Enforcement of Arbitral Awards Against States and State Entities

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I. INTRODUCTION

A PERCEIVED advantage of international arbitration as compared with litigation is the 'transportability' of arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention'), or under the Washington Convention on the Settlement of Investment Disputes 1965 (the 'ICSID Convention'), in the case of investment disputes submitted to arbitration thereunder.

On the basis of anecdotal evidence at least, it appears that currently the vast majority of international arbitration awards are complied with voluntarily, presumably due to the availability of enforcement mechanisms and negative publicity which would result from non-compliance. Furthermore, success rates in relation to enforcement of awards through the domestic courts pursuant to the New York Convention have historically been excellent.[1] As the number of BIT claims increases there will inevitably be more instances of awards not being paid voluntarily; this is perhaps more likely where the issues behind underlying claims are significant on a domestic political front, perhaps especially so where they are associated with externally influenced factors such as World Bank-sponsored liberalisation of utilities, as with recent cases in India and South America. What redress is there if the unsuccessful party fails to pay, in particular if that party is a state?

An ICSID arbitration necessarily involves a state as a party. An arbitration award which falls under the New York Convention may also be against a state. These conventions are subject to domestic immunity laws and public policy

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1 Professor Albert Jan ven der Berg, 'Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few' in (1999) 10 *ICC Bulletin* 75 (Special Supplement).

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exceptions which may operate to restrict or exclude execution of the awards against assets of the state or state entity. Furthermore, a respondent state may also obtain a stay of enforcement of an arbitral award under either convention pending determination of an annulment application. Argentina recently achieved exactly this result, in an award rendered in September 2006 in *CMS Gas Transmission Co. v. Argentine Republic*.[2] The legal framework for enforcement of international arbitral awards, and these three limitations on the ability to enforce or execute an arbitral award against a state, are discussed below.

II. THE LEGAL FRAMEWORK

(a) New York Convention

The New York Convention, in force in 137 countries, applies to foreign arbitral awards, *i.e.* awards made in the territory of any contracting state other than the one in which enforcement is sought (Article I(1)). Under Article I(3), a contracting party can opt for the 'reciprocity reservation', whereby it will only apply the Convention to arbitral awards made in another contracting state.

The principal obligation, embodied in Article III, is for the contracting states to recognise such awards as binding and enforce them in accordance with their domestic rules of procedure. The grounds for the opposing party to challenge enforcement, set out in Article V(1), are limited, and are as follows:

(a) incapacity of the parties or invalidity of the arbitration agreement;
(b) lack of due process;
(c) award exceeds the tribunal's authority;
(d) irregularity in the composition of the arbitral tribunal or in the arbitral procedure;
(e) award not binding, suspended or set aside in the country where it was made.

In addition, a court may refuse enforcement for reasons of public policy, as provided in Article V(2), as discussed in more detail below.

(b) ICSID Convention

The ICSID Convention provides an international regime for arbitration of investment disputes. There are 143 parties to the ICSID Convention, under which legal disputes between states and foreign investors are submitted to binding arbitration administered by the International Centre for the Settlement of Investment Disputes (ICSID). The ICSID Convention provides a comprehensive procedure for investment arbitrations, and excludes the application of national arbitration law. There is no seat or place of arbitration in an ICSID arbitration

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[2] ICSID Case ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006 ('*CMS* v. *Argentina*').

which would operate to trigger the application of a national law on arbitration. Accordingly, enforcement of an ICSID award is governed by the ICSID Convention and not the New York Convention (which applies to arbitrations rendered in a seat that is a New York Convention contracting state).

Article 54 of the ICSID Convention requires contracting states to enforce an ICSID award 'as if it were a final judgment of a court in that state'. There are no grounds for refusal of enforcement, although Article 55 makes clear that the Convention does not derogate from the law in force in any ICSID Convention contracting state relating to immunity of the state from execution; thus, the minefield that is domestic law on the issue of sovereign immunity remains to be negotiated.

