

Legislative Framework Relating to Investment Arbitration

Mrs. Satyabrata Mishra

Assistant Professor of Law, NUSRL, Ranchi, Jharkhand, India¹

Prof. Dr. P.K. Sarkar

Professor of Law, School of Law, KIIT University, Bhubaneswar, Odisha, India

Abstract

‘Investment Arbitration’ is one of the most popular methods for ‘resolving the Investor-state disputes.’ ‘Investment arbitration’ is administered through rules which are either institutional or ad hoc. Based on these set of rules, the arbitral tribunal is constituted which takes into consideration any issue arising between the contesting parties. These issues are majorly based on the violation of treatment standards as ensured by the host states in their BIT’s. Apart from the BIT’s which are administered under rules of public international law, the domestic laws of host states also plays a very crucial role in enforcement of the awards rendered by the investment arbitral tribunals. In this paper, the author has tried to examine the Legislative Framework relating to Investment Arbitration in India. India being one of the most popular host states with the foreign investors, attracts foreign investments through its structured regulatory framework. India has developed its institutional setup for administering international commercial disputes. In this paper, the researcher has tried to analyze the legal framework based on UNCITRAL Model Law, specifically for the enforcement of investment arbitral awards. The researcher has also made a comparative analysis of legislative framework facilitating enforcement of investment arbitration awards with ICSID signatory states like USA, UK and Singapore. Lastly, the researcher has concluded with suggestions on improving the legislative framework in India.

Keywords: ICSID, UNCITRAL, BIT’s, Investment Arbitration, Host states

Introduction

In this paper the researcher will analyze the existing legislative framework for resolving investment disputes through investment arbitration. ‘Investment Arbitration’ is one of the most popular methods for ‘resolving the Investor-state disputes.’ ‘Investment arbitration’ is administered through rules which are either institutional or ad hoc. Based on these set of rules, the arbitral tribunal is constituted which takes into consideration any issue arising between the contesting parties. These issues are majorly based on the violation of treatment standards as ensured by the host states in their BIT’s. The researcher has tried to analyze these rules based on two categories, the most popular forums for dispute resolution are ICSID and UNCITRAL.

The researcher has analyzed the relevant provisions of the ‘ICSID Convention’ and has found that these provisions are self-contained, clear and final. All states which have ratified the ICSID Convention are required to implement internal laws ‘for giving effect to the provisions of the ICSID Convention’. ‘Ratification establishes the consent of the state to be bound by the treaty at international plane² and it brings responsibility upon the states to follow the terms of the treaty’. Out of all the signatory states to ICSID Convention, the researcher has selected four states namely USA, UK, Singapore and Malaysia for analyzing their ‘domestic laws for giving effect to the provisions of ICSID Convention.’

The objective of researcher is to understand the legal framework for ‘facilitating recognition and enforcement of ICSID awards rendered by investment tribunals.’ As these four states have implemented their domestic laws based on ICSID Convention, there is a similarity of domestic laws for ‘recognition and enforcement of ICSID awards in these states’. When

¹ Email: satyabratamishra.kls@gmail.com

² Article 2 (1) (b), Vienna Convention on Law of Treaties (VCLT), 1969.

states follow one specific framework then there can be uniformity in domestic laws as well, like it has happened with New York Convention signatory states. All signatory states to 'New York Convention' have incorporated the provisions of New York Convention under their domestic laws which facilitates 'recognition and enforcement of commercial awards' in those jurisdictions. So, these conventions are tools to enhance certainty, predictability and uniformity in domestic laws and they reduce the scope of conflicts under domestic laws.

ICSID signatory states will seek 'enforcement of the awards under respective domestic laws of the states which have also ratified ICSID Convention'. For non-ICSID states like India, the alternative for seeking 'enforcement of non-ICSID investment awards is New York Convention'.

Objective

The objective of researcher is to understand the legal framework for 'facilitating recognition and enforcement of ICSID awards rendered by investment tribunals.' In furtherance of this objective, the researcher has divided this paper into four parts. the researcher has analyzed the existing Indian Laws which can be used for facilitating investment arbitration in **Part A** of this paper. In **Part B** of the paper the researcher has analyzed the domestic laws based on ICSID Convention. The researcher has analyzed about the application of 'New York Convention for enforcement of non-ICSID convention awards' in **Part C** of the paper. Lastly, the researcher has concluded the paper with specific observations.

Method

The researcher has used the doctrinal method of research. The approach of the researcher is analytical with a comparative methodology to get the answers for the research questions.

