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Ticking Bomb of ICSID Awards' Enforcement in Ukraine: Successful but Incorrect

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There have been six Ukrainian proceedings concerning the [enforcement](#) of ICSID awards to date. All have been successful, but Ukrainian courts have erroneously applied the New York Convention's regime for this purpose. In this post, the authors analyze the inconsistency of such an approach with the ICSID Convention regime and related implications, suggesting options to stimulate Ukrainian courts' compliance with the Convention. On a separate note, potential alternatives to resist enforcement of ICSID awards under Ukrainian law are also considered.

Ukrainian Jurisprudence and Legal Framework for Enforcing ICSID Awards

In all of the Ukrainian court proceedings concerning ICSID awards that have been resolved to date, the courts have ignored the ICSID Convention's provisions on the enforcement of the awards. They have instead examined the grounds for the refusal of enforcement of arbitral awards set forth either in Article V of the New York Convention and/or in Article 478 of the [Civil Procedure Code of Ukraine](#) ("CPCU") and Article 36 of the [Law of Ukraine "On International Commercial Arbitration"](#) ("**Law on ICA**"). These latter two instruments mirror the grounds specified in the New York Convention, with the only difference being that Article 478 of the CCU, unlike the New York Convention's discretionary "may", frames these grounds as mandatory for the courts to apply.

In fact, only two court rulings concerning the enforcement of ICSID awards in Ukraine have contained a direct reference to the ICSID Convention's provisions. In particular, both the Kyiv Court of Appeal in its [ruling](#) on enforcement of the award in ***City-State N.V. and others v Ukraine*** and the Solomianskyi District Court in its [ruling](#) on enforcement of the award in ***Bosh International, Inc and others v Ukraine*** referred to Article 53 of the ICSID Convention in concluding that "*an award shall be final and binding on the parties*". However, in neither case did the court take an opportunity to elaborate any further on the peculiarities of the enforcement of ICSID awards, instead immediately accompanying the above reference with an ordinary analysis under the New York Convention and Ukrainian procedural law.

In our opinion, there are at least two potential facts which explains such attitude of Ukrainian courts.

First, the moving parties often themselves rely on the New York Convention and Ukrainian ordinary procedural law to enforce ICSID Awards. For example, City-State N.V. in substantiating its application to the Kyiv Court of Appeal [directly referred](#) to the absence of any grounds for refusal of enforcement provided in the New York Convention.

Second, the Ukrainian procedural framework does not differentiate between ICSID and non-ICSID awards. Instead, the enforcement of all foreign awards is conducted under the CPCU, Law on ICA and the New York Convention.

Consistency with the ICSID's Self-Contained Regime

The self-contained regime established by the ICSID Convention is considered to be the most conspicuous feature of the ICSID Convention, often making it a preferable pick for foreign investors. Unlike in the non-ICSID setting, for ICSID awards national courts of the seat of arbitration do not have set aside powers over the awards. Instead, an autonomous procedure for the review and enforcement of the awards applies. Article 53 of the Convention famously says that an ICSID award "*shall not be subject to any appeal or to any other remedy except those provided for in this Convention*". This means that, at the stage of enforcement, the grounds for rejecting recognition and enforcement set forth in the New York Convention and like instruments are not available for ICSID awards. Instead, the ICSID Convention by Article 54(1) mandates the Contracting States to enforce the pecuniary obligations imposed by an ICSID award as if it was a final judgment of a court in the respective State.

Moreover, Ukrainian law itself mandates Ukrainian courts to apply the ICSID Convention regime to ICSID awards, instead of the ordinary enforcement procedure. Namely, both Article 9 of the Constitution of Ukraine and Article 3(2) of the CPCU provide that international treaties duly ratified by the Ukrainian Parliament, including the ICSID Convention, have a higher legal force than the legislation (albeit not higher than the Constitution of Ukraine). Consequently, the ICSID Convention's provisions on the recognition and enforcement of ICSID awards trump procedural rules set forth in the CPCU in case of a conflict. As such, under Ukrainian law, Ukrainian courts faced with an ICSID award should treat it as a final judgment of Ukrainian courts, as required by Article 54 of the ICSID Convention, and so should avoid applying the New York Convention and CPCU's ground for the non-enforcement.

Unfortunately, Ukrainian courts have not reflected the ICSID self-contained regime in their case law so far.