III. SOVEREIGN IMMUNITY

Immunity from execution arises when execution measures (following the court's recognition and enforcement of an arbitral award) are to be taken against a state's assets. States continue to apply such immunity, with the consequence that a successful ICSID claimant may suffer a Pyrrhic victory unless assets owned by the state but not immune from enforcement/execution (commonly those in use for commercial purposes) can be identified. Having gone to the significant costs of obtaining an ICSID award, and leave to enforce the award (pursuant to Article 54(2) of the ICSID Convention), the claimant may find itself unable to obtain satisfaction thereunder.

There is an apparent contradiction in a state's waiver of immunity from jurisdiction under Article 54 of the ICSID Convention (thereby enabling the successful party to obtain leave to enforce the award) but not from execution (pursuant to Article 55 of the ICSID Convention). This incongruity may be resolved by considering that the failure to waive immunity from execution does not imply that the successful party cannot execute against any of the state's assets. It is simply that such execution is subject to laws on immunity which restrict the categories of state assets which may be executed against. Of course, the practical reality is that there are very few state assets which will not fall under the protective cloak of immunity.

The case of *AIG Capital Partners Inc. and another* v. *Republic of Kazakhstan and others*,[3] before the English High Court, is a recent example of this. The claimants brought a claim against the Republic of Kazakhstan under the bilateral investment treaty between the United States and Kazakhstan in relation to the cancellation by Kazakhstan of a project to develop a housing complex and expropriation of land without compensation. The ICSID award recorded that Kazakhstan's actions amounted to expropriation, were arbitrary, in wilful disregard of due process of land and 'were shocking to "all sense of judicial propriety" '. Kazakhstan subsequently failed to comply with the award.

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[3] [2005] EWHC 2239, [2006] 1 All ER 284.

The claimants sought to enforce it against securities and cash held by third parties in London on behalf of the National Bank of Kazakhstan. The claimants contended that these assets were intended for use for commercial purposes, therefore falling outside the protections of the UK Sovereign Immunity Act 1978 (SIA). The SIA provides that property of a state is immune from enforcement unless it is intended for use for commercial purposes. It also provides that the property of a state's central bank should not be regarded as intended for such purposes. The English High Court held in favour of Kazakhstan. Pursuant to the SIA, all property of a central bank was found to enjoy complete immunity from enforcement, regardless of whether the property was used for commercial purposes. Whilst this decision did not depart from previously established principles of sovereign immunity, or indeed Article 55 of the ICSID Convention, which echoes those principles, it underlined the risk that a defaulting state may be immune from execution against an ICSID award.

Similarly, in *Svenska Petroleum* v. *Lithuania*[4] [2007] *W.L.R.* 876 (a case to do with the enforcement in London of an arbitration award obtained in ICC proceedings in Denmark), the English Court of Appeal noted that the waiver of sovereign immunity contained in section 9 of the SIA regarding enforcement of arbitration awards extended to both domestic and foreign awards. Somewhat amusingly, the Court noted that it had no need on the facts of the case to characterise relevant sovereign acts (to do with the exploitation of mineral resources) as public or private law: 'In the circumstances we prefer to express no concluded opinion on the question'.

In the United States, the Foreign Sovereign Immunities Act (FSIA)[5] similarly allows execution on property of the state provided that the property is 'used for a commercial activity in the United States'.[6] In the case of *LETCO* v. *Liberia*,[7] the US District Court for the Southern District of New York granted enforcement of an ICSID award against Liberia, but refused *execution* against fees and taxes payable by shipowners in the United States to Liberia. The award arose from an ICSID claim by LETCO against Liberia for the termination of a concession to harvest and exploit Liberian timber.[8] Following LETCO's initiation of arbitration proceedings, Liberia refused to participate in the arbitration and commenced an action in the Liberian courts. Nonetheless, the arbitral tribunal proceeded to enter an award against LETCO for over US$9 million. Liberia opposed a writ of execution issued to the US Marshal for the Southern District of New York, on the basis that execution against its property would contravene the FSIA. Liberia argued that by entering into the forestry concession contract with LETCO it had not waived its sovereign immunity to enforcement or execution. The District Court disagreed. It was held that Liberia, as a signatory to the ICSID

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4 [2006] EWHC Civ 1529.

5 28 U.S.C.

