Article

Enforcement of Investment Treaty Arbitration Awards in the BVI: Applicable Law and Rules

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The International Centre for Settlement of Investment Disputes (ICSID) is an international institution, created under the auspices of the World Bank, which is arguably the world's leading international institution for the resolution of international investment disputes. It was established in 1966 by the Convention on the Settlement of Investment Disputes between States and National of Other States 1965, known as the Washington Convention, which is a treaty ratified by 155 contracting states.

In recent years, a number of substantial awards have been issued against several of its member states by ICSID tribunals. A noteworthy one, at least in the context of the BVI, is the US$6.2 billion award that was made in favour of Tethyan Copper Company PTY Limited ("TCC"), against the Islamic Republic of Pakistan, on 12 July 2019 (the "Pakistan Case"). That decision is referred to in more detail below.

It is a fundamental principle of the ICSID regime that, once issued, ICSID awards are "automatically" enforceable and cannot be reviewed by national courts. Despite that, it has not always been entirely clear in the BVI how the holder of an ICSID award goes about obtaining "automatic" recognition and enforcement of that award in this jurisdiction. However, the Pakistan Case does provide some guidance on the applicable provisions, albeit the case itself must be treated with some caution (for now at least), for the reasons explained below.

The Pakistan Case: a summary of the case and stage of proceedings

In the Pakistan Case, the ICSID proceedings arose out of the refusal by Pakistan to grant a mining lease application submitted by TCC, which deprived TCC of the opportunity to build and operate a mine in Baluchistan, Pakistan. TCC claimed that Pakistan's actions had caused it to suffer substantial losses.

After nearlyeight years of arbitration, and after incurring over US$62 million in legal fees and disbursements, TCC was granted an arbitration award against Pakistan for a sum in excess of US$6.2 billion.

On 20 November 2020, TCC applied, *ex parte*, for *inter alia* an order granting it permission to register and enforce the ICSID award in the BVI. That order was granted by Wallbank J (along with other orders) at a hearing on 10 December 2020. However, that order (and the other *ex parte* orders) was subsequently set aside, following an *inter partes* hearing on 27-29 April 2021. In his judgment, handed down on 25 May 2021, Wallbank J found that TCC had failed to show that Pakistan does not enjoy a state immunity defence and, as against the other respondents, Wallbank J determined that those corporate entities could not in any event be treated as part of the Pakistan state. Wallbank J also found that TCC had breached its duties of full and frank disclosure in the way in which it had presented the case at the original *ex parte* hearing.

However, for present purposes, although the *ex parte* orders were set aside, Wallbank J did not suggest that the provisions that TCC had originally relied upon, in obtaining leave to enforce the ICSID Award, were inapplicable. It also appears from the judgment that no such argument was advanced by any of the Respondents.

Accordingly, the Pakistan Case does provide some guidance on the way in which an ICSID award may be enforced in the BVI. This is of course *subject to any state immunity defence arguments*, which are not addressed in this short article.

Enforcement provisions relied upon by TCC

According to the 25 May 2021 judgment, it appears that leave to enforce the ICSID Award was brought by TCC on the basis of:

(1) section 1(2) of the UK Arbitration (International Investment Disputes) Act 1966 ("the 1966 Act"), as extended to the BVI and amended by the UK Arbitration (International Investment Disputes) Act 1966 (Application to Colonies etc.) Order 1967 (SI 1967/159) ("the 1967 Order"); and/or

(2) sections 81 and 82 of the Arbitration Act, 2013 ("the 2013 Act").

The 1966 Act

Section 1(2) of the 1966 Act provides that, "A person seeking recognition or enforcement of [an ICSID award] shall be entitled to have the award registered in the High Court subject to proof of the prescribed matters and to the other provisions of this Act".

Section 1(7) (b) provides that an award is deemed to have been rendered pursuant to the Washington Convention on the date on which certified copies of the award were dispatched to the parties pursuant to the Convention.

The effect of registration under the 1966 Act is that any pecuniary obligations imposed by the ICSID award are treated as having the same force and effect for the purposes of execution as a judgment of the High Court given when the award was rendered and entered on the date of registration under the 1966 Act. Further: (1) proceedings may be taken on the award (in relation to those pecuniary obligations); (2) the sum shall carry interest; and (3) the High Court shall have the same control over the execution of the award as if the award had been a judgment of the High Court.

