 of the Code de procédure civile of 1 January 1976 (Code of Civil Procedure).)

14. Is there any recourse available against a leave for enforcement?

In SOABI v. Senegal, the Cour de cassation held that the autonomous enforcement system under the ICSID Convention excluded the remedies in the "Code de procédure civile". Thus, there should be no recourse available against a leave for enforcement, except for those provided for under the ICSID Convention.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

The rules for execution are set out in the "Code des procédures civiles d'exécution" (Code of civil execution procedures).

A creditor may decide the execution measures that are carried out, to the extent that they are proportionate and necessary. (Source: Article L. 111-7 of the "Code des procédures civiles d'exécution" of 1 June 2012 (Code of civil execution procedures).)

As the main execution measure, an attachment is carried out by a bailiff (huissier de justice). All assets of a debtor located in France can be attached, except those expressly specified by the law. (Source: Articles L. 112-1 and L. 112-2 of the Code des procédures civiles d'exécution of 1 June 2012 (Code of civil execution procedures).)

With respect to assets held by banks, only bank accounts opened in entities located in France can be attached. An entity is considered to be located in France if its registered offices are in France or if it has an entity in France that holds the assets to be attached. (Source: Cass. civ. 2, 10 December 2020, No. 18-17.937 and No. 19-10.801.) The assets held by a foreign subsidiary of a French bank can also be attached. (Source: Cass. civ. 2, 14 February 2008, No. 05-16.167.)

A debtor may challenge an attachment before the enforcement judge at the place of attachment.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

In France, the principle of state immunity from execution is expected subject to several exceptions.

Article L.111-1-2 of the "Code des procédures civiles d'exécution" provides that provisional or enforcement measures concerning property belonging to a foreign State may be authorized by a judge only if one of the following conditions is met:

1. The State concerned has expressly consented to the application of such a measure;
2. The State concerned has reserved or appropriated the property for the satisfaction of the claim which is the subject of the current proceedings;
3. Where a judgment or arbitral award has been rendered against the State concerned and the property in question is specifically used or intended to be used by the State concerned for non-commercial public service purposes and has a connection with the entity against which the proceedings have been brought.

The requirements above are further restated in Article 59 of the law 2016-1691, also known as the law Sapin II. This law is considered to contain the codification of the case law on matters of state immunity. (Source: LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique)

The following properties are generally considered as being used or intended to be used for non-commercial public service purposes:

1. Property, including bank accounts, used or intended to be used in the performance of the functions of the State's diplomatic mission or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or international conferences;
2. Property of a military nature or property used or intended to be used in the performance of military duties;
3. Property forming part of the cultural heritage of the State or its archives that is not offered or intended to be offered for sale;
4. Property forming part of an exhibition of objects of scientific, cultural or historical interest that are not offered or intended to be offered for sale;
5. Tax or social security claims of the State.

In its judgment of 7 July 2021, the Cour de cassation overturned an appeal judgment that had ordered the forced sale of the building that constituted the place of residence of the ambassador of the Democratic Republic of Congo for the execution of an ICSID award. It determined that, according to the Vienna Convention on Diplomatic Relations of 18 April 1961 and Article L. 111-1-2 of the 'Code des procédures civiles d'exécution,' such assets enjoy the same protection as the embassy and that enforcement measures on property of the State may only be ordered by the court if the property in question is used or intended to be used by that State other than for non-commercial public service purposes and has a connection with the entity against which the proceedings have been instituted, which includes property used or intended to be used in the performance of functions of its diplomatic mission.

Furthermore, Article L.111-1-3 of the "Code des procédures civiles d'exécution" provides that States enjoy diplomatic immunity from enforcement, the waiver of which must be explicit and specific. The said article provides:

> *"Precautionary measures or measures of execution may be taken against property, including bank accounts, used or intended to be used in the exercise of the functions of the diplomatic mission of foreign States or their consular posts, special missions or missions to international organizations only in the case of an express and special waiver by the States concerned."*

Article L. 111-1-3, therefore, has the effect of prohibiting a finding of waiver by the State when it has given its consent to arbitration under arbitration rules that make the enforcement of the award a comminatory rule.

Contributors:

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Greece

Implementation of the ICSID Convention in Greece

1. Is there a model BIT in place in Greece?

Yes. [UNCTAD, Greece Model BIT 2001].

2. Is Greece a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Yes. On 16 March 1966, Greece signed the ICSID Convention and ratified it on 11 November 1968 (Mandatory Law No. 608/1968). Greece deposited its instrument of ratification with the World Bank on 21 April 1969 and the Convention entered into force in Greece on 21 May 1969.

3. Has Greece made a notification or designation upon signing, ratifying or any time thereafter?

Yes. Based on publicly available information on the ICSID website, Greece has made designations to the panels of conciliators and arbitrators [ICSID, Greece: Members of the ICSID Panels].

- With effect from 4 February 2020 [ICSID, "New Designations to the ICSID Panels", 6 July 2020:

a) Greece redesignated Mr. Chariton Harry Kyriazis and designated for the first time Ms Zoe Giannopoulou, Mr Lazaros Panourgias, Ms Aphrodite Vassardani in the Panel of Conciliators.

b) Greece designated Mr Nikolas Kanellopoulos, Ms Glykeria Sioutis, Mr Ioannis Vassardanis, Mr Dimitris Ziouva in the Panel of Arbitrators.

- With effect from 27 January 2014 [ICSID, "New Designations to the ICSID Panels, 6 July 2020:

a) Greece designated Mr Ioannis C. Dryllerakis, Mr Harry Kyriazis, Mr Michael Marinos, Mr Ioannis Vassardanis in the Panel of Conciliators.

b) Greece designated Ms Antonias C. Dimolitsa, Mr Loukas Mistelis, Mr Evanghelos Perakis, Mr Michael Stathopoulos in the Panel of Arbitrators.

Based on ICSID [ICSID, Greece] Greece has made no notifications:

a) (or designations) of constituent subdivisions or agencies concerning the approval by Greece of their consent to ICSID jurisdiction (Article 25(1) and (3) of the ICSID Convention);

b) on the exclusion of territories (Article 70 of the ICSID Convention); and

c) concerning a class or classes of disputes which Greece would or would not consider submitting to the jurisdiction of the center (Article 25(4) of the ICSID Convention).

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against Greece?

According to the ICSID website [ICSID, Cases Database: Respondent – Greece] four (4) cases have been initiated against Greece at the time of writing, of which three have been concluded and one is still pending:

Concluded:

Case Name	Dispute
Cyprus Popular Bank v. Hellenic Republic, ICSID Case No. ARB/14/16	Greece allegedly did not treat Claimant equally compared to the treatment the State had provided to other financial institutions.

Bank of Cyprus Public Company Limited v. Hellenic Republic, ICSID Case No. ARB/17/4	Claimant filed a 4-billion-dollar claim against Greece in response to measures the Greek State had taken to fight the ongoing financial crisis.
Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8	The dispute arose during Greece's sovereign debt restructuring in 2012, when Greece introduced a new law on sovereign bonds that allowed the bond terms to be changed retroactively without the consent of all bondholders. As a bondholder, Postova Banka (and Istrokapital, which held shares in Postova Banka) claimed to have been harmed by the said law.

Pending:

Case Name	Dispute
Iskandar Safa and Akram Safa v. Hellenic Republic, ICSID Case No. ARB/16/20	The claims arose out of the allegedly illegal and harmful measures the Greek State took against a shipyard operator in Athens.

5. Are there any particular industries or investment sectors that have led to ICSID claims against Greece?

Three out of the four ICSID proceedings that have been commenced against Greece involved claims arising out of financial service activities, and in particular, the banking sector:

- Bank of Cyprus Public Company Limited v. Hellenic Republic, ICSID Case No. ARB/17/4
- Cyprus Popular Bank v. Hellenic Republic, ICSID Case No. ARB/14/16
- Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8

The fourth ICSID case against Greece, Iskandar Safa and Akram Safa v. Hellenic Republic, ICSID Case No. ARB/16/20, concerned claims stemming from the manufacturing sector.

6. Has Greece complied with ICSID awards rendered against it?

Iskandar Safa and Akram Safa v. Hellenic Republic, ICSID Case No. ARB/16/20 is the only case pending against Greece at the time of writing. The decision on jurisdiction and liability has been rendered against the state and the quantum phase is pending.

Of the three concluded ICSID cases against Greece, Bank of Cyprus Public Company Limited v. Hellenic Republic, ICSID Case No. ARB/17/4 was discontinued, whereas in Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic, ICSID Case No. ARB/13/8, the award was rendered in favor of the state. In Cyprus Popular Bank v. Hellenic Republic, ICSID Case No. ARB/14/16, the decision on annulment has been issued, but neither the outcome nor the decision have been made public at the time of writing.

7. What is the number of ICSID awards that have been enforced in Greece?

At the moment of writing, there is no publicly available information on any ICSID awards having been executed in Greece.

Enforcement of ICSID awards in Greece

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

The Single Judge Court of First Instance for Athens is the competent court to decide on a request for enforcement of an ICSID award [ICSID, Greece].

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in Greece? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

Note 1: As explained above, no ICSID awards have been executed in Greece at the moment of writing. Therefore, the analysis below is theoretical.

Note 2: The procedure for the execution of judgments and awards is set out in the Greek Code of Civil Procedure (hereinafter "the GCCP").

No requirement for the enforcement of an ICSID award

Pursuant to Article 54(1) of the ICSID Convention, Greece shall recognize every ICSID award as binding and enforce it as if it was a final judgment of a Greek court. In view of this provision, it has been suggested that Greek courts should treat ICSID awards as if they were domestic, not international, arbitral awards [Stelios Koussoulis, Diaitisia (Sakkoulas 2004), p. 276 (in Greek)]. Accordingly, because of their sui generis nature, ICSID awards have a unique status in the Greek legal order.

In Greece, there is no requirement for domestic arbitral awards to be recognized and enforced before being executed. In fact, a domestic award is automatically considered as a title that can be enforced in Greek territory - just like domestic court judgments - provided that:

i. the award is final and cannot be annulled anymore; and

ii. the tribunal has ordered a party to perform and has not just issued a declaratory award.

[Panagiotis Mazis, "Article 904" in Konstantinos D. Kerameus, Dionysios Kondylis, Nikolaos Th. Nikas, Ermineia KPolD: Arthra 904-1054 Anagkastiki Ektelesi (2nd edn, Sakkoulas 2021), para 18 (in Greek)].

Similarly, an ICSID award constitutes an enforceable title and is ready to be executed in Greece without the need to be recognized and enforced by a Greek court first. Therefore, unless indicated otherwise, any reference made to an award relates only to domestic and ICSID awards.

The ICSID Award as an "Enforceable Title"

Pursuant to Article 904(1) of the GCCP, execution (αναγκαστική εκτέλεση) can only be carried out on the basis of an enforceable title (εκτελεστός τίτλος). In particular, Article 904(2)(b) of the GCCP stipulates that arbitral awards (διαιτητικές αποφάσεις) constitute enforceable titles.

It is accepted that this provision refers solely to domestic arbitral awards, in comparison to subparagraph (f) of the same Article which states that foreign instruments (including foreign arbitral awards) are considered as enforceable titles, as long as they have already been declared as enforceable in the Greek legal order, namely provided they have been recognized and enforced by the competent Greek court first [Panagiotis Mazis, "Article 904" in Konstantinos D. Kerameus, Dionysios Kondylis, Nikolaos Th. Nikas, Ermineia KPolD: Arthra 904-1054 Anagkastiki Ektelesi (2nd edn, Sakkoulas 2021), para 18 (in Greek)].

Contrary to foreign arbitral awards, there is no requirement for domestic arbitral awards and, thus, ICSID awards, to be recognized by Greek courts in order to be enforceable [Stelios Koussoulis, Diaitisia (Sakkoulas 2004), p. 276 (in Greek)]. In other words, if the arbitration agreement does not provide for an annulment process, or the deadline for that process has elapsed, a domestic arbitral award has a res

judicata effect [Article 896 of the GCCP]. In that case, the award does not require further court involvement to be enforceable [Pelagia Yessiou-Faltsi, Anagkastiki Ektelesi: Geniko Meros, vol 1 (2nd edn, Sakkoulas 2017), p. 334 (in Greek)].

Accordingly, the party seeking to enforce an ICSID award in Greece shall take the following steps:

a) It shall furnish to the Single Judge Court of First Instance of Athens a copy of the award certified by the ICSID Secretary-General [Article 54(2) ICSID Convention].

Under Article 28(1) of the Greek Constitution, international conventions ratified by the Greek Parliament form an integral part of the Greek legal order and shall prevail over other contrary provisions of Greek law. The ICSID Convention was ratified and became part of the Greek legal order through Mandatory Law No. 608/1968 and, thus, shall prevail over the GCCP [See also Kostas Koutsolelos, Anagkastiki Ektelesi: Following the new Code of Civil procedure (Law 4335/2015) (Nomiki Vivliothiki 2016), p. 51].

Article 893 of the GCCP stipulates that the sole arbitrator or the president of the tribunal is obliged, unless otherwise specified by the arbitration agreement, to deposit the original arbitral award in paper or electronic form at the registry of the Single Judge Court of First Instance in the district in which it was issued and to deliver copies of it to those who concluded the arbitration agreement.

Pursuant to Article 54(2) of the ICSID Convention: "A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General."

Since Article 54(2) of the ICSID Convention specifies that a certified copy of the award shall be furnished to the competent court, which in Greece is the Single Judge Court of First Instance for Athens, Article 893 of the GCCP will not be applicable to ICSID awards.

b) It shall ensure that the formula of execution has been affixed to a certified copy of the award [Article 918(2)(d) of the GCCP].

Pursuant to Article 918(1) of the GCCP, an enforceable title can be executed only if it bears the formula of execution (απόγραφο). This formula is affixed to the first page of a copy of the (domestic or ICSID) award. Specifically, the formula contains an order issued in the name of the Greek people and addressed to all competent agents (e.g., bailiff) to enforce the award.

However, for such a formula to be affixed to a domestic arbitral award, and thus, an ICSID award, certain requirements must be fulfilled:

- the tribunal must have ordered the losing party to perform (καταψηφιστική διάταξη), and must not have only rendered a declaratory judgment (αναγνωριστική διάταξη) [Pelagia Yessiou-Faltsi, Anagkastiki Ektelesi: Geniko Meros, vol 1 (2nd edn, Sakkoulas 2017), p. 334 (in Greek). See also Panagiotis Mazis, "Article 904" in Konstantinos D. Kerameus, Dionysios Kondylis, Nikolaos Th. Nikas, Ermineia KPolD: Arthra 904-1054 Anagkastiki Ektelesi (2nd edn, Sakkoulas 2021), para 18 (in Greek)].
- the award must comply with the requirements of Articles 915-917 of the GCCP [Article 918(4) of the GCCP]. In particular, the claim that arises from the award:
  i. must not depend on a suspensive condition or a term (απαίτηση βέβαιη) [Article 915 of the GCCP]; and
  ii. must have been defined in quantity and quality (απαίτηση εκκαθαρισμένη) [Article 916-917 of the GCCP].

Once a copy of the arbitral award fulfils the aforementioned requirements and bears the formula of execution on the top of the first page, the execution procedure may now be triggered.

10. What are the costs associated with the enforcement of an ICSID award?

The cost to have the formula of execution affixed to a copy of the award by the court clerk is initially borne by the enforcing party, but eventually the party against whom execution is initiated will be liable for it [Article 932 of the GCCP].

Depending on the nature of the dispute, the cost for the formula of execution is calculated differently. For contractual disputes, the cost amounts to 3% of the total value of the claim plus the interest included in the award that is about to be executed [Articles 12 and 13(1)(a) of Pr. D. 28/28.7.1931].

11. What other practical considerations may affect the enforcement of an ICSID award in Greece?

Is the Remuneration of the Arbitrator(s) and the Tribunal Secretary Considered as Part of the Enforceable Award?

Under Greek case law, an arbitral award does not constitute an enforceable title with regard to the arbitrator's and tribunal secretary's remuneration [Greek Supreme Court (Άρειος Πάγος) Case No. 69/1990 (in Plenary Session); Greek Supreme Court Case No. 409/1996; See Pelagia Yessiou-Faltsi, Anagkastiki Ektelesi: Geniko Meros, vol 1 (2nd edn, Sakkoulas 2017), p. 336 (in Greek)].

Nevertheless, according to the judgment of the Greek Supreme Court in Plenary Session in Case No. 69/1990, there is an exception for cases that fall under the scope of Law No. 2687/1953 on Investment and the Protection of Foreign Capitals which aims "to promote productive investment and accelerate the economic development of the country" (that has remained in force thanks to Article 107(1) of the Greek Constitution of 1975 until today) [See also Pelagia Yessiou-Faltsi, Anagkastiki Ektelesi: Geniko Meros Part, vol 1 (2nd edn, Sakkoulas 2017), p. 336 (in Greek)].

Based on the Supreme Court's interpretation, it would come as no surprise if the competent court dealing with the enforceability of an ICSID award ruled that the same reasoning applies to ICSID awards, since they involve investments. In that case,

the remuneration of the arbitrator(s) and the tribunal secretary would be considered as forming part of the enforceable section of the award.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

As explained above, ICSID awards are automatically enforceable in Greece and no enforcement proceedings will be required to be commenced. In view of Article 54(1) of the ICSID Convention, the competent Greek court does not even have the power to examine whether the award is against the "international public order" (διεθνής δημόσια τάξη) under Greek law [Stelios Koussoulis, Diaitisia (Sakkoulas 2004), p. 276 (in Greek)].

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

No, since ICSID awards need not be enforced in order to be executed in Greece.

14. Is there any recourse available against a leave for enforcement?

No, since ICSID awards need not be enforced in order to be executed in Greece.

15. What are the rules in Greece with regard to the execution (after the enforcement) of an ICSID award?

First Steps Before the Execution Process is Activated

As explained previously, an ICSID award will automatically be considered as an enforceable title provided it is final and not simply declaratory (the tribunal must have ordered the losing party to perform).

The party who is interested in executing the award should ensure that a certified copy of the award bears the formula of execution. The judge of the competent court, i.e., the Single Judge Court of First Instance for Athens in the case of ICSID awards, has the power to affix the formula of execution to a copy of the award [Article 918(2)(d) of the GCCP].

Preliminary Phase

Once the abovementioned steps are complete, the preliminary phase of the execution proceedings officially begins when the losing party (hereinafter the "debtor") is served with a copy of the formula of execution including an order for execution (επιταγή προς εκτέλεση) which clearly identifies the claim [Article 924 of the GCCP. See Kostas Koutsolelos, Anagkastiki Ektelesi: Following the new Code of Civil procedure (Law 4335/2015) (Nomiki Vivliothiki 2016), p. 79 (in Greek)]. If there are more than one parties enforcing the award (hereinafter the "creditor" or "creditors"), they may serve the debtor with the same order for execution on a single formula of execution they share, notwithstanding the fact that their claims arising from the award might be distinct [Stefanos Pantazopoulos, Anagkastiki Ektelesi (Sakkoulas 2021), p. 141 (in Greek)].

In essence, this order invites the debtor to voluntarily comply with the award within three working days of the receipt of the order for execution [Stefanos Pantazopoulos, Anagkastiki Ektelesi (Sakkoulas 2021), pp. 140 and 144 (in Greek)]. During this time, the party enforcing the award is not allowed to proceed with any other execution measures [Article 925 of the GCCP].

Main Phase

If the debtor does not comply with the order within three working days after being served, the creditor may order a bailiff to proceed with the execution of the ICSID award. This marks the beginning of the main phase of the execution proceedings and must be done within a year from the date the debtor was served with this particular order for execution [Article 926(2) of the GCCP].

Pursuant to Article 927 of the GCCP, the creditor must incorporate to a copy of the formula of execution an order directed to a designated bailiff specifying the manner and, if possible, the objects on which enforcement is to be carried out. In the event movable or immovable property is attached, the enforcing party must also designate

a notary public from the district where the attachment is to be carried out who will act as the official before whom the electronic auction is to be conducted.

Execution proceedings differ depending on whether the nature of the claims being enforced:

- Non-pecuniary claims [Article 941-950 of the GCCP]

Depending on the type of performance required, the bailiff may have the power to proceed without any judicial intervention. For example, when the debtor is obliged to deliver movable or immovable property, including aircrafts and ships, the bailiff can remove the movable property from the debtor's possession or evict the debtor from the immovable property and transfer it to the creditor(s) [Article 941-944 of the GCCP].

- Pecuniary claims [Article 951 et seq of the GCCP]

This type of claims may be satisfied through attachment, temporary imprisonment or compulsory administration [Article 951 of the GCCP]. The attachment of assets is the most common procedure with regard to pecuniary claims. It is followed by the liquidation of the debtor's assets through a public auction and then the distribution of proceeds.

Creditors should bear in mind that execution proceedings are not allowed from 1 to 31 August, except when ships and aircrafts are involved [Article 940A of the GCCP].

Garnishment

The creditor may order garnishment proceedings (κατάσχεση εις χείρας τρίτου) to satisfy pecuniary claims [Articles 982-991B of the GCCP].

In order to initiate such proceedings, the creditor has to serve a third party with a document that contains (i) a sufficient description of the enforceable title and the claim on which the attachment is based; (ii) the sum to be attached; and (iii) an order to refrain from satisfying the debtor's claims against the third party [Article 983(1) of the GCCP]. For instance, the creditor may follow this process and order a bank to

attach any bank accounts, safe deposit boxes, investment products and others that it may keep on behalf of the debtor.

The creditor also needs to ensure that both the bank(s) and the debtor are served with the award bearing the formula and the order [Article 983(2) of the GCCP]. There is no need to order a bailiff to proceed with the execution and follow the procedure under Article 927 of the GCCP.

Defense of the debtor and third parties

The debtor can file an objection against execution proceedings (ανακοπή) [Article 933 of the GCCP], if it considers:

i. there has been a mistake, omission, or any other issue in the ongoing execution process [e.g., the creditor has not included an order for execution to the formula of execution affixed to the copy of the award. See Stefanos Pantazopoulos, Anagkastiki Ektelesi (Sakkoulas 2021), p. 161 (in Greek)]; or

ii. the claim is flawed; or

iii. the enforceable title is not valid.

Nevertheless, the debtor cannot object to the execution proceedings to the extent the reasons for its objection are barred by res judicata under Article 896 in conjunction with Article 330 of the GCCP [Article 933(4) of the GCCP. See Pelagia Yessiou-Faltsi, Anagkastiki Ektelesi: Geniko Meros Part, vol 1 (2nd edn, Sakkoulas 2017), p. 680 (in Greek)].

A third party that has a right with regard to the object of the execution may also file an objection against the proceedings [Article 936 of the GCCP].

If the debtor files an objection, it may also request the stay of the ongoing execution proceedings. The court may grant the request and suspend the proceedings

depending on whether the objection will probably be successful, and the debtor will face irreparable damage from these proceedings [Article 938 of the GCCP].

Pursuant to Article 1000 of the GCCP, the debtor has also the right to request the suspension of the auction, provided it files the request to the competent court at least fifteen working days before the date of the auction. Subsequently, the court may suspend the auction procedure for up to six months from the original date of the auction as long as there is no risk of damage to the creditor and provided it can reasonably be expected that the debtor will satisfy the creditor within this period or that, if this period expires, the proceeds of the auction will be increased.

Execution Costs

The party against whom execution is pursued bears the costs associated with the execution proceedings; however, these costs are borne first by the creditor enforcing the award [Article 932 of the GCCP].

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Execution against a foreign State

Pursuant to Article 923 of the GCCP, execution against a foreign State may occur provided that the Minister of Justice of Greece gives her or his permission. The reasoning behind this provision is that the Minister will weigh the strain a potential execution might put on Greece's relations with the debtor State against the nature of the execution itself [Panagiotis Mazis, "Article 923" in Konstantinos D. Kerameus, Dionysios Kondylis, Nikolaos Th. Nikas, Ermineia KPolD: Arthra 904-1054 Anagkastiki Ektelesi (2nd edn, Sakkoulas 2021), para 4 (in Greek); Stefanos Pantazopoulos, Anagkastiki Ektelesi (Sakkoulas 2021), p. 138 (in Greek)].

Under this provision, the assets that may be subject to execution proceedings (if the Minister allows it) are those that arise from instances in which the foreign State has acted as fiscus, i.e., has engaged in *acta iure gestionis* as a private party, and has not acted in its capacity as imperium [Panagiotis Mazis, "Article 923" in Konstantinos D. Kerameus, Dionysios Kondylis, Nikolaos Th. Nikas, Ermineia KPolD: Arthra 904-1054 Anagkastiki Ektelesi (2nd edn, Sakkoulas 2021), para 1 (in Greek)]. If the foreign State has assets that serve a public purpose, and thus, belong to the sphere of that State's sovereignty, they cannot be attached due to the foreign State's immunity [See also Article 3(2) of the GCCP]. In that case, the permission of the Minister of Justice is redundant [Athens Court of Appeal Case No. 5781/1975]. The same applies with regard to movable and immovable property belonging to a foreign diplomatic mission due to diplomatic immunities [Thessaloniki Court of Appeal Case No. 267/1999; Panagiotis Mazis, "Article 923" in Konstantinos D. Kerameus, Dionysios Kondylis, Nikolaos Th. Nikas, Ermineia KPolD: Arthra 904-1054 Anagkastiki Ektelesi (2nd edn, Sakkoulas 2021), para 2 (in Greek)].

In order to commence execution proceedings against a foreign State, the creditor must have secured the permission of the Minister of Justice before it takes any action related to execution, i.e., before it serves the foreign State with an order for execution. Otherwise, the foreign State will have the right to pursue an action under Article 933 of the GCCP and object to the proceedings [Panagiotis Mazis, "Article 923" in Konstantinos D. Kerameus, Dionysios Kondylis, Nikolaos Th. Nikas, Ermineia KPolD: Arthra 904-1054 Anagkastiki Ektelesi (2nd edn, Sakkoulas 2021), para 5 (in Greek)].

Execution against Greece

Pursuant to Article 94(4)(c) of the Greek Constitution, execution proceedings against the Greek State may be pursued on the basis of court judgments. Arbitral awards can also constitute titles enforceable against the Greek State [See also Stefanos Pantazopoulos, Anagkastiki Ektelesi (Sakkoulas 2021), p. 137 (in Greek)].

Only the State's "private" property, namely that which does not directly serve a public purpose, can be subject to execution [Stefanos Pantazopoulos, Anagkastiki Ektelesi

(Sakkoulas 2021), p. 137 (in Greek)]. Nonetheless, certain bank accounts of the Greek State cannot be attached, because they do not constitute private property of the Greek State. For instance, a special account of the Bank of Greece may contain funds that have been earmarked for specific public purposes in accordance with the adopted State budget [Stelios Stamatopoulos, "To antikeimeno tis anagkastikis ektelesis kata tou ellinikou Dimosiou kai n.p.d.d." Diki 2003, p. 1131 (in Greek)].

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in Greece?

No.

Contributor:

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Italy

Implementation of the ICSID Convention in Italy

1. Is there a model BIT in place in Italy?

The latest version of the Italian Model BIT was published in 2022, following several drafts created in previous years. It introduced innovations to the 2003 Model BIT that constitute the basis for the majority of Italian BITs. The new Model BIT is aimed to align Italian and European foreign direct investment policies and represents the "new generation BIT". Its main novelties reflect the latest trends in definitions of "investor" and "investment", standards of protection, corporate social responsibility of investors, counterclaims, sustainable development provisions, the conduct of arbitrators etc.