6 Foreign Sovereign Immunities Act, 28 U.S.C., s. 1610(a).

7 *Liberian Eastern Timber Corp. (LETCO)* v. *Government of the Republic of Liberia*, 650 F. Supp. 73; 1986 U.S. Dist. LEXIS 16534; 1987 AMC 819.

8 ICSID Case ARB/83/2.

Convention, had waived its sovereign immunity in the United States with respect to enforcement of the arbitral award. However, Liberia was not found thereby to have waived its sovereign immunity to execution against its assets. In particular, the collection of taxes by the Government of Liberia constituted the exercise of a sovereign power, and not a 'commercial activity' within the exception provided for in section 1610(a) of the FSIA. In a subsequent application to the District Court of Columbia, the court refused execution against bank accounts of the Embassy of Liberia on the grounds of diplomatic immunity pursuant to Article 25 of the Vienna Convention and sovereign immunity under section 1609 of the FSIA, and an account of the central bank of Liberia on the latter ground only.[9] The court stated that 'the concept of "commercial activity" should be defined narrowly because sovereign immunity remains the rule rather than the exception'.

A practical solution to the issue of sovereign immunity is inclusion in the relevant contract or treaty with the state a clause expressly waiving immunity from execution. ICSID recommends the following model clause for that purpose:

> The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this Agreement.[10]

However, even such clauses will not necessarily lead to the full panoply of execution processes being available; for example, processes of committal and fining will not be available, where the sovereign defendant has failed to comply with a disclosure order.

IV. PUBLIC POLICY EXCEPTION

Article V(2)(b) of the New York Convention entitles a court to refuse recognition and enforcement of an arbitral award if it would be contrary to the public policy (or *ordre public*) of the country in which it is sought. Accordingly, the scope of the public policy exception is defined by the domestic law of the country of enforcement and there is no public international law definition of the concept. Due to the lack of certainty as to the remit of the public policy exception, this argument may be raised by an unsuccessful defendant state in order to delay or avoid enforcement. Whilst this is not a defence exclusively available to states, there is clearly scope for arguments concerning bribery and corruption of government officials in relation to the procurement of contracts with states.

However, the public policy grounds for refusing enforcement are narrow, and such challenges rarely successful. For example, an award requiring payment under a contract for assistance in obtaining a government contract in Algeria was enforced by the English Commercial Court, notwithstanding that the contract breached

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[9] 659 F. Supp. 606; 1987 U.S. Dist. LEXIS 3812.

[10] ICSID Model Clauses, Doc. ICSID 5/Rev. 2 (1 February 1993).

Algerian law.[11] The English court found that there were no public policy grounds on which enforcement of the award could be refused, because the Swiss arbitral tribunal's express finding that there had been no bribery or corrupt practice was 'unchallengeable'. The English court considered that whilst a tribunal applying English law might have arrived at a different conclusion,[12] 'as a matter of policy of the upholding of international arbitral awards' the award should be enforced.

The court relied in this regard upon the Court of Appeal's statement in *Westacre Investments Inc.* v. *Jugoimport-SPDR Holding Co. Ltd*,[13] that if an arbitral tribunal determines to enforce a contract which does not offend the domestic public policy under the proper law of the contract or the curial law, the arbitral award should be enforced notwithstanding that English domestic public policy may have taken a different view. In *Westacre* the Court of Appeal permitted enforcement of an award arising from a contract which was for the purchase of personal influence from Kuwait government officials in relation to arms contracts. On the face of the award, performance of the contract was not contrary to its proper law and the curial law, or the law of the place of performance. Whilst a contract for the purchase of personal influence was contrary to English public policy, it did not infringe a rule of English public policy so serious that the English court would not enforce it whatever its proper law or place of performance (as would be the case for bribery, for instance). As a result, the public policy of finality and enforcing awards outweighed the public policy of not enforcing illegal contracts.

However, in *Soleimany* v. *Soleimany*,[14] the Court of Appeal refused to enforce an award concerned with an illegal contract for the smuggling of carpets out of Iran. In that case, the court considered that it would be contrary to public policy to enforce an award which on its face related to a contract contrary to the law of the place of performance. This is in distinction to *Westacre*, in which, at least on the face of the arbitral award, the contract was not contrary to the law of Kuwait, the place of performance.[15]

Unless there is good reason for the English courts to doubt the reliability of an arbitral award, they will not embark upon an inquiry into the issue of illegality.[16] It is clear that, consistent with the English courts' non-interventionist approach to arbitration proceedings generally,[17] the courts are resistant to attempts by defendants subject to enforcement proceedings to re-open facts found by arbitrators.

