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INTERNATIONAL INVESTMENT ARBITRATION UNDER ICSID – ENFORCEMENT AND APPEAL MECHANISM

AUTHORED BY - DHARUN LAKSHMAN
ICA RESEARCH PAPER

Introduction

The English poet Herbert Read once said that I can imagine no society which does not embody some method of arbitration.[1] Just like he said a half century ago, the mechanism of arbitration has developed into a different dimension. First let us start with the question of what arbitration is. Arbitration is one of the alternate dispute resolution methods where when a dispute arises between two parties, upon the agreement of the parties, they go to one or more arbitrators. The arbitrator(s) after doing a thorough analysis of the dispute, come up with a binding decree also called an award. It is basically a private dispute resolution method where the parties solve their dispute outside court. This method of arbitration is done mostly for commercial matters.

This paper primarily focuses on the topic of investment arbitration. We will try to under about international investment arbitration through the lens of ICSID (International Centre for Settlement of Investment Disputes). We will clearly discuss about essential features of ICSID, the instigation of investment arbitrations and the selection of arbitrators for the investment arbitration. Then we will take deep dive into the vast topics of enforcement of arbitral awards and appeal mechanism in the investment arbitration followed by case laws relating to investment arbitration.

International Centre for Settlement of Investment Disputes

International Centre for Settlement of Investment Disputes (ICSID hereinafter) is a multilateral treaty established by the convention on the settlement of investment disputes between the states and the investors who are citizens of some other coutry. This center was Executive directors of the world bank just for the purpose of promoting the scope of international investments around

[1] Herbert Read Quotes. BrainyQuote.com, BrainyMedia Inc, 2022. https://www.brainyquote.com/quotes/herbert_read_261755, accessed October 22, 2022.

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the world. ICSID offers solutions to investment disputes by the way of arbitration as well as conciliation. The two major instruments of ICSID are ICSID Convention and the ICSID Additional Facility. These two provide the complete procedural base for the process of arbitration. This base is accompanied by a set of rules and regulations.

Essential features of ICSID

Basically, ICSID provides a platform where its member nations can solve their disputes with the help of various alternate dispute resolution methods like Arbitration and conciliation. It gives a complete framework for the member states to arbitrate over their disputes. This ICSID is an international treaty among the members. The disputes arising between the countries which qualify as a member nation of ICSID and an investor who is a citizen of a country which is identified as a member nation of ICSID and if they have agreement to arbitrate following the rules of this convention then ICSID comes into picture to solve the dispute. This method of arbitration is made in a way that it is self-contained. Local courts cannot be involved in ICSID proceedings. All these apply to international investment arbitration also.

Some of the other features of ICSID are as follows:-

- Parties enjoy immunity from legal process in the conduct of the proceedings[2]
- The dispute must be a legal dispute arising directly out of an investment.The disputing parties must have consented in writing to the submission of their dispute to ICSID arbitration or conciliation.[3]
- Once disputing parties consent to ICSID arbitration and unless they agree otherwise, they accept ICSID arbitration as the exclusive remedy[4]
- A Member State cannot give diplomatic protection to any of its nationals which have consented to arbitration under the Convention, except in limited circumstances[5]
- The limited post-award remedies available are set out in the Convention itself[6]
- Awards in ICSID Convention arbitrations are final and binding, and may not be set aside by the courts of any Member State[7]

[2] ICSID Convention, Article 21 and ICSID Convention, Article 22
[3]ICSID Convention, Article 25
[4]ICSID Convention, Article 26
[5] ICSID Convention, Article 27
[6] ICSID Convention, Article 49 and ICSID Convention, Article 52
[7] ICSID Convention, Article 53

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- All Members States, whether or not parties to the dispute, recognize and enforce ICSID Convention monetary awards as final judgments in any Member State[8]
- The place of proceedings, i.e., where hearings are held, has no legal significance in Member States[9]

New York Convention –

This convention came to existence in the year 1959. This came in order to correct and address the problems that were there with the Geneva Protocol on the arbitration awards 1923. Through this convention comprehensive and very exhaustive rules were given. This convention basically makes sure that the nations which are member to it enforce the award given by the tribunal. It also makes sure that the courts present in the seat where the arbitration takes place have the absolute authority to annul an award based on legally valid grounds.

