

UNCITRAL Working Group III 6th intersessional meeting

Singapore, 7-8 September 2023

Session 6: Key common implementation and enforcement issues

Meg Kinnear, Secretary-General of the International Centre for
Settlement of Investment Disputes (ICSID)

SCENARIO 1

ICSID CONVENTION AMENDMENT

To establish the AM under the ICSID Convention for awards from all fora

SCOPE:

The AM would be established at ICSID and under the ICSID Convention. It would have jurisdiction over appeals of: (i) ICSID and non-ICSID awards between disputing parties from ICSID MS; and (ii) non-ICSID awards between disputing parties from non-ICSID MS if those parties agree to submit the award to appeal.

ENFORCEMENT:

The resulting appeal award would be enforceable under the ICSID Convention in all ICSID MS. The NYC would remain available if enforcement is sought in territory of a non-ICSID MS.

ISSUES:

- **Unanimity requirement**
- Requires the addition of “appeal” in Art. 53 and necessary adjustments to the Convention (eg: appealability of pre-award decisions; relationship with first-tier tribunal; relationship with other post-award remedies in the ICSID Convention)
- Requires extension of ICSID jurisdiction on appeal to: (i) disputes between disputing parties from ICSID MS under any forum; and (ii) disputes between disputing parties from non-ICSID MS that agree to submit their award for appeal to the ICSID AM
- For non-ICSID awards: potential for: (i) domestic set aside proceedings if a non-ICSID MS is the place of arbitration; (ii) refusal to enforce in a non-ICSID MS under the NYC

SCENARIO 2

ICSID CONVENTION AMENDMENT

To provide for appeal (or the option of appeal) of ICSID awards

SCOPE:

ICSID Convention amendment to allow for “appeal” under Art. 53 (via ICSID Art. 66). This scenario would also require the creation of an AM administered by ICSID (but not under the ICSID Convention), with jurisdiction over ICSID + non-ICSID appeal awards.

ENFORCEMENT:

ICSID appeal awards would be enforceable in all ICSID MS.

Non-ICSID appeal awards enforceable under the treaty establishing the AM in the participating States + enforceable in non-participating States under NYC.

ISSUES:

- **Unanimity requirement**
- Requires the addition of “appeal” in Art. 53 and necessary adjustments to the Convention (eg: appealability of pre-award decisions; relationship with first-tier tribunal; relationship with other post-award remedies in the ICSID Convention)
- **For non-ICSID awards: enforceable only as between the signatories to the treaty establishing the AM - potential for: (i) domestic set aside if a non-participating State is the place of arbitration; (ii) refusal to enforce if enforcement is sought in a non-participating State under the NYC**

SCENARIO 3

ICSID CONVENTION

INTER SE MODIFICATION

To provide for appeal of ICSID awards

SCOPE:

ICSID Convention inter se modification to allow for “appeal” under Art. 53 (via Art. 41 VCLT). This scenario would also require the creation of an ICSID administered appeal mechanism (not under the ICSID Convention), with jurisdiction over ICSID awards as between modifying inter se ICSID States + non-ICSID awards.

ENFORCEMENT:

ICSID appeal awards enforceable only as between the inter se modifying ICSID States

Non-ICSID awards: enforceable under the treaty establishing the AM in the participating States + enforceable in non-participating States under NYC.

ISSUES:

- Requires addition of “appeal” in Art. 53 and necessary adjustments to the Convention (eg: appealability of pre-award decisions; relationship with first-tier tribunal; relationship with other post-award remedies in the Convention)
- For ICSID awards: enforceable under the ICSID Convention only as between inter se modifying ICSID MS
- For non-ICSID awards: enforceable only as between the signatories to the treaty establishing the AM - potential for: (i) domestic set aside if a non-participating State is the place of arbitration; (ii) refusal to enforce if enforcement is sought in a non-participating State under the NYC

SCENARIO 4

ICSID CONVENTION

No Change

SCOPE:

The AM would be established independently of ICSID.

It would only have jurisdiction over non-ICSID awards.

ENFORCEMENT:

ICSID: Status quo

Non-ICSID awards: enforceable under the treaty establishing the AM in the participating States + enforcement in non-participating States under NYC.

ISSUES:

- **For non-ICSID awards: enforceable only as between the signatories to the treaty establishing the AM - potential for: (i) domestic set aside if a non-participating State is the place of arbitration (ii) refusal to enforce if enforcement is sought in a non-participating State under the NYC**

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