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ENFORCEMENT OF ARBITRAL AWARDS: "TO ICSID OR NOT TO ICSID" IS *NOT* THE QUESTION

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I. Introduction

Neither law-making nor law-enforcement is an end in and of itself, but both are indispensable for the survival of a society governed by the rule of law. Legal 'attention', particularly in public international law, is mainly focused on the former aspect ('law-making') in the form of assessing the normative desirability, interpretation or application of substantive rules. However, enacting more regulatory measures does not necessarily ensure the well-being of societies. *Having* a legal right does not mean much in practice, if such right cannot be *enforced*. In order to make a difference on the ground, States have to be brought to comply with international rules and to execute judicial decisions, if they have been found to have violated such rules. In other words, in order for a rule of law to successfully give effect to the important values set out in the substantive law, attention should also be paid to actual compliance, either voluntary or coerced via enforcement mechanisms.

Up to the Second World War, private individuals and companies were rather poorly protected by international law. The few rights which they did possess (for example the right to compensation for expropriation) could only be enforced if their home State was willing to risk souring its international relations, by taking up their plight via diplomatic protection. This dramatically changed with the conclusion of, on the one hand, numerous human rights treaties and, on the other hand, a growing number of

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bilateral investment treaties (BITs) – both of which offer individuals substantive protection as well as procedural weapons to enforce their rights against offending States. Individuals have indeed seized upon these significant possibilities by initiating cases at an exponentially increasing rate before regional human rights courts as well as investor-State arbitral tribunals. These adjudicatory bodies have in most cases done a remarkable job of weighing the interests of the individual against those of the State, rejecting unreasonable complaints but, when faced with substantiated allegations, offering remedies to repair the damage suffered by private parties. This is the point where law students might close the book, all's well that ends well, justice has been done. But has it?

The well-known scholar and counsel Thomas Waelde remarked some years ago that what law schools focus on most, namely the application and interpretation of the law, forms a mere 10% of what disputes are actually about – the other 90% centers on two issues: evidence and enforcement. Can you prove what you allege? And, once you have done that and won your case, can you in fact obtain what is due? This paper examines the latter question and argues that the two types of enforcement which are often presented as 'good versus bad', namely enforcement under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) [2] versus enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[3] do not affect a claimant's chances of success as much as often portrayed.

The grounds for this assertion are threefold. First and most important, a legal ground: the ICSID and the New York Convention enforcement system both contain a form of safeguard mechanism against 'blind' enforcement of awards (albeit at a different stage): the annulment procedure and the national review procedure, respectively, whereby the latter has certain significant advantages over the former. Second, a policy ground: several States have expressed doubts about the ICSID system, sometimes

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 *UNTS* 159. At the time of writing (18 October 2011), 147 States had deposited their instruments of ratification, acceptance or approval of the ICSID Convention.

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (done 10 June 1958, entered into force 7 June 1959) 330 *UNTS* 38. At the time of writing (18 October 2011), 146 States had deposited their instruments of ratification, acceptance or approval of the New York Convention.

even choosing to withdraw from the ICSID Convention, whereas New York Convention membership remains constant. And third, a practical ground: actual enforcement and compliance rates are equally high under both systems.

Three preliminary comments need to be made before embarking on an elaboration of these three grounds. First, this paper is written as a response to Silvia Marchili's contribution asserting that the ICSID enforcement system is superior to all other enforcement systems. As such, this paper is not an abstract overview of 'enforcement in international investment law', but specifically argues one particular point: 'going to ICSID' is not automatically determinative for enforcement success. Second, in order to keep this contribution within the allotted word-space, the author has chosen to contrast enforcement under the ICSID Convention with that under the New York Convention, thereby not elaborating on setting-aside and enforcement models stipulated in the UNCITRAL Model Law on International Commercial Arbitration,[4] regional treaties or domestic law. Finally, this is an analysis of a matter on which no official statistics exist. Therefore, this paper lays no claim to exhaustiveness in its discussion of arbitral awards which were challenged before domestic courts, but rather offers a broader comparison of enforcement procedures under the ICSID and New York Conventions.

II. Legal Ground: Annulment versus Refusal to Enforce

A. The ICSID Annulment Procedure

The ICSID Convention bears a striking similarity with the traditional Roman Catholic canonic law concerning marriage: according to Articles 53 and 54 of the ICSID Convention, all ICSID awards are final and binding; equally, according to canonic law, marriage vows are binding and last until one of the contracting parties passes away; divorce is not an option. However, both sets of rules allow for one important loophole: if the initial act was fundamentally flawed, it is considered never to have occurred in the first place. In other words, the two people have never been married, or

[4] See *e.g.*, Arts. 34-36 of the UNCITRAL 'Model Law on International Commercial Arbitration' (1985) *GAOR* 40th Session Supp 17 (A/40/17) Annex I, with amendments (2006) *GAOR* 61st Session, Supp No. 17 (A/61/17) – this Model Law may also apply to investor-State arbitrations (Art. 1(1) fn2).

the award has never been rendered – the act is removed from the (legal) order retroactively; it never happened.