What is Investment Arbitration?

It is a legal dispute resolution method where the parties are foreign investor and the host state in which the investor invested his money. It is also known as Investor – State Settlement. The existence of an arbitration method like this ensures that in case of a dispute between a foreign investor and a state, the investor who is foreigner with limited access, will stand a chance to have option to arbitrate the dispute with qualified arbitrator and render an enforceable award. This type of arbitration eliminates the possibility of biased approach of courts towards the foreigner and in favor of the state.

The consent of the state where a foreigner invests his money is very important for the investment arbitration. This consent is often present in the IIA (International Investment Agreement). This consent is given by the host nation mostly based on the nationality of the person or the entity which is planning to invest in their country. Sometimes in invest agreements also this consent can be seen. No matter where it is present this consent of the nation turns out to be a crucial element in the investment arbitration.

[8] ICSID Convention, Article 54
[9] ICSID Convention, Article 62 and ICSID Convention, Article 63

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Invest Arbitration – Instigation

All around the world, different individuals or firms tend to invest in other countries to yield more profit and popularity. During investments like these agreements will be made between the country in which the investment is made and the individual who is investing. In one of such agreements, the dispute resolution clause will be added in order to solve a dispute which might arise in future between the parties to the agreement. Usually, the agreements to an investment arbitration will give a "cooling off period". Mostly this period will be of six months when both the parties will be encouraged to get involved in negotiation with an intention of solving the problem in a simpler form which can give an amicable solution. This cooling off period will start from the moment the investor issues a notice to arbitrate the dispute against the host state. During this period the parties can involve in negotiations but in some cases the state wont participate in negotiations and will just stay put to see if the foreign investor is really interested in arbitration.

Once this cooling off period is done and even then if the dispute is resolved then the foreign investor has to file a request for arbitration. Upon such request from the foreign investor and if the consent to arbitration is there given by the host state then the arbitration will commence. The foreign investor should be very careful with the consent of the host state because in the consent, the state might have barred the foreign investor to go for arbitration if the courts of the host state were approached first before arbitration. If this happens then investor will be unable to arbitrate the dispute and court will be the ultimate authority with the discretion to decide on the dispute.

Selection of Arbitrators for the Investment Arbitration

Arbitration takes a very meager time when compared to court proceeding. This is an very important factor which pull people towards arbitration over normal court proceeding. But, in this less time also selection of arbitrators delays the entire process as both the party parties should agree on same arbitrator. Plus unilateral appointment of arbitrator is usually unstable in countries like India. Selection of the arbitral tribunal is one of the most crucial and rigorous processes involved in all of the arbitration process. Mostly, at this point of time, the arbitrators tend to be either "pro-state" or "pro-state". This is because of a lot of reasons like nationality, fees involved and independence given to the arbitrators by the law and parties. Another factor which will pull a person as an arbitrator in the arbitration process is that the fees provided to the arbitrators by the parties. In cases of international investment arbitration, only high-profile legal practitioners will be approached considering the density of the matter involved.

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ICSID gives the parties ie; the state and the foreign investor the independency to choose the arbitrator. They have the power choose the arbitrator they wish. There are zero restrictions from ICSID's side when it comes to selection of arbitrators except the nationality of the arbitrator and his qualifications. The parties are also mostly advised to choose the arbitrator from the panel of arbitrators that the ICSID have with them.