2. Is Italy a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force)

Italy signed the ICSID Convention on 18 November 1965 and ratified it with the Law of 10 May 1970 n. 1093 (Legge 10 maggio 1970, n. 1093 Ratifica ed esecuzione della Convenzione per il regolamento delle Controversie relative agli investimenti tra Stati e cittadini di altri Stati, adottata a Washington il 18 marzo 1965, Off. Gaz. 8, January 12, 1971, p. 155). The ICSID Convention entered into force on 28 April 1971.

3. Has Italy made a notification or designation upon signing, ratifying or any time thereafter?

According to Article 54(2) of the Convention, Italy designated the Courts of Appeal in the province where the enforcement is to take place as competent for the recognition and enforcement of ICSID awards. Moreover, Italy designates persons to serve on the Panel of Arbitrators and of Conciliators pursuant to Articles 12-16 of the Convention.

No notifications and designations were made with respect to exclusions of territories (under Article 70), constituent subdivision or agency (Article 25(1), (3)), or classes of

disputes considered suitable or unsuitable for submission to the center (Article 25(4)).

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against Italy?

As of 1 April 2023, 10 investment treaty arbitrations conducted under the ICSID Convention had/have been initiated against Italy.

Four cases are registered as concluded: Silver Ridge Power BV v. Italian Republic, (the case concerns an investment in 25 solar power plants and the termination of solar projects incentives by the Italian government); Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, Belenergia S.A. v. Italian Republic and Eskosol S.p.A. in liquidazione v. Italian Republic, (all three cases are related to the reduction of feed-in tariffs on investors' photovoltaic energy generation project by the Italian government).

The other 6 case are pending: ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, and Veolia Propreté SAS v. Italian Republic, (both claims arise out of Italian changes to the incentives regime for renewable energy generation enterprises. The former case is currently in the annulment stage); Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, (Italy introduced the ban on oil and gas exploration within the 12-mile coastline zone, which has led to the denial of production concessions for the investor's project. The decision on annulment is pending); VC Holding II S.a.r.l. and others v. Italian Republic, and Encavis and others v. Italian Republic, (Claimants brought both claims based on the government's changes in feed-in tariff policy for photovoltaic plants and solar power projects); Hamburg Commercial Bank AG v. Italian Republic, (the case concerns the seizure of a claimant-funded wind farm in Italy).

5. Are there any particular industries or investment sectors that have led to ICSID claims against Italy?

The majority of ICSID claims against Italy are related to the so-called "photovoltaic saga" and concerned investments in photovoltaic energy generation projects. Investors brought claims under the Energy Charter Treaty on the basis of numerous changes introduced to the Italian solar power policy and cut off the feed-in tariffs for renewable energy producers.

6. Has your country complied with ICSID awards rendered against it?

Only two ICSID awards were rendered against Italy, and neither has reached the enforcement phase.

The first decision in favor of an investor was rendered in ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic. The ICSID tribunal found that Italy violated the ECT by reversing its renewable energy legislation. Italy subsequently filed an application for annulment. Currently, the decision on annulment is pending with a provisional stay of the enforcement of the award.

Secondly, on 23 August 2022, an ICSID tribunal rendered a decision against Italy in Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic. The case concerned a renewable energy generation project in the Ombrina Mare. Claimants were refused a production concession and faced a general ban on oil and gas exploration and production activity within the 12-mile limit of the coastline. The tribunal held that there was a breach of the Energy Charter Treaty. It awarded claimants EUR 190 million in compensation. On 28 October 2022, Italy initiated annulment proceedings under Article 52 of the ICSID Convention. The decision is pending with a provisional stay of enforcement.

It remains to be seen whether Italy will succeed in the annulment of either of the awards.

7. What is the number of ICSID awards that have been enforced in Italy?

No practice exists in the enforcement of ICSID awards in Italy.

Enforcement of ICSID awards Italy

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

According to the designation made by Italy, the Courts of Appeal in the province where the enforcement is to take place are competent to decide on a request for enforcement. No other special rules exist governing the enforcement of ICSID awards.

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

There is no express provision of Italian law governing the enforcement and execution of ICSID awards. And, as stated earlier, it has not been possible to locate any decision of Italian courts enforcing an ICSID award. It is therefore not entirely clear what procedure Italian courts will adopt to enforce ICSID awards. Given that Italy is a signatory of the ICSID Convention, which was ratified by the Italian Parliament with Law of 10 May 1970 n. 1093, Italian courts should follow the procedure articulated in the Convention. This position was also advocated by prominent Italian arbitrators and scholars Massimo Benedettelli and Marco Torsello.

10. What are the costs associated with the enforcement of an ICSID award?

To enforce an arbitral award in Italy, including an ICSID awards, the enforcing party must pay a unified contribution fee of EUR 93 (see: art. 13 c. 1 lett. b DPR 115/2002).

A request to enforce an ICSID awards also triggers other costs, namely the registration tax ("imposta di registrazione") and stamp duty ("imposta di bollo"):

- The registration tax can be 1% or 3% of the value of the award to be enforced. The tax is set at 1% when the award of which enforcement is being sought merely grants the enforcing party declaratory relief concerning rights with patrimonial content. Instead, the tax is set at 3% when damages are awarded (Article 8, Annex A, Tariff, Part I, Presidential Decree No. 642/1972.
- The stamp duty is calculated at the rate of EUR 16.00 euros for every "sheet" of the arbitral award. A "sheet" consists of 4 pages of 25 lines each.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

As mentioned earlier, there is no active practice of enforcement of ICSID awards in Italy. It is therefore difficult to estimate what practical considerations may affect the enforceability of an ICSID award, beyond the compliance with the requirements laid down by the ICSID Convention.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

Assuming that Italian courts follow the provisions of the ICSID Convention (see answer 9), no ground for refusing enforcement should be available to the party resisting enforcement beyond a statement that the ICSID Committee has annulled the award or that its enforcement has been provisionally stayed pending annulment.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

According to Article 840(1) of the Italian Code of Civil Procedure, a decision refusing to enforce a foreign arbitral award can be appealed before the competent Court of Appeals within 30 days since decision to refuse enforcement was communicated to

the parties. The decision of the Court of Appeals can be further appealed before the Court of Cassation (See: Article 840(2) of the Italian Code of Civil Procedure).

14. Is there any recourse available against a leave for enforcement?

Articles 840(1) and (2) of the Italian Code of Civil Procedure also apply, and in the same fashion, to a decision to enforce an arbitral award.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

Pursuant to Article 474 of the Italian Code of Civil Procedure, an arbitral decision constitutes a valid title to initiate a levy of execution procedure. To levy the debtor's assets, the creditor must first communicate its intention to initiate a levy of execution procedure to the bailiff's office (Article 492 of the Italian Code of Civil Procedure). Said request must include a statement expressly identifying the debtor's assets that the creditor intends to levy as well as the executive title (in this case, the decision enforcing the arbitral award). The bailiff must promptly notify the debtor of the impending execution. If the debtor does not satisfy the creditor's demands within 10 days since the notification, the assets are either sold or repossessed by the creditor depending on the nature of the assets and the relief awarded.

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Sovereign immunity from execution is a valid defense under Italian law. Italian courts recognize the international law of sovereign immunity at a domestic level pursuant to the renvoi of Article 10 of the Italian Constitution which proscribes that "[t]he Italian legal system conforms to generally recognised principles of international law." Similar to international tribunals, Italian courts follow the well-known distinction between *jure imperii* and *jure gestionis* (Enciclopedia Treccani). State assets utilized to perform public functions may not be subject to enforcement; instead, property utilized for private activities can be levied (Decision of the Constitutional Court dated 15/07/1992, n. 329). The Italian Court of Cassation has held, for instance, that

hospitalization activities do not by themselves trigger the application of a foreign immunity defense (Decision of the Court of Cassation dated 16/09/2021, n. 25045). Conversely, accounts held by foreign central banks have been found to be governmental in nature and therefore not capable of being subjected to enforcement.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in Greece?

No.

Contributors:

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Moldova

Implementation of the ICSID Convention in Moldova

1. Is there a model BIT in place in your country?

The Republic of Moldova does not have a model BIT.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Moldova signed the ICSID Convention on 12 August 1992. The instrument of ratification of the Convention was deposited on 5 May 2011. The ICSID Convention entered into force on 4 June 2011.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Upon ratification, Moldova made the following notification: "Following Article 70 of the Convention, the Republic of Moldova specifies that the provisions of the Convention shall be applied only on the territory effectively controlled by the authorities of the Republic of Moldova."

Unlike other parties to the Convention, Moldova has not designated a certain court or authority as competent for the recognition and enforcement of arbitral awards pursuant to Article 54(2) of the Convention.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

The ICSID Cases Database reports 3 arbitration against Moldova under the ICSID Convention, including 2 concluded and 1 pending case, as follows:

Concluded:

- Franck Charles Arif v. Republic of Moldova
- Zbigniew Piotr Grot and others v. Republic of Moldova
- Pending:
- RTI Rotalin Gas Trading AG and Rotalin Gaz Trading S.R.L. v. Republic of Moldova

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

The pending ICSID arbitration is focused on a claim concerning the oil and gas sector, while the two concluded arbitrations concerned the agricultural and services and trade sectors.

6. Has your country complied with ICSID awards rendered against it?

- In the case of Zbigniew Piotr Grot, Grot Cimarron LLC, I.C.S. Laguardia SRL and Laguardia USA LLC v. Republic of Moldova, the Moldovan Government was reported to pay an initial instalment of 30% from the total amount of the award from the state reserve funds in 2018, while the remaining 70% were to be paid from the state budget for 2019. There is no publicly available data, however, confirming when and to what extent the remaining amount has been paid.
- In the case of Franck Charles Arif v. Republic of Moldova, the payment of the award was performed based on the Government Decision dated 22 December 2014.

7. What is the number of ICSID awards that have been enforced in your country?

The publicly available data shows that the Moldovan Government attempted to comply voluntarily with the two existing ICSID awards. As a result, there seems to be no indication that any ICSID award against Moldova was enforced on a non-voluntary basis in Moldovan courts. There have been no enforcement actions against other parties before Moldovan courts, either.

Enforcement of ICSID awards in Moldova

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

As mentioned above, there is no record of Moldova having designated a certain court or authority as competent for the recognition and enforcement of arbitral awards pursuant to Article 54(2) of the Convention.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

Under Moldovan law, there are no specific provisions regulating the enforcement of ICSID awards.

Article 156 of the Enforcement Code focuses on the execution of court decisions and foreign arbitral awards. It requires the foreign court decisions and arbitration decisions to be received for execution and to be executed only if their execution has been recognized and approved according to the procedure established in Chapter XLII of the Code of Civil Procedure. Further on, Chapter XLII of the Code of Civil Procedure extensively regulates the conditions and the procedure of recognition and enforcement of foreign arbitral awards. However, such recognition and enforcement procedure as established by the New York Convention are not applicable. As stated earlier, pursuant to Article 54 of the ICSID Convention, the ICSID awards are enforceable similarly to national court decisions and so, the conditions for enforcement and recognition established by the New York Convention reflected in the Civil Procedure Code are not applicable.

Given the above, the specific procedure for enforcement of ICSID awards remains unclear. Article 11 of the Enforcement Code provides the list of enforceable acts. ICSID awards, unlike the decisions of the European Court for Human Rights for instance, are not mentioned in this list as acts directly enforceable. As a result, an investor seeking to enforce an ICSID award against Moldova will need to obtain a writ of execution from the court. Article 12 of the Enforcement Code, which focuses on the issuance of the writ of execution, states that the writ of execution is issued to the creditor upon request by the first instance court, after the decision has become final.

10. What are the costs associated with the enforcement of an ICSID award?

The costs associated with the enforcement of an ICSID award will entail the fees of the enforcement officer in charge with the execution process only, since there is no court fee for the issuance of a writ of execution.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

N/A

12. In what way can a party against whom enforcement of an ICSID award is sought to defend itself with a view to preventing enforcement?

The Moldovan legislation does not provide specific rules that would regulate the manner in which a party against whom enforcement of an ICSID award is sought would defend itself with a view to preventing enforcement. Moreover, there is no case law to clarify the stance on this matter. By analogy, however, with the procedure of seeking enforcement of a local arbitral award, in line with Article 486, Chapter XLII of the Code of Civil Procedure, the court issues the writ of execution based on a ruling. Such ruling, which either grants or refuses the issuance of a subsequent writ of execution, may be appealed in line with the general civil procedural rules for appealing judicial rulings (Chapter XXXVIII, Section 1 of the Civil Procedure Code). There is no express list of grounds that shall be referred to when making the appeal,

but in examining the appeal, the court will have a limited scope of only verifying whether the procedural rules applied when issuing the ruling were properly followed.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

The Moldovan law does not provide for a specific procedure for appealing a decision refusing to enforce an ICSID award. However, as mentioned earlier, the court ruling that either grants or refuses the issuance of a writ of execution may be appealed. Please see the explanation provided for question number 12 above.

14. Is there any recourse available against a leave for enforcement?

Given the lack of designation of a specific court as an authority competent for the recognition and enforcement of arbitral awards pursuant to Article 54(2) of the Convention, as well as the lack of specific legal provisions on enforcement of ICSID awards, whether there is any recourse available against a leave for enforcement remains an unsettled matter.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

The applicable law to the execution is the Enforcement Code of the Republic of Moldova (the 'Code'). Pursuant to Article 15 of the Code, once the writ of execution is issued by the court, it shall be presented by the creditor to a chosen enforcement officer. However, a writ of execution issued on the basis of an ICSID award against Moldova probably falls under one of the exceptions established by Article 15. This exception requires that, when the enforcement takes place against the state budget, from the account of state and municipal enterprises or of commercial companies where the state is the major shareholder, the court submits the writ of execution ex officio to the enforcement officer mentioned by the creditor in the request for issuance of the writ.

Further on, Article 15(5) of the Enforcement Code also suggests that the writ of execution concerning the indisputable decommissioning of funds from the state

budget, the state social insurance budget, the mandatory medical assistance insurance funds, the budgets of administrative-territorial units, as well as from the account of public authorities/institutions, are executed in accordance with the procedure and deadlines established by the Law on Public Finances and Budgetary-Fiscal Responsibility No. 181 dated 25 July 2014. This Law provides for certain limitations when it comes to enforcement from state funds. Thus, Article 68(4) states that the amount of payments for enforced execution cannot exceed 20 percent of the approved budget of the budgetary authority/institution for the respective year, while the fee of the enforcement officer for the enforcement of the writ of execution will be calculated in accordance with the Enforcement Code, but will not exceed 5,000 Moldovan lei (approximately 250 EUR).

In terms of procedure, the Enforcement Code provides in Article 60 that within 3 days of receiving the writ of execution, the enforcement officer issues a decision regarding the start of the execution procedure, which he sends to the parties in the enforcement procedure no later than 3 days after issuance, and proposes the debtor to execute the writ voluntarily within 15 days, without taking actions to enforce it.

The decision concerning the start of the execution procedure can only be challenged by the debtor, on the basis provided for in Article 61(b) (the term for submitting the writ has expired; generally the term is 3 years), 61(e) (the term for voluntary execution has not expired) and 61(f) (the writ was executed) of the Enforcement Code, in the court in whose territorial jurisdiction the enforcement officer's office has its seat or, in the case of the municipality of Chisinau, in the court in whose constituency the territorial chamber of enforcement officers established the territorial competence of the officer. The appeal filed against the decision to initiate the enforcement procedure does not have a suspensive effect.

Furthermore, Article 66 of the Enforcement Code provides that the initiation, postponement, suspension and termination of the forced execution, the release or distribution of the sums obtained from the execution, the application and lifting of the measures to ensure the execution, other measures provided by law are disposed of

by the enforcement officer by means of a decision, which is legally enforceable from the moment of issuance and can be challenged in court within 10 days from the date of communication.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

There is no law on state immunity in Moldova. Please see the comment to question 15 for more details concerning the limitations imposed on the execution against public funds, which could apply in the case of an ICSID award against Moldova.

If a party were to seek enforcement of an ICSID award against another country in Moldova, then, depending on the assets targeted as part of the execution, Article 457 of the Civil Procedure Code may come into play. It covers actions brought against other states and international organizations and issues of diplomatic immunity and limits the possibility of initiating an action against another state in the court of the Republic of Moldova, involving it in the process as a defendant or intervener, seizing its property located on the territory of the Republic of Moldova or adopting other measures against the property to secure the claim, or seize it in the procedure for the execution of the court decision, unless the competent bodies of the respective state consent and if the national law or the international treaty to which the Republic of Moldova is a party does not provide otherwise.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

Contributor:

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Montenegro

Implementation of the ICSID Convention in Montenegro

1. Is there a model BIT in place in your country?

No, there is no model BIT in place in Montenegro.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Montenegro signed the ICSID Convention on 19 July 2012. In accordance with Article 75 of the ICSID Convention, the World Bank notified all ICSID Convention Signatory States of Montenegro's signature. On 10 April 2013, Montenegro ratified the ICSID Convention, while it entered into force on 10 May 2013.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

None.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

Up to this day and after its independence from the Republic of Serbia, there have been 3 reported investment treaty arbitrations conducted under the ICSID Convention and all of them are concluded.

The above-mentioned arbitrations are the following ones:

- Addiko Bank AG v. Montenegro
- CEAC Holdings Limited v. Montenegro
- MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

Having in mind, that there were only 3 arbitrations against Montenegro, it is not possible to select any particular industries or investment sectors that have led to ICSID claims against Montenegro.

6. Has your country complied with ICSID awards rendered against it?

Montenegro has not lost a case up to this day and therefore, there has been no award to comply with.

7. What is the number of ICSID awards that have been enforced in your country?

As explained above, there is no award against Montenegro. Hence, the number of ICSID awards that have been enforced against Montenegro is zero. According to the best of our knowledge, there have been no attempts to recognize, enforce and execute ICSID awards against any other state or investor in Montenegro.

Enforcement of ICSID awards in Montenegro

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

Keeping in mind that Montenegro has not designated the Competent Courts or Other Authorities for the Purpose of Recognizing and Enforcing Awards Rendered Pursuant to the Convention (Article 54(2)), meaning that domestic rule should be taken into account. Under article 6 of Montenegrin Arbitration Law the competent court shall have jurisdiction for ruling on an application for recognition of the arbitral award and the competent court is the Commercial Court of Montenegro. Pursuant to the Montenegrin Constitution, ICSID Convention shall be directly applicable. According to article 9 of the Montenegrin Constitution Confirmed and published international

treaties and generally accepted rules of international law are an integral part of the internal legal order, they have primacy over domestic legislation and are directly applied when they regulate relations differently from internal legislation, meaning ICSID awards shall be directly recognized.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

It is worth mentioning that in the translation of the ICSID convention enforcement and execution are the same izvršenje, for example Spanish version. Nevertheless, for the purpose of this chapter difference between enforcement and execution will be made and enforcement will be seen only as an addition to the recognition, confirming enforceability of the award to be the legal title for execution proceedings, while execution would be seen as one unit proceeding of both determination of the grounds for execution, as well as seizure and collection of assets (donošenje rešenja o izvršenju i sprovođenje izvršenja). Since ICSID awards shall be directly recognized as an award rendered by the domestic court as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a domestic court such recognition can be seen as similar to obtaining clause of finality and enforceability of domestic judgement (pribavljanje klauzule pravnosnažnosti i izvršnosti). Through, obtaining this clause, ICSID awards are seen as final and binding, as well as a valid title for execution. Hence, a party seeking recognition or enforcement in a Member State must provide a copy of the award certified by the Secretary-General to the competent court. The opposing party can only afterwards request revocation of the clause based on below mentioned limited reasons, making this procedure rather *ex parte*.

10. What are the costs associated with the enforcement of an ICSID award?

The costs associated with the enforcement of an ICSID award are the court fees and lawyers' fees and costs, who are entitled to request reimbursement thereof (assuming the applicant is seeking assistance from the lawyer). The Law "On court fees" in Montenegro does not recognize applications for recognition and enforcement of foreign arbitral awards as an independent designated submission, as it recognizes applications for recognition of the foreign court judgement, therefore leaving space for court interpretations. The principle of "loser pays" applies to all indispensable fees.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

Public bailiffs are equipped with the software database for checking whether the enforcement document (that is the award in question) has been handed over to another public bailiff for commencement of enforcement. This has been done to prevent multiple enforcements of judicial/arbitral acts.

12. In what way can a party against whom enforcement of an ICSID award is sought to defend itself with a view to preventing enforcement?

Recognition and enforcement cannot be opposed especially not based on public policy and/or other similar grounds. A party opposing enforcement can request revocation of the clause of finality and enforceability but only if the award has not been properly delivered to the state and/or if the time for voluntary payment has not yet lapsed. In the latter case, only the clause granting enforceability would be revoked.

If we understand execution as a separate unit proceeding (postupak izvršenja) please see the answer to question 16.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

Since, the court is obliged to issue such a clause granting the final and binding effect of the award and its enforceability it has a duty to do it. In case, the court does not do it, the enforcement seeker is entitled to an objection to the president of the court.

14. Is there any recourse available against a leave for enforcement?

The Party opposing enforcement of the award can request it as stated above and base its request on the above-mentioned grounds. The request will be delivered to the other party (i.e., the one who originally requested enforcement) and if necessary, the court can schedule a hearing to examine stated ground(s) for revocation. The court shall upon hearing arguments issue a decision on the request for revocation. On the decision on the request for revocation of the clause, ordinary legal remedy is allowed, but extraordinary legal remedies are not permitted.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

The execution procedure is regulated by the Law "On Execution and Security". The execution procedure is initiated by the party's proposal to the public bailiff. Pursuant to article 12 of the mentioned law, the execution of an enforceable foreign document shall be determined and carried out in accordance with this law, if the enforceable foreign document meets the conditions for recognition and enforcement prescribed by law or international agreement and if it has been previously recognized by the competent court. The public bailiff is obliged to issue a decision within five days as of the date of submission of the proposal (Article 40). The public bailiff adopts the proposal for execution in whole or in part, rejects the proposal or dismisses it. An unsatisfied party can submit a complaint against such a decision to the competent authority within 5 days upon receiving the decision. The complaint is filed to the public bailiff, but the public bailiff is obliged to submit the complaint and entire case files to the court for a decision on the complaint. The complaint does not prevent the

collection procedure because the payment is based on the enforceable title. The other party has a right to submit a response to the complaint (article 53).

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Pursuant to article 13 of the Law on enforcement and security interest the property of another state in Montenegro or an international organization located on the territory of Montenegro cannot be executed or secured without the prior written consent of the state administration body responsible for foreign affairs unless the other state or international organization has expressly agreed to the execution and/or security by written consent. In accordance with article 26", the objects of enforcement cannot be things outside of legal transactions. The objects of execution cannot be objects, weapons and equipment intended for the defence and security of the state. When assessing whether an object or a right can be subject to enforcement, or whether the enforcement of an object or a right can be limited, the circumstances at the time of submission of the proposal for enforcement shall be taken into account unless otherwise expressly determined by the above-mentioned law.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

Contributor:

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He obtained his Bachelor degree from the University of Belgrade, Faculty of Law (summa cum laude), where he also completed his LL.M in Company Law. In addition, he obtained LL.M. in Business Law for Foreign Lawyers at University Paris 1 Pantheon – Sorbonne (magna cum laude). Luka qualified as an Attorney at law in 2018 and is a member of the Vojvodina Bar Association. Prior to joining the firm, he worked for another Serbian reputable law firm and as a solo practitioner. He is fluent in English and has basic knowledge of French.

Netherlands

Implementation of the ICSID Convention in the Netherlands

1. Is there a model BIT in place in your country?

Yes, the Netherlands has a specific model BIT in place. Most of the BITs to which the Netherlands is a party are based on the 2004 Model BIT. However, in October 2017, the Dutch government adopted a new model BIT.

Substantive changes among other things relate to the notion of investment (only assets that have the characteristic of an investment are protected; the BIT model provides some examples of an investment) [see Art. 1(a) Model BIT], the notion of investor (limited to entities incorporated in the home state and having substantial business activities there) [see Art. 1(b)(ii) Model BIT] and that of fair and equitable treatment (defined by reference to a list of measures) [see Art. 9(2) Model BIT]. The drafters of the text also focused on corporate social responsibility and regional and gender diversity.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

The Netherlands is one of the founding parties to the ICSID Convention. The Netherlands signed the ICSID Convention on 25 May 1966 [see Tractatenblad 1966, 152, p. 78] and ratified it on 14 September 1966 [see Tractatenblad 1966, 225, p. 2]. The ICSID Convention entered into force in the Netherlands on 14 October 1966 [see Tractatenblad 1966, 225, p. 2].

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

On depositing its instrument of ratification, the Netherlands restricted the application of the Convention to the Kingdom in Europe; by a notification received on 22 May 1970, the Netherlands withdrew that restriction and thus extended the application of the Convention to Suriname and the Netherlands Antilles [see Tractatenblad 1970,

100, p. 3]. Suriname having attained independence on 25 November 1975, the Convention ceased to be applicable to Suriname as of that date.

The Netherlands furthermore designated the preliminary relief judge of the District Court of The Hague as the competent court in the sense of Article 54(2) ICSID Convention [see Wet houdende aanwijzing van een rechter op grond van artikel 54 van het Verdrag van Washington tussen Staten en onderdanen van andere Staten].

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

There have been two reported investment treaty arbitrations conducted under the ICSID Convention in which the Netherlands was named as a respondent. One case has been discontinued:

- Uniper SE. et al. v. Kingdom of the Netherlands (ICSID Case no. ARB/21/22
  - Claimants and their nationalities were Uniper SE (German), Uniper SE, Uniper Benelux Holding B.V. (Dutch) and Uniper Benelux N.V. (Dutch).
  - The dispute related to a coal-powered plant.
  - In the first week of October 2022, the Higher Regional Court of Cologne declared Uniper's intra-EU ICSID arbitration claim inadmissible. The Higher Regional Court of Cologne's orders can be appealed to the German Supreme Court (Bundesgerichtshof).
  - In 2022, Uniper agreed to withdraw its ECT claim as a condition of the bailout agreed with the German government. This bailout was accepted by Uniper due to financial difficulties. On 17 March 2023, the tribunal issued an order taking note of the discontinuance of the proceedings.

The other case is still pending:

- RWE AG and RWE Eemshaven Holding II BV v, Kingdom of the Netherlands (ICSID Case no. ARB/21/4
  - Claimants and their nationalities are RWE AG (German) and RWE Eemshaven Holding II BV (Dutch).

- The dispute also relates to a coal-powered plant.

In the first week of October 2022, the Higher Regional Court of Cologne declared RWE's intra-EU ICSID arbitration claim inadmissible. On 20 October 2022, the tribunal issued an order concerning the suspension of the proceedings.

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

The two cases against the Netherlands are both energy-related, i.e., these disputes have arisen within the realm of the 'Electric Power & Other Energy' sector. In both cases, the instrument invoked is the ECT (Energy Charter Treaty).

6. Has your country complied with ICSID awards rendered against it?

There have been no ICSID awards rendered against the Netherlands.

7. What is the number of ICSID awards that have been enforced in your country?

Not every court decision to enforce an award is published. On the contrary, what normally happens is that the court grants leave for enforcement by means of a judicial decision of no more than one or two pages. Such decisions are generally not published on the website of the courts. As a result, it is not possible to count the number of awards that have been enforced in the Netherlands.

Courts do often publish subsequent court decisions that concern disputes pertaining to specific enforcement measures and/or immunity of execution. These decisions clarify that there are several examples in which leave has been granted to enforce ICSID Awards. Examples include:

- Kazakhstan/Caratube: District Court of Amsterdam of 22 March 2018, ECLI:NL:RBAMS:2018:2548, para. 2.7.
- Crystalex/PDVSA District Court The Hague of 18 October 2017, ECLI:NL:RBDHA:2017:11906, para. 2.7.
- Oi/PDVSA: District Court of The Hague of 16 February 2022, ECLI:NL:RBDHA:2022:1602, para. 2.10, where reference is made to the

fact that the District Court of The Hague granted leave to enforce an ICSID award.