The US courts have taken a similar pro-enforcement approach, and declared that 'the [New York Convention's] public policy defense should be construed

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[11] *Omnium de Traitement et de Valorisation SA* v. *Hilmarton Ltd* [1999] 2 All ER (Comm.) 146.

[12] On the basis of the English law principle that the English courts will not enforce a contract where its performance involves the doing of an act in violation of the law of a foreign state (as stated in *Regazzoni* v. *K. C. Sethia (1944) Ltd* [1957] 3 All ER 286 at 289).

[13] [1998] 4 All ER 570 ('*Westacre*').

[14] [1999] QB 785.

[15] Albeit this finding was contradicted by Kuwaiti law evidence put before and accepted by the court.

[16] [1999] QB 785.

[17] As recognised by Arbitration Act 1996, s. 1(c): 'the court should not intervene except as provided by this Part'.

narrowly'.[18] In the United States, 'enforcement of foreign arbitral awards may be denied on this basis only where enforcement could violate the forum state's most basic notions of morality and justice'.[19] Thus, the public policy defence is rarely invoked successfully in the US courts.

In *Parsons & Whittemore Overseas Co.* v. *Société Générale de l'Industrie du Papier*,[20] the court made clear that 'national policy' of the US government could not be equated with 'public policy' for the purposes of resisting enforcement of an arbitral award. Accordingly, an award arising from a US engineering firm's failure to complete an Egyptian construction project in the wake of the Six Days War in 1967 when Egypt severed relations with the United States was held not to contravene public policy. The court commented, 'To read the public policy defense as a parochial device protective of national political interests would seriously undermine the [New York Convention's] utility'.[21] The court stated that considerations of reciprocity counselled against an expansive reading of the defence as foreign courts may otherwise frequently rely upon it to refuse to enforce arbitral awards rendered in the United States.

In another case, a public policy defence to enforcement of an arbitral award arising from a contract alleged by a Russian airline to violate the United State's foreign policy with respect to Iran was disallowed on the basis that it was not established that the contract violated the United States' most basic notions of morality and justice.[22]

The US courts have also rejected attempts to resist enforcement of foreign arbitral awards on the grounds of claims that an award conflicted with federal law[23] or that a party to the relevant agreement committed fraud.[24]

Accordingly, a narrow reading of the public policy defence has been applied by the US courts, in line with the purpose of the New York Convention to remove obstacles to the enforcement of foreign arbitral awards.

V. ANNULMENT

(a) A Delaying Tactic for ICSID Respondents?

In contrast to commercial arbitrations under the rules of other institutions, parties to ICSID arbitrations have the right to request the establishment of a second, new ICSID panel (referred to as an 'ad hoc committee') to consider the annulment of an ICSID award on certain prescribed grounds.

The grounds for annulment, set out in Article 52(3) of the ICSID Convention, are:

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[18] *Parsons & Whittemore Overseas Co.* v. *Société Générale de l'Industrie du Papier*, 508 F.2d 974 (2d Cir. 1974).
[19] *Ibid.*
[20] *Ibid.* 974–975.
[21] *Ibid.* 974.
[22] *MGM Productions Group, Inc.* v. *Aeroflot Russian Airlines*, 91 Fed. Appx. 716 (2d Cir. 2004).
[23] *E.g. Brandeis Intsel Ltd* v. *Calabrian Chemicals Corp.*, 656 F. Supp. 160 (S.D.N.Y. 1987).
[24] *Indocomex Fibres Pte., Ltd* v. *Cotton Co. Intern., Inc.*, 916 F. Supp. 721 (W.D. Tenn. 1996).

(a) the tribunal was not properly constituted;
(b) the tribunal manifestly exceeded its powers;
(c) there was corruption on the part of a tribunal member;
(d) there was a serious departure from a fundamental rule of procedure; or
(e) the award failed to state the reasons upon which it was based.