BILATERAL INVESTMENT AGREEMENT

The number of "bilateral investment treaties" (BITs) in existence currently exceeds 2,200. These international agreements give foreign investors a direct way of holding nations accountable for breaking their duties under the rule of law. The term "investor-state arbitration" is used to describe this. A well-known illustration of this kind of agreement is Chapter 11 of the "North American Free Trade Agreement" (NAFTA). BITs, like the Chapter 11 provisions of NAFTA, are not uniform and allow for a wide range of tribunal decisions. Concern has grown about whether there are enough mechanisms to ensure uniformity and accuracy with in ad hoc arbitral procedure as a result of the expansion in investor-state conflicts and new judgements resulting from such arbitrations. Since there were only 385 BITs in 1989, the number climbed considerably over the 1990s, reaching 2,265 in 2003. They are currently covering 176 nations.

DIFFERENCE BETWEEN INSTITUTIONAL INVESTMENT ARBITRATION AND AD HOC INVESTMENT ARBITRATION

While talking about international arbitration, it will be erroneous mistake to skip the part where we should talk about institutional and Ad Hoc investment arbitration. Institutional arbitrations are where an institution will administrate an arbitration with a particular set of rules. ICSID is a vert apt example for institutional investment arbitration. Other examples are Permanent court for Arbitration (PCC), International Chamber of Commerce (ICC). Institutional investment arbitration is usually very expansive because of an entire institution is involved and all the man power etc.,

Ad Hoc investment arbitration. On the other hand is a type arbitration where there is no institution involved which will administer the arbitration process with a set of rules and regulations to abide by. The process of Ad Hoc arbitrations are governed by the most famous and dimensional

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UNCITRAL arbitration rules. These days , the investors are given more leniency by providing them with the opportunity to appoint the arbitrators. But this leniency also depends upon the terms of the agreement upon which the dispute is brought for resolution.

ENFORCEMENT OF AWARD IN AN INTERNATIONAL INVESTMENT ARBITRATION

The enforcement of investment arbitration is facilitated by the way of treaties which are multilateral in nature. These treaties are there to give a platform or ground to enforce the award which arises out of the investment arbitration between a host state and a foreign investor.
This is basically a recognized legal regime which is widely used to enforce arbitral awards which as mentioned below;

ICSID Convention – This convention is basically came into existence to protect the investors from the unilateral enforcements of arbitral award by host nations. There are no grounds or legal explanation to refuse to enforce an award given by this convention. They strictly restrict refusing of awards. Even national courts cannot annul the award given by ICSID convention. ICSID has its own annulment process as well which we will talk about in the later part of the paper. ICSID provides sovereign immunity though. Articles 53, 54 and 55 regulate the enforcement of arbitral awards.

Article 53 states that the award which the convention shall be final and binding on both the parties to arbitration and appeals are not allowed at any manner. The enforcement of the award can be stayed but cannot be stopped from being enforced. This section defines an award as well.[10]

Article 54 reiterates the same thing that Article 53 stated and it also adds something like the award given by the convention should be enforced and recognized like it was an award given by the highest court of that country. The execution of these awards should be governed by the legal principles which govern the execution of judgments given by the court.[11]

Article 55 states that “Execution of the award shall be governed by the laws concerning the

[10] ICSID Convention, Article 53
[11] ibid.,

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execution of judgments in force in the State in whose territories such execution is sought."[12]

In case if the host state is not a party to the ICSID Convention then the enforcement of the award arising out of the investment arbitration will be governed under the convention on the recognition and enforcement of foreign arbitral award, 1958. To this convention almost 75 percent of the countries are members so this will ensure the enforcement of the award.

Appeal mechanism against investment arbitration award -

It is a known fact that ICSID does not allow the parties to go for an appeal against an award given by the convention and it is binding on both the parties. Only thing available for the party against which the award was given is annulment. This might seem like that there is no remedy available for the party. This also leads to the conclusion that even if the tribunal of the convention gives an award by wrong application of law then the party will have no option to appeal and make it right. An appellate authority would ensure that the law has been applied by the arbitrators properly. It will also ensure that there is a chance for reviewing the award is present so that there is no unilateral decision. It is also considered as a demerit of ICSID that there is no appellate authority.