Results

In this paper, the researcher has given an overview of the differences that are there in the legal framework for facilitating investment arbitration. In the first part of the paper mentions about the Indian Laws that reflect provisions under Constitution of India for fulfilling treaty obligations, 'Arbitration and Conciliation Act' which is based on the 'UNCITRAL Model Law on International Commercial Arbitration', under which the specific portion for 'recognition and enforcement of arbitral awards' is discussed. The important sections from Civil Procedure Code are also discussed which talk about the 'enforcement of foreign judgments.'

In the second part of the paper, the researcher gives an overview of the procedural details under two most popular investment dispute redressal methods namely ICSID and UNCITRAL. It highlights the domestic laws of the states namely USA, UK, Singapore, and Malaysia which are signatories to 'ICSID Convention and have implemented domestic law for facilitating recognition and enforcement of arbitral awards passed by the ICSID tribunals.'

The third part is about the application of the 'New York Convention for recognition and enforcement of non-ICSID arbitrations.' As 'India is not a party to the ICSID Convention, enforcement of investment awards can be initiated by the investors under the provisions of New York Convention which is present under the domestic law, Arbitration and Conciliation Act 1996'. The provisions of the 'Civil Procedure Code' cannot be utilized for investment awards as these are not considered as 'judgments as per definition clause under Code'. So, the procedure for 'recognition and enforcement of judgments will not be applicable in India for investment awards passed by the arbitral tribunals.'

Discussion

Part A: Indian Laws for Facilitating Investment Arbitration

India is 'not a party to the ICSID Convention'. Hence, there is no obligation for India to implement any domestic law for giving effect to ICSID Convention. Also, there is no obligation to facilitate 'the recognition and enforcement of investment arbitral awards' as is done by the states like USA, UK, Singapore, and Mauritius. India does not have any uniform law for addressing the investment arbitration cases. Indian courts have a scope of challenging 'the enforcement of investment awards.' India follows the 'ICSID Additional Facility rules.' Unlike ICSID Convention, there is no 'self-restrained mechanism under the additional facility rules for enforcement of investment awards.'

The ‘involvement of sovereign states, the state measures under challenge and the negative impact of an adverse investment award upon the state exchequer’ are the key considerations for challenging enforcement of awards³. ‘Investment awards delivered by ad hoc arbitral tribunals, like UNCITRAL, face challenges of enforcement and are subject to the domestic laws and jurisdiction of national courts, which have a scope for hindering the enforcement of award in case it is against the interest of their state.’ However, the states also have certain obligations to be fulfilled when they are entering into the bilateral agreements based on which the investment is made by the investor. ‘Commitments made by the state are international obligations, breach of which would amount to an internally wrongful act.’

The basic legal framework in India for investment arbitration primarily involves the following:

- **The Constitution of India:** Matter relating to fulfilment of obligations under International Agreements as reflected in Article 253; Entry 14 List I Schedule 7; Article 51 (b).
- **The Code of Civil Procedure, 1908:** Matter relating to ‘the enforcement of the foreign judgments’ as reflected in Section 13 and Section 44 A.
- **The Arbitration and Conciliation Act, 2015:** Matter relating to the ‘recognition and enforcement of awards’.

Relevant provisions of each of these laws are discussed hereunder.

The Constitution Of India Provisions For Enforcement Of Treaty Obligations:

The most fundamental reason for the ‘investor state dispute settlement mechanism is the breach of the treatment standards by the host states’. Therefore it is pertinent to understand the basis of these obligations. The main point for reference in this regard is to be found in the specific provision of the Constitution of India. India follows a dualist perspective on international law. According to this, the treaty obligations are fulfilled by enacting specific domestic laws or having specific provisions under the Constitution which portray the idea that treaty obligations must be fulfilled by the state.

Under the Indian scenario, the legal framework is quite clear. ‘The state shall endeavour to *promote respect for international law and for treaty obligations*’.⁴ By this it can be easily understood that the approach of the government would be to fulfil its ‘treaty obligations and not to act in an inconsistent manner, contrary to the object and purpose of the treaty’. But the same is to be balanced with the exercise of regulatory power by the states. This exercise of power should be done considering the treaty obligations as well as the rights of the investors.

