REVIEW AND ENFORCEMENT OF ICSID AWARDS
Context to the topics

• The underlying arbitration can sometimes represent half the battle
• Annulment, related stay applications, recognition, enforcement and execution bring in a whole new range of issues, considerations, delays and cost
• Need to consider these factors from the beginning of the case and manage expectations
No payment – what happens next?

• Respondent does not pay
• Claimant indicates an intention to recognize and enforce
• Respondent is either unhappy with the decision and/or wants to delay enforcement
• Interpretation, revision and/or annulment
• Stay request pending these steps
Issues to be covered

• Review
• Interpretation
• Annulment
  – Procedure
  – Main grounds
  – Jurisprudence
• Stay
• Recognition and enforcement
• Execution
Article 50: Interpretation

• If any dispute shall arise between the parties as to **the meaning or scope of an award**, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

• The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

• The Convention Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

• No deadline for a request for interpretation to be filed – but logic dictates it must be prompt.

• Not a review or reconsideration of the merits of the award.

• Rarely sought – only 3 known examples.
Article 51: Revision

• Either party may request revision of the award by an application in writing addressed to the Secretary General if:
  – the *discovery of some fact of such a nature as decisively to affect the award*
  – provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant; and
  – the applicant’s ignorance of that fact was not due to negligence

• The application shall be made *within 90 days of the discovery* of such fact and *in any event within three years* after the date on which the award was rendered

• Like interpretation, not particularly common with 6 known requests for revision
Article 52(1): Annulment

• 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:
  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
Controversy?

• By far the most commonly deployed of the three options
• Subject to much debate – two views:
  – Important safe-guard against “egregiously irregular awards” and apart from very limited exceptions serves this purpose admirably
  – Abused by parties (Respondents) who use it as a tool for further delay by pursuing applications that have little merit but which gain traction with over invasive ad hoc committees suffering from judgeitis
Article 52(2): Procedural Time Limits

• 120 days from day of Award
• If annulment sought on ground of corruption, limit is 120 days from day of discovery of corruption
• In any case application to be made within three years of award.
Article 52(3): Ad Hoc Committee

• Chairman shall appoint three persons on ad hoc committee who must not:
  – Have been a member of the Tribunal which rendered the award
  – Be of the same nationality as any such member
  – Be a national of the State party to the dispute
  – Be a national of the State whose national is party to the dispute
  – Have been designated to the Panel of Arbitrators by either State affected by the dispute.
Article 52: Annulment not Appeal

• Successful annulment application leads to the invalidation of the award (or parts of the award), and never to its revision or amendment.

• Ad hoc committee lacks jurisdiction to review the merits of the original award in any way.

• The awards can only be reviewed and annulled on the limited grounds of Article 52(1)

• If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal. Article 52(6)
Ground for annulment Art 52(1)(a): Improperly constituted Tribunal

If the Tribunal was constituted contrary to the ICSID Convention or the ICSID Arbitration Rules. Examples:

- Proposal for disqualification made under Article 57 but not decided under Article 58 before the award was given; or
- Decision on a proposal for disqualification was purportedly taken by a person other than the person prescribed by Article 58.
Ground for annulment Art 52(1)(b): Manifest Excess of Powers

- Tribunal has been found to be in excess of its powers where a Tribunal exceeds or alternatively fails to exercise the competence granted by the ICSID Convention or to apply the applicable law.
- However, misapplication of Convention or applicable law does not count (MINE v. Guinea ICSID Case ARB/84/4)

“disregard of the applicable rules of law must be distinguished from erroneous application of those rules which even if manifestly unwarranted furnishes no ground for annulment”
Ground for annulment Art 52(1)(c):
Corruption of the tribunal

- ICSID ad hoc annulment committees have not, to date, considered as a ground for annulment corruption of the tribunal
- Watch this space:
  - examples are appearing in commercial arbitration
  - Some ICSID cases are becoming increasingly hard fought
Ground for annulment 52(1)(d): departure from a rule of procedure