There are certainly more (published and unpublished) judgments that make reference to a decision regarding the enforcement of an ICSID awards.

Enforcement of ICSID awards in the Netherlands

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court authority to be competent?

The Act of 1 November 1980 designates the preliminary relief judge of the District Court of The Hague to be the court under Article 54 of the ICSID Convention. There are no additional rules or criteria on venue and jurisdiction.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g. adversarial vs. *ex parte*?)

Article 54(1) of the ICSID Convention provides that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State".

Article 54(2) of the ICSID Convention furthermore provides that "[a] party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. (...)". Hence, only a certified copy of the award is required to be submitted to the preliminary relief judge of the District Court of The Hague. The award holder in principle has no obligation to submit either translations (of the award), copies of the agreement to arbitrate or any other document. [Legislative History 1978-1979, 15423, Explanatory Memorandum, p. 1]. If the award is written in a language that the judges do not master, it is however

conceivable that a judge will request further information and/or a (partial) translation.

The application is decided on an ex parte basis and is usually decided upon within several days. The competent judge will not review the substance of the ICSID award. The judge will only verify that it indeed concerns a certified copy of an ICSID award [see Legislative History 1978-1979, 15423, Memorandum of Reply, p. 2]. If that question is answered in the affirmative, the Dutch court must grant leave for the enforcement of the ICSID award in the Netherlands.

10. What are the costs associated with the enforcement of an ICSID award?

The costs for leave to enforce an award are limited. This is a result of the limited scope of these proceedings. These costs generally include:

- Counsel's fees to draft a brief request for enforcement;
- Court fees: EUR 134,60.

The costs of enforcement itself could be more costly, depending on the precise nature of the assets seized as well as potential judicial conflicts that could arise. Costs may include disbursements, such as the bailiff's costs for enforcement, costs relating to an action further to the seizing of assets and costs for disputes at the enforcement stage (such as disputes regarding the alleged immunity of execution).

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

N/A

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

Assuming that Dutch courts follow the provisions of the ICSID Convention, no ground for refusing enforcement should be available to the party resisting enforcement beyond a statement that the ICSID Committee has annulled the award or that its enforcement has been provisionally stayed pending annulment.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

Under Dutch law, there is no explicit provision prohibiting an appeal to a decision refusing to enforce an ICSID award. However, in practice, such an appeal will in any event be a rare occasion given the *ex parte* handling of the case and the obligation in Article 54 ICSID Convention for member states to enforce ICSID awards.

14. Is there any recourse available against a leave for enforcement?

Dutch legislation does not explicitly provide for any recourse procedure against a leave for enforcement. The main rule under Dutch procedural law however is that it is possible to lodge an appeal further to an unfavorable judgment. Irrespective of whether such an appeal can be lodged, a judge would not be able to assess the merits.

Once leave for enforcement is granted, the award debtor can also – albeit on very limited grounds – file an enforcement dispute in which, for example, an immunity defence is raised or in which lifting of an attachment is claimed since an ICSID ad hoc committee has suspended the enforcement [see e.g. District Court Limburg 8 November 2022, ECLI:NL:RBLIM:2022:8753].

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

After obtaining an enforcement order in the Netherlands, a judgment creditor has the same remedies for execution as if it were a domestic final judgment made by a competent court in the Netherlands.

The following applies in general after obtaining an enforcement order (e.g., ICSID arbitral award with leave to enforce) and service to the debtor of a true bailiff's copy of the enforcement order: the creditor can enforce the judgment on the debtor's property, to the extent located in the Netherlands. Under Dutch law, a creditor can in principle have recourse for his claim against all the property of his debtor (including assets with or receivables on third parties, Article 3:276 Dutch Civil Code, "DCC"). In most instances, the bailiff will first seize assets. Sometimes, the asset will be sequestrated (see Article 853 DCCP et seq.). Sometimes, the debtor may still use the asset during attachment, but the debtor may not frustrate the enforcement. Judicial enforcement can be sought against (amongst others):

i. movable property, through public sale by the bailiff (article 463 DCCP);

ii. immovable property, through public sale by the civil-law notary (articles 514 DCCP and 519 DCCP);

iii. receivables on third parties (including bank accounts), through collection by the bailiff from the third party (article 477 DCCP);

iv. securities (including shares in a company based in the Netherlands), through a sale in form and on terms approved by the court, whereby provisions in the company's articles of association must in principle be complied with (article 474g DCCP and additionally article 2:195 DCC for sale of shares in a B.V.); and

v. other property rights, e.g., intellectual property rights and permits, where the procedure for judicial enforcement depends on the type of property right - general rule is public sale by the bailiff (articles 474bb and 463 DCCP).

A debtor can attempt to obstruct the enforcement by not disclosing the nature and/or location of his assets. Under Dutch law, a debtor has limited obligations regarding the disclosure of assets that are subject to redress [Cf. Supreme Court 20 September 1991, ECLI:NL:HR:1991:ZC0338 (Tripels/Masson); see also recently with regard to Art. 475g DCCP: Supreme Court 26 November 2021, ECLI:NL:HR:2021:1776]. It is not completely clear whether the same limitations apply to cases where a sovereign state is a debtor.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Article 55 of the ICSID Convention provides that Dutch law on State immunity is applicable to disputes concerning the execution of ICSID awards.

In the autumn of 2016, the Dutch Supreme Court set out the relevant rules on immunity from execution in three judgments [see Supreme Court 30 September 2006, ECLI:NL:HR:2016:2236, NJ 2017/190 (Morning Star International v. Gabon and the Kingdom of the Netherlands), Supreme Court 14 October 2016, ECLI:NL:HR:2016:2354, NJ 2017/191 (Kingdom of the Netherlands v. Servaas) and Supreme Court 14 October 2016, ECLI:NL:HR:2016:2371, NJ 2017/192 (N.N. v. Kingdom of the Netherlands).

The general principle presented therein is that the property of states has immunity from attachment and execution unless the property can be the subject of enforcement measures. That is the case when Article 19(a) (express consent to enforcement measures), Article 19(b) (state allocated property to satisfy the claim) or Article 19(c) (assets for use or intended for use for other than non-commercial purposes) of the UN Convention can be invoked.

The starting point under Article 19(c) UN Convention is that property of states is presumed to be immune from enforcement measures, except for in cases the property is in use or intended for use for other than government properties. The Netherlands Supreme Court also confirmed this in the Kazakhstan v. Samruk case:

'It is in accordance with the purport of the immunity from execution – aimed at respecting the sovereignty of foreign states – to take as a starting point the principle that property belonging to foreign states is not eligible for attachment and execution unless, and to the extent that, it has been established that its intended use is incompatible with attachment and execution. This is consistent with Article 19(c) of the UN Convention, which can be deemed to be a rule of customary international law on this point.' [see Supreme Court 18 December 2020, ECLI:NL:HR:2020:2103, NJ 2021/106 (Republic of Kazakhstan/Samruk-Kazyna JSC). See also Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236, RvdW 2016/1031; Supreme Court 14 October 2016, ECLI:NL:HR:2016:2371, RvdW 2016/1054; Supreme Court 14 October 2016, ECLI:NL:HR:2016:2354, RvdW 2016/1056]

This does not in any way mean that the property of foreign states cannot be attached. In accordance with the case law of the Supreme Court, property 'used or intended for – briefly put – other than public use' can be attached. To this end, the Supreme Court considered in the Kazakhstan v. Samruk case that under the rules of international law, property of a foreign state is subject to a presumption of immunity, which gives way only if it is established that the property in question is used or intended to use by the foreign state for purposes other than public purposes. It is incumbent on the party relying on an exception to immunity from execution to provide information on the basis of which it can be established that this exception applies. According to the Supreme Court, immunity from execution is not limited to property whose immediate destination is a public one. [see Supreme Court 18 December 2020, ECLI:NL:HR:2020:2103, NJ 2021/106 (Republic of Kazakhstan v. Samruk-Kazyna JSC)].

Miscelaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

After obtaining leave for a pre-judgment attachment or after a judgment on the merits has been handed down and has become enforceable, the creditor can levy attachments on the debtor's known assets. In case of attachments on state assets, the bailiff who levies the attachment is - pursuant to Article 3a Bailiff Act - required to inform the Dutch Ministry of Justice of such attachment if he reasonably has to take into account the possibility that levying an attachment is contrary to the obligations of the State under international law ("indien hij redelijkerwijs rekening moet houden met de mogelijkheid dat het verrichten van [een ambtshandeling] in strijd is met de volkenrechtelijke verplichtingen van de Staat (...)")

The wording ("reasonably take into account the possibility") leaves little room in practice to not inform the Dutch Ministry of Justice if the intended attachment concerns a foreign state's assets. It appears both from the drafting history of Article 3a Bailiff Act and the Government Gazette ("Staatscourant") that resistance from the Dutch government against an (imminent) attachment will not be easily omitted.

Through so-called Ministerial notices, the Minister of Justice may act before or after an attachment is levied. An attachment levied despite a prior ministerial notice renders the attachment null and void while a post ministerial notification

imposes an obligation on the bailiff to lift the attachment. Both the (alleged) creditor and bailiff may contest the (prior or post) ministerial notification in preliminary relief proceedings before the Dutch court. One may argue that this system in essence practically entails that a foreign state's assets are presumed to enjoy immunity from execution, whereupon the Dutch court must then see whether this privilege holds true.

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Poland

Implementation of the ICSID Convention in Poland

1. Is there a model BIT in place in your country?

Poland does not have a Model BIT.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

No, Poland is not a party to the ICSID Convention.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

N/A

Statistics

4. What is the number of reported investment treaty arbitrations initiated against your country?

There were three known proceedings against Poland that were adjudicated by the ICSID tribunal under the Additional Facility Rules on the basis of the BIT between the U.S. and Poland.

- Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland; sector: manufacturing of food products;
- David Minnotte and Robert Lewis v. Republic of Poland - sector: health care;
- Cargill, Incorporated v. Republic of Poland; sector: manufacturing (the case was ultimately adjudicated under the UNCITRAL Arbitration Rules in proceedings under the agreement on jurisdiction).

5. Are there any particular industries or investment sectors that have led to ISDS claims against your country?

The examples of particular industries or investment sectors that have led to claims in investment arbitration include the following:

- telecommunications (for example, Juvel and Bithell v. Poland, Vivendi v. Poland, Ameritech v. Poland, France Telecom v. Poland);
- extraction of crude oil and natural gas (for example, Mercuria v. Poland (II), Festorino and others v. Poland, Mercuria Energy v. Poland (I));
- mining (for example, Prairie v. Poland, Honwood v. Poland, Darley v. Poland, Miedzi Copper v. Poland, TRACO v. Poland);
- real estate (for example, Manchester Securities v. Poland, Griffin v. Poland, Strabag and others v. Poland).

6. Has your country complied with investment arbitration awards rendered against it?

There is no publicly available information regarding ISDS awards that Poland has complied with.

7. What is the number of investment arbitration awards that have been enforced in your country?

As of 1 January 2022, 8 awards have been decided in favour of the investors. There are at least two arbitral awards which have been enforced against Poland (Saar Papier (I) and Cargill) as a result of enforcement proceedings in Germany and the United States, respectively. [For further reference see E. Gaillard, I. M. Penushliski, "State Compliance with Investment Awards" [in:] ICSID Review, Vol. 35, No. 3 (2020), p. 566].

Enforcement of ICSID awards in Poland

Competent Court or Authority

8. Which court or authority is competent to decide on a request for recognition and enforcement of investment arbitration awards? Are there any criteria for the court or authority to be competent?

Pursuant to Article 1213(1) of the Polish Code of Civil Procedure (the "CCP"), the competent court to decide on a request for enforcement is the court of appeal in the territory of which the court, which would have had jurisdiction to hear the case had the parties not entered into an arbitration agreement, is located, and in the absence of such grounds - the Court of Appeal in Warsaw.

Procedural Rules

9. What is the procedure for enforcement of investment arbitration awards in your country? What are the requirements applicable to a request for the recognition and enforcement of an investment arbitration award? (e.g., adversarial vs. *ex parte*?)

In Poland, the enforcement of ISDS awards is governed by (i) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") – which governs the enforcement of foreign arbitral awards rendered in the States that are Party to the New York Convention; (ii) the provisions of the CCP (Article 1212 of the CCP et seq.)

The New York Convention

The New York Convention has been ratified by a large number of States (as at 1 January 2022, 168 States have acceded to it), which renders this mechanism very effective.

Although the New York Convention does not contain any specific provisions on the enforcement of investment awards, it has been applied thereto [A J van den Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions', (1987) 2 ICSID Review – Foreign Investment Law Journal 439, pp. 447–448].

Applicability

Pursuant to Article 1 of the New York Convention, it applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Requirements

Article 3 of the New York Convention specifies that the States party to the New York Convention must recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid out in its provisions.

Article 4 of the New York Convention further specifies that the party seeking enforcement of an award must supply (i) the duly authenticated original award or a duly certified copy thereof; (ii) the original arbitration agreement or a duly certified copy thereof. If these documents have not been prepared in the Polish language, the party must provide a translation by an official or sworn translator or by a diplomatic or consular agent.

Procedure

The New York Convention refers to the rules of the territory where the award is relied upon with regard to specific regulations regarding the procedure. In Poland, the CCP further regulates specific requirements as to the enforcement of arbitral awards.

The CCP

The CCP sets forth the procedure for the enforcement of arbitral awards.

Applicability

The provisions of the CCP apply to awards rendered in proceedings in which the seat of arbitration was in Poland or abroad. (Article 1212 § 2 of the CCP).

Requirements

To seek enforcement of an arbitral award, the party must submit (i) a request for the enforcement of the arbitral award, (ii) the original of the arbitral award or a copy thereof certified by the arbitration court, and (iii) the original of the arbitration clause or an officially certified copy thereof. If the arbitral award or the arbitration agreement is not in Polish, the party must provide certified translations (Article 1213 § 1 of the CCP).

Procedure

Pursuant to Article 1215 § 1of the CCP, the court decides on the recognition of an award issued abroad after holding a hearing.

10. What are the costs associated with the recognition and enforcement of an investment arbitration award?

The costs associated with the enforcement of arbitral awards may be composed of:

- a fixed fee in the amount of PLN 300 for the application for the recognition of an arbitral award (Article 24 para. 1 point 3 of the Act of 28 July 2005 on Court Costs in Civil Cases);
- potential costs of certified translation;
- collections costs incurred in connection with the bailiff's actions.

11. What other practical considerations may affect the recognition and enforcement of an investment arbitration award in your country?

Both the New York Convention and the CCP provide for mechanisms which may hinder the enforcement of arbitral awards (see the reply to the question below).

12. In what way can a party against whom recognition and enforcement of an investment arbitration award is sought defend itself with a view to preventing recognition and enforcement?

Both the New York Convention and the CCP provide for grounds which prevent recognition and enforcement of arbitral awards.

New York Convention

Pursuant to Article V of the New York Convention, recognition and enforcement of the arbitral award may be refused (i) at the request of the party against whom it is invoked; or (ii) ex officio.

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, in the following cases:

- the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of the award may be refused ex officio if:

- the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- the recognition or enforcement of the award would be contrary to the public policy of that country.

The CCP

Articles 1214 and 1215 of the CCP specify the grounds for refusal of recognition and enforcement of an arbitral award in line with Article V of the New York Convention.

Pursuant to Article 1214 § 3 of the CCP, the court shall refuse ex officio to recognise or confirm the enforcement of an arbitral award or a settlement reached before an arbitral tribunal if:

- according to the CCP, the dispute cannot be adjudicated by an arbitral tribunal;
- recognition of an arbitral award or a settlement reached before an arbitral tribunal would be contrary to the basic principles of the legal order of the Republic of Poland (the public order clause);
- a ruling of an arbitral tribunal or a settlement reached before an arbitral tribunal deprives a consumer of the protection afforded to them by the mandatory provisions of the law applicable to the agreement to which the consumer is a party, and where the applicable law is a law selected by the parties - the protection afforded to the consumer by the mandatory provisions of the law which would be applicable should no law have been selected.

Article 1215 of the CCP provides for the grounds for refusal of recognition and enforcement of an arbitral award at the request of a party if:

- there was no arbitration agreement, the arbitration agreement is void, invalid or has expired according to the relevant law;
- the party was not duly notified of the appointment of an arbitrator or proceedings before an arbitral tribunal, or was otherwise deprived of the possibility to defend his rights before an arbitral tribunal;
- the award of an arbitral tribunal concerns a dispute which is not covered by an arbitration agreement or falls beyond the subject-matter and scope of that agreement, however, if adjudication in matters covered by an arbitration agreement may be separated from adjudication in matters not covered by that agreement or falling beyond the subject-matter and scope of that agreement, a refusal to recognise or confirm enforcement of an arbitral award may only concern those matters which are not covered by the arbitration agreement or fall beyond the subject-matter and scope of that agreement;
- the composition of an arbitral tribunal or proceedings before an arbitral tribunal were not in accordance with an agreement between the parties or, if there was no such agreement, with the law of the state where the proceedings before an arbitral tribunal were conducted;
- an arbitral award is not yet binding on the parties or has been set aside, or its enforcement has been postponed by a court of the state in which or according to the law of which the award was issued.

Public policy

There is no legal definition of public policy in Polish law. It is understood as a mechanism including the fundamental principles of the Polish legal system. It appears as a procedural and substantive public policy, i.e., awards that are annulled on account of the procedure pursuant to which they were rendered as well as on account of their contents [Johannes Koepp, Agnieszka Ason, 'An Anti Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' [in:] Maxi Scherer (ed), Journal of International

Arbitration, International; Kluwer Law International 2018, Volume 35 Issue 2, pp. 157 – 172].

The ground for non-recognition or non-enforceability which is contrary to public policy as a basis for refusal of recognition or declaration of enforceability is determined according to the law applicable at the time when the recognition or declaration of enforceability is sought.

When assessing the violation of public policy, the courts in Poland rely on:

- the *pacta sunt servanda* principle (judgment of the Supreme Court of 11 August 2005, case file ref. V CK 86/05);
- freedom of contract (judgment of the Supreme Court of 30 September 2010, file ref. I CSK 342/10);
- the interpretation of the tests provided for Article 65 of the Polish Civil Code (judgment of the Supreme Court of 11 March 2011, case file ref. II CSK 385/10);
- the compensatory (and not punitive) nature of damages in the Polish legal system (Decision of the Supreme Court of 11 October 2013, case file ref. I CSK 697/12).

13. Is there any recourse available against a decision refusing to recognize or enforce an investment arbitration award?

Proceedings concerning the recognition and enforcement of investment arbitration awards are one-instance proceedings, decided by the competent court of appeal. The decision cannot be challenged in the usual appellate procedure.

However, there are procedural measures to review this decision. In accordance with Article 1215 § 3 of the CCP, a cassation to the Polish Supreme Court may be filed against a decision refusing to enforce an arbitration award as well as against a decision leaving such award for enforcement. A cassation may be based on an infringement of substantive law or a breach of the rules of procedure if the failure

could have had a significant effect on the outcome of the case.

In addition, pursuant to Article 1215 § 3 of the CCP, it is also possible to resort to extraordinary procedures to reinstate proceedings or to establish the unlawfulness of proceedings concluded by a final decision on the recognition of an arbitral award, even after the decision has become final. However, it seems that in practice the use of these procedures would be very limited due to the narrowly formulated prerequisites covering only exceptional situations, such as falsification of an arbitral award or obtaining a court's decision by means of a criminal offence.

14. Is there any recourse available against a leave for recognition and enforcement?

As in the case of a decision refusing to enforce an investment arbitration award (p. 13 above), there are also procedural measures against a decision of the court of appeal on a leave for enforcement of arbitration awards under Article 1215 § 3 of the CCP. There is a possibility to file a cassation to the Polish Supreme Court. The remarks set out in p. 13 apply. The decision of the court of appeal leaving an award for enforcement is final and could be enforced regardless of filing a cassation. In such an instance, it is possible for a court of appeal to suspend the enforceability of a decision leaving an award to be enforced only after the cassation has been decided by the Supreme Court.

15. What are the rules in your country with regard to the execution (after the enforcement) of an investment arbitration award?

Execution of investment arbitration awards shall be directed to the State Treasury, because, pursuant to Article 34 of the Polish Civil Code, the State Treasury is, in civil law relations, the subject of obligations that concern state property.

Article 1060 of the CCP provides for a special procedure for execution against the State Treasury. The State Treasury is represented by the state entity ("statio fisci") with whose activities the claim being executed is connected (Article 67 § 2 of the CCP and Article 6 of the Act of 16 December 2016 on the Principles of Management of

State Property).

In practice, it could be difficult to determine against which state entity the execution should be directed. It seems that a reasonable solution would be to identify the state entity that was directly responsible for the claim that was the basis for an arbitration, as it would be in the case where the investor seeks compensation against the State Treasury in a Polish common court.

Due to the specific nature of proceedings for execution of investment arbitration awards in Poland, Article 1060 of the CCP is not applicable directly but should be applied on an analogous basis.

To commence execution, it is necessary to first hold an execution title in the form of an arbitral award that has been recognised pursuant to Article 1215 of the CCP.

Execution has two stages:

- In the first stage, in accordance with Article 1060 § 1 of the CCP, the creditor (investor) requests the state legal entity to comply voluntarily with the obligation adjudicated by the arbitral award. The entity has two weeks from the date of a delivery of a request to comply with the request.

  Pursuant to Art 1060 § 1(1) of the CCP, in cases concerning the redress of damage suffered as a result of the issuance of a legal act, a regulation of the Council of Ministers, or a regulation of another authority which has been constitutionally appointed to issue regulations, which do not comply with the Polish Constitution, a ratified international agreement, or legal act, as well as in cases concerning the redress of damage caused by the fact that no such normative act has been issued despite the fact that its issuance is obligatory pursuant to a legal provision, the creditor (investor) shall request directly upon the minister responsible for public finance to satisfy the claim, whereupon the minister shall be obliged to promptly satisfy the claim using the funds of a specific reserve being part of the state budget.

- The course of the second stage depends on whether the obligation is monetary

or non-monetary. In practice, only monetary investment awards shall be considered. If the arbitral award with monetary obligations is not voluntarily complied with, the creditor may use, pursuant to Article 1060 § 2 of the CCP, an execution title (enforced arbitral award) to pursue execution from the bank account of the relevant state entity by way of seizing the funds held in that account. The seizure shall be carried out by a court bailiff in accordance with the provisions that are standard for execution from bank accounts (Article 889 of the CCP and et seq.).

State Immunity

16. How do courts deal with the law on state immunity when the execution of an investment arbitration award is sought?

In Poland, the possibility of execution of investment arbitration awards under the procedure provided for by the CCP or the New York Convention is under discussion.

Some of the legal scholars suggest that an obligation of a state to execute investment arbitration awards arises only from public international law and cannot be enforced under the CCP. Adopting this view would mean that, in the absence of voluntary state execution, it could be sought only either through diplomatic talks or in state-to-state arbitration under BITs (A.W. Wiśniewski, International commercial arbitration in Poland. Legal status of arbitration, Warsaw, Poland 2011, p. 130, and M. Dziurda, (in:) P. Rylski (editor), Polish Code of Civil Procedure. Commentary, Warsaw, Poland 2022, Commentary to Art. 1060 of Polish Code of Civil Procedure, p. A.VI.3, Legalis).

However, this position does not appear to be right. Execution of investment arbitration awards in Poland seems possible. Such an award – once recognised and enforced under the CCP – should be executed against the State Treasury in accordance with the special procedure described in p. 15 above.

There is no explicit state immunity clause against execution of investment arbitration awards in Polish statutory law. A potential argument for state immunity may be

derived from the norms of customary international law, which Poland is obliged to apply on the basis of Article 9 of the Polish Constitution; however, it is not a uniformly accepted view in literature and case law (M. Świątkowski, Execution of investment arbitration awards (in:) J. Poczobut, A.W. Wiśniewski (editors), Private Law and Arbitration. Anniversary book dedicated to Dr. Maciej Tomaszewski, Warsaw, Poland 2015, p. 375-376).

Part of the BITs to which Poland is a party (e.g., with the United States of America and Switzerland) provide for special clauses according to which Poland is obliged to execute awards in accordance with the CCP or to ensure that effective execution will be possible (J. Szpara, M. Łaszczuk (in:) A. Szumański (editor), System of commercial law. Volume 8. Commercial arbitration, Warsaw, Poland 2015, p. 832). This provides an explicit basis for a direct application of the CCP when executing investment awards on the basis of these BITs.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

Regarding the reasons why Poland is not a party to ICSID, publicly available sources indicate that the Polish government has argued that joining ICSID will not change the situation of foreign investors, who are currently protected by the BIT regime, and would also increase the costs associated with having to co-finance ICSID (E. Gruszewska, International Centre for Settlement of Investment Disputes. An international legal analysis from Poland's perspective, Białystok, Poland 2014, p. 213).

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Romania

Implementation of the ICSID Convention in Romania

1. Is there a model BIT in place in your country?

Romania does not have a model BIT.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Romania signed the ICSID Convention on 6 September 1974. The instrument of ratification of the Convention was deposited on 12 September 1975. The ICSID Convention entered into force on 12 October 1975.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Romania designated the Bucharest Court and the District Courts by circumstance as competent for the recognition and enforcement of arbitral awards pursuant to Article 54(2) of the Convention.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

The ICSID Cases Database reports 22 arbitrations against Romania under the ICSID Convention, including 10 concluded and 12 pending cases.

Concluded:

- Alverley Investments Limited and Germen Properties Ltd v. Romania (ICSID Case No. ARB/18/30)
- Marco Gavazzi and Stefano Gavazzi v. Romania (ICSID Case No. ARB/12/25)
- Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/14/29)

- Ömer Dede and Serdar Elhüseyni v. Romania (ICSID Case No. ARB/10/22)
- Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania (ICSID Case No. ARB/10/13)
- S&T Oil Equipment & Machinery Ltd. v. Romania (ICSID Case No. ARB/07/13)
- The Rompetrol Group N.V. v. Romania (ICSID Case No. ARB/06/3)
- Spyridon Roussalis v. Romania (ICSID Case No. ARB/06/1)
- EDF (Services) Limited v. Romania (ICSID Case No. ARB/05/13)
- Noble Ventures, Inc. v. Romania (ICSID Case No. ARB/01/11)
- Pending:
- Plaza Centers N.V. v. Romania (ICSID Case No. ARB/22/15)
- Aderlyne Limited v. Romania (ICSID Case No. ARB/22/13)
- Clara Petroleum Ltd v. Romania (ICSID Case No. ARB/22/10)
- KELAG-Kärntner Elektrizitäts-Aktiengesellschaft and others v. Romania (ICSID Case No. ARB/21/54)
- Fin.Doc S.r.l. and others v. Romania (ICSID Case No. ARB/20/35)
- EP Wind Project (Rom) Six Ltd. v. Romania (ICSID Case No. ARB/20/15)
- Petrochemical Holding GmbH v. Romania (ICSID Case No. ARB/19/21)
- LSG Building Solutions GmbH and others v. Romania (ICSID Case No. ARB/18/19)
- Nova Group Investments, B.V. v. Romania (ICSID Case No. ARB/16/19)
- Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (ICSID Case No. ARB/15/31)
- Alpiq AG v. Romania (ICSID Case No. ARB/14/28)
- Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/05/20)

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

The largest number of ICSID claims against Romania concern electric power and energy (approximately 6 claims), followed by oil and gas (approximately 4 claims), service and trade, food enterprise, chemical and industrial production. Real estate development, finance, construction, information, and communication are the sectors that are relevant to the fewest number of ICSID claims.

6. Has your country complied with ICSID awards rendered against it?

There are three ICSID awards rendered against Romania.