Another significant provision under the Constitution of India ‘empowers the Parliament to enact any domestic law for giving effect to the treaty obligation or any decision made at any international conference or association or other body’.⁵ An added point of reference is given under the union list, which states that Parliament has power to enact law for giving effect to treaties and agreements⁶. One such example of this is, ‘The Arbitration and conciliation Act, 1996 which is based on the UNCITRAL Model Law’. Under this act itself, there is a specific part which has incorporated the ‘New York Convention on Recognition and Enforcement of Foreign Arbitral Awards’. This convention is helpful in ‘facilitating

³ Kshama A. Loya and Moazzam Khan, ‘*Enforcement of BIT Awards at Bay in India as the Courts Rule Out the Applicability of the Arbitration and Conciliation Act 1996*’, Volume 22 Issue 1 ASIAN DISPUTE REVIEW 17 19-23 (2020).

⁴ The Constitution of India, Art 51 (c).

⁵ The Constitution of India, Art 253.

⁶ The Constitution of India, Entry 14 List 1 of Schedule 7 read with Art 246.

recognition and enforcement of arbitral awards which is significant in international commercial arbitration'. All the states that have 'ratified and enacted this Convention in their domestic law, have a strong position in the easy enforcement of commercial arbitral awards'.

Enforcement under The Code of Civil Procedure, 1908

The Code of Civil Procedure, 1908 provides for 'the recognition and enforcement of foreign judgments' under Section 13 and Section 44A. It clearly defines 'a foreign judgment as judgment pronounced by a foreign court'⁷. It provides that a foreign court is a 'court outside India and not controlled by the Central Government'⁸. According to the provisions of the code, any judgement pronounced by the foreign court would be considered as 'conclusive provided it is not falling in any of the following categories'⁹:

1. It is not pronounced by a court of competent jurisdiction
2. Not given on merits of the case
3. It is found on an incorrect view of international law or a refusal to recognise the law of India (where that would be applicable)
4. Where it is obtained by fraud
5. Where it sustains on any claim founded on a breach of any law in force in India'

There is a presumption as to foreign judgement that it is pronounced by a 'competent court', unless 'want of jurisdiction' is established.¹⁰ As per the code, 'the competent court to enforce a judgement is a district court where the certified copy of the foreign judgment passed by a competent court in reciprocating territory' is filed¹¹.

There is no formal procedure for execution of a foreign decree in India. 'The decree holder is required to file a certified copy of the decree and a certificate from the superior court of the foreign country stating any amount that has been satisfied.' After the decree holder files an application for execution before the competent court, the court will then issue notice to the person against whom the execution is sought. The court would require him to show cause as to why the decree should not be executed. At this stage, 'the judgement debtor has a right to challenge the execution on any of the grounds as mentioned under Section 13 of CPC.' In case the person against decree is to be executed does not show cause, the court can proceed with the recognition and enforcement proceedings as if it's a judgment pronounced by an Indian court of competent jurisdiction. The court will allow the decree holder to execute the judgment against the assets of the decree holder. The decree holder can apply to the court to provide directions to the judgment debtor, instructing it to disclose any assets or liabilities. If the assets are disclosed, the court will proceed with the attachment and sale of such property. This process is followed where the judgment is passed by a competent court from a reciprocating territory. In case where it is passed by a court from a non-reciprocating territory, the decree holder is required to file a suit. When the suit is allowed, it can be executed in terms of Order 21 of CPC.

⁷ The Code of Civil Procedure, 1908, Section 2 (6).

⁸ The Code of Civil Procedure, 1908 Section 2 (5),.

⁹ The Code of Civil Procedure, 1908 Section 13.

¹⁰ The Code of Civil Procedure, 1908 Section 14.

¹¹ The Code of Civil Procedure, 1908 Section 44A.

Enforcement Under The Arbitration and Conciliation Act 1996

The CPC 1908 specifies the procedures for enforcing a foreign court order or judgement. However, it is important to note that 'BIT awards cannot be construed as a foreign decree or judgement for the purposes of execution in India under the CPC because they are neither a 'judgement' as defined in the CPC nor have they been given by a 'Court' as defined in the CPC'. As a result, this is not an option for a party trying to 'enforce a BIT award against India'. 'A legitimate avenue that is open to BIT award creditors is to try and identify assets of the BIT award debtor (which may even be the Union of India) that are located outside India, preferably in a jurisdiction that has an established, recognised, tried and tested mechanism for enforcing BIT awards'.

