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How to Enforce an ICSID Award in Spain: The Legal Framework, the Competent Authority, and the Procedure

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A court of a Contracting State shall recognize an ICSID award as binding and enforce pecuniary obligations per that award within its territory as if it were a final judgment of the court in that State. The enforcement creditor is not required to obtain a declaration of enforceability (viz. the *exequatur*). At the same time, the interested party cannot file an appeal or seek annulment of the award outside of the ICSID self-contained mechanism.

Following the principle of *lex fori regit processum*, the governing law is the relevant procedural law of the State where the enforcement of an ICSID award is sought. Thus, the enforcement procedure varies from country to country.

Thus far, Spanish courts enforced only one ICSID Award.¹⁾ The enforcement procedure was carried out in 2013 under the former framework. This post addresses the enforcement of an ICSID Award in Spain under the new, reformed, legal framework that encompasses the Civil Procedure Law (LEC) and the Spanish Arbitration Act (SAA).

The Current Legal Framework

Articles 3 LEC and 523 LEC, regarding the territorial scope of the procedural law²⁾ and foreign enforcement titles³⁾, permit the Spanish procedural rules to be adjusted to international treaties and conventions (if necessary). Thus, the ICSID Convention supplements the LEC and SAA insofar as it relates to the enforcement of an ICSID award. As a result, the Spain's national framework is adjusted to the peculiarities of an ICSID award that has no seat, does not require any *exequatur*, and is the outcome of an International Organization's autonomous legal system.

Under this framework, the enforcement creditor should file an enforcement action with the competent court or other designated authority. Such a motion for enforcement should be accompanied by a copy of the award certified by the ICSID Secretary-General.

The Competent Authority

Spain recently, and rightfully so, designated the First Instance Court as the competent authority for recognition and enforcement of awards rendered under the auspices of the ICSID.

Such choice is in line with Article 54(1) ICSID Convention as it implicitly equates ICSID awards with the national arbitral awards (instead of foreign awards rendered outside Spain per Article 46(1) SAA).

The national awards are, in turn, equated with the final judgments of the national courts: they do not require the *exequatur* as opposed to other types of foreign arbitral awards. Specifically, the First Instance Court enforces national arbitral awards (Article 8(4) SAA), while the Civil and Criminal Chamber of the High Court of Justice of the Region decides on the prior recognition of foreign arbitral awards (Article 8(6) SAA). In terms of territorial jurisdiction, the competent chamber will generally be the one where the enforcement debtor has his place of business or residence.

The procedural nuance of the two provisions reflects the particularity of an ICSID *exequatur*-free award: the interested party does not have to apply for the prior recognition before the competent Civil and Criminal Chamber of the High Court of Justice.

The First Instance Court where the national award was rendered is competent for the enforcement of an ICSID award (Article 8(4) SAA, in conjunction with Article 545(2) LEC). However, an ICSID award is essentially not a national award, nor it has a seat – being the product of a “delocalized” system. As a result, the place where the ICSID award was rendered is irrelevant for the purpose of its enforcement. The competent First Instance Court, therefore, is the one in the place where the enforcement is sought.

The Enforcement Procedure

A party seeking to enforce its ICSID award in Spain should file the enforcement action accompanied by a certified copy of the award to the First Instance Court in the place of the debtor’s assets. The seized court will automatically consider the certified copy as a valid enforcement title (Article 517 LEC).

Once the enforcement creditor files his/her enforcement action, the judge will dispatch the general order of enforcement for the sum claimed. If the enforcement creditor so requests, the amount corresponding to the new maturities of principal and interests will extend the order of enforcement (Article 578 LEC). In case the sum claimed is in a foreign currency, the judge will order enforcement to obtain both the principal and interests in that foreign currency (Article 577(1) LEC). The order will also include the procedural delay interests, as the costs and expenses of the enforcement proceedings. The judge provisionally estimates the procedural delay interests pending the enforcement (Article 576 LEC).

On the same day, or on the working day following the day of the issuance of the enforcement order, the Court Clerk will issue a decree implementing the order of enforcement (Article 551(3) LEC). The implementing order contains the specific enforcement measures, including *inter alia*:

- the attachment of the enforcement debtor's assets as detected by the enforcement creditor,
- the further identification of debtor's assets as detected by the Court, and
- the request addressed to the enforcement debtor to indicate, within ten days, sufficient assets and rights to cover the amount of the outstanding enforcement, subject to a penalty for serious disobedience to the judicial authority.

The Court directly localizes the debtor's assets through its own mechanism. This mechanism is combined with the limited and exhaustive grounds for objecting the enforcement (Articles 556 and 559 LEC). In doing so, the Court lays down the basis for an effective enforcement procedure.

State Immunity Issues

Needless to say, the possibility of punishing a losing State for serious disobedience would spark quite interesting scenarios. The enforcement debtor could commit an offense in the event it fails to cooperate with the authority in charge of the enforcement by delaying, hindering or failing to provide the Court Clerk with a list of its assets necessary for the recovery of the sum claimed and the relevant interests (Article 258 of the Spanish Criminal Code).