- In the case of Marco Gavazzi and Stefano Gavazzi v. Romania (ICSID Case No. ARB/12/25), the Romanian authorities published a draft Emergency Order on supplementing the budget of the Authority for the Administration of State Assets from the budgetary reserve fund at the disposal of the Government provided for in the 2018 state budget, in order to pay the compensations awarded (See, case details). For more information on compliance with investment arbitration awards by Romania, please see Emmanuel Gaillard and Ilija Mitrev Penushliski, 'State Compliance with Investment Awards', ICSID Review, 1, 48 (2021). There is no publicly available information on whether the Order has been enforced and the payment performed.
- In the case of Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania (ICSID Case No. ARB/10/13), the award was reported to be paid by the Romanian authorities based on a similar Order on supplementing the budget of the Authority for the Administration of State Assets (See, case details).
- In the case of Ioan Micula, Viorel Micula and others v. Romania (I) (ICSID Case No. ARB/05/20), it was reported that the Romanian authorities made a partial payment in 2015. The European Commission concluded that the

payment of the awarded compensation constituted illegal State aid (See, COMMISSION DECISION (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013).

7. What is the number of ICSID awards that have been enforced in your country?

No, ICSID awards have been enforced in Romania.

Enforcement of ICSID awards in Romania

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

Romania designated the Bucharest Court and the District Courts by circumstance as competent for the recognition and enforcement of arbitral awards pursuant to Article 54(2) of the Convention.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

As a matter of general rule, pursuant to Article 1126 of Title IV of the Civil Procedure Code, when requesting the recognition and enforcement of an arbitral award, the parties must file a request before the competent court and attach the original or the certified copies of the award and arbitration agreement, which are subject to the superlegalization procedure. If the documents are not in the Romanian language, certified translation should be provided. It should be noted that the court cannot

review the merits of the dispute. To decide on the request for enforcement, the court summons the parties. If the respondent admitted the claim, then there is no requirement to summon the parties.

However, these general provisions are not applicable with respect to enforcement of ICSID awards. Moreover, the Civil Procedure Code does not provide for any specific legal procedures related to enforcement of ICSID awards. Pursuant to Article 54 of the ICSID Convention, an ICSID award is to be treated as if it was a final judgment of a court in the respective jurisdiction.

Thus, for instance, in the case of Ioan Micula, Viorel Micula and others v. Romania (I) (ICSID Case No. ARB/05/20), the Bucharest Tribunal invoked Article 54 to allow the execution of the award on 24 March 2014.

The reasoning of the Bucharest Tribunal focused on the fact that the Award is a directly enforceable act and must be treated as a final domestic judgment. The court thus considered that the procedure to recognise the award on the basis of the Romanian Procedural Civil Code (Art 1123- 1132) did not apply.

In its decision no 1483/2019 of 21 October 2019, the Bucharest Court of Appeal further developed on this in its decision concerning the opposition to the enforcement procedure, which was allowed initially by the Bucharest Tribunal. More specifically, the Court of Appeal stated that:

> *"[...] Art. 54 para. 2 of the Convention stipulates a simplified form of recognition of the arbitral award, the conclusion that emerges from the interpretation of these provisions of the convention being that the parties have excluded the procedure of arbitral recognition provided for by national legislation, no other formalities prior to execution being necessary, such as those provided for by Book VII a, Title IV, Chapter II of the New Code of Civil Procedure [...]. For recognition, the national court is limited to verifying the authenticity of the ICSID decision. For enforcement, the national court will apply the means and methods of*

enforcement available according to national procedural law, respectively the procedure for approving forced enforcement regulated by the Code of Civil Procedure."

10. What are the costs associated with the enforcement of an ICSID award?

Pursuant to the Emergency Order no 80 on court fees of 26 June 2013 (published in MONITORUL OFICIAL no 392 of 29 June 2013), tax for requesting the forced execution is of 20 Romanian lei for each enforcement title sought. At the same time, the request for suspension of execution is of 50 Romanian lei.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

N/A

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

As a matter of general rule, pursuant to Title IV of the Civil Procedure Code, the foreign arbitral awards may be recognised and enforced in Romania, provided that the dispute was arbitrable under Romanian law and that the award does not contain provisions violating the public policy of Romanian private international law. Moreover, as Romania is a signatory party of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the foreign arbitral awards may be recognised and enforced in Romania if no grounds for refusal apply, as provided for in Article 5 of the New York Convention.

However, as stated earlier, because an ICSID award is to be treated as a final judgment of a court in Romania, the general rules regarding enforcement procedure shall apply accordingly. In this respect, according to Article 712 of the Civil Procedure Code, the persons which may prove an interest in the proceedings, or any damaged party may submit an opposition to enforcement (in Romanian, "Contestatie la executare"), by means of which the party may challenge any enforcement deed which was issued in the proceedings, as well as against the enforcement *per se*.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

In case of enforcement of ICSID awards, the general legal provisions on enforcement of the Civil Procedure Code shall apply. In this respect, according to Article 666 para. (7) of the Civil Procedure Code, the creditor may submit an appeal against the decision regarding the refusal to enforce an ICSID award within 15 days as of the communication of the said decision. In line with the general procedure, pursuant to Article 479 of the Civil Procedure Code, in examining the appeal, the Court of Appeal will examine the factual pattern of the case and the manner in which the lower court applied the law.

14. Is there any recourse available against a leave for enforcement?

See comment to question no 13.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

The execution is regulated by the Romanian Civil Procedure Code and applies in the same manner as to any enforceable title. The execution may be performed either by foreclosure of the movable and immovable property and may regard inter alia the following means of execution provided for in Book V, Titles II and III of the Romanian Civil Procedure Code: establishment of a garnishment (in Romanian, "poprire") of debtor's accounts, foreclosure of the immovable goods' natural, industrial and civil fruits (in Romanian, "fructe") or foreclosure of the immovable goods followed by public tender.

Execution of the award may be suspended until a decision on the merits of a party's challenge is taken. For instance, such suspension of execution of the ICSID award was sought in the Micula case (for more information, click here).

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

According to Article 631 of the Civil Procedure Code, the enforcement proceedings may be initiated against any natural or legal person, either of public or private law, except those which benefit from enforcement immunity, if there is an express law provision in this regard. Therefore, sovereign immunity cannot be raised as a defence when execution is sought, as there is no express legal provision which prohibits the enforcement against the state, stemming from the execution of an ICSID award.

However, in line with the Government Order No 22 on the execution of payment obligations of public institutions, declared enforceable of 30 January 2002, in case the execution of claims declared enforceable does not begin or does not continue owing to lack of funds, the debtor institution is required to take, within 6 months, the necessary steps to comply with its payment obligation. The state entity may also seek the suspension or the change of the payment schedule.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

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Serbia

Implementation of the ICSID Convention in Serbia

1. Is there a model BIT in place in your country?

Yes, there is a draft of model BIT. The text is also available in English.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Yes, Serbia signed the ICSID Convention and deposited its ratification on 09 May 2007. On 08 June 2007, the ICSID Convention entered into force for Serbia. According to the Constitution of the Republic of Serbia, the ICSID Convention is directly applicable in the Republic of Serbia (Article 16 of the Constitution) and has supremacy over domestic laws, but it is subordinated to the Constitution (Article 144 of the Constitution).

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

None.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

Until this day there have been 11 investment treaty arbitration conducted under the ICSID Convention and initiated against Serbia.

Pending case are:

- APG SGA SA and D.O.O. za promet i usluge Alma Quattro Beograd v. Republic of Serbia

- United Group B.V., Adria Serbia Holdco B.V., and Serbia Broadband–srpske kablovske mreže d.o.o. Beograd v. Republic of Serbia
- Kornikom EOOD v. Republic of Serbia
- Rand Investments Ltd. and others v. Republic of Serbia
- Coropi Holdings Limited, Kalemegdan Investments Limited and Erinn Bernard Broshko v. Republic of Serbia
- Mera Investment Fund Limited v. Republic of Serbia

Concluded cases are:

- BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia
- Kunsttrans Holding GmbH and Kunsttrans d.o.o. Beograd v. Republic of Serbia
- Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia
- UAB "ARVI" ir ko and UAB "SANITEX" v. Republic of Serbia
- Club Hotel Loutraki S.A. and Casinos Austria International Holding GMBH v. Republic of Serbia

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

There is no particular industry, but (failed) real estate projects are more often than others. It can be said that the particularity of the cases against Serbia is the termination of the privatization agreements.

6. Has your country complied with ICSID awards rendered against it?

There would be no official information if the state complied with ICSID awards issued against it. From unofficial information, Serbia reached settlements with recent claimants and paid a designated amount of money in instalments.

7. What is the number of ICSID awards that have been enforced in your country?

There is no official information on the numbers of the ICSID awards that have been enforced in Serbia.

Enforcement of ICSID awards in Serbia

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

First of all, it is important to mention that the official translation of the ICSID Convention uses the same term for enforcement and execution of the ICSID award and that is izvršenje. However, if we look at the goals of Articles 54(2) and 54(3) of the ICSID Convention and align them with Serbian domestic law, as well as international obligation of the state from Article 54(1), recognition should only be seen as confirmation of the finality and binding effect of the award, equal to the domestic judgements. This process shall be done through the process of recognition of the ICSID award, which has a goal to make a decision *res judicata* and make it valid for execution. The process shall be similar to the one when the court confirms finality and binding effect of the domestic judgement (klauzula pravnosnažnosti i izvršnosti in Serbian). Having in mind that the Republic of Serbia has not informed the ICSID about the designations of Competent Courts or Other Authorities to recognize and enforce awards rendered pursuant to the ICSID Convention, domestic rules on jurisdiction in the process of enforcement shall be taken into account. According to Article 23 paragraph 3 of the Law On the Organization of Courts, the Higher Court shall have jurisdiction for recognition of the arbitral award and the Higher Court or the Commercial Court is competent to decide on a request for enforcement. The choice between two courts is made upon the fact whether the applicant is a natural or a legal person. If the applicant is a natural person, the request shall be filed before the Higher

Court, whereas if the applicant is a legal person, the Commercial Court has jurisdiction (Article 25 paragraph 2 of the above-mentioned law). Territorial jurisdiction is vested to one of these two courts in the place where the enforcement should be performed.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

If the enforcement is seen as just obtaining a valid title for execution, it is similar to the recognition, i.e., it is a formal proceeding aimed at confirming the authenticity of the award, as well as its finality and enforceability (i.e., possibility to use it as a valid title for forceful execution). In other terms, it is a simple *ex parte* court proceeding to confirm the final and binding effect and make a title for execution. The opposing party can only oppose due to the fact that the time for voluntary payment, if any, has not yet lapsed and preclude the decision from obtaining an enforcement title.

10. What are the costs associated with the enforcement of an ICSID award?

The cost of obtaining a certificate for recognition and enforceability of the award is free of charge. The actual costs can arise from the process of execution (in Serbian: izvršni postupak), which are translated into English also as enforcement, as explained above. Additionally, it is worth mentioning that in the public forceful proceedings there is no difference in the sense of enforcement or execution proceedings. Hence, the execution is a single uniformed proceeding (in Serbian: donošenje rešenja o izvršenju i sprovođenje izvršenje). The applicant requesting the execution of the ICSID award would have to pay fees for issuance of the decision on execution to the public bailiff, as well as serving the parties with the decision. Pursuant to the Public Bailiffs' tariff 1 and 2, the latter charges for preparation, management and archiving of cases, which is subjected to the value of the case, but cannot exceed RSD 250,000.00 (cca 2,100.00 EUR). The issuance of the decision may constitute 20% of

the above-mentioned number. Furthermore, there is a small charge for serving the debtor in the amount of RSD 300 (cca 2,5 EUR). It is important to note that Serbian legal system accepts the theory "loser pays", so in case of a successful outcome of the request, the applicant would be entitled to recover the amounts already paid.

It goes without saying that if the applicant hires lawyers or any other outside counsel, it will have to bear these additional costs. The same principle of "loser pays" applies also to legal fees.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

It is worth mentioning that in case a party intends to execute an ICSID award (or any other pecuniary obligation) against the Republic of Serbia or any sum directly or indirectly related to the state budget, it needs to first request payment from the Government of the Republic of Serbia.

12. In what way can a party against whom enforcement of an ICSID award is sought to defend itself with a view to preventing enforcement?

The party against whom enforcement of an ICSID award is sought cannot oppose enforcement based on public policy or other grounds.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

In case the court rejects to recognize and enforce an ICSID award (in the sense of granting the award with the stamp confirming its valid title for forceful execution), the applicant can approach the court administration or request issuance of the decision on rejection, against which it will have an appeal, pursuant to the general provision of the Law on Adversarial Proceedings (article 399 paragraph 1).

14. Is there any recourse available against a leave for enforcement?

Having in mind that the proceeding for granting enforceability is *ex parte* only upon issuance of the confirmation, dissatisfied party, i.e., the one against whom the awards

is issued can request cancellation of the certificate. It should be aligned with the provision treating finality and enforceability of a domestic judgment pursuant to Article 44 from the Law On Enforcement and Security interest, which stipulates that "an unfounded certificate of enforceability is cancelled by decision of the court, at the request of a party or ex officio". Sometimes, the court can schedule a hearing to examine if the certificate is enforceable.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

Execution proceedings are commenced by the petition for execution submitted to the court. A competent court is either Commercial Court or courts of basic jurisdiction, depending on the applicant (legal or natural person). The court can accept the petition and grant the decision on the execution, reject the petition, or dismiss the petition. In case the court grants a decision on the execution, it will deliver this decision to the opposing party. Therefore, the opposing party has limited recourses available against a decision on the execution. The enforcement debtor may use an appeal to contest the writ of execution for the following reasons that prevent the implementation of the enforcement:

i. If the document based on which the writ of execution was rendered does not have the capacity of the enforceable document;

ii. If the enforceable document, based on which the writ of execution was rendered, has been annulled, repealed, reversed, revoked or if it is not enforceable;

iii. If the court or administrative settlement, or the public notary settlement record based on which the writ of execution was rendered, have been annulled or otherwise revoked;

iv. If the deadline for fulfillment of the enforcement debtor's obligation has not expired;

v. If the obligation of the enforcement debtor depends on prior or simultaneous fulfillment of the enforcement creditor's obligation or on occurrence of a condition, and the enforcement creditor failed to fulfill his obligation or failed to secure the fulfillment thereof, or the condition has not occurred;

vi. If the claim from that enforceable document ceased;

vii. If the claim was not shifted or transferred to the enforcement creditor or if the obligation was not shifted or transferred to the enforcement debtor;

viii. If the deadline for filing a motion for enforcement expired;

ix. If the enforcement is determined on objects and rights that are exempt from enforcement, or against which the enforcement is limited;

x. If the statute of limitations for the claim from the enforceable document has expired;

xi. If the writ of execution determines the public enforcement officer that has no territorial jurisdiction.

In case of an unsuccessful appeal, based on facts that are in dispute between the parties and that relate to the claim itself, the opposing party may, within 30 days from the date of delivery of the decision rejecting the appeal, submit a lawsuit to the court in order to determine the inadmissibility of execution. The lawsuit does not delay execution.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

The enforcement extends to objects and rights of the enforcement debtor against which the enforcement is carried out. The enforcement does not cover objects that cannot be legally traded, facilities, weapons and equipment intended for the security

and defense of the Republic of Serbia. The enforcement is likewise not extended to immovable or movable objects used by state bodies to carry out tasks within their jurisdiction.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

It is worth mentioning that due to recent amendments of the Law on Enforcement and Security, in case of the debtor to enforcement proceeding is the Republic of Serbia and/or direct/indirect budget users, the enforcement claimant shall first approach the Government of the Republic of Serbia, more precisely the Ministry of Finance, with a request to honor the state's obligation, before filing a petition for enforcement. If the Ministry, on behalf of the State, refuses to meet the obligation of the State, the claimant shall demand from the Chamber of Public Bailiffs to designate a public bailiff to whom the petition for enforcement shall be submitted. The designated public bailiff shall decide and execute the petition for enforcement.

Contributor:

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Spain

Implementation of the ICSID Convention in Spain

1. Is there a model BIT in place in your country?

No, there is no model of BIT in Spain. However, it may be deduced from an analysis of all BIT's entered into by Spain that there are several provisions and clauses which usually are contained on them:

- fair and equitable treatment in accordance with international law;
- full protection and security, and prohibition of unjustified and discriminatory measures;
- non-discrimination: national treatment and most favored nation treatment; and
- expropriation, nationalization or other measures, the effects of which are similar to expropriation, may only be adopted in a non-discriminatory manner, for reasons of public interest and upon payment of prompt, adequate and effective compensation.

See for example (i) Argentina-Spain BIT (1991) (Articles II, IV and V); (ii) Chile - Spain BIT (1991) (Articles 4, 5, 7); (iii) Colombia - Spain BIT (2005) (Articles 2, 3,4); and (iv) Spain - Bolivarian Republic of Venezuela BIT (1995) (Articles III, IV, V).

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Spain signed the ICSID Convention on 21 March 1994, being ratified on 18 August 1994. The ICSID Convention entered into force on 17 September 1994.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Since the signing and subsequent ratification, Spain has designated the *Juzgados de Primera Instancia* (Courts of First Instance) as the competent courts for the purpose of recognizing and enforcing awards rendered pursuant the Convention.

Apart from that, Spain has not made any notification concerning the (i) exclusion of territories; (ii) designation of Constituent Subdivisions or Agencies and the approval of their consent to ICSID Jurisdiction; (iii) class or classes of disputes which would or would not consider submitting to the jurisdiction of the Centre; and (iv) legislative or other measures adopted by to make the Convention effective in its territory.

Spain has, however, designated members for the Panel of Conciliators and Arbitrators on several occasions. Read here the list of Panel Member designated by Spain.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

As of 1 January 2023, there were 42 ICSID cases reported against Spain.

The cases are the following (and can be found here):

1) WOC Photovoltaik Portfolio GmbH & Co. KG and others v. Kingdom of Spain: Pending
2) TS Villalba GmbH and others v. Kingdom of Spain: Concluded
3) Spanish Solar 1 Limited and Spanish Solar 2 Limited v. Kingdom of Spain: Pending
4) Mitsui & Co., Ltd. v. Kingdom of Spain: Pending
5) VM Solar Jerez GmbH and others v. Kingdom of Spain: Pending
6) Sapec, S.A. v. Kingdom of Spain: Pending
7) Canepa Green Energy Opportunities I, S.à r.l. and Canepa Green Energy Opportunities II, S.à r.l. v. Kingdom of Spain: Pending

8) European Solar Farms A/S v. Kingdom of Spain: Pending

9) EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. v. Kingdom of Spain: Pending

10) GBM Global, S.A. de C.V., Fondo de Inversión de Renta Variable and others v. Kingdom of Spain: Concluded

11) Itochu Corporation v. Kingdom of Spain: Pending

12) DCM Energy GmbH & Co. Solar 1 KG and others v. Kingdom of Spain: Pending

13) Portigon AG v. Kingdom of Spain: Pending

14) Sevilla Beheer B.V. and others v. Kingdom of Spain: Pending

15) Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain: Pending

16) Sun-Flower Olmeda GmbH & Co KG and others v. Kingdom of Spain: Pending

17) Eurus Energy Holdings Corporation v. Kingdom of Spain: Pending

18) Landesbank Baden-Württemberg and others v. Kingdom of Spain: Pending

19) Watkins Holdings S.à r.l. and others v. Kingdom of Spain: Pending

20) Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain: Pending

21) SolEs Badajoz GmbH v. Kingdom of Spain: Concluded

22) OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain: Pending

23) E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Kingdom of Spain: Pending

24) Cavalum SGPS, S.A. v. Kingdom of Spain: Concluded

25) JGC Holdings Corporation (formerly JGC Corporation) v. Kingdom of Spain: Pending

26) KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain: Pending

27) Mathias Kruck and others v. Kingdom of Spain: Pending

28) Cube Infrastructure Fund SICAV and others v. Kingdom of Spain: Concluded

29) BayWa r.e. AG v. Kingdom of Spain: Pending

30) 9REN Holding S.a.r.l v. Kingdom of Spain: Pending

31) STEAG GmbH v. Kingdom of Spain: Pending

32) Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain: Concluded

33) RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain: Pending

34) RENERGY S.à r.l. v. Kingdom of Spain: Pending

35) InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain: Concluded

36) NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain: Concluded

37) Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain: Concluded

38) Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain: Pending

39) Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain: Concluded

40) RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain: Concluded

41) Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L v. Kingdom of Spain: Concluded

42) Emilio Agustín Maffezini v. Kingdom of Spain: Concluded

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

Out of 42 ICSID cases against Spain, 38 concerned electric power and other energies. Specifically, most of the investment arbitrations brought against Spain are under the Energy Charter Treaty ("ECT") derived from a series of regulatory measures taken since 2010 in the renewable energy sector.

6. Has your country complied with ICSID awards rendered against it?

Although no official data is available, Spain is known to have already voluntarily complied with one award against the State without judicial enforcement proceedings, e.g., Emilio Agustín Maffezini v. Kingdom of Spain. However, there are also many other awards that for the moment, remain unpaid and Spain sought the annulment of the Eiser, Masdar, Antin Infrastructure, NextEra, InfraRed Environmental and Cube Infrastructure awards before ICSID and the Novenergia and Foresight awards before Swedish courts. Most of the cases concern intra-EU investment cases, reason why Spain is refusing to pay the award.

For their part, the investors have initiated enforcement proceedings against Spain, mainly in the United States.

7. What is the number of ICSID awards that have been enforced in your country?

There is no official data available about how many ICSID awards have been compulsorily enforced in Spain. However, we can highlight that the first enforcement measure adopted in Spain of an award rendered in an ICSID arbitration of which we are aware was taken on 6 March 2013. Madrid Court of First Instance No. 101 issued an Order and a Decree for the compulsory enforcement in Spain of the pecuniary obligations imposed in an arbitral award of 8 May 2008 rendered in the ICSID case

Victor Pey Casado and President Allende Foundation v. Republic of Chile under the Spain-Chile Agreement for the promotion and reciprocal protection of investments.

Enforcement of ICSID awards in Spain

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

In accordance with Article 54(2) of the ICSID Convention, the *Juzgados de Primera Instancia* (Courts of First Instance) have been designated by Spain as the competent court for the recognition and enforcement of arbitral awards rendered under the auspices of the ICSID Convention.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

At the moment, Spain has not yet enacted any provisions for the specific purpose of recognising and enforcing ICSID awards. Thus, the legal framework with respect to the enforcement of an ICSID award in Spain is embodied at the Spanish Civil Procedure Act (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil) and the Arbitration Law 60/2003 of 23 December (Ley 60/2003, de 23 de diciembre, de Arbitraje), complemented by the ICSID Convention.

Therefore, in order to determine the procedure for enforcement of an ICSID award, the Spanish Civil Procedure Act establishes the following steps to be followed:

- First, the party seeking to enforce its ICSID award in Spain, should file the enforcement action before the *Juzgado de Primera Instancia* (Court of First

Instance) of the place of execution or before the court of any place where there are assets of the enforced party that can be seized (article 545.3 Spanish Civil Procedure Act). Article 8.6 of the Arbitration Law states that for the enforcement of foreign arbitral awards or decisions, the Court of First Instance of the domicile or place of residence of the party against whom the recognition is sought, or of the domicile or place of residence of the person to whom the effects of the former refer, shall be competent, and the territorial competence shall be determined subsidiarily by the place of execution or where those awards or resolutions should produce their effects.

- According to the provisions of article 549.1 of the Spanish Civil Procedure Act, the claim for enforcement must state:

> *"1 .The title on which the executing party relies.*
>
> *2.The enforcement protection that is sought, in relation to the executive title that is invoked, specifying, in its case, the amount that is claimed in accordance with the provisions of article 575 of [the Spanish Civil Procedure Act].*
>
> *3.The assets of the executed party susceptible of seizure of which he has knowledge and, if applicable, if he considers them sufficient for the purpose of the execution.*
>
> *4.Where appropriate, the measures of location and investigation that may be of interest under Article 590 of [the Spanish Civil Procedure Act].*
>
> *5.The person or persons, with expression of their identifying circumstances, against whom the enforcement is sought, because they appear in the title as debtors or because they are subject to enforcement according to the provisions of articles 538 to 544 of [the Spanish Civil Procedure Act]."*

- In addition, the following documents must be attached to the claim for enforcement (Article 550 Spanish Civil Procedure Act):

    1) The arbitral award, and, in addition, the arbitration agreement and the documents accrediting the notification of the award to the parties.

    2) The power of attorney granted to the attorney, provided that the representation is not granted apud acta.

    3) The documents accrediting the prices or quotations applied for the calculation in money of non-monetary debts, when they are official data or of public knowledge.

    4) Any other documents required by law for the enforcement of the execution.

    5) Any documents that the executing party considers useful or convenient for the best development of the execution and which contain data of interest for the enforcement of the execution must also be attached to the executive demand.

- Second, for the purposes of enforcement, Article 575.1 of the Spanish Civil Procedure Act provides that the execution will be ordered for the amount claimed in the executive demand as principal and overdue default interest, increased by the amount provided to meet the interest that, if any, may accrue during the execution and the costs of this. The amount for these two concepts, which shall be provisionally fixed, may not exceed 30 per cent of the amount claimed in the enforceable claim, without prejudice to subsequent liquidation. Exceptionally, if the claimant justifies that, taking into account the foreseeable duration of the execution and the applicable interest rate, the interest that may accrue during the execution plus the costs of the execution would exceed the limit fixed in the preceding paragraph, the amount provisionally fixed for both items may exceed the limit indicated.

- It must be taken into account:
    - If the executor can locate the debtor's assets out of court, he must designate them already in the enforcement action.
    - Otherwise, the Court may be requested to carry out the investigation, in accordance with art. 590 Spanish Civil Procedure Act.
    - The investigation of the assets of the foreclosed party can be carried out through the Judicial Neutral Point (office of patrimonial investigation), by means of telematic consultation with respect to the assets and rights of which the foreclosed party may be the owner and of which there may be proof in the databases of the General Treasury of the Social Security, Tax Agency and other agencies with respect to which there is an agreement.
- Once the enforcement creditor files his/her enforcement action, and considering that all the requirements are fulfilled, the judge will dispatch the general order of enforcement for the sum claimed. The order will also include the procedural delay interests, as the costs and expenses of the enforcement proceedings.

It should also be noted that the enforcement of arbitral awards will not be ordered within twenty days after the arbitral award has been notified to the defendant (article 548 Spanish Civil Procedure Act).

10. What are the costs associated with the enforcement of an ICSID award?

Since there is no specific procedure, there are no direct costs associated with the enforcement of an ICSID award. Therefore, in order to determine the costs associated with the enforcement of an ICSID award, we must refer in general terms to the costs and expenses of the enforcement procedure.

Article 539 of the Spanish Civil Procedure Act provides that both the executing party and the executed party must be represented by counsel and by a court representative (procurador), provided that the amount for which the enforcement is ordered exceeds 2,000 euros.

Furthermore, since the enforcement of an ICSID award is a process in which the national judge does not have to expressly rule on costs, the costs will be borne by the defendant without the need for express taxation. However, until they are settled, the executing party must pay the costs and expenses incurred, except for those corresponding to actions carried out at the request of the executing party or other parties, which must be paid by the party who has requested the action in question.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

In general terms, we must highlight that, in recent years, the Court of Justice of the European Union (CJEU) has attempted to clarify to some extent the compatibility of the International Investment Law with EU Law.