Unlike the ICSID states there is 'no separate mechanism for enforcement of investment treaty awards in India'. The 'Arbitration and Conciliation Act provides for the enforcement of commercial awards.' Hence the next question to be determined is **whether the investment awards can be considered as commercial in nature**. For getting an answer to this, UNCITRAL Model can be seen. The 'Arbitration and conciliation Act is based on the same model law. Article 1 of the UNCITRAL Model law mentions about the scope of application of the UNCITRAL Model Law.' Article 1 (1) specifically mentions that 'this law shall be applicable to international commercial arbitration and it shall be subject to any law that is made by the states'¹². The footnote 2 to this provision further clarifies that 'the term "commercial" is to be given a wide interpretation and it should cover matters arising from all relationships of a commercial nature whether contractual or not'. It further clarified that 'relationships of a commercial nature would include number of aspects, but it would not be limited to, following transactions like: any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by rail, sea, road and sea'.¹³

Under the UNCITRAL Model law, the term 'commercial' is given a broader interpretation. Under the Indian Model BIT of 2015, it is mentioned that 'a claim which is submitted to arbitration under this article is to be considered to arise out of a commercial relationship or a transaction for the purposes'¹⁴ of Article 1 of New York Convention, 1958¹⁵. 'India has availed for reservation under Article 1 (3) of New York Convention, 1958.'

Hence for the purposes of 'enforcement of investment awards passed by non- ICSID forums for countries like India, which are non- signatory to ICSID, the recourse is under the New York Convention, 1958.' So, the next point of consideration is would it be appropriate to consider the application of provisions under the New York Convention for enforcement of investment awards. Some aspects relating to this have been discussed by the researcher in the next part.

Part B: Laws Based on ICSID Convention from USA, UK, Singapore, and Mauritius

ICSID is one of the most popular institutions administering 'investment arbitration'. It is based on the 'ICSID Convention' which provide for mainly two methods of dispute resolution: 'Arbitration and Conciliation'. 'Arbitration' under ICSID is

¹² UNCITRAL Model Law, 1985, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (Last accessed on Dec 12, 2022).

¹³ Ibid.

¹⁴ Model BIT 2015, Article 27.5.

¹⁵ New York Convention, 1958, Article 1 (3) states 'A state may declare that it will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.'

one of the ‘most popular platforms for resolution of investment disputes’. Arbitration is administered under ‘the ICSID Convention, ICSID Additional Facility Rules and ICSID Rules of Arbitration’.

‘The provisions of the ICSID Convention can be used when both the contracting states i.e. ‘both the home and host state are parties to it’¹⁶. ‘Additional Facility rules can be used when any one of the disputing parties is a party to ICSID Convention and the other is not.’¹⁷ The popularity of ICSID as a forum for resolution of investment disputes lies in the fact that awards pronounced by ICSID arbitral tribunal can be enforced without any challenge.¹⁸ ‘The awards are final and binding between the parties and not subject to any appeal.’¹⁹ The awards can only be annulled on the grounds as mentioned under the convention as: ‘*tribunal not properly constituted; tribunal exceeded power; corruption of tribunal member; rule of procedure not followed; award is not proper*’.²⁰ As there is finality attached to these awards and the national courts have no role to play, ICSID is very popular forum for resolving investment related disputes. All those states that are signatories to it can utilize the provisions of this convention for resolving the investment related disputes. For better utilization, states are required to take steps by implementing domestic laws for giving effect to the provisions of this convention.²¹ In light of the same, number of ‘states, that have ratified this convention, have implemented domestic laws in their territories for giving effect to the provisions of this convention.’ The researcher has selected few such jurisdictions which have implemented domestic law for ICSID convention like USA, UK, Singapore, Malaysia. The reason for selecting these jurisdictions lies in the fact that India has received substantial amount of FDI from these states. So, it would be improper not to take an understanding of their domestic law regarding Investment Arbitration.

United Kingdom Law: Arbitration (International Investment Disputes) Act 1966

This act was enacted in United Kingdom for giving effect to the provisions of the ICISID Convention, 1958. This act came into effect on 18th January 1967. The most significant provision under this act is about the recognition and enforcement of award²² passed pursuant to the ICSID Convention. The award would be recognized in United Kingdom if it is registered in the High Court²³. Upon recognition, the enforcement becomes a bit easier. The effect of registration is that the award, along with its pecuniary obligations that it imposes, shall have same effect as if it had been a judgment of the high court.²⁴

¹⁶ See, ICSID Convention, Article 25 https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf (Last visited on Dec 12, 2022).

¹⁷ See, ‘Article 2 of ICSID Additional Facility Rules 2006, https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf’ (Last visited on July 4, 2022).