This rule has been incorporated in Article 52 of the ICSID Convention since its entry into force in 1966: awards can be annulled for one or more of the following (exhaustively enumerated) reasons:[5]

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
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> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the Tribunal;
> (d) that there has been a serious departure from a fundamental rule of procedure; or
> (e) that the award has failed to state the reasons on which it is based.

Article 52 of the ICSID Convention was very rarely invoked during the first thirty-five years of the Convention's life; in recent years however, losing parties have much more frequently submitted an application for annulment.[6] Between 1966 and 2000, only 5 annulment applications were registered with the ICSID Secretariat, compared to no less than 39 such applications between 2001 and (September) 2011. This, of course, reflects the trend towards increasing recourse to investor-State arbitration in general, and ICSID arbitration in particular. For example, in the aftermath of the financial crisis in Argentina during the late 1990s and early 2000s and the Argentinean government measures aimed at remedying this crisis, more than forty arbitral proceedings were initiated by foreign investors. In the large majority of cases, Argentina was held to have violated the relevant BIT, after which it systematically decided to file for annulment. Several of these proceedings are still pending (*e.g., LG&E v. Argentina*),[7] some were discontinued (*e.g., Siemens v. Argentina*)[8] and a number of *ad hoc* annulment committees that have rendered their decision have

[5] For an extensive analysis of annulment under the ICSID Convention, see *e.g.,* Balaš, V., 'Review of Awards', in: Muchlinski, P., Ortino, F., Schreuer, C., [Eds.], *The Oxford Handbook of International Investment Law*, OUP (2008) 1125-1153, at 1136-1150; Gaillard, E., Banifatemi, Y., [Eds.], *Annulment of ICSID Awards*, IAI International Arbitration Series No. 1, Paris, Juris Publishing (2004).

[6] See *e.g.*, Bjorklund, A., 'The Continuing Appeal of Annulment: Lessons from *Amco Asia* and *CME*', in Weiler, T., [Ed.], *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, London Cameron May (2005) 471-521.

[7] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1).

[8] *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8) Order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1), 28 September 2009.

decided not to annul (*e.g., Azurix v. Argentina; Continental Casualty Company v. Argentina*).[9] However, in other cases, awards have been partially or entirely annulled which meant the claimants had to go back to the drawing-board (*e.g., Sempra v. Argentina; Enron v. Argentina*).[10] This could hardly be called a victory for the 'ICSID equals easy enforcement' advocates.

Even in cases where the application for annulment is rejected and the original tribunal's award is maintained in its entirety, an ambiguous situation looms if the *ad hoc* annulment committee throws shadows of doubt on the legal validity of the original tribunal's reasoning. Such dubious situation was for example created by the *CMS ad hoc* committee blowing simultaneously hot and cold when finding that although the original tribunal had misinterpreted and misapplied the law, the award could nevertheless not be annulled:[11]

> Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.[12]

In other words, the *CMS ad hoc* committee held that the case had been decided on the wrong legal grounds, but simply because (some) legal grounds were relied upon, the award could not be annulled. The annulment decision was a significant disappointment for both parties to the dispute: the claimant (CMS) had won a hollow legal victory because the original award was still standing (but with minimal authority); the host State (Argentina) had won a hollow moral victory (the recognition that the original case had been wrongly decided) but was nevertheless still under the obligation (less willing than ever) to comply with the original award because it was not formally annulled.

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[9] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) Annulment Decision, 1 September 2009; *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9) Annulment Decision, 16 September 2011.

[10] *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Annulment Decision, 29 June 2010; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Annulment Decision, 30 July 2010.

[11] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Annulment Decision, 25 September 2007, ¶¶119-136.

[12] *Id.*, ¶136.

The ICSID annulment procedure has started to resemble a form of a standard appeal, a route taken as a matter of course, rather than as an exception. As a result, the average duration of an ICSID proceeding (from initiation to annulment award, often with a stay of enforcement of the original award, and possible re-take before a different tribunal) is significantly extended. This makes the entire process much more expensive because the parties not only finance the constitution and working hours of the *ad hoc* annulment committee, but lawyers' billing hours keep being added up as well. Both these changes (increased duration and cost) go against the original reasons why arbitration may be opted for instead of litigation.[13] From a public international law point of view, particularly the Vienna Convention rules on treaty interpretation with their focus on 'object and purpose of a treaty', the question can be raised whether this extensive use of the annulment option was at all foreseen and consented to by States when drafting, signing and ratifying the ICSID Convention. Specifically the situation where an annulment decision condemns the original award but leaves it standing because it is not *so* deeply flawed that it fulfils one of the five annulment thresholds of Article 52, erodes the status of international investment law as a stable, reliable and predictable legal system.

Outside of the ICSID framework, applying for annulment under the *lex fori* is also an option for a defiant respondent.[14] However, as States are more likely not to take the 'proactive' stance of challenging the award before domestic courts at the seat of the arbitration but rather prefer to 'passively' resist recognition and enforcement wherever the investor initiates such procedures − and as the 'proactive' challenge and the 'passive' resistance are most often based on very similar legal reasoning,[15] this option is not examined separately in this paper.