If the ad hoc committee determines that one of these grounds exists, then, at the request of either party, the dispute will be reheard by a newly constituted ICSID tribunal. The application for annulment must be submitted to the Secretary General within 120 days of the award being rendered. Upon receipt of the request the Chairman of the Administrative Council must forthwith appoint an ad hoc committee of three persons (which cannot include any member of the relevant tribunal or any national of the same nationality as either of the parties to the dispute or any tribunal member) to determine the annulment application.[25]

There is obviously a danger that the annulment procedure may be used as a delaying or negotiation tactic by recalcitrant unsuccessful parties. However, the statistics suggest that the annulment procedure is not frequently used: of the 214 current and concluded ICSID cases, 16 have been subject to an annulment procedure.[26] Nonetheless, where annulment is requested this can significantly delay final resolution of the dispute. Notably, in two cases the awards issued by the new panels following successful annulment applications were themselves also subject to annulment procedures (which were rejected).[27] As a result, one of those cases lasted for nearly 12 years, and the other for over nine years.

Earlier this year, Argentina was successful in obtaining a continued stay of execution in *CMS* v. *Argentina*.[28] The award in that case was the first ICSID award made against Argentina arising from the economic crisis which led to repeal of currency convertibility laws and adoption of 'pesification' in early 2002. The arbitration was registered in 2001, and now appears unlikely to reach final resolution for some time yet. The timescale for the annulment procedure can be long, particularly if a stay of enforcement is applied for. In *Repsol YPF Ecuador S.A.* v. *Empresa Estatal Petróleos del Ecuador (Petroecuador)*,[29] Ecuador's application for a stay of enforcement (pending the annulment procedure) alone took almost two years. The annulment proceeding is still afoot. In the case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentine Republic*,[30] a partial annulment procedure (which did not incorporate an application for a stay against enforcement) took 16 months.

One of the oft-cited benefits of arbitral awards – finality (or limited availability of an appeal mechanism) – becomes less meaningful when awards can be subject to such

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[25] Article 52 of the ICSID Convention sets out the annulment procedure.
[26] Although a number of the concluded cases were settled prior to the rendering of an award.
[27] *Amco Asia Corp. and others* v. *Republic of Indonesia*, Case ARB/81/1; *Klöckner Industrie-Anlagen GmbH* v. *United Republic of Cameroon and Société Camerounaise des Engrais*, Case ARB/81/2.
[28] ICSID Case ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006.
[29] ICSID Case ARB/01/10.
[30] ICSID Case ARB/97/3.

lengthy annulment procedures. However, the narrow grounds for annulment, which are more restrictive than the grounds which might be available under domestic law for appealing or setting aside an award,[31] place real limits on its availability. In addition, the prejudice to a claimant by the delay caused by an annulment application can be redressed by an award of interest in the event the annulment application fails.

Whilst the ICSID Convention does not specifically provide for it, a party seeking a stay of enforcement may be required by the ad hoc committee to post a bond or provide a guarantee. This is not always required,[32] but has been ordered on a number of occasions.[33] An ad hoc committee would exercise its discretion to require a bond where it considers that there is a risk of non-compliance in the future.[34] This is most likely to be the case where the annulment application appears to be merely dilatory. The practice of requiring a bond or guarantee therefore should serve as a disincentive to vexatious annulment applications.

CMS argued that the provisional stay of enforcement in Argentina's favour should not be continued 'unless Argentina provides adequate assurances (such as the provision of an irrevocable and unconditional bank guarantee in favour of CMS) as to the payment of the Award, should its application for annulment fail'.[35] CMS contended that, to the contrary, Argentina had expressly stated an intention to submit final ICSID Awards 'to a novel domestic review mechanism before the Argentine Supreme Court (or other fora) in open breach of its obligations under the ICSID Convention'.[36] However, the ad hoc committee determined not to require Argentina to provide a bond. It considered that any doubts as to Argentina's intentions to comply with an eventual award were dispelled by the provision by the Attorney General of Argentina, at the ad hoc committee's request, of a written undertaking that it would recognise as binding and enforce in Argentina such award in the event the annulment was not granted.