¹⁸ See, ‘Article 54 ICSID Convention, https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf’ (Last visited on July 4, 2022).

¹⁹ Ibid, Article 53.

²⁰ Ibid., Article 52.

²¹ Ibid., Article 69.

²² United Kingdom Law, Section 1 (7) (a) of Arbitration (International Investment Disputes) Act 1966 states, ‘*award shall include any decision interpreting, revising, annulling an award being a decision, pursuant to the Convention, and any decision as to costs which under the convention is t form part of the award.*’ And; Section 1 (7) (b) an award shall be deemed to have been rendered pursuant to the Convention on the date on which certified copies of award were dispatched to the parties’.

²³ United Kingdom Law, Section 1 (2) Arbitration (International Investment Disputes) Act 1966.

²⁴ Ibid, Section 2 (1).

After registration, United Kingdom courts can take actions for executing the award. The pecuniary obligations attached to the award shall also carry interests.²⁵ The award shall be treated equally as that of judgement passed by the high court.²⁶

Hence, by implementing the domestic act, United Kingdom has facilitated enforcement of arbitral awards rendered by ICSID tribunals. Easy enforcement standards help in enhancing investor confidence. Undue delays caused by judiciary resulting into non-enforcement of awards, hampers the investor confidence which ultimately has a negative impact on inflow of investments.

United States of America: United States Code: Settlement of Investment Disputes, 22 USC

The United States of America has domestically implemented provisions of the ICSID Convention by enacting United States Code: Settlement of Investment Disputes, 22 USC. This act was passed on 11th August 1966. This code has a specific part dedicated to investment dispute resolution²⁷. The chapter 21A under the code provides that President may appoint committee members and representatives, as provided under the convention.²⁸ ‘The Code also specifies that any award rendered pursuant to Chapter IV of the ICISID convention, which provides the arbitration mechanism, will give rise to a *right under a treaty* of the United States²⁹.’ An award’s monetary obligations shall be enforced, and the award shall have the same effect as a national court’s judgement.³⁰ ‘The district courts in the United States shall have complete authority to resolve any disputes arising out of the award³¹.’

As it is clearly mentioned under the domestic law, that award will create ‘a right under a treaty of the United States’, it gives a positive hope to the award creditor that his rights would be recognised and he will get the fruits out of the award. Also, recognising the right under an award, gives scope to the judicial organs of United States to enforce arbitral award as they do for the domestic judgments. ‘There is no scope for revision or appeal of the ICSID awards, hence the same is also reflected in the domestic law.’ Again, finality of award and pro-enforcement attitude, increases the investor confidence and also strengthens the position of any state as a hub for investments.

Mauritius: Investment Disputes (Enforcement of Awards) Act 1969

This Act was enacted for domestically ‘implementing the provisions of ICSID Convention in Mauritius.’ This Act entered into force on 24th April, 1969 and is primarily focusing on enforcement of awards passed pursuant to the ICSID Convention for investment disputes. ‘An investment dispute is defined under the Act as a dispute arising directly out of investment and within scope of the convention’³². An award is defined as ‘any award that is made in accordance with the ICSID convention

²⁵ Ibid.

²⁶ Ibid.

²⁷ UNITED STATES CODE <https://www.govinfo.gov/content/pkg/USCODE-2020-title22/pdf/USCODE-2020-title22-chap21A.pdf> (Last visited on Nov 12, 2022).

²⁸ United States Code: Settlement of Investment Disputes 1967, Section 1650.

²⁹ United States Code: Settlement of Investment Disputes, Section 1650 (a).

³⁰ Ibid.

³¹ United States Code: Settlement of Investment Disputes Section 1650 (b).

³² Mauritius Law, Investment Disputes (Enforcement of Awards) Act 1969 Section 2.

and includes any decision revising, interpreting or annulling an award³³. As is described under the Convention that ‘award shall be binding between the parties’, same is followed under the act also³⁴. The Act facilitates ‘recognition and enforcement of awards’. ‘An award has to be registered by the party before the Supreme Court within a period of six years or any extended period, as per discretion of the Supreme Court³⁵.’ There are certain procedural formalities attached with the application for registration. The certified copy of the award and a sworn statement that no annulment proceeding is pending against the award are to be attached along with the application for registration³⁶. After looking into the authenticity of the documents submitted along with application, Supreme Court will permit the registration of the award.³⁷ The effect of registration is that the after registration, award shall be considered as a judgment passed by the Supreme Court and the pecuniary obligations arising under it can also be enforced like arising under the judgment of the Supreme Court.³⁸ Under this framework the costs incurred can also be recovered as if they are sums payable under the award.³⁹ Again, this framework of smooth enforcement of investment awards will help the creditor of the award in fulfilling his pecuniary obligations. Such a domestic law will increase investor confidence.