In Achmea (C-284/16) the Court of Justice clarified that the arbitration clause included in the Slovakia-Netherlands Bilateral Investment Treaty was not compatible with EU law as the arbitral tribunal in the proceedings could not be qualified as a court or tribunal of one of the Member States within the meaning of Article 267 Treaty on the Functioning of the European Union (TFEU) on preliminary ruling proceedings and therefore, the arbitral tribunal was not entitled to make a reference for a preliminary ruling to the Court of Justice. In this regard, the Court considered that the arbitration clause did not ensure the full effectiveness of EU law by affecting the power of Member States to make preliminary rulings to the Court of Justice and highlighted that there is no place for such arbitrations when they are based on Reciprocal Promotion and Protection of Investments Agreements concluded between two Member States of the EU.

On 2 September 2021, the CJEU rendered its judgement in Komstroy (C-741/19). This case confirmed the judgment in Achmea which considers investment arbitration based on intra-EU BITs to be incompatible with EU law and extended it to multilateral

treaties such as the Energy Charter Treaty, signed by many EU Member States and by the European Union itself.

Therefore, in general terms, we must consider EU law and the position of the CJEU in relation to intra-EU BITs, which may include the possibility of ICSID arbitration, but in any case, the arbitration clauses contained therein will be considered contrary to EU law.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

No party can file an appeal or seek annulment of the award outside of the ICSID self-contained mechanism.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

There is no special recourse available against a decision refusing enforcement of an ICSID award, however the Spanish Civil Procedure Act (Article 552.2) provides that, in case of refusal of enforcement, an appeal procedure may be lodged only with the creditor. The creditor may also, at its option, file an administrative appeal (recurso de reposición) for reconsideration prior to the appeal.

14. Is there any recourse available against a leave for enforcement?

Pursuant to Article 551.4 of the Spanish Civil Procedure Act, no appeal shall be allowed against the order authorizing and dispatching the execution, notwithstanding the opposition that may be formulated by the executed party (which we have already seen in question 12).

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

Article 580 of the Spanish Civil Procedure Act establishes that in cases where the enforceable title consists of arbitration awards, it will not be necessary to request payment from the defendant in order to proceed with the seizure of his assets.

Likewise, Article 585 of the Spanish Civil Procedure Act establishes that once the execution has been ordered, the seizure of assets will proceed in accordance with the provisions of the Spanish Civil Procedure Act unless the executed party consigns the amount for which the execution has been ordered, in which case the seizure will be suspended.

Pursuant to Article 570 of the Spanish Civil Procedure Act, compulsory execution will only be terminated with the complete satisfaction of the enforcing creditor, which will be agreed upon by decree of the Court Clerk, against which a direct appeal for review may be filed.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

It should be pointed out that in the enforcement phase, the invocation by the executing State of the immunity plea could shield the assets resulting from this relationship. However, in this scenario Spanish law seems to provide the enforcing party with a particularly strong tool by means of Article 2(2) of the Arbitration Act (Ley 60/2003, de 23 de diciembre, de Arbitraje), which reads as follows:

> *"2. When the arbitration is international and one of the parties is a State or a company, organisation or enterprise controlled by a State, that party may not invoke the prerogatives of its own law to avoid the obligations arising from the arbitration agreement."*

This article could be interpreted as an implicit waiver by a state of immunity, since the state may not invoke the prerogatives of its own law, and these prerogatives certainly include its immunity before a Spanish court. Moreover, it could be argued that this waiver of immunity would cover all the support or complementary procedures provided by the Spanish judge to an arbitration (e.g., the judicial adoption of interim measures or the enforcement of the award itself) both in the pre- and post-issuance phase of the award, since the pecuniary obligations arising from the award are included within the obligations arising from the arbitration agreement.

Organic Law 16/2015, of 27 October, on privileges and immunities of foreign States (Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España), in its Article 16 (1) (d) supports this interpretation by establishing that a foreign State, which consented to the submission of a dispute with a national of another State to arbitration, may not assert immunity before a Spanish court in a proceeding on "the recognition of the effects of foreign awards."

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

With regard to the country's legislative reforms in the renewable energy sector that led Spain to numerous arbitrations before ICSID, we must mention Royal Decree-Law 17/2019, of November 22, adopting urgent measures for the necessary adaptation of remuneration parameters affecting the electricity system and responding to the process of cessation of activity of thermal generation plants. In this Royal Decree, economic incentives were offered only to those investors who would desist from their pending cases based on the Energy Charter Treaty. Several investors have availed themselves of this measure: Stadtwerke München GmbH and other companies

waived their rights to pursue arbitration proceedings in Spain and withdrew from the action for annulment of an ICSID award favourable to Spain.

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The United Kingdom of great Britain and northern Ireland ("UK")

Implementation of the ICSID Convention

1. Is there a Model BIT in Place in the United Kingdom?

Yes, the UK government drafted a model BIT, which was last updated in 2008.

2. Is the UK a Party to the ICSID Convention? If so, Please Include the Relevant Dates (Signed, Ratification, Entry into Force).

Yes, the UK is a party to the ICSID Convention. The UK first signed the ICSID Convention on 26 May 1965, and subsequently ratified it on 19 December 1966, thereby paving the way for the ICSID Convention to enter into force for the UK on 18 January 1967.

3. Has the UK Made a Notification or Designation Upon Signing, Ratifying or Any Time Thereafter?

Pursuant to Article 70 of the ICSID Convention, the UK has excluded the following territories from the application of the ICSID Convention:

Territories Excluded
British Indian Ocean Territory
Pitcairn Islands
British Antarctic
Sovereign Base Areas of Cyprus
New Hebrides

Pursuant to Articles 25(1) and (3) of the ICSID Convention, the UK has designated the following territories as constituent subdivisions or agencies:

Territory/Subdivision/Agency	Date of Designation
Bermuda	7 May 1968
British Virgin Islands	7 May 1968
Cayman Islands	7 May 1968
Falkland Islands (Malvinas)	7 May 1968
Falkland Islands (Malvinas) Dependencies	7 May 1968
Gibraltar	7 May 1968
Montserrat	7 May 1968
Anguilla	7 May 1968
St. Helena	7 May 1968
St. Helena Dependencies	7 May 1968
Turks & Caicos Islands	7 May 1968
Guernsey (Bailiwick of)	11 June 1973
Jersey (Bailiwick of)	1 October 1990
Isle of Man	1 October 1990

Pursuant to Article 54(2) of the ICSID Convention, the UK has designated the following courts and authorities for the purpose of recognizing and enforcing awards rendered under the ICSID Convention:

Court or Other Authority
Bermuda
British Virgin Islands
Cayman Islands

England and Wales
Falkland Islands (Malvinas)
Falkland Island (Malvinas) Dependencies
Gibraltar
Guernsey (Bailiwick of) Islands of Guernsey, Herm and Jethou
Islands of Alderney
Islands of Sark
Isle of Man
Jersey (Bailiwick of)
Montserrat
Northern Ireland
Anguilla
St. Helena
St. Helena Dependencies
Scotland
Turks and Caicos Islands

The UK has not provided a notification pursuant to Article 25(4) of the ICSID Convention concerning a class or classes of disputes which the UK would or would not consider submitting to the jurisdiction of the Centre.

Statistics

4. What is the number of Reported Investment Treaty Arbitrations Conducted under the ICSID Convention initiated against the UK?

There are no publicly known arbitrations conducted under the ICSID Convention initiated against the UK to date.

There is one publicly known investment treaty arbitration brought against the UK under the UNCITRAL Rules. In 2006, a London-based lawyer of Indian nationality brought an investment treaty arbitration against the UK under the India-UK BIT. The arbitration appears to have been settled, with a termination order dated 25 July 2009.

Reportedly, in October 2022, Chinese technology group, Huawei Technologies submitted a notice of dispute to the UK, invoking the China-UK BIT. It is yet to be seen whether Huawei Technologies will commence arbitration proceedings and if so, under which rules.

5. Are there any Particular Industries or Investment Sectors that have led to ICSID Claims Against Your Country?

Not applicable given that there are no publicly known ICSID arbitrations initiated against the UK to date.

6. Has your Country Complied with ICSID Awards Rendered Against It?

Not applicable since there are no publicly known ICSID awards rendered against the UK to date.

7. What is the number of ICSID awards that have been enforced in the UK?

Not all applications to register and enforce an ICSID award in the UK are necessarily publicly available. It is thus difficult to quantify the exact number of ICSID awards that have been enforced in the UK. The following four recent cases involve a UK court upholding and enforcing an ICSID award:

CASE	OUTCOME
Infrastructure Services Luxembourg SARL & Anor v. Kingdom of Spain [2023] EWHC 234 (Comm), and [2023] EWHC 1226 (Comm)	The English High Court rejected both of Spain's applications to set aside an *ex parte* order granting leave to register a 2018 ICSID award against Spain.
Ioan Micula, Viorel Micula and others v. Romania (I) [2020] UKSC 5 (on appeals from: [2018] EWCA Civ 1801 and [2019] EWHC 2401 (Comm))	The UK Supreme Court lifted a stay of enforcement of an ICSID award rendered against Romania, thereby upholding the judgment creditor's application to register the ICSID award with the English High Court in 2014.
Union Fenosa Gas v. Egypt [2020] EWHC 1723 (Comm)	The English High Court clarified that service of claim form was not mandatory for the application to register the 2018 ICSID award against Egypt, thereby upholding the judgment creditor's application to register the award with the English High Court in 2018.
Gold Reserve Inc. v. Bolivarian Republic of Venezuela [2016] EWHC 153 (Comm)	The English High Court rejected Venezuela's application to set aside an *ex parte* order granting leave to enforce a 2014 ICSID (Additional Facility) Award against Venezuela.

Enforcement of ICSID awards

Competent Court or Authority

8. Which Court or Authority is Competent to Decide on a Request for Enforcement? Are there Any Criteria for the Court or Authority to be Competent?

The process for registering and enforcing ICSID awards is governed by the Arbitration (International Investment Disputes) Act 1966 ("1966 Act"), which was adopted with a view to implementing the ICSID Convention.

The following acts, orders and instruments were subsequently adopted with a view to implementing and expanding the 1966 Act's scope to the UK's territories: the 1966 Act (Commencement) Order 1966 (Statutory Instruments ("SI"), 1966, No. 1597, December 21, 1966); the 1966 Act (Application to Colonies etc.) Order 1967 (SI 1967, No. 159, February 10, 1967); the Arbitration (International Investment Disputes) (Guernsey) Order 1968 (SI 1968, No. 1199, July 26, 1968); the Arbitration (International Investment Disputes) (Jersey) Order 1979 (SI, 1979, No. 572, May 23, 1979); and the Arbitration (International Investment Disputes) Act 1983 (an Act of Tynwald).

Section 1(2) of the 1966 Act provides that "[a] person seeking recognition and enforcement of such an award shall be entitled to have the award registered in the High Court subject to proof of the prescribed matters and to other provisions of this Act." As further clarified by the Act and the subsequent instruments, the reference to the "High Court" is a reference to the High Court in England and Wales, to the Court of Session in Scotland, to the High Court in Northern Ireland, and to appellate review up to the Supreme Court.

The court's competence and authority to decide on enforcement requests derives from the 1966 Act and the subsequent instruments, yet applicants will separately have to comply with each respective court's procedural rules when seeking the enforcement of an ICSID award. By way of example, the registration and

enforcement of ICSID awards in England and Wales is specifically governed by Civil Procedure Rule ("CPR") 62.21.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in the UK? What are the requirements applicable to a request for the enforcement of an ICSID award?

As recognized by the UK Supreme Court in Micula and others v Romania [2020] UKSC 5, Article 54(1) of the ICSID Convention imposes a duty on national courts to recognise an ICSID award as binding and to enforce it "as if it were a final judgment" by a domestic court. The procedure for the enforcement of ICSID awards in the UK is governed by the 1966 Act.

Pursuant to section 1(2) of the 1966 Act, the first step in the process of enforcing an ICSID award is recognition. Specifically, section 1(2) of the 1966 Act provides that a party seeking enforcement shall register the award in the competent High Court by providing proof of the required documents.

The second step in the process of enforcing an ICSID award is execution. Section 2(1) of the 1966 Act provides that an award registered under the 1966 Act by a competent High Court shall have the same force and effect for the purposes of execution as if it were a judgment of the High Court.

Section 6 of the 1966 Act gives power to the competent High Court to prescribe rules concerning the registration of the award. In England and Wales, such rules for registration and enforcement are laid down in Part 62.21 of the CPR. The requirements under Part 62.21 CPR include:

- exhibiting a copy of the award certified under the ICSID Convention (CPR 62.21(4)(a) and CPR 74.4(1)(a));

- submitting written evidence in support of the application, such as the details of the judgment debtor and judgment creditor, grounds for enforcement, and the amount of money to be recovered (CPR 74.4(2)(a) to (d));
- submitting further written evidence confirming whether the judgment is a money judgment and its enforceability in the state of origin (CPR 74.4(4));
- serving a copy of the registration order and any other orders on the judgment debtor (CPR 74.6(1) and 74.9(3)).

10. What are the costs associated with the enforcement of an ICSID award?

A party seeking to enforce an ICSID award in the UK will have to pay the relevant court fees. Supplemental fees may also be applied at the time of execution of any assets.

For example, the current court fees for an application requesting permission to enforce an arbitration award in the High Court (as per 7.5 of Schedule 1 to the Civil Proceedings Fees Order 2008; SI 2008/1053) is £71.

11. What other practical considerations may affect the enforcement of an ICSID award in the UK?

The High Court of England and Wales has clarified that the procedure for registering an ICSID award under the 1996 Act and CPR 62.21 allows a party to register an ICSID award on an *ex parte* basis (see Union Fenosa Gas v. Egypt [2020] EWHC 1723 (Comm)).

It is worth noting that when seeking such an *ex parte* order, the judgment creditor has a duty to make full and frank disclosure on any possible defences that the judgment debtor may raise. In Gold Reserve Inc. v The Bolivarian Republic of Venezuela [2016] EWHC 153 (Comm), the High Court of England and Wales held that Gold Reserve Inc. ("GRI") should have disclosed the fact that Venezuela could have invoked a state immunity defence, as it had done in other enforcement proceedings. The Court reasoned that this could have had a material impact on its decision to grant an *ex parte* order for recognition and enforcement and to dispense with the service of the

arbitration claim form. Consequently, the Court imposed cost sanctions on GRI for failure to make full and frank disclosure.

12. In what way can a party against whom enforcement of an ICSID award is sought, defend itself with a view to preventing enforcement?

The UK Supreme Court in Micula and others v Romania [2020] UKSC 5 emphasized that "a notable feature" of the ICSID Convention was that "once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits" or "refuse to enforce an authenticated ICSID award on grounds of national or international public policy." However, having reviewed the *travaux préparatoires* of the ICSID Convention, the UK Supreme Court considered that in "certain exceptional or extraordinary circumstances," national law defences to enforcement could be invoked "if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to [ICSID] Convention organs under articles 50 to 52 of the [ICSID] Convention."

The UK Supreme Court's judgment arguably opens the door for additional defences against enforcement in specific and extraordinary circumstances "which are not defined." However, ultimately, the UK Supreme Court considered that the proper interpretation of Article 54(1) of the ICSID Convention is something which "could only be authoritatively resolved by the International Court of Justice."

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

An application to register and enforce an ICSID award in the UK is heard before the competent High Court. Any order by the High Court refusing to register and enforce an ICSID award may be appealed with permission to appeal from the competent court. In England and Wales, the rules for such appeals are governed by CPR Part 52.

14. Is there any recourse available against a leave for enforcement?

In England and Wales, the rules for appeals against an order granting recognition and enforcement of an ICSID award are set out in CPR Part 52.

Notably, CPR 62.21(5) allows for an application to stay the enforcement of an award under certain circumstances. If the enforcement of the award is stayed under the ICSID Convention or if the High Court finds that an application has been made under the ICSID Convention, which, if granted, might result in a stay of the enforcement of the award, then the High Court may stay its proceedings for an appropriate amount of time.

15. What are the rules in the UK with regard to the execution (after the enforcement) of an ICSID award?

After the ICSID award has been recognized and enforced, the judgment creditor will have available to it the same remedies for execution as if the ICSID award were a final domestic judgment by a competent UK court.

In England and Wales, available remedies include the following:

- A freezing injunction, an interim measure, where there is a real risk of dissipation of assets (CPR Part 25);
- seizing and selling goods located in the jurisdiction (CPR 83 to 85);
- obtaining a charging order against the judgment debtor's interest in an asset (CPR 73);
- obtaining a garnishee, or third-party debt order, for payment of money which a third-party owes to the judgment debtor (CPR 72);
- obtaining an attachment for earnings order against a judgment debtor (CPR 89);
- obtaining a receivership order to appoint a court receiver to preserve the assets of the judgment debtor (CPR 69).

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Article 55 of the ICSID Convention explicitly preserves a state's right to raise the sovereign immunity defence and to argue that its assets are immune from execution under the national laws of the enforcing courts. In the UK, the relevant law on state immunity is found in the State Immunity Act 1978 ("SIA").

Pursuant to section 1(1) of the SIA, a state is immune from the jurisdiction of the UK courts, except as provided for in the SIA. Particularly relevant for present purposes are the exceptions set out in sections 2(2) and 9(1) of the SIA.

Section 2(2) of the SIA provides that a state loses its immunity if by "prior written agreement" it has submitted to the jurisdiction of the English courts. In Infrastructure Services Luxembourg SARL & Anor v. Kingdom of Spain [2023] EWHC 1226 (Comm.), the judgment creditors submitted that Article 54 of the ICSID Convention constituted a "prior written agreement." Spain argued that only an express agreement to submit to the jurisdiction of the UK courts would satisfy the requirement of section 2(2) of the SIA. The High Court of England and Wales rejected Spain's argument and held that Article 54 of the ICSID Convention, as well as Article 26 of the Energy Charter Treaty which incorporates the ICSID Convention, fall within "prior written agreement" for the purposes of section 2(2) of the SIA.

Section 9(1) of the SIA provides that a state that has agreed in writing to submit a dispute to arbitration loses immunity in the UK courts for proceedings that relate to the arbitration, including proceedings for the recognition of any resulting award. In the above-mentioned case, Infrastructure Services Luxembourg SARL & Anor v. Kingdom of Spain [2023] EWHC 1226 (Comm.), the High Court of England and Wales held that the ICSID Convention (and the Energy Charter Treaty which incorporates the ICSID Convention) also satisfies the requirements of section 9(1) of the SIA as it is "an agreement in writing by all the Contracting States to submit disputes with

investors from other states to international arbitration." Another interesting case is Gold Reserve Inc. v The Bolivarian Republic of Venezuela [2016] EWHC 153 (Comm.), where the High Court of England and Wales held that the agreement in writing between the state and the investor was to be found in the unilateral offer of the state (contained in the bilateral investment treaty ("BIT")) and in the investor's acceptance of that offer by commencing arbitration against the state. In this case, Venezuela had argued that GRI did not qualify as an "investor" under the Canada-Venezuela BIT, and that therefore there was no agreement to arbitrate between the parties. As a result, according to Venezuela, section 9(1) of the SIA did not apply, and Venezuela was entitled to state immunity. The High Court of England and Wales concluded, in agreement with the arbitral tribunal, that GRI was an investor within the meaning of the BIT and therefore party to an agreement in writing with Venezuela to arbitrate its claim against Venezuela. As a result, the Court held that section 9(1) of the SIA applied and that accordingly, Venezuela had lost its right to rely upon the defence of state immunity.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

In the context of the broader debates on investment arbitration in intra-EU disputes, it is worth pointing to the recent decision of the High Court of England and Wales in Infrastructure Services Luxembourg SARL & Anor v. Kingdom of Spain [2023] EWHC 1226 (Comm.), which arose out of an intra-EU investment dispute. Spain argued that, in light of the rulings of the Court of Justice of the European Union ("CJEU") in Achmea v Slovak Republic [Case C-284/16] and Komstroy v Moldova [Case C-741/19], any ICSID award that touches upon matters of EU law must have been reached without jurisdiction and so cannot be a valid award, and/or that it has immunity from recognition in the UK courts for similar reasons.

The High Court of England and Wales rejected Spain's argument. The Court explained that "the logical consequence (or extension) of this argument for it to be correct is that these decisions of the CJEU must be taken as binding all the parties to the ECT and to the ICSID Convention – whether Member States of the EU or otherwise – and take priority over all other treaty obligations entered into by any other state, even those obligations assumed by treaty prior to the creation of the EU." This would mean that "the EU and the CJEU would have unilaterally changed – if not removed – all existing treaty obligations of all the Contracting Parties to the ICSID Convention," which the Court held "simply cannot be correct." The Court concluded that there is no scope for these CJEU rulings to override the international law obligations of the UK, including its international treaty obligations under the ICSID Convention, as enacted into domestic law by the 1966 Act.

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Ukraine

Implementation of the ICSID Convention in Ukraine

1. Is there a model BIT in place in your country?

No, Ukraine did not adopt any text of a model Bilateral Investment Treaty.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Yes. Ukraine signed the Washington Convention on the Settlement of Investment Disputes between State and Nationals of Other States of 1965 (the ICSID Convention) on 03 April 1998. The ICSID Convention was ratified by the Ukrainian parliament on 16 March 2000 and was deposited on 7 June 2000. It entered into force for Ukraine on 07 July 2000.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

No.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

18 investment treaty arbitrations have been initiated against Ukraine since it ratified the ICSID Convention. 14 of them are concluded and 4 are pending before the tribunal.

Pending cases:

- SREW N.V. v. Ukraine (Case No. ARB/21/52)
- Misen Energy AB (publ) and Misen Enterprises AB v. Ukraine (Case No. ARB/21/15)

- Emergofin B.V. and Velbay Holdings Ltd. v. Ukraine (Case No. ARB/16/35)
- Gilward Investments B.V. v. Ukraine (Case No. ARB/15/33)

Concluded cases:

- Philip Morris International Inc. and others v. Ukraine (Case No. ARB/21/3)
- Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine (Case No. ARB/15/9)
- Krederi Ltd. v. Ukraine (Case No. ARB/14/17)
- City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine (Case No. ARB/14/9)
- Global Trading Resource Corp. and Globex International, Inc. v. Ukraine (Case No. ARB/09/11)
- GEA Group Aktiengesellschaft v. Ukraine (Case No. ARB/08/16)
- Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine (Case No. ARB/08/11)
- Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine (Case No. ARB/08/8)
- Alpha Projektholding GmbH v. Ukraine (Case No. ARB/07/16)
- Joseph C. Lemire v. Ukraine (Case No. ARB/06/18)
- Western NIS Enterprise Fund v. Ukraine (Case No. ARB/04/2)
- Tokios Tokelės v. Ukraine (Case No. ARB/02/18)
- Generation Ukraine Inc. v. Ukraine (Case No. ARB/00/9)
- Joseph C. Lemire v. Ukraine (Case No. ARB(AF)/98/1)

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

Most recently, investors in the renewable energy sector filed several investment claims against Ukraine due to Ukraine's cuts to the feed-in tariffs for the produced renewable energy.

In July 2020, the Ukrainian parliament adopted a law that, inter alia, significantly reduced the feed-in tariffs for wind power and solar power plants. The rate of reduction depends on the date on which the power plant was commissioned and on the type of renewable energy (for more details see here, last accessed 5 September 2022). The adoption of the law was preceded by extensive discussion of the draft law implementing changes. It is worth noting that there had been significant opposition against it from the members of the energy sector. Ukraine tried to avert potential investment claims by signing the memorandum of understanding with the two energy sector associations which represented most but not all renewable energy producers (see here, last accessed 5 September 2022).

However, not all investors agreed with the terms of the memorandum; so far, at least two investment claims have been filed against Ukraine due to cuts to the feed-in tariff. One of the investors, SREW NV, a Belgian company that is the owner of a 110-megawatt wind power plant in southern Ukraine, lodged an ICSID claim against Ukraine in October 2021 (see here, last accessed 5 September 2022). As of the moment of writing, the case has been suspended by the agreement of the parties in light of the Russian invasion of Ukraine. Another investor, the Dutch company Modus Energy International BV lodged its application under the Energy Charter Treaty before the Stockholm Chamber of Commerce. Proceedings, in this case, have been also suspended.

Another industry that became the focus of threats of bringing investment-treaty claims against Ukraine is the tobacco industry. In October 2019 the Antimonopoly Committee of Ukraine ('AMCU') fined major producers of cigarettes, British American Tobacco, Philip Morris, Imperial Tobacco, and Japan Tobacco International, and

distributor TEDIS Ukraine – for creating artificial barriers to entering the market of cigarettes distributorship. This included setting up conditions for distributorship which only TEDIS could satisfy. As a result, TEDIS became a monopolist with over 99% of the share.

British American Tobacco was ordered to pay €19.5 million; while Imperial Tobacco and its Ukrainian subsidiary were fined €16.9 million; Japan Tobacco International and a subsidiary €33.9 million; Philip Morris Ukraine €44.4 million; and TEDIS €125.2 million ('Ukraine threatened to aby another tobacco producer', last accessed 5 September 2022).

Philip Morris brought an ICSID claim against Ukraine in January 2021, while other companies such as Imperial Tobacco also threatened to bring an arbitration claim. Eventually, the issue seems to have been resolved by obtaining several favorable decisions from the Supreme Court of Ukraine which found the position of the AMCU to be groundless. Accordingly, proceedings in the ICSID case brought by Philip Morris have been discontinued.

6. Has your country complied with ICSID awards rendered against it?

Out of 14 concluded ICSID cases against Ukraine, 4 of them resulted in adverse awards against Ukraine, and 2 of them were settled (Joseph Lemire v. Ukraine(I), Western NIS Enterprise Fund v. Ukraine). According to public sources, Ukraine complied with awards in Joseph Lemire v. Ukraine (II), Alpha Projektholding GmbH v. Ukraine, City-State, and others v. Ukraine. In the case, Inmaris Perestroika v. Ukraine, the Pechersk District Court of Kyiv granted relief for enforcement of the award (Ruling of Pechersk District Court of Kyiv in case No. 2-к-14/12 dated 26 September 2012). There is no publicly available information on whether the award has been paid; however, considering that Ukraine did not oppose the request of investors for enforcement, it is safe to assume that Ukraine complied with the award.

7. What is the number of ICSID awards that have been enforced in your country?

As of 1 January 2022, Ukrainian courts enforced 7 ICSID awards in the following cases: Krederi Ltd. v. Ukraine, Kazmin v. Latvia, City-State and others v. Ukraine, Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine, GEA Group Aktiengesellschaft v. Ukraine, Inmaris Perestroika v. Ukraine, Alpha Projektholding GmbH v. Ukraine.

Enforcement of ICSID awards in Ukraine

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

Under Article 475(3) of the Code of Civil Procedure of Ukraine, the request for enforcement is decided by 'the appellate court with jurisdiction over the city of Kyiv', i.e., Kyiv Court of Appeal that reviews requests for enforcement as a court of the first instance.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

The question of enforcement of the arbitral awards, including ICSID awards, is regulated under Ukrainian law, mostly, by the provisions of the Code of Civil Procedure of Ukraine (hereinafter referred to as 'CCPU') and Law of Ukraine 'On International Commercial Arbitration' No. 4002-XII dated 24 February 2002 ('Law on Arbitration').

It also should be pointed out at the outset that, under Article 9 of the Constitution of Ukraine, treaties duly notified by the Ukrainian Parliament are part of the national legislation of Ukraine. According to Article 3(2) CCPU, in case of collision between provisions of CCPU and the treaty ratified by Ukraine, the latter prevails.

Unlike certain other jurisdictions (e.g., U.S. Federal Arbitration Act, §1650a), Ukrainian procedural legislation does not differentiate between ICSID and other arbitral awards and, therefore, courts apply to the enforcement of ICSID awards the same procedural framework applied to the enforcement of commercial arbitration awards. Because of this, Ukrainian courts approach certain questions of enforcement inconsistently which results in procedural and substantive irregularities.

