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PECULIARITIES OF THE RECOGNITION, ENFORCEMENT AND ANNULMENT OF ICSID ARBITRAL AWARDS

Abstract: This paper will explore the peculiarities existing in terms of the recognition, enforcement, and annulment of arbitral awards rendered by the ICSID (International Center for Settlement of Disputes) operating based on the Convention on the Settlement of Investment Disputes between States and nationals of other States (Washington, 1966). This paper will also touch upon the specific requirements set for ICSID arbitral awards, prerequisites and relevant grounds for challenging the arbitral award, as well as the case law demonstrating the practice of ICSID in terms of annulment proceedings. The paper will also investigate the issue of sovereign immunity claimed by States in terms of resisting enforcement of arbitral awards rendered by ICSID.

Keywords: ICSID, arbitral award, enforcement, recognition, annulment, sovereign immunity, BIT, ad hoc committee, New York Convention, non-ICSID awards.

Аннотация: В данной статье изучены особенности, существующие с точки зрения признания, исполнения и отмены арбитражных решений, вынесенных ICSID (Международный центр по урегулированию инвестиционных споров), действующий на основе Конвенции об урегулировании инвестиционных споров между государствами и гражданами других государств (Вашингтон, 1966 г.). В статье также затронуты конкретные требования, установленные для арбитражных решений МЦУИС, предварительные условия и соответствующие основания для оспаривания арбитражного решения, а также прецедентное право, демонстрирующее практику МЦУИС в отношении процедур аннулирования. Дополнительно рассмотрены вопросы суверенного иммунитета, на который претендуют государства в связи с сопротивлением исполнению арбитражных решений, вынесенных МЦУИС.

Ключевые слова: МЦУИС, арбитражное решение, приведение в исполнение, признание, аннулирование, суверенный иммунитет, BIT, специальный комитет, Нью-Йоркская конвенция, решения, не относящиеся к МЦУИС.

I. INTRODUCTION

Currently, as of October 2020, 163 Member States have signed this Convention. Although there is a long-established rule stating about arbitral awards to be final and binding on the parties and, such awards are subject to certain challenges based on various grounds. Among such arbitral awards, we can particularly highlight the arbitral awards to be rendered by the ICSID for number of its peculiarities, which makes it different from the awards rendered by the non-ICSID arbitral institutions.

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention) establishes a self-contained and autonomous arbitration system. This system includes an internal procedure for the review of ICSID awards and limits the role of domestic courts to the recognition and enforcement of these awards. In recognizing and enforcing ICSID awards, the domestic courts of each contracting state to the ICSID Convention are required to enforce the pecuniary obligations imposed by an ICSID award as if it were a final court judgment of the contracting state.

ICSID arbitration is more attractive than ever (49 ICSID arbitrations were initiated in 2018) and the ICSID Convention continues to attract new contracting parties, such as Mexico in 2018 and Iraq in 2015. Yet, the ICSID annulment and enforcement regime faces a number of challenges, some new and others that have been grappled with since inception, spanning the degree of scrutiny of ICSID awards in the annulment process and the recognition and enforcement of investment treaty awards within the European Union.

II. RECOGNITION AND ENFORCEMENT

As most investment treaties are silent on recognition and enforcement, the ICSID Convention applies to recognition and enforcement of ICSID arbitral awards, in addition to enforcement provisions of the law of the place of enforcement. The Member States' obligation to recognize an ICSID award is unconditional under the ICSID Convention, although enforcement is subject to the law of the place of enforcement. In turn, in most jurisdictions non-ICSID awards' recognition and enforcement are subject to the New York Convention.

When enforcing an award against States or State entities, immunity from jurisdiction or immunity from enforcement or execution might be an issue. The main difference between ICSID awards and non-ICSID awards with respect to immunity is that the question of immunity from jurisdiction does not arise in the context of the ICSID Convention.

Article 53 (1) of the ICSID Convention provides that the award shall be binding, not subject to appeal or other remedy different from those set forth in the Convention. Because of its binding effect, an award has to be well drafted, disposing of the relevant matters in a clear way allowing the reader to follow its reasoning and understand the relief granted. ICSID awards are subject to certain mandatory requirements under Article 48 of the ICSID Convention that cannot be subject to modification by the parties. Awards have to be rendered by majority but may contain separate or dissenting opinions as attachments.

