

Enforcement of ICSID Awards

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Generally, arbitral awards can be the subject of annulment proceedings upon the request of the party before the courts of the country in which the award was rendered (i.e., at the seat of the arbitration). The enforcement of arbitral awards may be challenged before the courts of the countries in which enforcement is sought pursuant to local laws on the enforcement of foreign arbitral awards or international legal agreements, particularly the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards

However, this is not the scenario of ICSID awards. An ICSID award may not be challenged before the courts of the country in which the award was rendered or before the courts of any State party to the ICSID Convention, since Contracting States to the ICSID Convention have agreed to recognize awards as binding as per Article 54 of the Convention.

The only procedure to oppose an ICSID award is filing an annulment action before an ad hoc ICSID Committee that is constituted at the request of challenging party in accordance with Article 52 of the ICSID Convention.

According to Article 52(2) of the ICSID Convention, the application for such an annulment shall be made within 120 days after date on which the award was rendered.

If the losing party decides to request annulment, then ICSID will appoint (from the ICSID Panel of Arbitrators) the members of the ad hoc Committee. These panel members should be neither national of the State party to the dispute nor of the Claimant's nationality. This rule is set out in Article 52(3) of the ICSID Convention.

Such an annulment procedure takes approximately 12 to 18 months. According to Rule 54(2) of ICSID's Arbitration Rules, if the applicant requests a stay of the enforcement of the award with its application for annulment, ICSID's Secretary General automatically suspends the enforcement of the award. Yet, as soon as the Committee is constituted, if neither party requests, then the Committee will have to rule within 30 days on the stay.

According to Rule 54(1), each Committee has the discretion to decide on the stay and its effect is that the award is not subject to enforcement proceedings

until the outcome of the annulment application.

This being said, ICSID ad hoc Committees have constantly affirmed that a stay may be granted provided the state gives reasonable assurances that the award, if not annulled, will be complied with. If the stay is thus granted, it is possible to ask for a bank guarantee or a bond to be posted in the amount of the damages granted in the award. Usually, this bank guarantee or a bond is put in an escrow account under ICSID's supervision until the final decision is rendered by the ad hoc committee. It is eventually released automatically when the annulment application fails as stated in Rules 54(3).

Finally, concerning the cost of such a procedure, it is a general practice of ad hoc committees to decide that each party shall bear its own cost of representation and that each party should pay half of the Committee's and administrative costs.

It is very difficult to predict the reaction of losing States in ICSID proceedings. Should suspension of the award be refused or the annulment action fail, the claimant, unless the losing state complies voluntarily with the Award, must apply to the national courts of the Contracting States to enforce the award, i.e., to obtain the *exequatur* or an enforcement order.

Two factors lead us to believe that the losing states may consider voluntarily honoring the Award. First, non-compliance with the ICSID award after a chal-

lenge will put it in an embarrassing position vis-à-vis the World Bank and the international community. Second, ICSID Awards benefit, as set forth below, from a favorable enforcement regime which will inevitably lead to the enforcement, and even more so given the extent of resources of the losing state.

In principle, the state party to the ICSID Convention would not be able to block the enforcement of the award before its own courts if it wishes to comply with the ICSID Convention. Any procedure at the enforcement stage beyond the verification of the authenticity of the ICSID award would, in principle, be contrary to the ICSID Convention and thus in violation of its international obligations.

In this regard, the Contracting States may rely on public policy considerations to block the enforcement of award within its territory. This being said, the records of western countries shows a favorable approach towards arbitration and enforcement. Even in France, where the public policy is strictly applies, the French Supreme Court set the record straight by ruling that the enforcement of an ICSID award in France could not lead to the examination by the enforcement court of the conformity of the ICSID award with French law as to the enforcement awards due to the Article 54(1) of the ICSID Convention.

On the other hand, the Contracting States are aware of the fact that enforcement of the ICSID Award would in any event remain possible worldwide pursuant to the ICSID Convention in the 142 other States that have ratified the ICSID Convention- even the local courts of the losing state denies the enforcement because of the sovereign immune.

At the end of the day, the claimant will need to execute the award against the losing Country's assets should it refuse voluntarily comply with the award. It is very unlikely that any ICSID award could be enforced in the losing state against its treasury or any public assets. But what about the state's ability to invoke its immunity from execution abroad? It depends on the provisions of the law and jurisprudence of the places where enforcement is sought.

Recent trends in Western legal systems give increasing support to the restrictive doctrine of immunity from execution. The test is whether the assets are used for sovereign or commercial purposes, as only the commercial assets of the foreign State can be subject to execution. In this regard, properties such as the embassies, diplomatic bank accounts or military equipment which are directly respect to the sovereign activity cannot be the subject of execution. This immunity is also guaranteed by the 1961 and 1963 Vienna Convention.

At this point the question would then arise whether the assets in question are held by the State or by an independent legal entity. It is generally accepted assets owned by entities owned by the State but have a separate legal existence and are not state property (e.g. a national airline owned by the State). The question of what constitutes an extension of the State varies from jurisdiction to jurisdiction. In summary, enforcement of an ICSID award needs various aspects of research regarding the assets of losing state and its doctrine of immunity from execution.