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Investment Court System Under EU Trade and Investment Agreements: Enforcement Issues

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EU Investment Court System

The Investment Court System ("ICS") included in the European Union ("EU")'s recent investment and trade agreements with Canada, Singapore, Vietnam and Mexico (together, the "EU Agreements")[1] provides for the creation of a permanent first instance tribunal and an appellate tribunal drawn from a pre-selected roster of tribunal members. In this regard, the ICS represents a significant departure from the long-standing investor-State dispute settlement ("ISDS") model of party-appointed arbitrators.

While the ICS is expected to address a number criticisms of ISDS such as the (real or perceived) lack of consistency of arbitral awards and independence of arbitrators, it also raises new challenges that must be resolved for its effective operation. One such challenge is around uncertainty regarding the enforcement of ICS awards under the ICSID Convention and/or the New York Convention.[2] Whilst the enforcement provisions under the EU Agreements refer to both the ICSID Convention[3] and the New York Convention,[4] serious questions arise as to whether they will fulfill the necessary requirements.

Enforcement under the ICSID Convention

Most scholars and practitioners agree that t**here is no mechanism for enforcement of ICS awards under the ICSID Convention**.[5] For enforcement under the ICSID Convention, the award must have resulted from arbitration proceedings conducted in accordance with the ICSID Convention and ICSID Rules. The two-tier structure and appeal mechanism under the ICS are clearly not compatible with Article 53(1) of the ICSID Convention, which expressly forbids any appeal.[6] To address this inconsistency, parties to the EU Agreements could seek to amend the ICSID Convention (either in its entirety or by way of a limited inter se amendment) to permit an appeal mechanism for claims brought pursuant to the EU Agreements.[7]

However, both types of amendment face practical difficulties. First, whilst legally possible, any overarching amendment of the ICSID Convention requires unanimous approval of all signatories,[8] thus rendering it wholly impractical. In the alternative, the EU and its trading partners under the EU Agreements could enter into an inter se amendment to modify the terms of the ICSID

Convention under Article 41(1)(b) of the Vienna Convention in order to provide for the appeal mechanism stipulated in the EU Agreements.[9]

Notwithstanding this, commentators have noted that an inter se amendment of the ICSID Convention allowing for an appeal mechanism may be precluded on the basis that any such amendment fails to meet the first requirement under Article 41(1)(b) of the Vienna Convention, namely that the inter se modification in question is not prohibited by the subject treaty. Article 53(1) of the ICSID Convention explicitly provides that an ICSID Convention award "shall not be subject to any appeal or to any other remedy except those provided for in this Convention." Thus, it remains to be seen whether such an amendment could be effected.

Enforcement under the New York Convention

Although the possibility to enforce the ICS awards pursuant to the ICSID Convention remains doubtful, scholars and practitioners generally agree that it will be possible to enforce ICS awards under the New York Convention. The New York Convention applies to the enforcement and recognition of any foreign "arbitral award"[10] with the proviso that individual States may reserve the right to apply the New York Convention to arbitral awards in "commercial" disputes only.[11] Prima facie, both of these requirements are satisfied.

First, the New York Convention does not prescribe any strict definition of "arbitral award", instead granting interpretative discretion to the jurisdiction in which enforcement is sought.[12] Article I(2) of the New York Convention defines the term "arbitral awards" to "include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted." Such permanent arbitral bodies may include tribunals where all of the members are appointed by the State parties like the Members of the ICS first instance and the appeal tribunals.[13]

Moreover, ICS awards may be treated as "commercial" for the purpose of the New York Convention, in the event that States have made a reservation to this effect. This issue has already arisen under the current investor-State dispute settlement regime, and domestic courts have consistently affirmed that an investment treaty arbitration award qualifies as "commercial" for the purposes of the New York Convention.[14] As a further reassurance, the EU Agreements explicitly state that final awards are deemed to be arbitral awards in relation to claims arising out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention.[15]

Looking ahead

As soon as the EU Agreements fully enter into force, the ICS will finally start to be operational (regardless of whether there are any disputes under the EU Agreements). It will be important for the EU and its trading partners who are parties to the EU Agreements to resolve new challenges raised under the ICS – in particular, enforcement of ICS tribunal decisions under the ICSID Convention and New York Convention. In many ways the ICS' success is dependent upon its growth. The EU must convince more trading partners to adopt the new regime before many of its intended benefits will be seen. The extent to which it can do so depends on its ability to satisfactorily resolve this, and other, issues.

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