CCPU Chapter IX Subchapter 3 along with the Law on Arbitration (which is mainly based on UNCITRAL Model Law on International Commercial Arbitration) outlines the main steps for enforcement of arbitral awards.

To begin with, Article 474 of CCPU provides a general provision that arbitral awards, regardless of the country where they were rendered, are enforced in Ukraine in accordance with a treaty ratified by Ukraine's Parliament or the principle of reciprocity which is presumed.

Enforcement requests must be lodged to the Kyiv Court of Appeal within 3 years of the date when the award has been rendered (CCPU, Article 475(3)). The request should indicate:

- the name of the court with which the request is filed,
- names of the parties (and their counsels), their place of residence or location
- names of the arbitrators that rendered the award,
- the date when it was rendered,
- the date when the party received it, and
- the relief for issuing a letter of execution (CCPU, Article 476(2)).

Per Article 476 of CCPU, the following documents should be enclosed with the request:

- original arbitral award or notarized copy thereof,
- original arbitration agreement or notarized copy thereof,
- the document, confirming payment of a court fee,
- power of attorney, and
- copies of the listed documents for other parties.

In some of the cases, the court held that, in enforcing the ICSID award in a Ukrainian court, a party must comply only with provisions of Article 54 of the ICSID Convention. Therefore, the court held, that when lodging a request for enforcement, the party must submit only a copy of the award certified by the ICSID Secretary-General (Ruling of Kyiv Appellate Court in case No. 760/11060/15-ц dated 22 July 2015).

However, in most cases, the court analyzed whether the party complied with the requirements of Article 476 CCPU and submitted all required documents. For example, in Krederi Ltd. v. Ukraine, the court dismissed the request for enforcement in the initial review stage because the applicant did not submit the original or notarized copy of the arbitration agreement (Ruling of Appellate Court of Kyiv in case No. 824/136/19 dated 19 July 2019). Eventually, the applicant refiled the request with a copy of the arbitration agreement (Ruling of Appellate Court of Kyiv in case No. 824/136/19 dated 26 August 2019).

After receiving the request and making sure that the applicant submitted all necessary documents, no later than 5 days after receipt, the court informs the other party and gives it one month to file its response to the request (CCPU, Article 477(4)). After receiving the response or elapsing of a one-month period, the judge determines the date and time of court hearings and notifies the parties thereof (CCPU, Article 477(5)).

The request is reviewed by the court within 2 months of its filing in the court proceeding with the summoning of both parties (CCPU, Article 477(1)). If requested by either of the parties, the court hearing can be rescheduled only if a party can prove the existence of good reasons to do so (CCPU, Article 477(6)). If any duly notified party fails to appear before the court, the court is entitled to continue hearing the case without the party (CCPU, Article 477(1)).

Upon the hearings, the court renders a ruling on the recognition and enforcement of the award or the refusal to recognize and enforce the award (CCPU, Article 479). The grounds for a refusal to recognize and enforce the award will be discussed in more detail separately.

10. What are the costs associated with the enforcement of an ICSID award?

The main costs associated with the enforcement of the ICSID award in Ukraine include court, legal, notary, and translation fees. The notary and translation fees relate to the requirement of procedural law to notarize and translate in the Ukrainian language the copies of the arbitral award and the arbitration agreement.

Whereas the legal, notary and translation fees may considerably vary, the amount of court fees is established by law. At the time of writing, they are UAH 1,240.50 (approx. USD 33) if the request is filed by the legal entity and UAH 496.20 (approx. USD 13) if filed by an individual.

The applicant should also take into account costs associated with the execution of the award after obtaining the leave for enforcement. These costs include the advance payment for lodging the execution request in the amount of 2% of the awarded amount which, however, as of the moment of writing, cannot be more than UAH 65,000 (which is to be returned to the creditor after the execution proceedings).

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

Other practical considerations which should be taken into account when enforcing the ICSID award are provisional measures and stay of the proceedings.

Regarding provisional measures, Article 477(3) of CCPU indicates that a court may resort to provisional measures established herein at the request of the party seeking enforcement. Provisional measures are allowed at any stage of the review of the enforcement request if failure to resort to these measures complicates or makes it impossible to execute the award if it is enforced.

Provisional measures established in the CCPU include, *inter alia*:

1) seizure of property, money, or other assets,
2) prohibition to take actions,
3) prohibition to third parties to take actions regarding the subject-matter of the dispute or make payments, or transfer the property to the respondent,
4) other measures established by law and treaties ratified by Ukraine (CCPU, Article 150). The court can resort to several different provisional measures simultaneously (ibid.).

Regarding the stay of proceedings, it should be, first, reminded that Article 52(5) of the ICSID Convention provides that '[t]he Committee may if it considers that the circumstances so require, stay enforcement of the award pending its decision.'

Similarly, Article 477(7) of CCPU sets forth that the court may stay the enforcement of the award if a competent court considers the annulment of the award – until the decision on such annulment enters into effect.

The courts have not yet applied this provision in the context of enforcement of ICSID awards, and it is primarily applied when enforcing commercial arbitration awards. However, under this provision, the only fact that the applicant has to prove is a competent court is considering the annulment of the award (Resolution of the Supreme Court in case No. 824/239/2018 dated 28 March 2019). Thus, considering the willingness of Ukrainian courts to apply domestic rules to the enforcement of ICSID awards, an applicant may succeed in seeking a stay of the proceedings if the award is being challenged.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

This section will discuss potential defenses against the enforcement of the ICSID award and consider in more detail the implications of non-differentiation in Ukrainian procedural law between ICSID and other arbitral awards as pointed out above (see supra question 9).

It is worth beginning by mentioning that the self-contained character of the ICSID Convention, guaranteed by the internal review system and provisions of Article 54 regarding enforcement, is one of the most fundamental pillars of the ICSID system in that it assures a 'total divorce' from the provisions of the New York Convention governing enforcement of commercial arbitration awards and from the annulment proceedings in national courts (George A. Bermann 'Understanding ICSID Article 54', ICSID Review, Vol. 35, No. 1-2 (2020), pp. 312).

In light of this, according to the widely held view, national authorities are bound to enforce the ICSID awards on the sole condition that it was certified by the ICSID Secretary-General. In practice, however, awards are often subject to various kinds of reviews on either substantive, jurisdictional, or procedural grounds (ibid.).

Similarly, running afoul of the self-containment character of the ICSID Convention, the Ukrainian procedural framework does not differentiate between ICSID and other arbitral awards. Consequently, Ukrainian courts tend to apply to the recognition and enforcement of ICSID awards the same standard of review as to awards of commercial arbitrations by applying corresponding international and domestic rules, including New York Convention. The Supreme Court, however, has overturned this approach in the most recent decision on the enforcement of ICSID awards in Ukraine, as we will see in detail below.

While enforcing ICSID awards, Ukrainian courts have analyzed grounds for a refusal to recognize and enforce provided by Article V of the New York Convention and by Article 478 of the CCPU which are almost verbatim those of Article V, albeit in neither

of the analyzed cases the court actually refused the enforcement of the ICSID award on the basis of one of these grounds.

For example, during the enforcement proceeding initiated by the investor in the case Krederi Ltd. v. Ukraine, the Kyiv Court of Appeal held that Ukraine, which was opposing the request, did not prove any of the grounds for refusing the request provided in Article 478 of the CCPU and Article V of the New York Convention (Ruling of Kyiv Appellate Court in case No. 824/136/19 dated 23 October 2019). Similarly, in the case, City-State N.V. v Ukraine, the Kyiv Court of Appeal, granting the investors' request for recognition and enforcement, found that in this case no grounds to refuse exist under Article 478 CCPU and Article V of the New York Convention (Ruling of Kyiv Court of Appeal in case No. 824/138/19 dated 16 September 2019). In these cases, the court did not question the applicability of these provisions to the enforcement of the ICSID awards: the court assumed their relevance.

However, the court approach seems to be far from consistent. In several cases, the appellate court specifically pointed out that enforcement of ICSID awards should be regulated primarily under the ICSID Convention and the provisions of the New York Convention do not apply to their enforcement.

One of these cases dates back to 2015 when Ukraine was trying to enforce an ICSID award against Bosh International, Inc and B&P Ltd Foreign Investments Enterprise. The court of first instance dismissed Ukraine's request in June 2015 on procedural grounds: the request did not comply with the requirements of procedural legislation and the applicant did not enclose all necessary documents (Ruling of Solomyansky District Court of Kyiv in case No. 760/11060/15-ц dated 15 June 2015). Kyiv Court of Appeal reversed this judgment and concluded that the court of the first instance should have applied the provisions of the ICSID Convention (Ruling of Kyiv Appellate Court in case No. 760/11060/15-ц dated 22 July 2015). The court held that the submission of the award certified by the ICSID Secretary-General suffices for enforcement proceedings and there is no need to apply domestic procedural rules which require the submission of other documents as well (ibid.). Such a conclusion

corresponds with provisions of Article 9 of Ukraine's Constitution and Article 3(2) of CCPU explained above.

For whatever reason, the court in subsequent cases did not adhere to this approach and applied the procedural framework applicable to the foreign arbitral awards, including grounds for refusal under Article V of the New York Convention.

However, in October 2021, the Kyiv Court of Appeal, when granting Latvia's request to enforce the ICSID award in the case of Kazmin v. Latvia, made a conclusion that derogates from the previous court's practice. In this case, the claimant, Eugene Kazmin, filed a claim against Latvia alleging misconduct regarding the claimant's investments in Latvia's steel manufacturing industry. However, the proceeding was discontinued due to the claimant's failure to pay the security of costs in the amount of EUR 3 million. The claimant was ordered to reimburse the respondent for the costs associated with the arbitration proceedings. Respondent, subsequently, filed an application for enforcement to the Kyiv Appellate Court. The court, analyzing the investor's arguments to refuse the enforcement, specifically held that the New York Convention does not apply to the enforcement of ICSID awards (Ruling of Kyiv Appellate Court in case No. 824/182/21 dated 18 October 2021).

The investor argued that enforcement should be refused on the basis of Article V(1)(d) and V(2)(b) of the New York Convention because, inter alia, 1) the ICSID tribunal had no powers to discontinue proceedings and, in any event, the discontinuance should have been in the form of procedural order rather than the award, and 2) the award violates public order because it infringes upon the investor's right to a fair trial and goes against the principle of reasonableness and fairness.

Kyiv Court of Appeal dismissed the investor's reference to the New York Convention holding that it does not apply to the enforcement of the ICSID awards. Rather, this issue primarily should be regulated by the provisions of the ICSID Convention.

However, after dismissing the New York Convention, the court continued to analyze the investor's arguments on the basis of Article 478 of CCPU and Article 36 of

Arbitration Law which provide the same grounds for refusal as Article V. In particular, the court found that the tribunal lawfully discontinued proceedings and could do it in the form of the award, therefore, the arbitral procedure was in accordance with the agreement of the parties.

In addition, the court found no violation of public order. The court pointed out that violation of public order may take place only when the enforcement of a foreign arbitral award would be inconsistent with the 'fundamentals of the law and order of a state' (Ruling of Kyiv Appellate Court in case No. 824/182/21 dated 18 October 2021). The court dismissed the investor's arguments that the award violates public order: the investor failed to prove that the award would somehow affect the social or economic foundations of Ukraine, or that its enforcement results in actions that are prohibited under Ukrainian law, or which infringe upon the sovereignty or safety of Ukraine (ibid.).

The judgment of the Kyiv Court of Appeal has been upheld by the Supreme Court of Ukraine (Resolution of the Supreme Court in case No. 824/182/21 dated 2 September 2022), where the Court further clarified the approach regarding enforcement of ICSID awards in Ukraine.

The Supreme Court held that the provisions of the New York Convention do not apply to the recognition and enforcement of the ICSID awards. The Court—having referred to Article VII of the New York Convention—explained that the provisions of the ICSID Convention, namely Article 54, are more favorable to the enforcement of ICSID awards and, therefore, should prevail over the New York Convention.

The Supreme Court also held that provisions of the CCPU, regulating international commercial arbitration procedures (see question 9 above), and Articles 35, and 36 of the Law on Arbitration are, generally, applicable to the enforcement and recognition of ICSID awards in Ukrainian courts. However, as to the grounds to refuse recognition and enforcement under domestic Ukrainian law, the Supreme Court held that grounds under Article 478 CCPU and 35, 36 of Law on Arbitration—basically, a verbatim adoption of Article V of New York Convention—do not apply to the enforcement of

ICSID awards since, under Article 9 of the Constitution of Ukraine and Article 19 of the Law on Treaties, provisions of the ICSID Convention should prevail.

Therefore, the effect of the judgment of the Supreme Court is that neither Article V of the New York Convention nor grounds to refuse recognition and enforcement of arbitral awards under domestic Ukrainian law apply to the enforcement procedures of ICSID Conventions in Ukraine.

However, the Supreme Court continued and found that, according to the ICSID Convention provisions, the only ground to refuse recognition and enforcement of the award is the violation of public order of a country, where the recognition and enforcement are sought. The Court defined public order in terms of three pillars:

- basic, fundamental principles of Ukrainian law, first of all, constitutional principles, the foundations of law and order in Ukraine, as well as the basic principles of civil law,
- generally accepted principles of morality, legitimate interests of individuals, society, and the state,
- fundamental principles and norms of international law, including international human rights law.

The appellant—claimant in the arbitration proceedings—argued that discontinuing arbitration proceedings without sufficient legal grounds violates his right to a fair trial of his claim and, thus, contradicts the public order of Ukraine. The Supreme Court disregarded this argument and pointed out that the discontinuance of proceedings was a result of the claimant's failure to pay the security for costs.

To sum up, in the most recent decision, the Supreme Court found that the violation of public order in Ukraine is the only ground on which the court can reject the recognition and enforcement of the ICSID award. The court found that grounds for refusal in Article V of the New York Convention and verbatim grounds under domestic Ukrainian law do not apply to the enforcement procedures of ICSID awards.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

The decision of the Kyiv Court of Appeal to refuse the enforcement of the ICSID awards may be appealed to the Supreme Court of Ukraine (CCPU, Article 479(7)). In these cases, the Kyiv Court of Appeal acts as a court of the first instance, and the Supreme Court of Ukraine – as a court of the appellate instance (CCPU, Article 351(2)).

The appeal may be filed with the Supreme Court of Ukraine within 30 days from the day when the decision was announced by the court of the first instance in the court hearing or if at the court hearing the court announced only introductory and operative parts of the judgment, – from the day when the full text of the judgment was received by the parties (CCPU, Articles 354, 355).

In the appeal, the appellant should explain, amongst other things, why the challenged judgment is illegal or lacks grounds such as that relevant circumstances were analyzed insufficiently or inadequately, or the evidence was dismissed without a good reason or was analyzed and evaluated incorrectly, etc. (CCPU, Article 355)

The court must decide whether to initiate appellate proceedings no later than 5 days after the appeal was filed (CCPU, Article 360). If the court begins appellate proceedings, it must decide on the appeal no later than 60 days from the day when proceedings were opened (ibid.).

The other party is entitled to file an answer to the appeal (ibid). The appeal will be decided in a court hearing with the summons of both parties (CCPU, Article 366). The court, generally, will decide whether the challenged judgment is legal and well-grounded only within the claims of the appellate complaint, meaning the court will not explore grounds for reversal sua sponte (CCPU, Article 367). New evidence which has not been examined by the first instance court may be presented only if the party proves that it was unable to present them sooner because of good reasons which are objectively independent of that party (ibid.).

Upon review, the Supreme Court has the following options:

i. dismissing the appeal,

ii. reversing the judgment of the first instance court (entirely or in part) and rendering the new judgment or amending the judgment,

iii. reversing the judgment of the first instance court and discontinuing the proceedings (CCPU, Article 374).

The Supreme Court decisions enter into effect at the moment of their adoption, are final, and are not subject to any review.

14. Is there any recourse available against a leave for enforcement?

Similarly, a judgment of the Kyiv Court of Appeal granting leave for enforcement of the ICSID award can be appealed to the Supreme Court of Ukraine according to the same procedure as described in the previous section.

It should be noted that, if the judgment granting enforcement is appealed, it enters into effect only after the Supreme Court decides on the appeal (CCPU, Article 479). If not appealed, the judgment enters into force upon elapsing of time for filing an appeal (ibid.).

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

The question of the execution of the award is regulated primarily by the provisions of CCPU and the Law on Execution Proceedings No. 1404-VIII dated 2 June 2016 ('Law on Execution') (Law on Execution, Article 78). In execution proceedings, the party enforcing the award is referred to as the creditor, and the party against whom the award was rendered – as the debtor.

The procedure for execution of the ICSID award depends on whether the award is executed against Ukraine, against an investor, or another country. Whereas the procedure for execution of awards against the investor and foreign country is similar,

considerations connected with the state immunity will be looked at in the next question.

The execution of the award begins with issuing the letter of execution which the Kyiv Court of Appeal issues upon granting the leave for enforcement. This letter is a ground for undertaking further actions for execution. The legislator established a limit of three years for submitting this letter for execution (Law on Execution, Article 12).

If the award is executed against the investor or a foreign state, the party executing the award should submit a motion for execution along with the letter of execution to either state or private executor at the place of residence or work of the investor, if it is an individual, or the place of incorporation if it is a legal entity; or at the place of location of their property (Law on Execution, Article 24).

Before submitting the application, the applicant must make an advance payment in the amount of 2% of the awarded amount which, however, cannot be more than UAH 65,000 as of the moment of writing (Law on Execution, Article 26(2)). If all documents comply with the requirement of the law, the executor issues a resolution on the initiation of execution proceedings (ibid.).

The Law on Execution grants the executor the power to recover the awarded amount from the debtor. In particular, the executor can seize and sell the debtor's property (including, real estate) at an auction, or recover money from the debtor's bank accounts (Law on Execution, Articles 48, 50).

The money, actually recovered from the debtor, is distributed by the executor in four stages:

- first, the advance payment made by the creditor is returned,
- second, costs of the execution proceedings not covered by the advance payment are covered,
- third, the demands of the creditor are satisfied, and the execution fee in the amount of 10% of the actually recovered sum is paid to the state budget,

- fourth, the executor charges any fines imposed on the debtor (Law on Execution, Article 45).

If the award is executed against Ukraine, the investor obtains the letter of execution, submits it to the executor, and obtains from the executor a resolution on the initiation of execution proceedings. Afterward, the investor should apply for payment to the Ministry of Justice of Ukraine with the executor's resolution on the initiation of execution proceedings along with the ICSID award with translation in Ukrainian ('The procedure for the use of funds provided in the state budget for payments related to the execution of decisions of foreign jurisdictional bodies adopted as a result of adjudication of cases against Ukraine', Resolution of the Cabinet of Ministry of Ukraine No. 408 dated 7 March 2007). The Ministry of Justice manages state funds allocated for the execution of decisions of 'foreign jurisdictional bodies', including international arbitration, which had been rendered in cases against Ukraine (ibid.). Upon receipt of all proper documents from the investor, the Ministry of Justice carries out payment of awarded sums through the State Treasury Service of Ukraine.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Under Article 55 of the ICSID Convention, '[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution'. The result of this provision is that neither the ratification of the ICSID Convention nor the conclusion of the arbitration agreement per se could be considered as an implied waiver of the sovereign immunity from execution (Andrea Kay Bjorklund, Lukas Vanhonnaeker, et al., "State Immunity as a Defense to Resist the Enforcement of ICSID Awards", in Meg Kinnear and Campbell McLachlan (eds), ICSID Review - Foreign Investment Law Journal, (© The Author(s); Oxford University Press 2020, Volume 35 Issue 3) pp. 506 - 522).

Thus, whenever executing an ICSID award in any Contracting Party, regard should be given to the local laws on state immunity.

In Ukraine, the question of state immunity is primarily regulated by Article 79 of the Law on Private International Law No. 2709-IV dated 23 June 2005 ('PIL Act') which provides as follows: '[b]ringing an action against a foreign state, joinder of a foreign state to a case as a respondent or a third party, seizure of property belonging to a foreign state and located on the territory of Ukraine, subjecting such property to other interim measures and foreclosure on a such property may be allowed only with the consent of competent authorities of the respective state unless otherwise provided for by an international treaty or law of Ukraine.'

The current rule favors the absolute approach toward state immunity by providing consent of the state as the only way to waive state immunity. One of the most recent decisions which analyzed the notion of state immunity against the execution of investment arbitral awards, and which tried to restrict the absolute nature of this provision is the Supreme Court decision in the case Everest Estate LLC et. al vs. Russian Federation (Resolution of the Supreme Court in case No. 796/165/18 dated t25 January 2019).

The investment claim, in this case, was brought by owners of various properties (villas, office buildings, apartments buildings) in Crimea which, according to the claim, were expropriated as a result of the 2014 Russian occupation of Crimea. The arbitral tribunal satisfied the claim in part and awarded to 18 different investors around USD 130 million in damages. Investors brought the award before the Kyiv Court of Appeal requesting recognition and enforcement on the basis that Russia's property is located in Ukraine. In particular, investors argued for the jurisdiction of the court on the basis of Ukrainian subsidiaries of Russian state-owned banks (Prominvestbank (a subsidiary of VEB), VTB, Sberbank) in which Russia owned the absolute majority of shares, mostly, indirectly through various state bodies such as Central Bank or state corporations. During the enforcement, investors moved the court for the seizure of banks' shares. The Kyiv Court of Appeal ordered a seizure, and its decision was

appealed to the Supreme Court of Ukraine. In this context, the Supreme Court analyzed the question of sovereign immunity of Russian assets in Ukraine.

The Supreme Court upheld the decision of the Kyiv Court of Appeal and dismissed banks' arguments that their assets are protected by sovereign immunity. The Court held that Russia, by signing the Ukraine-Russia BIT containing an arbitration clause which, inter alia, contained provisions on the mandatory force of arbitral awards and the obligation of both parties to enforce them, waived its state immunities against claims, interim measures, and execution. The Court analyzed the restrictive approach towards state immunity under the UN Convention on Jurisdictional Immunities, the European Convention on State Immunity, and the European Court of Human Rights case law. The court pointed out that the concept of restrictive state immunity is established in Russian law and, although Ukraine is not a party to said conventions, the concept of restrictive state immunity is applied in Ukraine according to customary international law (Resolution of the Supreme Court in case No. 796/165/18 dated 25 January 2019). Thus, the Supreme Court recognized that the conclusion of the arbitration agreement whereby the parties recognized the mandatory force of arbitral awards and undertook an unequivocal obligation to enforce them waives state immunity against execution.

The Supreme Court undertook a similar approach in the subsequent enforcement decision in the case Olympic Entertainment v. Ukraine where the Estonian investor was seeking enforcement of the award against Ukraine. The Supreme Court in upholding the decision of the Kyiv Court of Appeal granting leave of enforcement, without going into much detail, briefly pointed out that Ukraine waived its state immunity in Article 79 PIL Act by signing an arbitration agreement that contained the obligation of parties to comply with and enforce the award (Resolution of the Supreme Court in case No. 824/245/21 dated 12 May 2022).

Thus, Ukrainian courts consider the state immunity against execution waived when, inter alia, the state concludes an arbitration agreement that contains its unequivocal obligation to execute the award.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

All relevant aspects have been addressed in the previous questions.

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Latin America

Bolivia

Implementation of the ICSID Convention in Bolivia

1. Is there a model BIT in place in your country?

Bolivia promulgated a new Political Constitution of the State on 7 February 2009. The Bilateral Investment Treaties had to be adapted to the Article 320 of the Constitution.

The Article 320. II establishes '...every foreign investment shall submit to Bolivian jurisdiction, laws and authorities, and no one may cite an exceptional situation, nor appeal to diplomatic claims to obtain a more favorable treatment...'.

In addition, the Ministry of Foreign Affairs claims '...the Constitution requires compliance with certain requirements for investment in Bolivia, such as social and environmental licenses, in order that the benefits are received by the communities and districts where it is located...' [Denunciation and Renegotiation of International Treaties for their adaptation to the Political Constitution of the State, 2013.

As a result, Bolivia has decided to withdraw twenty-two 22 Bilateral Investment Treaties and the ICSID Convention [International Arbitration, Official Note from website of the Attorney General's Office of the Plurinational State of Bolivia].

The Bolivian State has created a new model of BIT called Investment Agreement for Development '...consists of 20 articles that deal extensively with aspects such as investment security, respect, equity and non-discrimination between the parties, investment promotion and facilitation, transparency and the fight against corruption, among others...'[The State Attorney General's Office presented the Legal Framework for Investments to Bolivia's Partner Countries and Organizations, 3 June 2022].

The new model of BIT is guided by Law 516 on Investment Promotion of 2014, which provides the principles to which investments must be subject and regulates the legal and institutional framework for their promotion [Article 3. Gaceta Oficial de Bolivia].

Treaties concerning foreign investments that are renegotiated, and all new investment agreements will be based on the Bolivian Constitution [Articles 255-320,

2009. Gaceta Oficial de Bolivia], and Law 516 [First additional disposition,2014. Gaceta Oficial de Bolivia].

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Before Bolivia's denunciation of the ICSID Convention, the State signed the ICSID Convention on 3 May 1991 and deposited its instrument of ratification on 23 June 1995. The Convention entered into force on 23 July 1995 [International Centre for Settlement of Investment Disputes-ICSID, 'List of Contracting States and Signatories to the Agreement', 3 September 2021].

Under Law 1593 of 12 August 1994, the Bolivian State approved and ratified its accession to the ICSID Convention [Single Article. Gaceta Oficial de Bolivia].

3. Has your country made a notification or designation upon signing, ratifying or any time?

On 2 May 2007 Bolivia became the first country to denounce the ICSID Convention [World Bank Group, 'Denunciation of ICSID Convention', 16 May 2007]. The depositary received a written notification of Bolivia's denunciation of the Convention.

In accordance with Article 71 of the Convention, the denunciation took effect on 3 November 2007. In other words, six months after the receipt of the notification from the Bolivian State.

According to the Ministry of Foreign Affairs of Bolivia, the content of the ICSID Convention was against the Article 320 of the Constitution.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

The web database of ICSID has reported five investment treaty arbitration cases conducted under the ICSID Convention initiated against Bolivia arising from

expropriations and nationalizations [International Centre for Settlement of Investment Disputes -ICSID, Cases Database.]

The cases which the Bolivian State had claims in concordance with the ICSID Convention and prior to the denunciation are:

- Quiborax S.A. and Non-Metallic Minerals S.A. v Plurinational State of Bolivia.
- Aguas del Tunari S.A. v. Republic of Bolivia.

In the case of arbitration claims filed during the six-month period after withdrawal in accordance with Article 71 of the ICSID Convention [Bernal José Carlos & Viscarra Mauricio, 'Life after ICSID: 10th Anniversary of Bolivia's Withdrawal from ICSID']:

- E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia.

Bolivia had arbitration claims filed long after the country's withdrawal, in accordance with Article 72 of the ICSID Convention [Bernal José Carlos & Viscarra Mauricio, 'Life after ICSID: 10th Anniversary of Bolivia's Withdrawal from ICSID']:

- Pan American Energy LLC v. Plurinational State of Bolivia.
- Banco Bilbao Vizcaya Argentaria S.A. v. Plurinational State of Bolivia.

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

The Plurinational State of Bolivia has had claims in different industries and investment sectors.

In the sector of oil, gas and mining the country had the symbolic cases against Pan American Energy LLC and Quiborax S.A. and Non-Metallic Minerals S.A.

Bolivia also had an emblematic case about water, sanitation & flood protection against a Bolivian company known as Aguas del Tunari S.A.

In relation to the area of information and communication had a case with E.T.I. Euro Telecom International N.V.

Nowadays, the Bolivian State has a case related to the finance and insurance activities sector with the Banco Bilbao Vizcaya Argentaria S.A., whose award has recently been issued.