B. Refusal to Enforce under the New York Convention

Some lawyers seem to look down on 'non-ICSID' awards, as if an award rendered under the UNCITRAL rules for example and subsequently in need of enforcement

[13] Balaš, V., *op.cit.*, at 1150-1151.
[14] *E.g.*, Art. 34 of the UNCITRAL 'Model Law on International Commercial Arbitration'.
[15] Hobér, K., Eliasson, N., 'Review of Investment Treaty Awards by Municipal Courts', in: Yannaca-Small, K., [Ed.] *Arbitration under International Investment Agreements: a Guide to the Key Issues*, OUP (2010) 635-670.

under the New York Convention is a recipe for disaster. Admittedly, Articles 53 and 54 of the ICSID Convention state very clearly that awards are final and binding[16] – however, awards rendered in 'non-ICSID' cases can be final and binding as well (*e.g.* Article 34(2) UNCITRAL Arbitration Rules).[17] The main difference is alleged to lie in Article 54(1) of the ICSID Convention which states that:

> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state. [emphasis added]

However, does this difference really give the claimant the spectacular advantage often asserted? First of all, it needs to be noted that Article 54(1) of the ICSID Convention applies to the pecuniary obligations solely – with regard to non-pecuniary damages which may be awarded by a tribunal, such as a certain performance, the ICSID enforcement rules do not apply. Furthermore, this Article does not apply to awards which are made under the ICSID Additional Facility rules,[18] which, for the purpose of this paper, fall under 'non-ICSID' awards.

Claimants who wish to enforce final and binding 'non-ICSID' awards do not risk having to go through an extended annulment procedure but are usually subject to the provisions of the New York Convention which allow for a limited form of national review, possibly resulting in a refusal to enforce the arbitral award.[19] The general obligation of the Member States to the New York Convention is to recognize foreign

[16] For an elaborate analysis of the text, history and practical application of enforcement under the ICSID Convention, see *e.g.*, Alexandrov, S.A., 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention', in: Binder, C., Kriebaum, U., Reinisch, A., Wittich, S., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, OUP (2009) 322-337; Broches, A., 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution', 2 *ICSID Rev* (1987) 287-334.

[17] UNGA Res 31/98 'Arbitration Rules of the United Nations Commission on International Trade Law' (1976) *GAOR* 31st Session Supp No. 17 (A/31/17), chap. V, sect. C., as revised (2010) *GAOR* 65th Session Supp No. 17 (A/65/17), chap. III.

[18] ICSID Arbitration (Additional Facility) Rules (1979) 1 *ICSID Rep* 249 (as amended with effect from 10 April 2006) 15 *ICSID Rep* 656.

[19] For an extensive analysis of the New York Convention provisions, see *e.g.*, van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, Kluwer Deventer (1981); Di Pietro, D., Platte, M., *Enforcement of International Arbitration Awards–The New York Convention of 1958*, London, Cameron May (2001).

arbitral awards as binding and to enforce them in accordance with their rules of procedure, as stipulated in Article III. According to Article IV, a party applying for recognition and enforcement of a foreign arbitral award has to supply the competent authority with: (a) the arbitral award; and (b) the arbitration agreement. The party against whom enforcement is sought, can object to such enforcement by submitting proof of one of the grounds for refusal of recognition and enforcement which are exhaustively listed in Article V(1), namely:

> *(a)* The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made ; or
> *(b)* The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
> *(c)* The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
> *(d)* The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
> *(e)* The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Furthermore, the competent authority may *proprio motu* refuse recognition and enforcement for reasons of public policy as provided in Article V(2), namely if:

> *(a)* The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
> *(b)* The recognition or enforcement of the award would be contrary to the public policy of that country.[20]

[20] The meaning of 'public policy' in this context was further elaborated upon by for example, the ILA Committee on International Commercial Arbitration, which defined it as follows in its Resolution 2/2002: "1.1(d) The international public policy of any State includes**:** (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "*lois de police*" or "public policy rules" and (iii) the duty of the State to respect its obligations towards other States or international organisations." (International Law Association, New Delhi Conference (2002), Committee on International Commercial Arbitration, *Final Report and Recommendation 2/2002 on Public Policy as a Bar to Enforcement of International Arbitral Awards*).

Moreover, the authority before which the award is sought to be relied upon has the discretion to adjourn the decision on the enforcement of the award and to order the other party to give suitable security.[21] Finally, a party can also seek enforcement on the basis of domestic law or bilateral or other multilateral treaties in force in the country where it seeks enforcement.[22]

C. The Better of Two "Evils"?

Both annulment and national review are often seen as 'evils' restricting quick and efficient enforcement of arbitral decisions. Is this local review by a competent authority which has the power to refuse recognition and enforcement on the grounds enumerated in Article V(1) of the New York Convention really such a hardship as often presented? It is not, for the following reasons: (1) all arbitral awards may encounter certain enforcement hurdles; (2) awards may actually benefit from an additional review; (3) the grounds for refusal to recognise and enforce under the New York Convention are to a large extent similar to those for annulment under the ICSID Convention; and (4) a refusal to enforce does not have the same devastating effect on the original decision that an annulment has.