PROBLEMS WITH HAVING APPEAL MECHANISM

There is no doubt that the finality benefits of arbitration is greatly weakened if you add a second complete appeals phase to the whole arbitration procedure. Particularly, the length and cost of arbitrations will significantly rise, as will the likelihood that the claimant would receive a negative ruling. Large, resourceful governments and enterprises will gain from the process' extension. Smaller investors' complaints and developing nations' defences will consequently be far more challenging. The quality of the evaluation of any review process becomes a crucial consideration when addressing the issue of accuracy. The threshold of assessment can be thought of as a spectrum, with restricted review included in judicial review under the UNCITRAL Model Law or New York Convention across one end of the scale and complete appeal on both fact and law, with the discretion of the courts to replace its conclusion, on the other. The review gets increasingly time-consuming (and expensive) as one moves closer to an appeal.

[12] ICSID Convention, Article 55

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ANNULMENT

In comparison, only the self-contained ICSID annulment procedure can nullify ICSID awards. The contracting nations of the ICSID Convention have undertaken to implement ICSID awards automatically until they are overturned by such an ICSID annulment tribunal. The ICSID Convention establishes an unified set of premise for annulment to be adapted to just about every ICSID award, even farther differing from the guidelines established by the New York and Panama Conventions, that also contemplate and recognise some variation in the merits for annulment implemented by each contracting party to its own domestic arbitrations.

The following reasons can be used by an ad hoc annulment panel to nullify the arbitration award in response to a petition for annulment under Article 52:

There were major violations of a key procedural norm, the tribunal wasn't even appropriately formed, it had clearly overstepped its authority, one of its members had engaged in corruption, and the award lacked a justification for its conclusions. The creation of an ad hoc commission in response to each annulment request, though, has resulted in a broad interpretation of the criteria for annulment. Additionally, the grounds for annulment are limited to purely procedural infractions and do not include actual initiatives like public policy. In actuality, a number of contested awards are also not annulled due to the strict criteria established for the annulment process. The strict guidelines for annulment procedures established by the annulment panel focus solely on the validity of the mechanism used to determine the award. It has been noted that even when awards are overturned, the reasons for doing so are frequently due to improper use of the law instead of improper application of a relevant laws. The annulment committee also disregards grounds such failing to provide enough justification, applying the legislation incorrectly, etc. An appeals facility will offer a wider scope of review of an award than annulment procedures.[13]

Case laws on Investment Arbitration

Micula V Romania

This judgment confirmed that the UK's responsibilities under the Convention to acknowledge and start enforcing ICSID arbitral award are not avoided by the responsibility of assistance and cooperation under EU law. The SC's decision is noteworthy because this attempts to deal with the

[13] Thomas W Walsh, 'Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality' (2006) 24 BJIL 444 accessed on 20 October 2022.

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interaction of (occasionally) opposite manner of national, international, and EU law in the setting of investment arbitration.[14]

Eiser and infrastructure services v. Spain

The Supreme Court in this case, made it quite apparent that removing foreign sovereign protection does not prevent an award from being acknowledged as a judgement. The ruling also emphasizes the complexity of a procedure that is frequently seen as being very simple when engaging with regular business parties. Foreign arbitral awards are typically simple to recognise and enforce when there is no sovereign party involved. When attempting to impose against a recalcitrant sovereign, greater obstacles are likely to be encountered.[15]

COCLUSION

International arbitration, which offers a neutral court for the settlement of disputes with said host state, is a key safeguard provided by investment treaties intended to draw foreign investment. A reasonably high proportion of voluntary cooperation with investment treaty judgments has historically enhanced the promises of investment arbitration.

For several years, some well-known experts have predicted the end of investment arbitration. However, it is difficult to undo the several conventions and treaties currently in force, so it is unlikely that it will end very soon.

The moment has now come for the ICSID not just to reopen the debate as well as to take concrete actions toward the creation of an appellate framework as a result of the increase in investment in the economy and ISDS.

[14] Micula v Romania, [2020] UKSC 5
[15] Eiser and infrastructure services v. Spain ,[2020] FCA 157