6. Has your country complied with ICSID awards rendered against it?

In relation to compliance with ICSID awards by the Bolivian State, the following aspects should be questioned:

Concerning Pan American Energy LLC vs Plurinational State of Bolivia case, the status of the proceeding is concluded due to the discontinuance of it pursuant to ICSID Arbitration Rule 43(1). The parties reached an agreement for US$ 357,023.360 million as a consequence of the nationalization that took place in 2009 [Supreme Decree No. 2220 ,2014.Gaceta Oficial de Bolivia] and [Nicolás Misculin, Bolivia agrees to pay $357 mln to Pan American Energy for 2009 nationalization), Thomson Reuters, 18 December 2014].

A similar situation occurred in E.T.I. Euro Telecom International N.V. vs Plurinational State of Bolivia. Pursuant to ICSID Arbitration Rule 44, the parties agreed to terminate the arbitration, which is recorded in the Procedural Order issued on 21 October 2009.

E.T.I. presented a new request of arbitration to the Permanent Court of Arbitration, but the arbitration did not advance [United Nations UNCTAD, 'ETI v. Bolivia (II)', Investment Dispute Settlement Navigator]. The Bolivian State signed a settlement agreement for US $100 million as a compensation for the nationalization occurred on 1 May 2008[Supreme Decree No. 692, 2010. Gaceta Oficial de Bolivia] and [Carlos Quiroga, 'Bolivia pays 100million dollars to Telecom Italia for nationalization', Thomson Reuters, 6 November 2010].

In Quiborax S.A. and Non-Metallic Minerals S.A. vs Plurinational State of Bolivia, the State signed a transactional agreement with the objective to comply with the final award released on 16 September 2015. The agreement includes the waiver by Quiborax and NMM of 20% of the net amount of the compensation, 50% of the interest and the totality of the costs determined by the Award.

The Bolivian State paid US$42,676730.00 million as a compensation according to the Supreme Decree Nº3582 of 6 June 2018 [Ministry of Mining and Metallurgy, 'Bolivia Signs Contract to Comply with Quiborax Award', 7 June 2022] and [Supreme Decree No. 3582 (2018). Gaceta Oficial de Bolivia]. Although Bolivia had communicated the denunciation of the ICSID agreement, '...it has nonetheless announced its intention to honour its international obligations and has promptly complied with adverse awards rendered against it...' [Yanos Alexander A and Bromberek Kristen K , 'Enforcement Strategies Where the Opponent Is a Sovereign', 8 June 2021].

In Aguas del Tunari S.A. vs Republic of Bolivia, the parties agreed with the discontinuance of the proceeding in concordance with the ICSID Arbitration Rule 44.

However, this case had a huge repercussion in Bolivia. Privatization of the water supply led to a price increase. This situation caused indignation among the Bolivian population, which led to the outbreak of the water war. Bolivian State had to nationalize again the water supply [Transnational Institute-TNI, 'Impacts of investor arbitration claims against Latin American and Caribbean States', June, 2021]. It was also '...an international solidarity network of individuals and organizations from more than 43 countries...these protests took place in the streets of the United States, the Netherlands, and Spain and through online activity...' [The Democracy Center, 'Bechtel vs Bolivia: Details of the Case and the Campaign', n.d.].

Therefore, Aguas del Tunari and Bolivia '...have settled their dispute over the concession for the supply of water services and related contracts to the city of Cochabamba...'[Bechtel Corporate, 'Bechtel perspective on the Aguas del Tunari water concession in Cochabamba, Bolivia', n.d.].

The Government of Bolivia and Aguas del Tunari didn't pay a compensation for the termination of the concession and the withdrawal of the claim [United Nations UNCTAD, 'Aguas del Tunari v. Bolivia', Investment Dispute Settlement Navigator. Nevertheless, it was a symbolic payment of US $0.30 cents [Supreme Decree No. 28539, 2005. Gaceta Oficial de Bolivia] and [Opinión Diario de circulación nacional, 'The International fame of Cochabamba, 18 September 2007. Concerning Banco

Bilbao Vizcaya Argentaria S.A. vs Plurinational State of Bolivia, recently, the Arbitral Tribunal issued the award condemning the Bolivian State to pay the sum of US $105 millions as a compensation for the nationalization [Ciar Global, 'BBVA obtains $105M compensation in investment arbitration with Bolivia', 18 July 2022].

In response, the Bolivian State communicated the intention to file the request for annulment of the award in favor of BBVA [Ciar Global, 'Bolivia will request the annulment of the award of 105M € in favor of BBVA',20 July 2022].

7. What is the number of ICSID awards that have been enforced in your country?

According to the case law finder of Supreme Court of Justice of Bolivia and with the public information about enforcement of foreign awards. There is no ICSID award enforced in Bolivia [Supreme Court of Justice of Bolivia, Unidad de sistematización de jurisprudencia].

Enforcement of awards in Bolivia

Competent Court or Authority

8. Which court or authority is competent to decide on a request for recognition and enforcement of investment arbitration awards? Are there any criteria for the court or authority to be competent?

Article 178 of the Political Constitution regulates the principle of legal pluralism, by which the Bolivian State recognizes '...the coexistence of different jurisdictions in the territory...' [Flores Beatriz, 'La aplicabilidad del proceso de exequátur para la ejecución de laudos arbitrales extranjeros en Bolivia', 2014].

In this sense, the Article 120 of Law 708 defines a foreign award as '...any arbitral award rendered in a venue other than the territory of the Plurinational State of Bolivia...' [2015. Gaceta Oficial de Bolivia].

In line with this reasoning, its article 121 establishes that the applicable rules for the recognition and enforcement of foreign awards shall be those relating to international judicial cooperation, established in the civil procedural law in force and in the treaties on recognition and enforcement of foreign arbitral awards or judgments.

As can be seen, the enforcement of foreign awards is also subject to the provisions of the Bolivian Code of Civil Procedure, which recognizes international judicial cooperation with respect to the recognition and enforcement of foreign awards in its articles 502 to 509.

Pursuant to Article 123 of Law 708 and with the Article 507 of the Code of Civil Procedure, the request for recognition and enforcement of the foreign award must be filed before the Supreme Court of Justice [Supreme Court of Justice of Bolivia, Auto Supreme (Decision) No.320 , 20 October 2003]. The recognition and compliance with the arbitration award is '...the responsibility of the ordinary justice through the competent court that would have led to the hearing of the arbitrated case according to the matter, nature and amount...'(unofficial translation)].

Procedural Rules

9. What is the procedure for enforcement of investment arbitration awards in your country? What are the requirements applicable to a request for the recognition and enforcement of an investment arbitration award? (e.g. adversarial vs. *ex parte*?)

In accordance with the provisions of articles 123 to 125 of Law 708 and Articles 502 to 508 of the Code of Civil Procedure, the procedure for the recognition and enforcement of foreign awards is as follows:

- The request must be filed before the Supreme Court of Justice.
- The requesting party must attach a copy of the agreement and the foreign arbitration award, duly legalized.

- If the award is rendered in a language different from Spanish, a sworn translation of the document by an authorized translator must be attached.
- Once the requirements of validity have been met and verified, the Supreme Court of Justice will transfer the case to the other party so that it may respond within 10 days of its notification and present the corresponding evidence [Law No. 708 on Conciliation and Arbitration, 2015, Article 124. Gaceta Oficial de Bolivia].
- A term of 8 days computable from the notification is granted to produce evidence. Once the term of proof has expired within 5 days, the Supreme Court will issue a decision [Law No. 708 on Conciliation and Arbitration ,2015, Article 124. Gaceta Oficial de Bolivia].
- Once the Supreme Court of Justice has ordered the proceeding of the resolution, it will proceed with the enforcement of the foreign award through the competent judicial authority to be designated by the Supreme Court [Arciénaga Biggemann, E. 'Instituciones del Código Procesal Civil' (Institutions of the Code of Civil Procedure). Olimpo, Cochabamba, Bolivia, 2016. 'The executor of the foreign judgment is the public judge in civil and commercial matters, who is responsible for taking all measures to make the judgment effective' effective'(unofficial translation)], considering the domicile of the party 'against whom the recognition of the Foreign Arbitral Award has been invoked or requested or, in its absence, by the one having jurisdiction in the place where they are located' [Law 708 on Conciliation and Arbitration, 2015. Article 124. Gaceta Oficial de Bolivia].
- Once the award has been executed in accordance with domestic legislation, '...the public Judge returns the records to the Supreme Court of Justice, adding the documentation related to the acts of execution, which will be sent to the requesting State through the same way used for their arrival...' [Arciénaga Biggemann, E. 'Instituciones del Código Procesal Civil' (Institutions of the Code of Civil Procedure). Olimpo, Cochabamba, Bolivia, 2016].

Article 122 of Law 708 provides grounds for inadmissibility for the enforcement and recognition of the arbitration award, these include:

- Existence of any of the grounds for nullity set forth in Article 112 of Law 708, proven by the party against whom the recognition and enforcement of the Foreign Arbitral Award is invoked.
- Absence of binding force due to lack of enforceability, nullity, or suspension of the Foreign Arbitral Award by the competent judicial authority of the State where it was rendered, proven by the party against whom the recognition and enforcement of the Foreign Arbitral Award is invoked.
- Existence of grounds of nullity or inadmissibility established by international agreements or conventions in force.
- Non-compliance with the rules contained in the civil procedural law in force regarding international judicial cooperation [Code of Civil Procedure (2013), Articles 492-493.Gaceta Oficial de Bolivia].

Pursuant to the Article 505 of Code of Civil Procedure, the validity requirements for the enforcement of ICSID awards in Bolivia are as follows:

- Compliance with the extrinsic formalities to be considered authentic in the country of origin.
- The award and annexed documentation must be duly legalized in accordance with Bolivian law, unless it was sent through diplomatic or consular channels or through the competent administrative authorities.
- The translation of the award into Spanish, if necessary.
- The Arbitral Tribunal that issued the award '...has jurisdiction in the international sphere to take cognizance of the case, in accordance with the rules of its own law, unless the matter is within the exclusive jurisdiction of Bolivian judicial authorities...'.

- The respondent party has been legally notified in accordance with the law of the foreign Arbitral Tribunal.
- Respect for the principles of due process.
- The award is res judicata according to the legal system of the country of origin.
- The award is not contrary to international public order.

10. What are the costs associated with the recognition and enforcement of an investment arbitration award?

Pursuant to the Code of Civil Procedure, the validity requirements for the enforcement of ICSID awards in Bolivia are as follows:

- The legalization of the award and annexed documents by the authority of the corresponding country.
- The legalization of the award and attached documents by the Bolivian Ministry of Foreign Affairs [Code of Civil Procedure,2013, Article 505. II. Gaceta Oficial de Bolivia].
- The letter rogatory and other commissions for acts of procedural communication or to receive or obtain evidence and reports [Code of Civil Procedure,2013, Articles 492-493.Gaceta Oficial de Bolivia].
- The translation of the award if it is issued in a language other than Spanish [Code of Civil Procedure, 2013, Article 505.3. Gaceta Oficial de Bolivia].
- In the case of forced execution, all the costs related with the seizure.

11. What other practical considerations may affect the recognition and enforcement of an investment arbitration award in your country?

Article 121.I. of Law 708 provides that foreign awards shall be recognized and enforced in Bolivia, in accordance with the treaties on recognition and enforcement of foreign arbitral awards or judgments. Such wording shows that Bolivia is a State where the enforcement of foreign awards is permissible.

Article 121.II of Law 708 also provides that if there is more than one applicable convention, the one most favorable to the requesting party shall be chosen. And in the absence of a treaty, the provisions of Law 708 shall apply.

This wording allows the requesting party to apply the law most favorable to enforcement, as does the New York Convention in Art. VII (1). Among the most favorable rules can be found: the national law of the forum, or the treaties applicable in the Bolivian territory.

Hence, Article 121 seeks to privilege the enforceability of an award, even if it has not been rendered in a Bolivian venue, it seeks to protect the winner in a foreign award.

The international conventions on the recognition and enforcement of foreign awards to which Bolivia is a party are the following:

- Inter-American Convention on International Commercial Arbitration, Panama, January 30, 1975.
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958.
- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Approved in Montevideo on May 8, 1979.

It is important to mention that, on 2 May 2007, Bolivia denounced the ICSID Convention, approved in Washington on 18 March 1965, generating in this way that it is not applicable for the enforcement of foreign awards as previously foreseen in art. 72.I. of the abrogated Law 1770.

Under Article 121.III of Law 708, in the absence of the ICSID Convention, foreign ICSID arbitral awards shall be recognized and enforced in accordance with the provisions of Law 708.

Among the international conventions ratified by the Bolivian State, the New York Convention is the international instrument most favorable to recognition and enforcement. Therefore, in observance of Article 123, the Supreme Court of Justice

should opt for its application. However, Bolivia has been a party to the New York Convention (1958) since August 12, 1994. This does not exempt that since its ratification it should have applied it i) to the recognition of awards prior to it; and ii) to awards whose recognition procedure had been underway under other norms.

12. In what way can a party against whom recognition and enforcement of an investment arbitration award is sought defend itself with a view to preventing recognition and enforcement?

Law 708 in its Art. 124 grants a term of 8 days computable from the notification to produce evidence.

This means that the party against whom the enforcement is opposed has the possibility to respond or oppose the enforcement in accordance with the grounds set forth in paragraph II of Art. 119 of said Law. These grounds are:

- When it is demonstrated with documents that the party has complied with the provisions of the arbitration award.
- When there is an appeal of nullity against the arbitral award that is pending. In this case, the judicial authority must suspend the forced enforcement of the arbitral award until the appeal is resolved.

13. Is there any recourse available against a decision refusing to recognize or enforce an investment arbitration award?

Law 708 does not expressly mention the filing of any appeal in response to the opposition to the enforcement of the award, because the Supreme Court of Justice of Bolivia is the highest judicial instance.

Article 124 of Law 708 establishes the opening of an evidentiary term of 8 days and within 5 days of the expiration of the evidentiary term the Supreme Court of Justice must issue a decision.

14. Is there any recourse available against a leave for recognition and enforcement?

In the absence of an ordinary remedy applicable against an enforcement authorization, there is the alternative of resorting to a constitutional proceeding.

In recent times, the parties have constitutionalized arbitration, whether in domestic, international or investment arbitration, it has become a kind of ultima ratio.

According to Article 55 of the Constitutional Procedural Code, there is a six-month term to file a Constitutional Protection Action (Amparo) denouncing alleged violations of constitutional rights and guarantees as of the date of notification of the decision.

15. What are the rules in your country with regard to the execution (after the enforcement) of an investment arbitration award?

Article 117 of Law 708 stipulates that '...once the Arbitration Award has been enforced and the time limit for its compliance has expired, the interested party may request its enforcement...' before the civil judge [Supreme Court of Justice of Bolivia, Auto Supremo (Decision) No.321, 20 October 2003].

The party requesting the forced enforcement of the arbitration award shall enclose with the claim authenticated copies of the following documents [Law 708 on Conciliation and Arbitration,2015. Article 118. Gaceta Oficial de Bolivia]:

- Main contract contains the arbitration clause or arbitration agreement entered between the parties.
- Arbitral Award and amendments, complements and clarifications.
- Proof or written evidence of notification to the parties with the Arbitration Award.

The procedure for forced enforcement is governed by the following parameters [Law 708 on Conciliation and Arbitration,2015. Article 119. Gaceta Oficial de Bolivia]:

- Once the request has been filed, the judicial authority shall forward it to the opposing party, who shall reply within 5 days of its notification.

- The judge '...shall accept opposition to the compulsory enforcement of the Arbitral Award when the compliance with the Arbitral Award itself or the existence of an appeal for nullity of the Arbitral Award pending is demonstrated by documentary evidence. In the latter case, the judicial authority shall suspend the enforcement of the Arbitral Award until the appeal is resolved...' [Law 708 on Conciliation and Arbitration,2015. Article 119. II. Gaceta Oficial de Bolivia].
- The judicial authority shall reject without any formality whatsoever, any opposition based on arguments other than those indicated in the preceding paragraph, or any incident intended to hinder the enforcement requested.
- The decision shall not admit any challenge or appeal whatsoever.
- The judge shall reject *ex officio* the forced enforcement when the Arbitral Award is subject to any of the grounds set forth in Article 112 of this Law.
- For the purposes of coercive execution of sums of money, the provisions of Articles 404. 6 to 428 of the Code of Civil Procedure shall apply.

Article 404 of the Code of Civil Procedure should be applied only in the pertinent aspects, since it is not possible to disregard the rules of the aforementioned Article 119, which clearly establishes that the execution instance may not be suspended in any case, by any ordinary or extraordinary appeal, nor the Appeal for Reversal, nor the Appeal, nor the Cassation Appeal, nor the Appeal of Compulsa, nor by any request that tends to delay or impede the execution process [Code of Civil Procedure,2013, Article 252. Gaceta Oficial de Bolivia].

State Immunity

16. How do courts deal with the law on state immunity when the execution of an investment arbitration award is sought?

The Bolivian State does not waive its sovereign immunity because it is the investor's task to enforce the award against assets not covered by this immunity. Therefore, investors are subject to Bolivian law regarding the enforcement of foreign awards [Bernal José Carlos, 'Post-award Bargaining Power of States: Examples from Bolivia'. Kluwer Arbitration Blog, 2017].

As mentioned in previous sections, no ICSID awards have been enforced in Bolivia. However, the Bolivian courts of justice will act in accordance with the Political Constitution of the State, the Code of Civil Procedure, Law 708, Law 516 and the international Conventions ratified by Bolivia.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

On 7 February 2009, Bolivia enacted a new Political Constitution of the State, for which reason Bolivian law adapted its rules to the new constitutional postulates. The Bolivian State is based on plurality and political, economic, legal, cultural and linguistic pluralism, within the process of integration of the country.

In view of this situation, Bolivia decided to denounce the ICSID Convention on 2 May 2007 and 22 twenty-two Bilateral Investment Treaties. The Bolivian State implemented a new BIT model.

Subsequently, on 19 November 2013, the Code of Civil Procedure entered into force. This set of rules is essential to understand the regulation of the enforcement of foreign awards in Bolivia, together with the international conventions signed by Bolivian State to bring them in line with the current rules.

Likewise, on 4 April 2014, Law 516 on Investment Promotion was enacted, which establishes the general legal and institutional framework for investments in the Bolivian State. The law requires the drafting of a new law on Dispute Settlement and Arbitration.

In this sense, Law 708 on Conciliation and Arbitration, enacted on 25 June 2015, abrogated Law 1770 of 1997. The Law 708 has simplified the enforcement of foreign awards in Bolivia, allowing the procedure and enforcement to be more expeditious [Villarpando Pérez Aylin, Enforcement of foreign awards in Bolivia, Stampa Abogados, 2020].

In view of the existence of a new constitutional order and norms appropriate to the postulates of the same, the purpose is to make known the procedure for the enforcement of awards in Bolivia, especially in relation to investment arbitration.

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Mexico

Implementation of the ICSID Convention in Mexico

1. Is there a model BIT in place in your country?

No. Although the UNCTAD's Work Program on International Investment Agreements mentions a model BIT dated December 2008 known as the Mexican Model of Investment Promotion and Protection Agreement (IPPA), Mexico has no official model BIT.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

Mexico is a party to the ICSID Convention. The Convention was signed on 11 January 2018. The ratification instrument was deposited on 27 July 2018. It entered into force on 26 August 2018.

- Signature: 11 January 2018
- Deposit of ratification: 27 July 2018
- Entry into force: 26 August 2018

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

Yes. Mexico notified legislative or other measures adopted to make the ICSID Convention effective in its territory, according to Article 69. The measure is the decree whereby the ICSID Convention is approved, named 'DECRETO por el que se aprueba el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados, hecho en la ciudad de Washington, D.C., el dieciocho de marzo de mil novecientos sesenta y cinco, Diario Oficial de la Federación 22/06/2018.'

Mexico has also designated eight Panel Members whose terms end on 13 November 2024. The following link includes the most up-to-date list of designated members, their titles, and corresponding panels: Mexico ICSID Panels.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

As of January 2022, there are 33 registered cases against Mexico. Most of them have been conducted under the Additional Facility Rules, which applied until Mexico joined the ICSID Convention in 2018, or under the UNCITRAL Rules. Nine of the arbitrations have been initiated according to the ICSID Arbitration Rules. Seven of them are still pending.

Legacy Vulcan, LLC v. United Mexican States (ICSID Case No. ARB/19/1). The dispute arises from the alleged breach of two contracts that were meant to solve certain disagreements related to the rights of the investor on a port concession, an extraction project, and the payment of taxes.

Terence Highlands v. United Mexican States (ICSID Case No. ARB/19/26). This dispute relates to the seizure of two vessels belonging to Marfield Ltd. Inc. and Shanara Maritime Ltd International S.A., which were in possession of Oceanografía S.A. de C.V. – due to certain maritime transportation services contracts – in a proceeding against the latter. The investor claimed to be the owner of the vessels and alleged that he was denied their control and possession. He also alleged that the State did not maintain the two vessels properly during the seizure.

Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States (ICSID Case No. ARB/20/13). This case relates to certain measures taken by a local government that allegedly affected the transportation concession of the investor for the substitution, installation, and maintenance of digital taximeters to implement and operate a ride-hailing application in Mexico City.

First Majestic Silver Corp. v. United Mexican States (ICSID Case No. ARB/21/14). The investor, a mining corporation, alleges that certain measures of the State breach taxation-related commitments of the latter.

Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States (ICSID Case No. ARB/21/25). This dispute relates to the termination of several oil and gas construction contracts signed between the investor and a State-Owned Enterprise. The investor alleges that domestic companies in the same circumstances negotiated with the State and received compensation.

Consolidated Water Coöperatief, U.A. v. United Mexican States (ICSID Case No. ARB/22/6). The dispute concerns the termination of a public-private partnership agreement for a desalination plant and pipelines project in Rosarito. The investor alleges that it has incurred in several costs in connection to the project and that they have not been reimbursed by the State entities with whom the contract was signed.

Doups Holdings LLC v. United Mexican States (ICSID Case No. ARB/22/24). This dispute relates to the revocation of concessions for a parking meter system and a mobile application for these services in Mexico City.

Mexico is the third country in the Latin American and Caribbean region and the fifth worldwide with the most investor-State cases. In 53% of those cases, foreign investors have won.

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

Historically, sanitation services and telecommunications are the industries in which most claims against Mexico have been initiated. Since the ratification of Mexico of the ICSID Convention in 2018, oil, gas, mining, and transportation have also become recurrent. Moreover, over the last decade, there has been a considerable increase of ICSID claims in those sectors not only in Mexico, but in Latin American countries.

6. Has your country complied with ICSID awards rendered against it?

Thus far, no award has been rendered against Mexico in the cases initiated against it pursuant to the ICSID Arbitration Rules. However, it has voluntarily satisfied with all awards rendered against it under the Additional Facility Rules.

7. What is the number of ICSID awards that have been enforced in your country?

There is no publicly available information on the enforcement of any ICSID awards in Mexico.

Enforcement of ICSID awards in Mexico

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

In compliance with article 54(2) of the ICSID convention, Mexico has designated the federal courts which are part of the 'Poder Judicial de la Federación' (Federal Judicial Authority) as the competent ones to hear a petition to enforce an ICSID award.

Arbitration is a matter of federal jurisdiction in Mexico. Pursuant to the 'Código de Comercio' (Commerce Code) and the 'Código Federal de Procedimientos Civiles' (Federal Code of Civil Procedures), applicable to the recognition and enforcement of international arbitration awards, federal judges are competent to enforce foreign judgments.

Since distinct federal first instance courts can have jurisdiction on the same matter, to determine their competence, courts will consider:

i. Whether the parties have chosen a court.

ii. The domicile of the party against whom enforcement is sought.

iii. The location of the assets subject to the enforcement proceedings.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

i. Procedure for enforcement:

The procedure to enforce an ICSID award in Mexico is adversarial, i.e., the participation is of the party against whom the award is invoked is required. The procedure is a special one which is governed by articles 1461, 1471 and 1472 to 1476 of the 'Código de Comercio.'

Procedure:

- The procedure is triggered by a written application filed by the party that is seeking the recognition and enforcement.
- Once the application has been admitted, the court will serve the party against whom the award is invoked. The defendant has 15 days to serve its written evidence in response.
- Once the term to reply has expired, if neither party has submitted evidence nor does the judge deems them necessary, the court shall summon the parties for a hearing within 3 days.
- If the parties have submitted evidence, or if the judge has deemed it necessary to do so, an evidence period of 10 days will be granted.
- Once the evidence period has concluded, the hearing takes place. Then, the court renders its decision in writing which will be served to the parties.

ii. Requirements:

According to article 1461 of the 'Código de Comercio,' the party who is seeking to recognize and enforce an ICSID award must file a petition in writing. The party must submit with its petition the authenticated original award, or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. In case

that the award or the arbitration agreement is not written in Spanish, the applicant must submit a certified translation made by an expert translator registered in the Mexican judicial branch or made by a diplomatic or consular agent. This is because the judge who will evaluate the petition would be a native Spanish speaker.

10. What are the costs associated with the enforcement of an ICSID award?

In Mexico there are no government fees to enforce an ICSID award. This is because court proceedings are free pursuant to article 17(2) of the Mexican Constitution, which establishes that access to justice is universal and, therefore, the parties do not bear any court fees under Mexican law. However, parties may be incurred in costs from private services such as legal fees, translators' fees, and day-to-day administrative expenses, which will depend on a case-by-case basis.

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

Other practical considerations that may affect the enforcement of an ICSID award in Mexico:

- A party has ten years after the notification of an arbitration award to seek recognition and enforcement. (Source: Article 1046 of the Código de Comercio of 7 October 1889 (Commerce Code)).
- The burden of proof in an enforcement procedure is on the party against whom the award is being enforced. This is because that party must refuse the application and prove the existence of grounds to deny the recognition and enforcement.
- The competent court of an enforcement proceeding may not review the merits of the award as its competence is limited to analyze the grounds of the enforcement application.

- There are no limitations to the number of documents or the length of the submission that a party can file to the competent court.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

According to the general provision established in article 1462 of 'Código de Comercio', enforcement of an arbitration award, wherever the award was rendered, may only be denied when:

1) The party against whom the award is invoked proves that:
    a. A party to arbitration agreement was under any kind of incapacity.
    b. The arbitration agreement is invalid under the law to which was subjected to.
    c. The appointment of a member of the arbitration tribunal or the arbitral proceedings were not duly notified to the party.
    d. The party did not have the opportunity to defend its rights during the arbitration proceedings.
    e. The dispute in which the award was rendered was not considered in the arbitration agreement or contains decisions that exceed the scope of the arbitration agreement. However, if the decisions that exceeded the scope of the arbitration agreement can be separated from the ones that are within the scope, then the court could recognize and enforce those within the scope of the arbitration agreement.
    f. The composition of the arbitral tribunal or the arbitration proceedings were not in accordance with the arbitration agreement, or they did not comply with the law of the seat.
    g. The award is not yet binding, or it has been set aside or suspended by a judge of the country where the award was rendered.

2) A Mexican federal court finds that the subject of the dispute is not arbitrable under Mexican law, or the recognition and enforcement of the arbitration award is contrary to Mexican public policy.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

No. According to article 1476 of the 'Código de Comercio,' the final decision rendered by a court in which is refusing to enforce an ICSID award will not be subject to appeal.

However, in Mexico there is a mechanism to challenge certain actions known as 'Amparo.' It allows federal courts to review the recognition and enforcement procedure of an ICSID award and the merits on which the award was based. This is a constitutional mechanism that grants the competent federal courts the power to only analyze the violation of human and fundamental rights. It is regulated by articles 103 and 107 of the Mexican Constitution and the 'Ley de Amparo,' which is a specific law that governs Amparo proceedings.