1. Enforcement hurdles for all arbitral awards

Even having an ICSID award which provides for pecuniary damages does not mean that when the award is rendered, the compensation magically appears on the claimant's bank account. ICSID awards, as all other arbitral awards, may encounter two groups of enforcement hurdles: firstly, challenges to final judgments allowed under domestic laws, and secondly, the invocation of State immunity from execution.

First, as BALDWIN, KANTOR and NOLAN note with regard to the ICSID system, in many jurisdictions even final judgments can be challenged under a number of circumstances.[23] This of course applies equally to final 'non-ICSID' awards. For example in the US on the basis of Rule 60(b) of the Federal Rules of Civil Procedure, such circumstances include substantive and procedural grounds, *e.g.* lack of

[21] Art. VI of the New York Convention.
[22] Art. VII(1) of the New York Convention.
[23] For a detailed overview and examples of case law, see Baldwin, E., Kantor, M., Nolan, M., 'Limits to Enforcement of ICSID Awards' 23 *JIntlArb* (2006) 1–24, at 9 *et seq*.

impartiality of a judge, unequal knowledge and bargaining power, imprecise methods of determining damages, as well as mistakes, errors and omissions in the award at issue. Similar grounds can be found in many Codes of Civil Procedure in civil law countries, such as France, Belgium, Switzerland and Venezuela.[24]

Second, the invocation of State immunity from execution may constitute a further hurdle to enforcement. The procedure for the enforcement of all arbitral awards is governed by the law on execution of judgments of the State where the claimant wishes to enforce. Moreover, with regard to ICSID and 'non-ICSID' awards alike, customary international law provides for immunity from execution regarding non-commercial property so investors have to identify State assets capable of seizure. Such customary rules are codified in Articles 54 and 55 of the ICSID Convention, international as well as regional treaties and national laws.

Article 54 of the ICSID Convention requires a Member State to treat an award rendered pursuant to the Convention as if it were a final judgment of its own courts but it does not require a Member State "to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed".[25] In order to remove all doubt, Article 55 of the ICSID Convention adds that "[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." However, as the ICSID *ad hoc* committee in *MINE v. Guinea* noted,

> State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award. In fact, the issue of State immunity from forcible execution of an award will typically arise if the State party refuses to comply with its treaty obligations. Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions.[26]

[24] Art. 1480 French Code of Civil Procedure; Art. 1704 Belgian Code of Civil Procedure; Art. 190(2) Swiss Federal Code on Private International Law; Art. 244 Venezuelan Code of Civil Procedure.
[25] Report of the Executive Directors on the Convention, 48.
[26] *MINE v. Guinea,* Interim Order No. 1 on Guinea's application for Stay of Enforcement of the Award, 12 August 1988, 4 *ICSID Rep.* 111, ¶25.

In other words, the right to diplomatic protection will revive according to Article 27 of the ICSID Convention, so that the home State may pursue the case on behalf of its national, be it a natural or legal person.

While State immunity against execution is not explicitly referred to in the New York Convention, several regional treaties do provide for an explicit or implicit exception on this basis, including the Inter-American Convention on Extra-Territorial Validity of Foreign Judgments and Arbitral Awards, the Riyadh Convention on Judicial Co-operation between States of the Arab League, and the Uniform Act on Arbitration Law of the Organisation for the Harmonization of Business Law in Africa.[27] The 2004 UN Convention on Jurisdictional Immunities of States (not yet in force) exempts from immunity "property […] specifically in use or intended for use by the State for other than government non-commercial purposes".[28]

Under some national laws, such as those of the US and the UK, State immunity from execution covers even commercial State property if such property is or was *not* used for the commercial activity upon which the claim is based.[29] In some States, such as Switzerland, even a jurisdictional link between the dispute and the State *where* enforcement is sought, is required as established in *LIAMCO* − otherwise commercial property of the State *against which* enforcement is sought, is protected by national

[27] Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (adopted 8 May 1979, entered into force 14 June 1980) 1439 *UNTS* 87; Riyadh Arab Agreement for Judicial Co-operation (written 6 April 1983) *unofficial English translation*, *available at* http://www.unhcr.org/refworld/docid/3ae6b38d8.html [last accessed 18 October 2011]; Uniform Act on Arbitration Law of the Organisation for the Harmonization of Business Law in Africa (OHADA Uniform Act on Arbitration) (adopted 10 April 1998, entered into force 1 January 1999) *French version only*, *available at* http://www.jurisint.org/ohada/text/text.07.fr.html [last accessed 18 October 2011]; for a more extensive analysis, see Bjorklund, A., 'State Immunity and the Enforcement of Investor-State Arbitral Awards', in: Binder, C., Kriebaum, U., Reinisch, A., Wittich, S., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, OUP (2009) 302-21.

[28] Art. 19 (c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (signed 2 December 2004, will enter into force after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession – currently 12 parties) 44 *ILM* 803 (2005); for a more elaborate analysis of this Convention, see *e.g.*, Hafner, G., Köhler, U., 'The United Nations Convention on Jurisdictional Immunities of States and their Property', 35 *Netherlands Yearbook of International Law* (2004) 3-49; Stewart, D.P., 'The UN Convention on Jurisdictional Immunities of States and Their Property', 99 *AJIL* 1 (2005) 194-210; Yamada, C., 'UN Convention on Jurisdictional Immunities of States and Their Property: how the Differences Were Overcome', 53 *Japanese Yearbook of International Law 2010* (2011) 243-254.