Singapore: Arbitration (International Investment Disputes) Act 1968 (Revised in 2020)

The Arbitration (International Investment Disputes) Act 1968 was enacted in Singapore for ‘giving effect to the provisions of ICSID Convention’. The revised edition of this act came in 2020 and it has entered into force on 31st December 2021. This act facilitates the ‘enforcement of ICSID awards’. An award is a decision pursuant to ICSID Convention and under this act it ‘includes any decision interpreting, reversing or annulling an award and also any costs in relation to the award’⁴⁰. The Act requires that for ‘recognition or enforcement of an award passed under ICSID Convention, any interested person must get the award registered in the General Division of High Court’⁴¹. The registration of award facilitates fulfilment of pecuniary obligations arising out of the award. The registration of the award may be refused if all the pecuniary obligations arising out of award have been satisfied⁴². If the pecuniary obligation is partially fulfilled, the award can be registered for remaining amount⁴³. Once the award is registered, it would be considered as equivalent to a judgment passed by the General Division of High Court and its execution shall also be controlled under the High Court.⁴⁴ Interest will also be calculated on

³³ Ibid.

³⁴ Ibid., Section 3.

³⁵ Ibid., Section 4(1).

³⁶ Ibid, Section 4 (2).

³⁷ Ibid., Section 4 (4).

³⁸ Ibid., Section 5 (a).

³⁹ Ibid., Section 5 (b).

⁴⁰ See, Singapore Law, Arbitration (International Investment Disputes) Act 1968 Section 2 (1), <https://sso.agc.gov.sg/Act/AIIDA1968?ProvIds=xv->. (Last visited on Mar 12, 2022).

⁴¹ Ibid., Section 4 (1).

⁴² Ibid., Section 4 (3).

⁴³ Ibid.

⁴⁴ Ibid., Section 5.

the pecuniary obligations arising under the award and proceedings can be initiated for its enforcement as if it is a judgment of the General Division of the High Court.⁴⁵

Thus, the ultimate motive of any investment award, irrespective of whether it is initiated under an institution or in ad hoc manner, is to fulfil the pecuniary obligations arising under it. The ICSID Convention provides a self-contained system of enforcement of awards passed by its tribunals, where there is no scope of appeal or challenge for the national courts. The ICSID Convention's requirement of steps to be taken by signatory states in the form of enacting domestic laws is a positive step that ensures that national courts of those states would facilitate in the enforcement mechanism. These domestic laws treat these international awards as equivalent to the judgments passed by their national courts and thus help in their realization.

But all states are not signatories to ICSID Convention. It would be completely wrong to say that the non-ICSID states do not have any mechanism to enforce or recognize the awards passed by investment tribunals other than ICSID. India is also a non-signatory state to ICSID. The legal framework in India for enforcement of BIT obligations and non-ICSID award enforcement is covered under subsequent pages.

Part C: Application of New York Convention to Non-ICSID Arbitrations

As discussed in the preceding paragraphs 'ICSID is one of the most popular forums for resolution of investment disputes and the awards passed by the tribunals are final and binding on the parties.' The 'recognition and enforcement of ICSID Convention awards' are carried as per the provision under the Convention⁴⁶. The 'recognition and enforcement of non-ICSID awards are processed under The New York Convention, 1958', which is a part of domestic law of many states, including India. This convention is incorporated under Part II Chapter 1 of the 'Arbitration and Conciliation Act, 2015'.

The annulment proceedings of awards under ICSID are done before ad hoc committee comprising of three members nominated by the ICSID administrative council on the grounds mentioned under the convention⁴⁷. These grounds include: *"improper constitution of tribunal; manifest excess of power by tribunal; corruption on the part of a member of a tribunal; departure from rule of procedure; failure to state reasons"*⁴⁸. 'The non-ICSID awards can be challenged for setting aside by the competent court of the country of the seat of arbitration under national arbitration statutes.'

The 'grounds for setting aside a non-ICSID arbitral award are clearly stated under the UNCITRAL Model law on International Commercial Arbitration (1985)' with amendments as adopted in 2006. 'The arbitral award may be annulled if it is proven by the party making an application for annulment that: *one of the parties was under incapacity; notice of appointment of arbitrator was not furnished; award is not falling within terms of submission to arbitration; composition of tribunal was not proper; subject matter of dispute is not capable of settlement by arbitration; award is in conflict with*

⁴⁵ Ibid.