At the enforcement stage, the losing State may invoke immunity exceptions to shield its assets. Article 55 of the ICSID Convention establishes that *"nothing in Article 54 shall not be interpreted as derogating from the laws in force in any Contracting State relating to immunity of that State or of any foreign State from execution."* Nevertheless, on this point, Spanish national law seems to root for the enforcement creditor by providing him/her with a strong weapon enshrined in Article 2(2) SAA:

"In international arbitration, when one of the parties is a State or a State-controlled company, organization or enterprise, that party may not invoke prerogatives of its own law to circumvent obligations stemming from the arbitration agreement."

The cited provision can be construed as a compulsory immunity waiver, barring a State from relying on its immunity, since it may not invoke the prerogatives of its own law. Undoubtedly, among those prerogatives, is State's immunity before a foreign court. Moreover, since the pecuniary obligations resulting from an ICSID award are inherent to the obligations stemming from the arbitration agreement, this mandatory immunity waiver before the First Instance Court may cover the assistance provided by a Spanish judge to the arbitration both in the pre-award as well as post-award phase. Such assistance encompasses the court's support for taking evidence, adopting interim measures, and enforcing such awards. Arguably, it is not coincidental that Article 8 SAA enlists, one after the other, all these judicial ancillary functions as if there was no difference in terms of immunity hurdles. In doing so, Article 8 SAA seems to be overturning the approach that no waiver of immunity could be extended to enforcement measures.

The Organic Law on Privileges and Immunities of Foreign States in its Article 16(1)(d)

further backs up this interpretation: a foreign State that consented to an arbitration with a national of another State shall not assert immunity before a Spanish court in proceedings concerning *“the recognition of the effects of the foreign award.”*

Conclusion

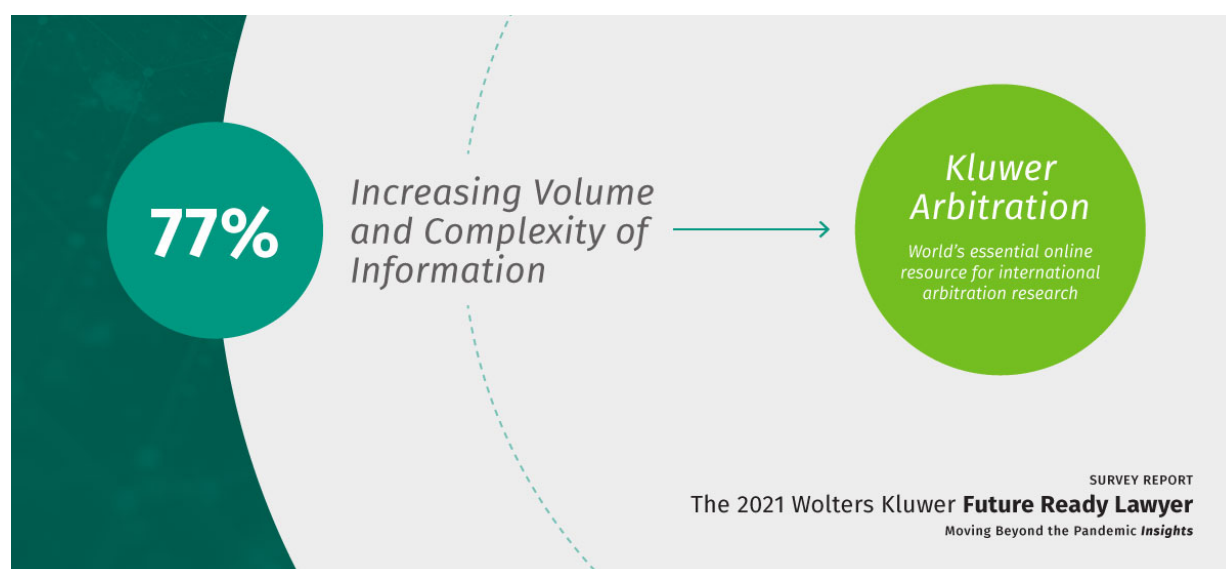
Although just one ICSID Award has been enforced in Spain thus far, clearly, this jurisdiction is bound to become an “awards enforcing destination” thanks to this friendly-arbitration platform consisting of a legal framework fully complying with the ICSID Convention’s requirements under Article 54(1)-(2), an effective enforcement procedure and confined state immunity exceptions.

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References

- ↑1 Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2
- Article 3 LEC. Territorial scope of civil procedural rules. With the sole exceptions
- ↑2 which may be stipulated in international treaties and conventions, civil procedure taking place in Spain shall only be regulated by Spanish procedural rules.
- Article 523 LEC. Enforceability in Spain. Law applicable to the procedure. 1. For the definitive judgements and other enforcement titles that entail enforcement in Spain, the provisions in the International Treaties and the legal provisions on international
- ↑3 judicial co-operation shall apply. 2. In any case, the enforcement of foreign judgements and enforcement titles shall be carried out in Spain in accordance with the provisions herein, unless otherwise provided in the International Treaties in force in Spain

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