[29] US Foreign Sovereign Immunities Act, 15 *ILM* 1388 (1976); UK State Immunity Act, 17 *ILM* 1123 (1978).

immunity laws.[30] The crucial hurdle under national laws with regard to State immunity against enforcement before a domestic court remains the question whether the State property at hand is serving a commercial purpose, as discussed in the various national cases relating to the enforcement of the award in *Sedelmayer v. Russia*.[31]

2. Benefits of an additional review

ICSID claimants hence also have to turn to national courts for enforcement but these courts cannot review such awards. But would this necessarily be such a bad thing? This question leads us to the second reason why national review should not be seen as an absolute hardship: in some cases parties may actually benefit from having a different legal institution review a decision in a case which is apparently still under dispute. The ultimate goal of dispute resolution is not to point out winners and losers but to find a solution which is acceptable to both parties. In case of review under the New York Convention, this 'reviewer', unlike an annulment committee, is not linked to the same institution as the first tribunal which rendered the original decision, so it may be perceived as more 'neutral' by the parties. If the original award is then re-affirmed by the reviewing authority, it might help the 'losing party' to accept the outcome.

3. Similarity of grounds for annulment and refusal to recognise and enforce

To a large extent, the grounds for refusal to enforce under Article V(1) of the New York Convention are similar to those under Article 52 of the ICSID Convention. These include, for example, the improper constitution of a tribunal, failure to respect certain procedural rules (absence of consent to arbitrate or failure to notify the initiation of arbitral proceedings; violations of due process) or excess of powers on the part of the tribunal rendering the decision. But there are differences as well: on the one hand, the New York Convention is broader in its allowing for refusal to enforce as it does not require that the tribunal's excess of powers is 'manifest', or that the

[30] This requirement is not explicitly stipulated in the Swiss Federal Code on Private International Law but it has been developed and applied in case law, see *e.g., Socialist People's Libyan Arab Jamahiriya v. LIAMCO*, Switzerland, Federal Tribunal, 19 June 1980, 20 *ILM* 151 (1981) BGE 106 la 142.

[31] *Sedelmayer v. Russian Federation*, Stockholm Chamber of Commerce, *Ad hoc* arbitration rules, Award, 7 July 1998, *IIC* 106 (1998); for a more extensive overview of this case before various national courts, see Reinisch, A., 'Enforcement of Investment Awards', in Yannaca-Small, K., [Ed.] *Arbitration under International Investment Agreements: a Guide to the Key Issues*, OUP (2010) 671-97, at 685-688.

procedural flaws are 'serious'. On the other hand, Article 52 of the ICSID Convention could equally be seen as broader, as it provides for two grounds that are not listed in Article V(1) of the New York Convention, namely annulment due to corruption of a tribunal member and failure to state the reasons on which the award was based.

With regard to the former, annulment on ground of corruption, this could arguably be interpreted as falling under Article V(1)(d) of the New York Convention, as it would be hard to imagine that corruption of a tribunal member is part of the agreement of the parties or, failing such agreement, the *lex locus standi*. However, it could equally be argued that this Article deals with the composition of the tribunal *stricto sensu* and not with their integrity or acts which happen after the tribunal has been constituted. Another option is that this would be seen as covered by the *ordre public* ground in Article V(2)(b) of the New York Convention pursuant to domestic public policy. With regard to the latter, annulment for lack of reasoning, this is a ground which cannot be found in the New York Convention, perhaps due to the fact that the New York Convention, unlike the ICSID Convention, was not devised with investor-State but with commercial arbitration in mind. In commercial arbitration, there is a longstanding *ex aequo et bono* tradition – if private parties want a fully reasoned decision on pure hard law legal grounds, they would have brought their case before a 'regular' court. Hence, what an enforcement authority under the New York Convention can in principle *not* do, is review the entire case on its legal merits or indeed scrutinise the (presence of) legal reasoning in the original award.

Admittedly, one problem with enforcement under the New York Convention is that Article V(1)(e) allows for the non-enforcement of awards which were set aside or suspended by a competent authority of the country in which those awards were made. The drafters of the European Convention on International Commercial Arbitration tried to restrict the potentially very wide scope of this provision to the setting-aside on grounds similar to those in the New York Convention.[32] In practice however, Article V(1)(e) does not seem to cause much upheaval, *e.g.* French courts disregard such ground for setting aside an award and use only French law as a benchmark – as

[32] Art. IX of the European Convention on International Commercial Arbitration (done 21 April 1961, entered into force 7 January 1964) 484 *UNTS* 349; see also Art. 34 of the UNCITRAL 'Model Law on International Commercial Arbitration'.

allowed under Article VII(1) of the New York Convention. US courts used to do the same in *e.g., Chromalloy Aeroservices v. Arab Republic of Egypt,*[33] but departed from this approach in *e.g., TermoRio and LeaseCo Group v. Electranta*.[34] In Germany and England, awards which are set aside abroad are not enforced, except if this setting-aside was in itself a fundamental violation of justice, for example if it was obtained through corruption or other manifest abuse contrary to public policy.[35]