• A fundamental rule of procedure:
  – concerns the manner in which the Tribunal proceeded, not the content of the decision
  – goes to the heart of the integrity of the arbitration proceedings
  – This means fairness, impartiality, equal treatment and respect for the right to be heard show this

• A departure is serious if:
  – it deprives a party of the benefit or protection which the rule was intended to provide; or
  – it causes a tribunal to reach a result substantially different from what it would have awarded had such a rule been observed

• Need to satisfy both criteria – fundamental rule and serious departure
Ground for annulment Art 52(1)(e): failure to state reasons

• Annulment granted if:
  – Tribunal is silent as to its reasoning on particular findings (fact or law); or
  – Offers radically contradictory reasoning for particular decisions (fact or law)

• Annulment not granted if:
  – The reasoning is just faulty
  – The reasoning is there by could be regarded as insufficient
  – The ad hoc committee is able to reconstruct missing reasoning
Annulment: Three Generations

Generation One

• Early 1980s
• *Klöckner v Cameroon* and *Amco Asia v Indonesia*
• Both Awards annulled on basis that tribunals had manifestly exceed powers:
  • *Klöckner* due to a failure to apply applicable law – postulation of but not application of French law principles
  • *Amco* due to a failure to apply applicable law
• These decisions aggressively attacked by commentators and in subsequent decision – basis of attack: acting like Appellate Court by engaging in a detailed analysis of underlying facts and conclusions of law
Generation Two

- Late 1980s, early 1990s
- More measured approach consistent with the underlying intent of annulment process
  - *MINE v Guinea*: committee let stand the original tribunal’s ruling on liability, annulling only the tribunal’s damages for failure to state reasons
  - *Klöckner II and Amco Asia II*: applications for annulment rejected.
Generation Three - Wena

- 2000s
- *Wena Hotels Ltd v Arab Republic of Egypt*
  - Under Award Egypt responsible for the expropriation of a UK hotel management company.
  - Egypt applied for annulment on usual grounds
  - Committee rejected all grounds for annulment concluding that the tribunal had not manifestly exceeded its authority when it applied the substantive provisions of the BIT and supplemented it with other international law principles even though the parties had not expressly selected international law as the governing law
• Award dismissed Claimant’s case in its entirety so Vivendi sought partial annulment of the award on the grounds that the tribunal had:
  – Exceeded its powers (Art 52(1)(b)) in failing to exercise jurisdiction over treaty claims it mistakenly construed as contractual claims;
  – Departed from a fundamental rule of procedure (Art 52(1)(d)) by not giving Vivendi the opportunity to present its case on a jurisdictional matter; and
  – Failed to state the reasons on which the award was based (Art 52(1)(e))
• Award partially annulled by the committee as the tribunal had exceeded its powers by finding that it had jurisdiction but then refusing to consider, as its mandate required, the merits of those treaty claims because they overlapped with contract claims.
Generation Three – 16 more cases

- Generation Three enjoyed a long life
- 16 annulment cases followed *Wena and Vivendi I* up to September 2010
- Of these, only 6 resulted in whole or partial annulments
- Overall, these decisions consistently adopted the mantra of a focused consideration of the correct issues and did not delve into the merits or take an appellate like approach
Generation 4
(or back to Generation 1)?

• Two decisions arising from the Argentine financial crisis suggest that there had either been a blip or that Generation One was back
• In *Sempra*:
  – Award annulled on the basis that the tribunal had manifestly exceeded its powers when it applied customary international law to Argentina’s necessity defence but did not separately analyse Article XI of the BIT
• In *Enron*:
  – Award annulled on the basis that the tribunal’s finding that the various requirements of the customary international law defence of necessity, as reflected in Article 25 of the ILC Articles on State Responsibility, were not satisfied
• Decisions since then suggested that it was merely a blip and that the focused, limited approach remains in place, e.g.
  – *Victor Pey Casado and President Allende Foundation v. Republic of Chile ICSID Case No. ARB/98/2*
  – *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22*
Waiving the right to seek annulment

• IF parties wish to avoid the uncertainty created by the prospect of ICSID annulment proceedings they can waive the right in the arbitration agreement.