The first instance for an 'Amparo' proceeding is conducted by a 'Juzgado de Distrito' (District Judge). The decision rendered by this judge can be challenged at a 'Tribunal Colegiado de Circuito' (Circuit Tribunal) or the Mexican Supreme Court of Justice when it is requested due to the interest and transcendence of the case.

As a result of the Amparo proceeding, a recognition or enforcement decision could be confirmed or revoked with final effects.

14. Is there any recourse available against a leave for enforcement?

No. Pursuant to article 1476 of the 'Código de Comercio,' the final decision rendered by a court in which is enforcing an ICSID award will not be appealable.

As it was mentioned before, the only challenging mechanism available is the constitutional proceeding known as 'Amparo', which only allows the parties to invoke violations of human and fundamental rights.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

There are no specific rules in Mexico regarding the execution of an ICSID award. Hence, the provisions of the 'Código de Comercio' and, supplementary, the 'Código Federal de Procedimientos Civiles' and the local civil procedure codes are applicable.

Once the enforcement is granted, the interested party can request its execution to the first instance judge that granted the leave. The judge will set certain period for the debtor to comply with the award unless this period has already been determined previously.

If upon requesting the execution there are no seized assets, the judge can order it and notify the party whose assets were seized. The seizure can be ordered even in those cases where the compliance period has not matured. The debtor can, at this point, defend itself by proving that the payment of the award has been done.

Once the parties have stated their claims and defenses, the judge will determine whether the seized assets will be auctioned. The parties shall present the corresponding appraisal for each one of the assets within ten days. They can also agree on an appraisal and sale procedure.

It is relevant to note that, given the nature of the enforcement proceedings, the interested party may request precautionary measures. This way, assets can be seized even before entering the execution phase to guarantee payment of the award.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

Mexico has no specific regulation on sovereign immunity. The Supreme Court of Mexico established by precedent in 2003 that foreign states have immunity from Mexican courts and that their assets on Mexican territory shall enjoy sovereign

immunity. To do so, the foreign state must act as a sovereign entity and not in its commercial capacity. This is subject to interpretation by national courts on a case-by-case basis. An investor may apply for interim measures against state-owned property in Mexico, depending on each case.

Further, as party to the United Nations Convention on Jurisdictional Immunities of States and Their Property, Mexico recognizes other member states' immunity from the jurisdiction of its courts. However, the enforcement of certain assets of foreign states is allowed under certain circumstances:

i. That express consent regarding pre- and post-enforcement measures is granted by the foreign state.

ii. That the property is in Mexico, and it is used or intended for use for other than non-commercial governmental purposes.

iii. That a foreign state has a written agreement with a Mexican person (physical or legal) whereby they consent to submit to arbitration differences deriving from a commercial transaction, unless expressly agreed that the foreign state can invoke jurisdictional immunity.

In these cases, the foreign state cannot invoke immunity from jurisdiction regarding the validity, interpretation, or application of an arbitration agreement, an arbitration procedure, the setting aside or the recognition and enforcement of an arbitral award.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

Contributors:

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Middle East

United arab emirates

Implementation of the ICSID Convention in the United Arab emirates

1. Is there a model BIT in place in your country?

No, the State has not adopted any Model BIT.

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates(signed, ratification, entry into force).

Yes, United Arab Emirates (UAE) is a party to the ICSID Convention ("Convention" or "ICSID Convention"). UAE signed and ratified the ICSID Convention on 23 December 1981. The Convention entered into force for UAE on 22 January 1982.

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

No, UAE has not made any notification or designation upon signing, ratifying or any time thereafter.

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSIDConvention initiated against your country?

There are five reported investment treaty arbitration conducted under the ICSID Convention initiated against UAE. Two cases are still pending while three cases have been concluded (out of which two were withdrawn and one was annulled).

Pending Cases:

- Amir Masood Taheri v. United Arab Emirates (ICSID Case No. ARB/21/19)
- BM Mühendislik ve İnşaat A.Ş. v. United Arab Emirates (ICSID Case No. ARB/17/20)

Concluded:

- Shokat Mohammed Dalal v. United Arab Emirates (ICSID Case No. ARB/19/10)
- Hussein Nuaman Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/7)
- Impregilo, S.p.A and Rizzani De Eccher S.p.A. v. United Arab Emirates (ICSID Case No. ARB/01/1)

5. Are there any particular industries or investment sectors that have led to ICSID claimsagainst your country?

The majority of the ICSID claims against UAE came out of wholesale and retail trade; repair of motor vehicles and motorcycles, real estate, construction and transportation.

6. Has your country complied with ICSID awards rendered against it?

There are no ICSID awards rendered against UAE for compliance.

7. What is the number of ICSID awards that have been enforced in your country?

No ICSID award has been yet enforced in UAE.

Enforcement of ICSID awards in the UAE

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

UAE has not adopted domestic law mechanisms for the enforcement of ICSID awards. Hence, the enforcement procedure of an ICSID award will be similar to the enforcement of foreign judgements and arbitral awards in UAE outlined in Cabinet Resolution No. 57 of 2018 ("Cabinet Resolution").

Under Article 69 of the Cabinet Resolution, the Execution Judge at the seat of each Court of First Instance shall be competent to decide on the request for enforcement. The execution competence shall be conferred upon the execution judge in the Court

that issued the writ of execution in the State.

Procedural Rules

9. What is the procedure for enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

Article 85 of the Cabinet Resolution contains the substantive law and procedure for the enforcement of the foreign judgement. Article 86 of the Cabinet Resolution states that the provisions of Article 85 (which deals with the enforcement of foreign judgements) of the Cabinet Resolution shall apply to foreign arbitration awards. The ICSID awards would be enforced pursuant to Articles 85 and 86 of the Cabinet Resolution.

Article 85(2) of the Cabinet Resolution provides that an application for execution shall be made on a petition and submitted by the person concerned to the execution judge. There are certain requirements under Article 85(2) which needs to be satisfied before the execution judge passes an order for execution of a foreign award. These conditions are:

- The courts of UAE are not exclusively competent in the dispute in which the judgment or order was rendered and the foreign courts that issued it are competent in accordance with the rules of international jurisdiction established by their law.
- The judgment or order is delivered by a court in accordance with the law of the country in which it was issued and duly ratified.
- The litigants in the case in which the foreign judgment was delivered were summoned and were duly represented.
- The judgment or order has the force of res judicata in accordance with the law of the court which issued it, provided that the judgment has acquired the force of res judicata or provided for in the same judgment.

- The judgment does not conflict with a judgment or order rendered by a court of UAE and does not contain anything contrary to public order or morals of UAE.

Article 86 of the Cabinet Resolution puts up an additional condition that the award must have been issued on a subject matter which is arbitrable in accordance with UAE Law and is enforceable in the jurisdiction in which it is issued.

10. What are the costs associated with the enforcement of an ICSID award?

Since no ICSID award has been enforced in UAE, it is yet to be seen if there is any cost associated with the enforcement of an ICSID award in UAE.

11. What other practical considerations may affect the enforcement of an ICSID award in yourcountry?

Since no ICSID award has been enforced in UAE, it is yet to be seen if any practical considerations may affect the enforcement of an ICSID award in UAE.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

Since no ICSID award has been enforced in UAE, it is yet to be seen if UAE allows the opposition to the enforcement of the ICSID award on public policy grounds. The Cabinet Resolution does not enlist public policy or any other ground to be used as a defence to prevent enforcement of an ICSID award.

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

The decision of the Execution Judge in Article 85 of the Cabinet Resolution to enforce or not enforce the award can be appealed through the Appeal Mechanism to the President of the Court detailed in Article 72 of Cabinet Resolution.

14. Is there any recourse available against a leave for enforcement?

See answer to question 13 above.

15. What are the rules in your country with regard to the execution (after the enforcement) ofan ICSID award?

The execution of an ICSID award is similar to the execution procedure of any other judgement under the provisions of the Cabinet Resolution of UAE. Article 97 of the Cabinet Resolution prescribes that a writ of execution needs to be filed with details of the matter required to be executed. Chapter 6 further lays out in detail the execution procedure which will take place in case of property, movable assets or funds are involved.

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

UAE Courts have not yet dealt with State immunity while executing an ICSID award.

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

There are no other unaddressed aspects.

Contributor:

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North America

New York

Implementation of the ICSID Convention in New York

1. Is there a model BIT in place in your country?

There is no model BIT specific to the State of New York. However, the United States of America does have a 2004 Model BIT (available here).

2. Is your country a party to the ICSID Convention? If so, please include the relevant dates (signed, ratification, entry into force).

The State of New York is not a party to the ICSID Convention, but the United States of America is. According to the database of ICSID Member States, the United States of America signed the ICSID Convention on 27 August 1965, and deposited its ratification document on 10 June 1966. The ICSID Convention entered into force in the United States of America on 14 October 1966. (Database of ICSID Member States)

3. Has your country made a notification or designation upon signing, ratifying or any time thereafter?

As the State of New York is not a party to the ICSID Convention, no such notification exists. The United States of America also has not made a notification, but has designated its Federal District Courts, including each Court created by the Act of congress in a territory which is invested with any jurisdiction of a district court of the United States of America, as the competent courts for the purpose of recognizing and enforcing awards rendered pursuant to the ICSID Convention. The United States of America has also signed an Executive Order designating certain public international organizations as entitled to enjoy certain privileges, exemptions, and immunities. (United States of America Country Detail, ICSID; Exec. Order 11966)

Statistics

4. What is the number of reported investment treaty arbitrations conducted under the ICSID Convention initiated against your country?

There are no investment treaty arbitrations conducted against the State of New York, but the official ICSID website states that there have been nine investment treaty arbitrations against the United States of America under the auspices of the ICSID Convention. (ICSID Case Database)

5. Are there any particular industries or investment sectors that have led to ICSID claims against your country?

No ICSID claim has been made against the State of New York, as ICSID arbitrations are initiated against the United States of America as a whole. The majority of ICSID claims against the United States of America emanate from disputes in the Construction sector. From the Construction Sector the following disputes have arisen against the United States of America:

i. Optima Ventures LLC and Optima 55 Public Square LLC v. United States of America, ICSID Case No. ARB/21/12;

ii. Optima Ventures LLC, Optima 7171 LLC and Optima 55 Public Square LLC v. United States of America, ICSID Case No. ARB/21/11;

iii. Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2.

6. Has your country complied with ICSID awards rendered against it?

As stated previously, ICSID arbitrations are initiated against the United States of America as a whole and not individually against the State of New York. Among the limited ICSID arbitrations initiated against the United States of America, not a single arbitral award has been rendered against it. Hence, the question of whether the United States of America has complied with the ICSID awards rendered against it does not arise. (State Compliance with Investment Awards)

7. What is the number of ICSID awards that have been enforced in your country?

The data for the number of ICSID awards that have been enforced in the State of New York is not available.

Enforcement of ICSID awards in New York

Competent Court or Authority

8. Which court or authority is competent to decide on a request for enforcement? Are there any criteria for the court or authority to be competent?

In the United States of America, the ICSID Convention for recognition and enforcement of ICSID Awards is implemented through 22 U.S.C. § 1650a. It reads as follows:

> *"22 U.S.C. § 1650a - - Arbitration awards under the Convention*
>
> *(a) Treaty rights; enforcement; full faith and credit; nonapplication of Federal Arbitration Act*
>
> *An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to the enforcement of awards rendered pursuant to the convention.*
>
> *(b)Jurisdiction; amount in controversy*
>
> *The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have exclusive jurisdiction*

over actions and proceedings under subsection (a) of this section, regardless of the amount in controversy."

In the State of New York, enforcement of ICSID Awards made under the ICSID Convention is governed by the provisions of 22 U.S.C. § 1650a. On a plain reading of the statute, it is apparent that the Federal Arbitration Act is not applicable to the enforcement of ICSID awards in the United States of America, including in the State of New York. (The Guide to Challenging and Enforcing Arbitration Awards - Second Edition)

In the State of New York, the United States District Courts for the Second Circuit have the exclusive jurisdiction to enforce ICSID Awards. However, there is no criteria specified by the statute for a federal court to be competent to decide on a request for enforcement. In an enforcement proceeding, the statute requires the federal courts to give full faith and credit to the ICSID Award as it would to a final judgment of a court of general jurisdiction of one of the states. The expression "full faith and credit" has to be interpreted in accordance with the Full Faith and Credit Clause in Article IV of the U.S. Constitution which mandates each State to recognize the "public acts, records, and judicial proceedings of every other state". Hence, ICSID Awards are placed on the same footing as a domestic judgment passed by a state court.

Procedural Rules

9. What is the procedure for the enforcement of ICSID awards in your country? What are the requirements applicable to a request for the enforcement of an ICSID award? (e.g., adversarial vs. *ex parte*?)

Statutory Framework

In the United States of America, two major statutes regulate the enforcement of ICSID awards. As already mentioned above, for one, 22 U.S.C. § 1650a—the enabling statute through which the ICSID Convention is implemented in the United States of America—stipulates that "[t]he pecuniary obligations imposed by [an ICSID] award

shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."

Another major statute is the Foreign Sovereign Immunities Act ("FSIA") of 1976, 28 U.S.C. §§ 1602–1611 (2012), which governs the enforcement of arbitral awards against foreign States, their agencies, or their instrumentalities. In particular, it provides for the immunity of sovereign States from jurisdiction of US courts and execution of judgements rendered by such courts. See Sophie Davin, Enforcement of ICSID Awards in the United States: Should the ICSID Convention be Read As Allowing A 'Second Bite At the Apple'?, 48 N.Y.U. J. INT'L L. & POL. 1255, 1256 (2016).

It is also worth noting that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2–14 (2012) does not apply to the enforcement of ICSID awards, as 22 U.S.C. § 1650a explicitly precludes the FAA's application to enforcement of ICSID awards.

Procedures and Requirements for Enforcing ICSID Awards

Despite the statutory frameworks, the United States of America's legislation provides minimal guidance on the procedures and requirements for enforcing ICSID awards in US federal courts. For example, 22 U.S.C. § 1650a does not affirmatively prescribe the specific procedures that federal courts should employ for the enforcement of ICSID awards. In addition, the relationship between 22 U.S.C. § 1650a and the FISA remains uncertain. See Second Circuit Upends Enforcement of ICSID Awards in New York, Eliminates Circuit Split, HERBERT SMITH FREEHILLS (July 17, 2017). As a result, a split existed among US federal courts as to the proper procedures for enforcing ICSID awards. Compare Mobil Cerro Negro v. Bolivarian Republic of Venezuela, 87 F. Supp. 3d 573, 584–86 (S.D.N.Y. 2015) (allowing *ex parte* proceedings), with Micula v. Government of Romania, 104 F. Supp. 3d 42, 47–52 (D.D.C. 2015) (making plenary actions governed by FSIA mandatory). Until June 2017, no US court of appeals had "given studied consideration" on this issue to resolve the split. Mobil Cerro Negro v. Bolivarian Republic of Venezuela, 863 F.3d 96, 105 (2d Cir. 2017).

Nevertheless, in a series of decisions district courts in the Southern District of New

York (the "Southern District") permitted award-creditors to obtain expedited enforcement of ICSID awards through *ex parte* proceedings based on summary procedures available under New York state law, i.e., New York Civil Practice Law & Rules, Article 54. See, e.g., Mobil Cerro Negro, 87 F. Supp. 3d at 584–86; Liberian E. Timber Corp. v. Government of Republic of Liberia, 650 F. Supp. 73, 75 (S.D.N.Y. 1986); Siag v. Arab Republic of Egypt, No. M-82 (PKC), 2009 WL 1834562, at *3 (S.D.N.Y. June 19, 2009); Grenada v. Grynberg, No. 11 Misc. 45 (S.D.N.Y. Apr. 29, 2011) (Batts, J.); Sempra Energy Int'l v. Argentine Republic, No. M-82 (S.D.N.Y. Nov. 14, 2007) (Buchwald, J.); Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic, No. M-82 (S.D.N.Y. Nov. 20, 2007) (Buchwald, J.). In these decisions, the district courts in the Southern District considered that *ex parte* proceedings, rather than intensive plenary actions, are more consistent with the intent of the ICSID Convention to promote streamlined enforcement of arbitral awards. See, e.g., Mobile Cerro Negro, 87 F. Supp. 3d at 584.

In June 2017, however, the United States Court of Appeals for the Second Circuit (the "Second Circuit") overruled the Southern District's precedent governing enforcement of ICSID awards that had permitted parties to enforce ICSID awards *ex parte*. Mobil Cerro Negro, 863 F.3d at 99–100. The Second Circuit held that *ex parte* procedures for enforcing ICSID awards violates foreign States' right to procedural protections under the FSIA. Id. The Court further clarified that in the United States the FSIA "provides the sole basis for subject-matter jurisdiction over actions to enforce ICSID awards against a foreign sovereign," and thus it is the only means by which to enforce ICSID awards against a foreign sovereign. Id.

Accordingly, parties seeking to enforce ICSID awards in New York must comply with the FSIA's procedural requirements. Under the FSIA, enforcement proceedings are adversarial, rather than *ex parte*. See Elliot Friedman, David Livshiz & Paige von Mehren, Applicable Requirements as to the Form of Arbitral Awards, GLOBAL ARBITRATION REV. (June 8, 2021). Thus, ICSID award-creditors pursuing judgments to enforce their awards must commence actions in federal courts against the foreign

State, serve the sovereign with process in compliance with the FSIA, and satisfy the venue requirements before seeking entry of a federal judgment. Mobil Cerro Negro, 863 F.3d at 99–100.

10. What are the costs associated with the enforcement of an ICSID award?

At the time of this writing, in the Southern District of New York a party commencing a federal action to enforce an ICSID award is required to pay US$402, including a US$350 filing fee plus a US$52 administrative fee. See Fee Schedule and Related Information (effective Dec. 1, 2020), US District Court for the Southern District of New York.

In addition to the filing fee, there are other factors that may incur additional costs for actions enforcing ICSID awards, such as costs associated with litigating debtor States' actions seeking for sovereign immunity afforded by the FISA and/or for annulment. See Thomas K. Sprange & Thomas C Childs, The Investment Treaty Arbitration Review: Enforcement of Awards, THE LAW REVIEWS (June 14, 2022).

11. What other practical considerations may affect the enforcement of an ICSID award in your country?

As a practical matter, procedural hurdles in New York courts may result in potentially lengthy and complex proceedings for award-creditors to enforce ICSID awards than the ICSID Convention originally contemplated. See Second Circuit Upends Enforcement of ICSID Awards in New York, Eliminates Circuit Split, HERBERT SMITH FREEHILLS (July 17, 2017). In particular, under the FSIA, service of process on a foreign sovereign can take over six months or longer, as enforcing parties are required to serve process appropriately via an international treaty, mail, or diplomatic channels absent parties' agreement on a "special arrangement for service" under 28 U.S.C. 1608(a)(1). See Steven K. Davidsonm et al., First Tuesday Update, STEPTOE (Apr. 3, 2018). Aside from that, once service has been effected, the FSIA affords foreign States sixty days to respond. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (2012). The potential delay in the proceedings may further complicate the

enforcement process. For example, foreign States could take the opportunity to dissipate their assets, which may render enforcement more difficult. See Catherine Amirfar et al., Second Circuit Rejects Ex Parte Enforcement of ICSID Awards Against Foreign States, DEBEVOISE & PLIMPTON (July 21, 2017).

Therefore, while New York provides robust remedies to creditors in accessing non-immune, sovereign assets, award-creditors should reconsider whether New York remains a convenient forum to seek enforcement of ICSID awards. See Steven K. Davidsonm et al., First Tuesday Update, STEPTOE (Apr. 3, 2018). Instead, award-creditors may benefit more by bringing enforcement actions in more favorable fora, such as Washington, District of Columbia —a default venue against foreign States under the FISA. Although courts in Washington, DC conduct plenary reviews without allowing expedited *ex parte* procedures, award-creditors may still benefit as they are unlikely to be faced with successful challenges to venue. Id. Alternatively, parties seeking ICSID award enforcement may consider even more attractive fora outside of the United States of America, such as the United Kingdom and France, which allow *ex parte* procedures for immediate and prompt enforcement of ICSID awards. Id.

12. In what way can a party against whom enforcement of an ICSID award is sought defend itself with a view to preventing enforcement?

In light of the procedural requirements for the enforcement of ICSID awards in the State of New York, foreign sovereigns can assert non-merits, procedural defenses to award-creditors' enforcement actions. For example, award-debtors can "question the authenticity of the award presented for enforcement [and] the finality of the award," or raise the "possibility that an offset might apply to the award that would make execution in the full amount improper." Mobil Cerro Negro, 863 F.3d at 121. Other potential defenses include lack of standing to enforce the award, res judicata, expiration of the statute of limitations, and among others. See Second Circuit Upends Enforcement of ICSID Awards in New York, Eliminates Circuit Split, HERBERT SMITH FREEHILLS (July 17, 2017).

13. Is there any recourse available against a decision refusing to enforce an ICSID award?

ICSID Rules on Enforcement

ICSID does not play a formal role in the recognition and enforcement of an award under the Convention. However, if a party informs ICSID of the other party's non-compliance with an award, it may be said that it is their practice to contact the non-complying party to request information on the steps that party has taken, or will take, to comply with the award. (https://icsid.worldbank.org/services/arbitration/convention/process/recognition-enforcement)

ICSID awards are "automatically" enforceable in any state that ratified the treaty as per Article 54(1). Sovereign immunity (Article 55, https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf) is however one of the only avenues to refuse to enforce an ICSID award and is often invoked as ICSID awards generally concern the payment of state owned assets.

Recourse to refusal of enforcement

If assets in question do not fall within the exemptions in the above list, a court is likely to refuse enforcement. However, as enforcement is conducted by domestic courts, a refusal of enforcement can be subject to appeal.

Alternatively, filing in another jurisdiction (that is also an ICSID member) where 'commercial assets' (as per the national definition) of the target state's might be accessible is also possible. Forum shopping, although tedious and expensive, is not barred by a restriction against the seeking of enforcement in multiple jurisdictions.

14. Is there any recourse available against a leave for enforcement?

ICSID has minimal governance in the post-award stage. An investor in possession of a certified copy of an ICSID award is entitled to execute that award in any contracting state. (Article 54, https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf

Once a court grants leave to recognize and enforce the award, the judicial system allows for the possibility of an appeal against the enforcement order to a higher court. Judicial precedent has tended to cause the State of New York to be viewed as an 'arbitration friendly' jurisdiction. Accordingly, the threshold for appeal would likely be high.

15. What are the rules in your country with regard to the execution (after the enforcement) of an ICSID award?

After a court orders confirmation of an arbitration award as a judgment, the judgment is enforceable.

Article 54 of the ICSID Convention first requires contracting States to recognize ICSID awards as binding. This requires a domestic court to confirm the legally binding nature of the award, that it has res judicata effects, and to take the steps necessary under domestic law to give legal effect to the award within the State's domestic legal system. (https://jusmundi.com/en/document/publication/en-enforcement-and-recognition-of-icsid-awards)

Following the arbitrator's issuance of an award, a party can file a motion or petition to confirm the award in federal or state court. (The Federal Arbitration Act's 3-year time limit is not applicable to ICSID awards)

A party needs to make a motion to the relevant court for confirmation, supported by a "duly certified copy of the award" (or the original), a "duly certified copy of the arbitration agreement" (or the original) and a certified translation of these documents if they are in a language other than English. (https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/new-york)

Once a judgment confirming the award has been issued, the winning party can enforce that judgment using the various enforcement procedures including freezing assets and attachment of assets of the judgment debtor, if a monetary award is involved.

Confirmation of an award is generally a summary process unless the opposing party

resists confirmation of an award and proves that one of the seven defenses provided by the FAA applies.

Because of the public policy favoring arbitration, particularly international arbitration, US courts "must confirm an award unless it is vacated, modified, or corrected".

Further, under the United States Foreign Sovereign Immunities Act, awards are subject to personal jurisdiction, service of process and venue requirements as well as defenses to enforcement available under the New York Convention, in contrast with the ICSID Convention, which provides for automatic recognition of awards.

New York courts have generally decided that parties seeking to enforce an ICSID award may take advantage of expedited, *ex parte* procedures under New York state law. (Santiago Bejarano and Julie Thompson, ICSID AWARD ENFORCEMENT AND RECOGNITION: HAVE NEW YORK COURTS WON AN ADVANTAGE OVER THE DC COURTS? (page 23))

State Immunity

16. How do courts deal with the law on state immunity when the execution of an ICSID award is sought?

In the context of Article 55 of the ICSID Convention, the 1976 U.S. Foreign Sovereign Immunities Act contains a prescribed list of exemptions which must be overcome to enforce an award.

Sovereign Immunity in the State of New York

The US Foreign Sovereign Immunity Act provides a set of exceptions to sovereign immunity.

i. Commercial activity performed by the foreign state in the United States of America;

ii. Acts performed by the foreign state in the United States of America in connection with commercial activity performed by the foreign state elsewhere

or;

iii. Acts performed by the foreign state outside of the United States of America in connection with commercial activity performed outside of the United States of America that has a direct effect in the United States of America.

Regarding the applicability of the FSIA, in the case of Mobil Cerro Negro v. Venezuela (2015), Mobil Cerro Negro sought enforcement of its award through the procedure endorsed in New York state law – permitting entry of judgment through *ex parte* action, without the FSIA. The New York district court approved such procedure, stating that it is consistent with the streamlined intent of the ICSID Convention and the enforcement objectives of the New York Convention. Where the State of New York uses a streamlined procedure, the court said, "the nature of that proceeding would not expand or contract Venezuela's substantive rights". Therefore, a more intensive plenary review, the court stated, is not necessary and would run counter to the objectives of international arbitration. (Santiago Bejarano and Julie Thompson, ICSID AWARD ENFORCEMENT AND RECOGNITION: HAVE NEW YORK COURTS WON AN ADVANTAGE OVER THE DC COURTS? (page 23))

Venezuela appealed to the Second Circuit. Over the course of the appeal, the U.S. Department of Justice filed an amicus curiae brief with the Second Circuit (signed by then-U.S. Attorney for the Southern District of New York), arguing that *ex parte* proceedings to recognize an arbitral award against a foreign state in the United States of America are not permitted under the FSIA – a statute containing "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state."

The Second Circuit reversed the district court's decision and set forth the procedure that ICSID award creditors must follow to enforce their awards against foreign sovereigns. The award creditor must "fil[e] a federal action on the award against the sovereign, serv[e] the sovereign with process in compliance with the FSIA, and mee[t] the FSIA's venue requirements before seeking entry of a federal judgment, whether through a motion for judgment on the pleadings or for summary judgment."

It noted that "applying the FSIA will facilitate national uniformity in procedure," and emphasized that "consistency as to enforcement seems to us importantly aligned with the values of predictability and federal control that foreign affairs demands and that the FSIA was designed to promote."

Thus, because Mobil had failed to comply with the FSIA's notice requirements, the SDNY lacked jurisdiction over the petition to recognize and enforcement the ICSID award.

This approach guarantees foreign sovereigns the right to assert procedural defenses to enforcement, including lack of standing to enforce the award, res judicata, and time-bar.

In parallel, however, this will also likely result in lengthier and more complex proceedings to recognize and enforce ICSID awards. Courts of the SDNY will likely now require the same significant amount of time to convert an ICSID award into a judgment: under the FSIA, service of process could take over six months, following which the state is entitled to 60 days to respond to the summons and complaint, culminating in a likely phase of motion practice on personal jurisdiction and other similar issues. (*Second Circuit Upends Enforcement of ICSID Awards in New York, Eliminates Circuit Split,* Larry Shore, Christian Leathley, May Khoury, Elena Ponte, Conor Doyle)

Miscellaneous

17. Are there any (other) aspects unaddressed that are relevant in your country?

No.

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