This leads us to another problem with enforcement under the New York Convention relating to Article V(2), which allows for non-enforcement on grounds of public policy. This could theoretically open the door for mass non-enforcement as it is largely within a State's margin of discretion to interpret what is part of public policy. However, in practice, States cannot be seen to invoke this frequently in order to avoid having to enforce an arbitral award.[36] This ground does not have an explicit 'equivalent' in ICSID as Article 53 provides that awards are not subject to any appeal, and public policy is not a ground for annulment under Article 52. However, it is not unthinkable that domestic courts somehow read a public policy exception into the ICSID Convention, or, that States at least manage to postpone enforcement by vehemently arguing such exception before national courts.[37] In *Jose Cartellone Construcciones Civiles, S.A. v. Hidroelectrica Norpatagonia, S.A.*, for example, the Argentinean Supreme Court held that notwithstanding the fact that the award was rendered under procedures that prohibited any appeal, a determination as to whether the award contradicted *ordre public* was within the scope of the domestic court's competence.[38] Although this was a commercial arbitration case, the same argument could be made for investor-State arbitral awards – perhaps even more strongly, as such awards directly affect a State and thereby public interests. Traces of this line of thinking could be spurred for example in the *CMS v. Argentina* case, although the Argentinean Supreme Court has not ruled on the matter (yet).

[33] US District Court (Columbia 31 July 1996) 939 Fed. Supp. 907.
[34] US Court of Appeals (25 May 2007) 487 F 3d 928.
[35] Kleinheisterkamp, J., 'Recognition and Enforcement of Foreign Arbitral Awards', in Wolfrum, R., [Ed.], *Max Planck Encyclopedia of Public International Law*, OUP (2010) para. 35.
[36] Committee on International Commercial Arbitration, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', ILA, New Delhi Conference (2002).
[37] For a more detailed elaboration, see Baldwin, Kantor and Nolan, *op.cit*., 15 *et seq*.
[38] *Jose Cartellone Construcciones Civiles, S.A. v. Hidroelectrica Norpatagonia, S.A.*, Supreme Court of the Argentinean Republic, Decision of 1 June 2004, ¶19.

4. Effect of refusal to enforce as opposed to annulment

Finally, even in the worst-case scenario, where a domestic court refuses enforcement on one of the grounds listed in the New York Convention, the situation is not as dramatic as when an ICSID annulment committee annuls an award because importantly, *after a refusal to enforce, the original award still exists in the international legal order*. Also an ambiguous situation similar to the one arising when an annulment committee refuses to annul but raises serious doubts as to the legal validity of the original award's reasoning, cannot as easily occur due to one national court's refusal to enforce under the New York Convention. The claimant does not need to re-litigate the entire case before a different investor-State tribunal, hoping to find it as willing as the first one to accept its claims. Claimants whose efforts to enforce an award have been rebuffed by one domestic court, have a straightforward course of action: simply to apply for enforcement before a national court in one of the other 140+ Member States to the New York Convention. Evidently, initiating enforcement procedures in many of these States may not be an appealing option as assets of the non-compliant State may not be located in each of them, but it seems equally unlikely that such assets will *only* be present in *one* other State. So, after one refusal to enforce by one domestic court, it will still be rewarding to attempt enforcement in another Member State of the New York Convention. At least one court in one of these jurisdictions is bound to be willing to enforce – and if really all competent authorities refuse enforcement, then it is perhaps questionable whether the original award was such a just and good decision in the first place.

III. Policy Ground: State Perception

Both the ICSID Convention and the New York Convention have some of the highest membership rates of all multilateral treaties in force: approximately 75% of States have ratified either or both Conventions. However, this is not fixed in stone: under the international law of treaties, States can withdraw from their international agreements according to the procedure stipulated in the treaty at issue. The logical ground for this is that international law is based on State consent – when this consent is no longer present, it ought to be possible, taking into account certain precautions such as a

notification period, to be released from an obligation. For the New York Convention, withdrawal or denunciation is regulated in Article XIII(1):

> Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General." In the ICSID Convention, such procedure is laid down in Article 71: "Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

In recent years several States have expressed doubts about the ICSID system, sometimes even choosing to denounce the ICSID Convention whereas New York Convention membership seems to remain constant. Importantly, States which have actually taken the step to withdraw from ICSID, such as Ecuador and Bolivia, have not denounced the New York Convention. The BITs concluded by these States evidently remain in force, so enforcement will have to be pursued via the New York Convention track. Additionally, several economically important States, including Brazil, Canada, India, Mexico, Russia and South Africa, have never been parties to ICSID, while they did sign and ratify the New York Convention.[39] A possible counterargument could be that there equally exist States which are parties to ICSID but not to the New York Convention – however, when examining which States are concerned in the light of their economic impact, it seems rather unlikely that this will hugely affect possible enforcement.[40] Hence for many States, which in the end 'make and break' international law, enforcement via the New York Convention seems a better acceptable option from a policy point of view.