• The validity of such waivers has not yet been tested, some commentators suggest that Article 52 cannot be modified by the parties and such any waiver could be challenged by the committee.

• In any event, given the Convention’s exclusion of any recourse to external review, a waiver of the right to annulment would foreclose the only remedy available to them to challenge a truly horrendous award.
Annulment By Numbers

• 62 annulment applications have been filed with ICSID.
• 3% of all cases registered have ultimately resulted in annulment (in full or in part)
• 8% of all Awards rendered have been annulled (in full or in part)
• On any view these are impressive numbers
• Even more so considering the complexity, value and stakes involved in most cases
Enforcement: Time + Money
Why?

• Processes associated with enforcement lengthy and challenging anyway
• More so with ICSID Awards in several respects
  – Time gap between filing of claim and Award
  – Stay regime less robust
  – Service delays following recognition and enforcement
  – State Immunity protections strong and well policed
• Time + Money because one party wants money, quickly while the other party wants to avoid paying money for as long as possible
Article 53 (1): Stay pending Annulment

“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”
Provisional Stay

• Stays neutralise the practical effect of Award including its authority as res judicata.

• However, stays do not affect the intrinsic legal validity of the Award.

• A stay is automatic only if the moving party requests the stay at the time it files an application for annulment.

• The Secretary General cannot refuse a provisional stay.

• The provisional stay terminates automatically upon the constitution of the ad hoc committee unless extended.
Extension of Provisional Stay

• This where the rubber meets the road in many cases because:
  – losing party has the opportunity to avoid payment for an extended period
  – winning party has the opportunity to seek conditions on any stay such as security

• Of the 24 requests for stays in annulment cases, 22 to have led to Ad Hoc Committee decisions. All 22 granted continuing stays although there is still no established presumption *Occidental v. Ecuador* 13 September 2013, s. 54 Stay Decision

• So issue is really about the conditions of the stay
What factors are considered

- Strength of the annulment case
- Whether there are dilatory tactics behind the annulment request
- Risks associated with enforcement of the Award short term and long term
- The prejudice to either party in the event that the stay is either lifted or continued
- Quantum of the Award
- Form of security that could be provided
No stay in place? R-E-E

Three stages:

1. Recognition: formal certification that an ICSID award is a final and binding disposition of contested claims

2. Enforcement: all remaining steps leading up to, but stopping short of, actual execution of an award, facilitated in local courts by treaty obligations

3. Execution: the actual collection of monetary damages, or achievement of other relief
Recognition and Enforcement

- Tend to be considered together given nuanced difference between the two
- ICSID Convention accepts no grounds whatsoever for national courts to refuse recognition and enforcement of ICSID tribunal awards
- The national courts of Contracting States must therefore recognise and enforce monetary awards immediately, as if they were final judgments of the local courts themselves – Article 54.1
- Stark contrast to New York Convention Awards
Execution – Practical Challenges

• The law saves the hardest part for last
• A number of challenges faced by a Claimant seeking to enforce an Award, post annulment:
  – Where are the assets
  – Are they held directly or indirectly
  – What enforcement methods are available
  – Are the assets subject to State Immunity
  – What steps can the Respondent take to avoid the enforcement
Execution – An English view

• *Alcom Ltd v. Columbia*
  – Funds in account used for day to day diplomatic expenses not for commercial use and therefore not susceptible to execution

• *AIG v. Kazakhstan*
  – Share and funds held for investment purposes for benefit of National Fund not commercial in nature

• *Servaas Incorporated v. Iraq*
  – Commercial assets acquired by state in a bankruptcy not susceptible to execution because their ultimate intended use was to fund the National Development Fund

• *FG Hemisphere v. Congo*
  – State owned mining company distinct from state despite levels of control, overlap in management and day to day functions; extreme circumstances required to displace notion of separateness or veil pierce

• *Kensington v. Congo*
  – Where sham transactions deployed by state to avoid the execution process appropriate to pierce the corporate veil