⁴⁶ Supra, note 3.

⁴⁷ Supra, note 5.

⁴⁸ Ibid.

*public policy*⁴⁹.’ These ‘grounds for setting aside an arbitral award under UNCITRAL overlap with the grounds mentioned in the grounds mentioned under New York Convention as exceptions to recognition and enforcement of awards’.⁵⁰

The “qualifying criteria of ‘manifest excess of power’ and ‘serious departure from fundamental rule of procedure’ under Article 52 (b) and (d) for annulment of award under ICSID Convention are very high⁵¹ and difficult to establish as compared to the criteria of annulment under New York Convention, 1958”.

Apart from differences in annulment proceedings, there are significant point of differences for provisions of recognition.

An ICSID award which is under annulment proceeding cannot be circulated for enforcement rather the same may be resubmitted to the arbitral tribunal. As for non-ICSID awards, their ‘recognition proceedings can be initiated by investors even during the annulment proceedings of the award’. Under ‘New York Convention, an application for setting aside does not prevent a motion for recognition of the award.’ Investors can also ‘proceed for the enforcement proceedings, pending annulment proceedings’.⁵² New York convention only specifies that recognition and enforcement may be denied if it is falling under any of the expressed grounds⁵³. As these grounds are subject to interpretation by the national courts, there can be ‘substantial differences in different jurisdictions regarding the conditions of recognition and enforcement of a non-ICSID award’. It cannot be excluded that ‘a non-ICSID award might be enforceable in one state but not on the other due to the public policy exception under Article V (2)(b) of the New York Convention’⁵⁴.

‘The ICSID Additional facility rules are also available to the investors for facilitating recognition and enforcement and these rules mandate that none of the rules of ICSID convention shall be applicable to additional facility proceedings⁵⁵.’ ‘To ensure enforceability of awards under New York Convention, specific articles were adopted under Arbitration (Additional Facility Rules) which state arbitration proceedings to be held in states that are parties to New York Convention⁵⁶ and award is to be made at place of arbitration⁵⁷.’

‘After recognition, both ICSID and non-ICSID awards are enforced according to the domestic laws of the enforcement jurisdiction.’ Also, ‘the ICSID annulment committees are formed on an ad hoc basis which always implies different members whereas the annulment proceedings of non-ICSID awards are administered by permanent domestic courts.’

⁴⁹ See, UNCITRAL Model Law Article 34 (2), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (Last visited on July 12, 2022).

⁵⁰ See, New York Convention, 1958 Article V <https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf> (Last visited on July 12, 2022).

⁵¹ KATIA FACH GOMEZ AND ANA M. LOPEZ- RODRIGUEZ (EDS), 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES, 441 445-456 (2019).

⁵² Ibid.

⁵³ Supra note 48.

⁵⁴ Supra not 278 at 430-440.

⁵⁵ ICSID Additional facility Rules, Article 3 https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf (Last visited on July 12, 2022).

⁵⁶ Ibid., Article 19.

⁵⁷ Ibid., Article 20.

Hence, the previous decisions of ICSID ad hoc committees do not carry any precedential value, but the decisions of common law courts are subject to *stare decisis* rule.⁵⁸

The ‘enforcement regime under the ICSID Convention’ is applicable only to the ‘pecuniary obligation’ arising under the ICSID award⁵⁹. This means that the non-pecuniary obligations like ‘restitution or other forms of specific performance or an injunction to desist from a certain cause of action’ does not arise under ICSID Convention⁶⁰. Because of this distinction between pecuniary and non-pecuniary obligations, usually ICSID tribunals do not impose any non-pecuniary obligations in awards or they look for a pecuniary alternative to facilitate enforcement of award under ICSID convention⁶¹. In case of ‘non-performance of a non-pecuniary obligation, the party seeking enforcement has an option to avail either domestic law or any international instrument like the New York Convention, 1958⁶².’

The ‘New York Convention 1958’ was designed to be applicable to ‘recognition and enforcement of international commercial disputes’ hence it does not have any explicit provision for ‘recognition and enforcement of investment awards’. At the time when this document was adopted, diplomatic protection was the method for resolving foreign investment disputes and investment arbitration became a dispute settlement framework from early 2000’s.⁶³ Notwithstanding this fact, ‘New York Convention is an alternative for the enforcement of non- ICSID arbitral awards’, provided, certain conditions under it are met.