[39] There are currently (18 October 2011) 26 States which are parties to the New York Convention but not to the ICSID Convention (in alphabetical order): Antigua & Barbuda, Bolivia, Brazil, Canada (signed but not ratified), Cook Islands, Cuba, Djibouti, Domenica, Domenican Republic, Ecuador, Holy See, India, Iran, Kyrgyzstan, Lao's People's Democratic Republic, Liechtenstein, Marshall Islands, Mexico, Monaco, Montenegro, Poland, Russian Federation, San Marino, South Africa, Thailand and Viet Nam.

[40] There are currently (18 October 2011) 27 States which are parties to the ICSID Convention but not to the New York Convention (in alphabetical order): Burundi, Cape Verde, Chad, Comoros, Congo Republic, Democratic Republic of Congo, Gambia, Grenada, Guyana, Kosovo, Malawi, Federal States of Micronesia, Papua New Guinea, Samoa, Seychelles, Sierra Leone, Solomon Islands, Somalia, St. Kitts & Nevis, St. Lucia, Sudan, Swaziland, Timor-Leste, Togo, Tonga, Turkmenistan and Yemen.

IV. Practical Ground: No Actual Effect

Finally and perhaps most importantly for practitioners: there appears to be little evidence of any (statistically relevant) difference between actual enforcement and compliance rates of ICSID as opposed to 'non-ICSID' awards. This ground is the hardest one to argue in a legal paper, because there exist no official records of compliance with investor-State awards. In general, it seems that there have been relatively few cases where claimants have had to resort to national courts for enforcement of their arbitral awards as State respondents generally comply with adverse awards, or are at least willing to negotiate a mutually acceptable post-award settlement.[41] Even if respondent States do not agree with the outcome of an arbitral proceeding, this does not automatically thwart enforcement as claimants will be inclined to enforce wherever these States' assets are present and the national arbitral enforcement laws are favourable. In many cases, this implies that enforcement will not be sought in the country against which the arbitral award was obtained. For such purpose the New York Convention offers a wide range of options as many countries have incorporated its provisions in their domestic laws.

This assumption seems to be confirmed when looking at the survey conducted by the UNCITRAL Commission, with the aim of monitoring the implementation of the New York Convention in national legislation and the procedural mechanisms that States have enacted to operationalise the Convention.[42] In cooperation with the Arbitration Committee of the International Bar Association, the UNCITRAL Secretariat prepared a questionnaire which was subsequently circulated to States Parties to the New York Convention. The information on the procedural framework in which the Convention operates would enable the Commission to consider possible further action to improve the functioning of the Convention. The underlying goal of the project was to enhance awareness of the Convention's application. In 2008, the UNCITRAL Secretariat presented a synthesis of the survey's results, covering implementation of the New York Convention by States, its interpretation and application, based on replies

[41] Reinisch, *op.cit*., 671; Alexandroff, A.S., Laird, I.A., 'Compliance and Enforcement', in Muchlinski, P., Ortino, F., Schreuer, C., [Eds.], *The Oxford Handbook of International Investment Law*, OUP (2008) 1171-1187, at 1173 (fn 6).
[42] UNCITRAL Commission, twenty-eighth session (Vienna, 2-26 May 1995).

received from 108 States Parties.[43] A compilation of information collected during the survey was published on the UNCITRAL website, urging States to provide the Secretariat with accurate information to ensure that the data remain up to date (currently updated until 21 September 2011).[44] Evidently, the fact that Member States of the New York Convention signal that they have fully implemented the Convention does not imply that every enforcement has and will always run smoothly. However, the UNCITRAL survey does indicate that there are no significant problems which countries themselves consider worth reporting, even when they know that their answers will be subjected to public scrutiny.

If the host State objects to enforcement before the courts of a third State, there seems to be very little difference between ICSID and 'non-ICSID' awards. In their study on compliance and enforcement,[45] ALEXANDROFF and LAIRD reported only five cases in which enforcement was challenged by the State respondents involved – whereof four concerned ICSID awards (*Benvenuti & Bonfant v. Congo*; *SOABI v. Senegal*; *LETCO v. Liberia* and *AIG Partners v. Kazachstan*)[46] as opposed to only one 'non-ICSID' award (*Sedelmayer v. Russia*).[47] In addition, one could also mention the challenge to the enforcement of an ICSID award on the alleged basis of State immunity (*LETCO v. Liberia*);[48] and the challenge to the enforcement of 'non-ICSID' awards before courts in London (*Occidental v. Ecuador*), Sweden (*CME v. Czech Republic*) and Canada (*Metalclad v. Mexico; Feldman v. Mexico; SD Myers v. Canada*).[49] This (admittedly

[43] UNCITRAL Commission, forty-first session (New York, 16 June-3 July 2008) A/CN.9/656 and A/CN.9/656/Add.1 (since the information was provided as part of a general survey on the New York Convention, the compilation is only indicative of procedural mechanisms that were made known to the UNCITRAL Secretariat).

[44] http://www.cnudci.org/uncitral/uncitral_texts/arbitration/NYConvention_implementation.html [last accessed 18 October 2011].

[45] Alexandroff, Laird, *op. cit*., 1171-1187.