Although this deficiency has never resulted in a non-enforcement decision to date, the *status quo* carries risks that it will happen in the future. This problem may be especially sensitive for foreign investors in cases in which there may be arguable grounds to reject enforcement under the New York Convention like, for example, public policy violations.

Alternatives to Bring Ukrainian Jurisprudence in Line with the ICSID Regime

To redress the developing situation in Ukrainian case law, the best option would be for the legislator to direct courts toward compliance with the ICSID Convention. It could do this, first, by clearly stating in the CPCU that ICSID Awards are not subject to Article 478 of the CPC of Ukraine and should instead be treated as final court judgments for enforcement purposes.

It could, otherwise, at least provide that Article 478 with its mandatory wording is subject to exceptions that may exist in treaties ratified by Ukraine, including the ICSID Convention. In this way, Ukrainian courts will not be tied with mandatory wording of Article 478 of the CCU, which currently encourages the courts to apply the New York Convention-like grounds for not enforcing arbitral awards. Instead, Article 478 will explicitly mandate Ukrainian courts to directly rely on the ICSID Convention in this regard.

Potential Proper Recourse against ICSID Awards under Ukrainian law

When Ukrainian courts shift their jurisprudence in compliance with the ICSID Convention, counsel at the place of enforcement may still potentially rely on certain extremely narrow remedies to resist the enforcement of ICSID awards. This includes potential remedies under municipal rules applicable to final court judgments, or under constitutional law, public international law, and sovereign immunity rules¹⁾.

First, as mentioned above, the Constitution of Ukraine still has a higher legal force than the international treaties of Ukraine. Consequently, if an ICSID Award or the process of its issuance contradicts the constitutional rules one way or another, this may be a ground for the Ukrainian court to deny enforcement. However, this should be something rather extraordinary to trigger the violation of the Constitution. Considering the supremacy of the Constitution, the mentioned logic is equally applicable in the context of the New York Convention, where the constitutional violations would be likely to be characterized as public policy violations under Article V of the New York Convention.

Second, Article 55 of the ICSID Convention directly says that it does not shield ICSID awards from the rules on immunities of states from execution. Consequently, Article 79 of the Law of Ukraine on Private International Law providing immunities to foreign state's property would still apply. Sovereign immunities and relevant exceptions under Ukrainian law are analyzed in more detail in this [post](#) by Oleksii Maslov.

Third, the ICSID Convention requires municipal courts to treat ICSID awards as final judgments in the respective jurisdictions, and so it is sometimes suggested that the national recourse against final judgments might be available against ICSID awards.²⁾ In Ukraine, as per Article 423 of the CPCU, a final judgment can be reconsidered due to newly-discovered or exceptional circumstances, *inter alia*, when the court did not

establish material circumstances of the case and the moving party was not aware and could not have been aware about them . This, if applied by Ukrainian courts to ICSID awards, potentially leaves room for the reconsideration of awards on the merits, which is not available under the New York Convention. Although it would operate only in rare cases, the mere opportunity of such a challenge likely goes against the ICSID Convention's spirit. The conventional provisions providing that remedies against ICSID awards are limited by the four corners of the ICSID Convention should preclude Ukrainian courts from applying the mentioned grounds for reconsideration.

Concluding Remarks

Although all attempts to enforce ICSID awards in Ukraine have been successful to date, the current erroneous approach of Ukrainian courts creates risks for negative developments in the future. The primacy of international treaties over the CPCU's provisions suggests that Ukrainian law as it now stands allows Ukrainian courts to fully comply with the ICSID Convention and in fact mandates them to do so. Yet, given the practice of the courts to date, more direct wording in the CPCU saying that the grounds for non-enforcement in Article 478 of the CPCU do not apply when the applicable international treaty such as the ICSID Convention says otherwise would be welcome. The question arises, then, who will initiate a change: the Parliament by calibrating Article 478 of the CPCU or Ukrainian courts by turning their jurisprudence in compliance with the ICSID Convention? In our view, the author of the change makes little difference as long as the change occurs prior to the first investor being hurt.

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References

- ↑¹ Edward Baldwin, Mark A. Kantor, et al., “Limits to Enforcement of ICSID Awards”, *Journal of International Arbitration*, 2006, Volume 23, Issue 1.
- ↑² Ibid.

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