Firstly, ‘New York Convention applies to recognition and enforcement of awards that are foreign in accordance with Article I (1) which means those awards that are passed at a state other than the enforcing state or it can also be said that they are non-domestic awards of the executing state’. A non- ICSID award is ‘subject to the *lex arbitri* and is made in the territory of a state’.⁶⁴

Secondly, based on the concept of arbitration without privity, ‘requirement of arbitration agreement to be in writing for the purposes of Article II and Article V (1)(a) of the convention is satisfied when, the investor accepts the standing offer to arbitrate by submitting a request of arbitration’.⁶⁵

Third, there can be two reservations to ‘article I (3) of the convention’. Firstly, based on the ‘requirement of reciprocity, the state where recognition and enforcement is sought will apply the convention only if the award was made in the territory of another contracting state’. To facilitate enforcement, usually states lay down under the investment agreements that ‘the seat of arbitration shall be in the territory of a contracting state to the New York Convention, 1958’. Secondly, is about ‘nature of the dispute which should arise out of a legal relationship, commercial in nature under the national law of the state making the reservation’. So, if the ‘enforcing state has implemented UNCITRAL Model Law on International

⁵⁸ Supra, note 49.

⁵⁹ Supra note 3.

⁶⁰ CHRISTOPH H. SCHREUER, THE ICISID CONVENTION: A COMMENTARY ARTICLE 54, 1118 (Cambridge University Press, 2009).

⁶¹ Ibid., 1137-1139.

⁶² Supra, note 52.

⁶³ Ibid.

⁶⁴ Supra, note 52.

⁶⁵ Ibid.

Commercial Arbitration under its domestic law, investment arbitral award will be easily enforceable under the New York Convention as UNCITRAL model law gives a wide interpretation to the term commercial and it includes ‘investment’ also⁶⁶.

The ultimate objective of an investor state dispute resolution system is to produce an enforceable decision. Hence, it can be concluded that enforcement is strong under ICSID Convention but for non-ICSID awards, enforcement under New York Convention is very much possible.

References

1. Kshama A. Loya and Moazzam Khan, ‘*Enforcement of BIT Awards at Bay in India as the Courts Rule Out the Applicability of the Arbitration and Conciliation Act 1996*’, Volume 22 Issue 1 ASIAN DISPUTE REVIEW 17 19-23 (2020).
2. UNCITRAL Model Law, 1985, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (Last accessed on Dec 12, 2022).
3. ICSID Convention, Article 25 https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf (Last visited on Dec 12, 2022).
4. ‘Article 2 of ICSID Additional Facility Rules 2006, https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf’ (Last visited on July 4, 2022).
5. ‘Article 54 ICSID Convention, https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf’ (Last visited on July 4, 2022).
6. United Kingdom Law, Section 1 (7) (a) of Arbitration (International Investment Disputes) Act 1966 states, ‘*award shall include any decision interpreting, revising, annulling an award being a decision, pursuant to the Convention, and any decision as to costs which under the convention is t form part of the award.*’ And; Section 1 (7) (b) an award shall be deemed to have been rendered pursuant to the Convention on the date on which certified copies of award were dispatched to the parties’.
7. UNITED STATES CODE <https://www.govinfo.gov/content/pkg/USCODE-2020-title22/pdf/USCODE-2020-title22-chap21A.pdf> (Last visited on Nov 12, 2022).
8. United States Code: Settlement of Investment Disputes 1967, Section 1650.
9. Mauritius Law, Investment Disputes (Enforcement of Awards) Act 1969 Section 2.
10. See, Singapore Law, Arbitration (International Investment Disputes) Act 1968 Section2 (1), <https://sso.agc.gov.sg/Act/AIIDA1968?ProvIds=xv-> (Last visited on Mar 12, 2022).
11. UNCITRAL Model Law Article 34 (2), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (Last visited on July 12, 2022).
12. New York Convention, 1958 Article V <https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf> (Last visited on July 12, 2022).
13. KATIA FACH GOMEZ AND ANA M. LOPEZ- RODRIGUEZ (EDS), 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES, 441 445-456 (2019).
14. ICSID Additional facility Rules, Article 3 https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf (Last visited on July 12, 2022).
15. CHRISTOPH H. SCHREUER, THE ICISID CONVENTION: A COMMENTARY ARTICLE 54, 1118 (Cambridge University Press, 2009).

⁶⁶ Supra, note 40.