Awards also have to be in writing and signed by the tribunal members, who voted on it. Awards also have to be exhaustive, dealing with every legal question or claim submitted by the parties. The exhaustiveness requirement does not mean that the award has to discuss every argument of the parties' pleadings. For example, the tribunal does not have to discuss alternative arguments when acceptance of a party's argument leads to this party's desired relief.

Moreover, awards also have to state reasons, a requirement that is consistent with contemporary international dispute resolution. An award entirely without reasons has never arisen in ICSID arbitration [1, p.817]. The *Klöckner v. Cameroon* [2] ad hoc annulment committee explained that this requirement means stating reasons with substance permitting to follow the tribunal's reasoning.

Awards are deemed to be rendered "on the date on which the certified copies were dispatched" to the parties [3, art.49(1)]. Within forty-five days of the award's dispatch to the parties, a party may request that the same tribunal supplement omissions in the award and rectify "clerical, arithmetical or similar error" under Article 49(2) of the ICSID Convention, subject to notifying this to the other party. The tribunal cannot supplement or rectify the award on its own without a party's request.

Article 49(2), which applies to awards and to ad hoc annulment committee decisions, provides as follows:

The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award.

The expression "may" for supplementation requests and the expression "shall" for rectification requests in Article 49(2) above suggests that the tribunal has an obligation to rectify clerical, arithmetical or similar errors but no obligation to supplement the award. Supplementing the award is a limited remedy intended for unintentional omissions rather than "essential" omissions justifying award annulment under Article 52 [1, p. 860-864].

If the parties have a dispute about the meaning or the scope of an existing award, either party may at any time request the award's interpretation by application to the ICSID Secretary General under Article 50 of the ICSID Convention.

Finally, a newly discovered fact decisively affecting the award can serve as a ground for an award revision application to the ICSID Secretary General under Article 51 of the ICSID Convention. Article 51(1) requires that this newly discovered fact be *"unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence"*. The revision application has to be made within ninety days after discovering the new fact, subject to a three-year limitation counting from the award's issuance. If the same tribunal is no longer available, a new ICSID tribunal will be constituted to rule on this application.

Article 54(1) of the ICSID Convention sets forth the Member States' unconditional obligation to "recognize" the award as a "final judgment" of their courts, as follows:

Each 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.

The recognition obligation under Article 54(1) extends to the whole award leading to res judicata effect of the entire award in the State where recognition is sought. The enforcement obligation under the same provision extends only to pecuniary obligations. It does not extend to other obligations under the award such as restitution and specific performance[1].

Although the recognition obligation is unconditional, the enforcement obligation under Article 54 is subject to the law of the forum State under Article 54(3). The UK High Court decision in *Micula et al. v. Romania and European Commission* illustrates the distinction between the recognition and enforcement obligations under Article 54 of the ICSID Convention.

Relying on tax incentives, the claimants in *Micula et al. v. Romania [4]* heavily invested in a food production operation in the Şeti-Nucet-Drăgăneşti region, Romania, in the 2000s. In 2004, Romania passed legislation repealing most tax incentives because of EU State aid regulation, leading to an ICSID arbitration instituted in 2005 under the Sweden- Romania BIT [5].

In the same year, the claimants registered the ICSID award with the High Court, the UK's "designated authority" under Article 54(2). Romania, supported by the European Commission, applied for refusal of registration or of enforcement of the ICSID award. Among other things, Romania argued that the UK proceedings be stayed because whether State courts could give res judicata effect to an award circumventing EU State aid law had been raised before the CJEU in the annulment proceedings. The CJEU annulment proceedings sought to annul a European Commission's decision [8] finding that payment of compensation awarded to the claimants in the arbitration was State aid breaching EU law.

According to the High Court, the European Commission's decision only prohibits the award's payment by Romania; hence, simple award registration or recognition does not create a risk of conflict between decisions of domestic and EU institutions. Yet, the High Court favored staying enforcement to prevent conflicting decisions inconsistent with Article 351 of the Treaty on the Functioning of the EU (TFEU). Therefore, the court dismissed Romania's application for setting aside the registration order and stayed the award's enforcement pending the resolution of the claimants' CJEU proceedings seeking annulment of the European Commission's decision.