Under the 1966 Act (s.1(6)), and the 1967 Order, provision is made for rules of Court to be provided for the purpose of:

(1) setting out the procedure for applying for registration, and to require an applicant to give prior notice of his intention to other parties;

(2) to prescribe matters to be proved on the application and the manner of proof, and in particular to require the applicant to furnish a copy of the award certified pursuant to the Convention; and

(3) to provide for the service of the notice of registration of the award by the applicant on other parties.

To date no specific procedural rules have been adopted in the BVI, save for the general provisions in CPR 43.10. Unfortunately, the existing rules do not require the applicant to provide all of the things set out in (1) to (3) above, and could certainly be enhanced by expressly providing for those matters. It appears to be due to that lacuna that in the Pakistan Case TCC also sought to rely on the provisions of the BVI Arbitration Act 2013, discussed below. Nevertheless, in our view the fact that certain things have not been included in CPR 43.10 should not on its face cause an issue when enforcing under the 1966 Act, because the Court does have a discretion. The Court would be well guided to exercise that discretion within the spirit of the "automatic" enforcement regime under the Washington Convention.

The Arbitration Act 2013

In addition to the 1966 Act, TCC also sought to rely upon ss.81-83 of the 2013 Act. For the reasons set out below, it is less clear whether that option is in fact a proper route to the "automatic" recognition and enforcement of an ICSID award, as none of those sections appear to be tailored to the ICSID regime.

Pursuant to s.3 of the 1966 Act, and the 1967 Order, the provisions of the 2013 Act are expressly disapplied in relation to "proceedings pursuant to the Convention", save for s.18 (staying court proceedings where there is a submission to arbitration). It is not entirely clear whether "proceedings pursuant to the Convention" means the underlying ICSID proceedings, or BVI proceedings to recognise and enforce any ICSID award, but it is assumed that it is the former, since, as a rule, matters of recognition and enforcement are outside of the scope of arbitration.

Proceeding on that basis, and subject to the caveat mentioned below (namely that the Court exercises its discretion in line with the "automatic" ICSID enforcement regime), it would appear, therefore, that it is possible to enforce an ICSID award under the general provisions of ss.81-83 of the Arbitration Act 2013, which apply to any arbitral award that is not a New York Convention award. CPR 43.10 would also apply, in so far as it adds to those sections.

However, the wrinkle with ss.81-83 is that s.82 and 83 clearly include certain requirements that are at best odd, and in some cases contrary to the intentions of the ICSID regime, namely the "automatic" enforcement of an ICSID award. For instance, s.83(1) provides that the Court may refuse to enforce the arbitral award if the person against whom the award is invoked proves one or more of the defences mentioned in s.83(1)(a) to (f). Section 83(2) also provides further potential defences. More importantly, the Arbitration Act 2013 does not provide any legal framework for the circumstances where enforcement of the ICSID award has been stayed under the Washington Convention.

However, it is right to say that although s.83 does provide certain defences to enforcement, it appears to be well settled that the Court retains a discretion (albeit a very narrow one) to enforce an arbitral award even if one or more of the stated defences are proved. In the circumstances, although it is not clear how this point was dealt with in the Pakistan Case (if at all), it seems arguable that the Court could in practice treat the narrow discretion to enforce as applicable to ICSID awards, given the terms and intention of the Washington Convention. The end result would be that, in practice, the Court would exercise its discretion to enforce the ICSID award without regard

to the defences under s.83 (and even if one or more of those defences are proved). So long as the Court adopts that approach, it seems to us that ss.81-83 would provide an alternative route to enforcement.

Conclusion

Although it appears that this issue has not been explored in any BVI cases to date, our view is that the provisions that TCC relied upon in the Pakistan Case, in order to enforce the ICSID Award, are ones that are likely to be upheld if any serious challenge to them were to be raised. Having said that, it would certainly be desirable to have separate procedural rules tailored to the ICSID regime, laying out a clear route to "automatic" recognition and enforcement of ICSID awards in the BVI. However, as mentioned above, the elephant in the room in all of this is likely to be the potential impact of any state immunity defence (if raised).

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