(b) Adjournment under Article VI of the New York Convention

Whilst commercial arbitration rules (as compared with the ICSID Arbitration Rules) do not provide for an annulment procedure, parties to commercial arbitrations may apply to annul an arbitral award in the courts of the seat of the

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[31] For example, see sections 67, 68 and 69 of the Arbitration Act 1996 in England.

[32] *Patrick Mitchell* v. *Democratic Republic of the Congo*, ICSID Case ARB/99/7, Decision of 30 November 2004; *Maritime International Nomineees Establishment* v. *Republic of* Guinea, 22 December 1989; *MTD Equity Sdn Bhd and MTD Chile S.A.* v. *Republic of Chile*, ICSID Case ARB/01/7 and *CMS* v. *Argentina*, *supra* n. 2, where the annulment panel declined to require the posting of a bond.

[33] *Amco Asia Corp. and others* v. *Republic of Indonesia*, Decision Annulling the Award, 16 May 1986; *Amco Asia Corp. and others* v. *Republic of Indonesia*, Second Annulment, ICSID Case ARB/81/1, Annulment Decision, 3 December 1992; *Wena Hotels Ltd* v. *Arab Republic of Egypt*, ICSID Case ARB/98/4, Procedural Order No. 1, 5 April 2001; *CDC Group PLC* v. *Republic of the Seychelles*, ICSID Case ARB/02/14, Decision, 14 July 2004; *Repsol Y.P.F. Ecuador* v. *Petroecuador*, ICSID Case ARB/01/11, Decision, 22 December 2005.

[34] In *MTD* v. *Chile*, *supra* n. 32, the ad hoc committee stated that a 'Respondent seeking a remedy under the Convention should demonstrate that for its part it will comply with the Convention, and if there is doubt in that regard, the committee may order the provision of a bank guarantee as a condition of a stay'. Decision of the ad hoc committee on the Respondent's Request for a Continued Stay of Execution, 1 June 2005.

[35] Award of the ad hoc committee, 1 September 2006, para. 16.

[36] *Supra* n. 28 at para. 18.

arbitration, to the extent the curial law allows annulment. Accordingly, an annulment application in the domestic courts can also be used as a method of delaying enforcement of an arbitral award.

Under Article VI of the New York Convention, enforcement of an arbitral award in any contracting state may be adjourned if the arbitral award is the subject of annulment proceedings in the courts of the seat of the arbitration. A court adjourning its decision on enforcement under Article VI may order the party against whom enforcement is sought to give suitable security.

VI. CONCLUSION

An arbitral award, whether obtained pursuant to the provisions of a private contract or a treaty between states, is enforceable against a state under the New York Convention or the ICSID Convention, as applicable. A party seeking to enforce an arbitral award against a state or state entity is not confined to the territory of that state. Accordingly, even if a state's courts are reluctant to enforce an award against their own state, the claimant may succeed in enforcing the award against assets of the state in other New York or ICSID Convention (as the case may be), contracting states.[37] Such steps will commonly be taken in the world's leading international financial centres where state assets deployed in international finance and trade may be located – and where a reasonably robust attitude to issues of comity encountered in enforcement against assets may be expected. Before deciding against which assets to enforce an award, it is worth researching the enforcement history of the relevant country, as some countries (including Indonesia, China and India) do not have a good enforcement record. An analysis of relevant trade patterns and practices will often pay dividends also.

However, the ability to enforce against a state, or a state entity, is restricted by the domestic law of the place of enforcement on sovereign immunity and public policy. Furthermore, a state may seek to create mischief by applying to annul an award in the domestic courts or before an ICSID ad hoc committee. Argentina obtained a stay of enforcement of the ICSID award rendered against it in *CMS* v. *Argentina*. The annulment procedure can lead to significant delays in obtaining payment under an award. However, grounds for annulment are very limited, and where it appears dilatory the applicant can be required to post a bond, thereby deterring vexatious annulment applications. The public policy exception to enforcement of an award is also very narrow in scope. The greatest restriction on obtaining satisfaction of an arbitral award against a state therefore remains domestic rules on sovereign immunity, a restriction which applies in equal measure to court judgments.

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[37] Provided, in the case of a New York Convention award, the seat of the arbitration was a New York Convention contracting state.