III. ANNULMENT PROCEEDINGS

Appeals are generally not accepted in international arbitration, including investment arbitration. As discussed above, in ICSID and non-ICSID arbitration parties can apply for correction of minor deficiencies and award interpretation. But these applications are not sufficient to correct egregious errors threatening arbitration's legitimacy [6], errors which due to their gravity are subject to annulment proceedings.

Annulment proceedings are part of the ICSID's self-contained nature pursuant to the exclusive-remedy rule of Article 26 of the ICSID Convention. Pursuant to Article 52 of the ICSID Convention, the Centre constitutes an ad hoc committee on a case-by-case basis to rule on annulment applications.

Annulment differs from appeal because annulment concerns the legitimacy of decision-making not its merits [1, p.901], unless the annulment is based on the incompatibility of the award with international public policy. Moreover, annulment leads to "invalidation of the original decision" not to its modification.

The 2017 ICSID Annual Report [7] states that of 555 registered arbitrations leading to 261 awards, only five awards were annulled in full and another twelve were partially annulled. This shows an annulment rate of approximately 6.5% for awards and of approximately 3% for registered arbitrations. Article 52 (1) of the ICSID Convention sets forth the limited annulment powers of ad hoc committees:

Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- *that the Tribunal was not properly constituted;*
- *that the Tribunal has manifestly exceeded its powers;*
- *that there was corruption on the part of a member of the Tribunal;*
- *that there has been a serious departure from a fundamental rule of procedure; or*

[1] Professor Schreuer explains that the restriction to pecuniary relief sought to ensure that every legal system could enforce it (for instance, in some States "courts may not have the power to order specific performance"). He also states that a party could rely on the New York Convention to enforce non-pecuniary obligations. See Christoph H. Schreuer et al., The ICSID Convention: A Commentary, 1137–1139 (2nd ed., Cambridge University Press 2014).

- *that the award has failed to state the reasons on which it is based.*

The annulment ground under Article 52(1) (a) on improper constitution of the tribunal has been interpreted to include the party's confidence in the independence and impartiality of arbitrators under Article 14 (1) of the ICSID Convention. The ad hoc committee in *Suez et al. v. Argentina* held that:

"*The Committee agrees with Respondent that the parties' confidence in the independence and impartiality of the arbitrators deciding their case is essential for ensuring the integrity of the proceedings and the dispute resolution mechanism as such; thus, in principle, a lack of the qualities in Article 14(1) may serve as ground for annulment under Article 52(1 (a)".*

This conclusion is in line with the finding made by the ad hoc committee in *EDF v. Argentina* and also with the apparent intention of the drafters of the ICSID Convention.

Article 52(1) (b) on manifest excess of powers is a recurrent ground than Article 52(1) (a) above. Parties have relied on Article 52 (1) (b) to argue that the tribunal (a) lacked or exceeded jurisdiction; (b) failed to exercise jurisdiction; and/or (c) failed to apply the proper law [1, p.908].

For example, in *Occidental v. Ecuador* the ad hoc committee found that the tribunal exceeded jurisdiction compensating an investor for an expropriated investment that was 40% beneficially owned and controlled by a Chinese non-protected investor under the US-Ecuador BIT [9].

Moreover, in *Venezuela Holdings et al. v. Venezuela* the ad hoc committee partially annulled the award for manifest excess of powers for failure to apply the proper law. In the ad hoc committee's view, the tribunal made a mistake when holding that customary international law governed compensation for investment expropriation in the Cerro Negro Project [10]. The ad hoc committee concluded that the tribunal should have applied the relevant BIT compensation standard on expropriation, not customary international law.

Parties have seldom relied on corruption of a tribunal member under Article 52 (1) (c) to challenge ICSID awards. For example, in *Aguas del Aconquija and Vivendi Argentina* withdrew the Article 52 (1) (c) challenge before the ad hoc committee could rule on it [11].

On Article 52 (1) (d), the ad hoc committee in *TECO v. Guatemala* noted that *"a departure from a rule of procedure may lead to the annulment of an award only if the departure is serious and the rule of procedure that was not complied with is fundamental" [12]*. Applying this standard, the committee found that the tribunal erred when denying TECO's claim for interest on historical damages on unjust enrichment grounds. In the committee's view, the tribunal surprised the parties when relying on unjust enrichment, which was never alluded by the parties or the tribunal. Consequently, the tribunal breached the parties' "right to be heard" on unjust enrichment.