[46] *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo* (ICSID Case No. ARB/77/2) Award, 8 August 1980; *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal* (ICSID Case No. ARB/82/1) Award, 25 February 1988; *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia* (ICSID Case No. ARB/83/2) Award, 31 March 1986; *AIG Capital Partners Incorporated and CJSC Tema Real Estate Company Limited v Kazakhstan* (ICSID Case No ARB/01/6) Award, 7 October 2003.

[47] *Sedelmayer v. Russian Federation, op. cit.;* Judgment (Case No T 6-583-98) 18 December 2002; Appeal judgment (Case No T 525-03) 15 June 2005; Execution of enforcement measure (Case No 170-10) 1 July 2011.

[48] *LETCO v. Liberia*, District Court SDNY, 12 December 1986, 2 *ICSID Rep.* 385, particularly 388-409.

[49] *Occidental Exploration and Production Co v Ecuador* (LCIA Case No UN 3467) Award, 1 July 2004; Judgment, 29 April 2005, EWHC 774 (Comm); Judgment, 9 September 2005, EWCA Civ 1116; Judgment, 2 March 2006, EWHC 345 (Comm); Appeal judgment, 4 July 2007, EWCA Civ 656*; CME*

rather limited) jurisprudence could serve as an indication that the enforcement of 'non-ICSID' awards is not particularly more contested than that of ICSID awards.

Finally, it may be that theoretical discussions concerning the merits of the ICSID Convention and the New York Convention at the international level have been overtaken by practical developments at the national level. Some States, such as Belgium, France and The Netherlands have adopted a more 'pro-enforcement' approach in their Codes of Civil Procedure than what is provided by either Convention.

V. Conclusion

'To ICSID or not to ICSID' is not the (relevant) question. The two types of enforcement which are often presented as 'good versus bad', namely ICSID versus New York Convention enforcement, do not affect a claimant's chances of success as much as often portrayed. The grounds for this assertion are threefold. First and most important, there is a legal ground: the ICSID and the New York Convention enforcement system both contain a form of safeguard mechanism against 'blind' enforcement of all – including severely flawed – awards (albeit at a different stage): the annulment procedure and the national review procedure, respectively. Both legal mechanisms are often seen as 'evils' restricting quick and efficient enforcement of arbitral decisions. However, this local review by a competent authority which has the power to refuse enforcement on the grounds enumerated in the New York Convention is not such a hardship as often presented for four reasons.

Czech Republic BV v Czech Republic (UNCITRAL Arbitration Rules, IIC 62) Final Award and Separate Opinion, 14 March 2003; Judgment of the Svea Court of Appeal (T 8735–01) 15 May 2003*; Metalclad Corp v Mexico* (ICSID Case No ARB(AF)/97/1) Award, 25 August 2000; Review by the supreme court of British Columbia, 2 May 2001, IIC 162 (2001); Supplementary reasons for judgment, 31 October 2001, 2001 BCSC 1529*; Feldman Karpa v Mexico* (ICSID Case No ARB(AF)/99/1) Award and separate opinion, 16 December 2002, 18 *ICSID Rev—FILJ* 488; Judicial review decision, (Court File No 03-CV-23500) 3 December 2003; Appeal to judicial review decision (Docket No C41169) 11 January 2005*; SD Myers Inc v Canada* (Ad hoc—UNCITRAL Arbitration Rules) Final Award and Dissenting Opinion, 30 December 2002, IIC 251 (2002); Order (FC 38) 13 January 2004, IIC 252. An additional case in which an arbitral award was challenged was *LIAMCO v. Libya*, on the ground of lack of arbitrability – however, this case dates from 1977 (*Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, Award, 12 April 1977, 20 *ILM* (1981) 1; 482 F. Supp. 1175 (D.D.C. 1980), vacated without op., 684 F.2d 1032 (D.C. Cir. 1981)) and can be considered too remote from today's investment arbitration practice to still be an authoritative precedent.

First, all arbitral awards may encounter certain enforcement hurdles based on challenges to final judgments allowed under domestic laws and the invocation of State immunity from execution. Second, awards may actually benefit from an additional review by a domestic authority. Third, the grounds for review under the New York Convention are to a large extent similar to those for annulment under the ICSID Convention. Fourth, refusal to enforce does not have the same devastating effect on the original decision as annulment has. After a refusal to enforce, the original award still exists in the international legal order so the claimant never needs to re-litigate the entire case before a different investor-State tribunal, but merely has to apply for enforcement in one of the many other Member States to the New York Convention.

The second ground supporting the assertion that enforcement under the New York Convention is not inferior to enforcement under the ICSID system is a policy ground: several States have expressed doubts about the ICSID system, sometimes even choosing to withdraw from the ICSID Convention whereas New York Convention membership remains constant and includes several economically important States which are not parties to the ICSID Convention.

The third and last ground of the assertion put forward in this paper is a practical ground: actual compliance and enforcement rates seem equally high under both systems. What is therefore important for those lawyers who aspire to have nothing but satisfied clients is not to opt for ICSID arbitration no-matter-what, but to be aware of the differences between the enforcement systems and to choose wisely taking into account the advantages and disadvantages linked to each enforcement mechanism.