Finally, when seeking annulment under Article 52(1)(e), parties have made arguments on (a) the absence of reasons; (b) insufficient and inadequate reasons; (c) contradictory reasons; or (d) the tribunal's failure to deal with questions [1, p.908]. Noting that ad hoc committees do not have authority to review the merits [13], the *Tidewater et al. v. Venezuela* committee held that stating reasons is a crucial duty of tribunals:

"The statement of reasons is one of the central duties of arbitral tribunals. An award is not a discretionary fiat but the result of the process of weighing evidence and applying and interpreting the law and subsuming the facts thus established under the law as interpreted by the Tribunal. The legitimacy of the process depends on its intelligibility and transparency. The statement of reasons allows the Parties to understand the process through which the tribunal makes its findings…"

Applying this standard, the *Tidewater* committee annulled part of an award quantifying reparation for expropriation on Article 52(1) (e) grounds. According to the ad hoc committee, the tribunal's contradictory reasoning when calculating reparation cancelled out the tribunal's previous reasoning about the same reparation. Also, the ad hoc committee in *TECO v. Guatemala* annulled part of an award for the tribunal's failure to deal with evidence on the loss of value claim pursuant to Article 52 (1) (e).

It is noteworthy mentioning that when an annulment application is made before the Secretary General under Article 52 (1), the Chairman of the Administrative Council will "appoint from the Panel of Arbitrators an ad hoc Committee of three persons" pursuant to Article 52 (3). None of the ad hoc committee appointed members can be a national of the State party to the dispute or by the State of the investor's nationality or be designated to the Panel of Arbitrators by these States. The ad hoc members cannot have acted as an arbitrator or a conciliator in the same dispute.

The annulment application must be made within 120 days of the award's dispatch to the parties. This is so, except when the annulment application alleges corruption of an arbitrator; then, the 120-day time limit counts from discovery of corruption under Article 52(2).

IV. SOVEREIGN IMMUNITY

An important question about enforcement against States is whether they are subject to immunity from jurisdiction or immunity from enforcement or execution. The main difference between ICSID awards and non-ICSID awards with respect to immunity is that the question of immunity from jurisdiction does not arise in the context of the ICSID Convention.

Immunity from jurisdiction is a non-issue in ICSID arbitration because Member States have given their consent to ICSID jurisdiction under Article 25(1), and have assumed the unconditional obligation to recognize ICSID awards under Article 54(1). Nevertheless, immunity from execution is subject to the law of the forum State under Article 55, which provides that: "*Nothing 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".*

Article 55 provides a clarification to Article 54(3) on execution being subject to the law of the State where execution is sought. Article 55 only applies to immunity from execution. It does not apply to immunity from jurisdiction, because the obligation to recognize the award as binding is unconditional. State immunity law does not therefore affect the res judicata effect of an ICSID award, once it is recognized [1, p.1153]. Irrespective of the forum State's law on immunity from execution, ICSID Member States have the obligation to comply with the award under Article 53 (1) of the ICSID Convention. Alternatively, a party seeking payment can seek diplomatic protection under Article 27 (1), and a Member State can resort to the ICJ under Article 64 of the ICSID Convention if there is a dispute with another Member State about award execution.

V. CONCLUSION

Despite the fact that awards are final and binding on the parties, the issuance of an investment award is only

the first step to obtaining satisfaction on your claim. After its issuance, the award is subject to recognition and enforcement.

Most investment treaties are silent on recognition and enforcement, the ICSID Convention governs recognition and enforcement of ICSID arbitral awards, in addition to the laws on enforcement of the forum State. Under the ICSID Convention the recognition obligation is unconditional, although ICSID award enforcement is conditional on the law of the place of enforcement. In contrast, non-ICSID awards' recognition and enforcement are subject to the New York Convention in most jurisdictions.

The ICSID Convention provides for a self-contained annulment mechanism. Non-ICSID awards are subject to annulment proceedings before arbitral seat's State courts.

When enforcing an award against States or State entities immunity from jurisdiction and/or immunity from execution might be an issue (though in relation to ICSID awards immunity from jurisdiction is a non-issue). The success rate for a State's alleging State immunity from execution of investment awards is high. Nevertheless, immunity from execution can be waived contractually in certain situations.

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