ENFORCEMENT OF ICSID AND NON-ICSID ARBITRATION AWARDS AND THE ENFORCEMENT ENVIRONMENT IN BRICS.

Muruga Perumal Ramaswamy*

ABSTRACT

Investment awards resulting from ICSID and Non-ICSID investment arbitration could face diverse set of challenges. Such differences can be perceived both in annulment proceedings as well as during the stage of seeking recognition and enforcement of awards. The paper aims at examine the challenges in recognition and enforcement of international investment awards and investigate the enforcement environment and recent developments in specific BRICS member states. The paper emphasizes the need to assess the implications of recognition and enforcement challenges in BRICS in the specific context of international investment awards and address them effectively in order to enhance investor confidence and improve investment flows.

Keywords: Investment Awards, ICSID, Recognition and Enforcement, BRICS, Post-award Challenges.

INTRODUCTION

Awards resulting from international investment arbitration could face challenges and it is crucial to assess and address those challenges effectively in order to ensure that the arbitration as the preferred method of Investor State Dispute Settlement (ISDS) remains vivacious. The post award challenges could arise during proceedings seeking to annul an investment award or proceedings related to recognition and enforcement of investment awards. The objective of the present paper is to examine specific challenges in domestic enforcement of awards and assess the respective position of BRICS member states. The paper will analyze key domestic measures and recent reforms in individual BRICS members as well as their international obligations relating to recognition and enforcement and discuss some implications for investment awards.

The enforcement challenges facing investment arbitration awards could differ based on the nature of the arbitration mechanism that renders the award. This is particularly evident in the diversity of international enforcement rules and procedure governing investment arbitration conducted by the International Center for Settlement of Investment Disputes (ICSID) under the obligations arising out of the related convention (ICSID Convention) and non-ICSID arbitrations. Moreover, the characteristics of enforcement regimes in individual host states could also give rise to diverse challenges.

Among the two sets of post award challenges, the paper briefly examines the challenges emanating from annulment proceedings before the challenges in recognition and enforcement of awards is analyzed in detail. The issues arising out of recognition and enforcement are mainly examined in the context of ICSID awards and the awards sought to be enforced under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). The paper analyzes the challenges in the specific context of BRICS member states and concludes with an emphasis on the need to assess and address related challenges in the context of investment awards in order to enhance investor confidence.

INTERNATIONAL ARBITRATION AS A PREFERRED METHOD OF RESOLUTION OF INVESTMENT DISPUTES

Investment disputes involving a foreign investor and a host state, by virtue of the fact that it involves a mighty sovereign as a party, traditionally favored a neutral and efficient mechanism to settle disputes. The want of neutrality and trust naturally resulted in the choice of an international rather than a national forum. International arbitration became a widely preferred choice for the task as it is perceived to be not only neutral but efficient.

One of the fundamental features of arbitration, which motivates its choice, is the finality of the award resulting from the process. Unlike judgements resulting from an adjudicatory mechanism that could be subjected to appeal process, arbitration awards gain finality once rendered. But, although arbitration awards may enjoy an edge over judgements with regard to finality, they still have to seek enforcement under the auspices of the judiciary. In order to ensure that such dependency does not offset the finality advantage arbitration enjoys, it is crucial to assess key challenges facing enforcement of awards and ensure that they do not create undue obstacles. It is in this pursuit, the reminder of the paper will primarily deal with enforcement challenges in the context of investment awards and BRICS. Resistance relating to investment arbitration could broadly be divided into two categories namely pre and post award challenges. While pre-award challenges generally raise jurisdictional questions, post-award challenges typically pertains to the issue of annulment or recognition and enforcement of arbitral awards.

POTENTIAL CHALLENGES AT VARIOUS STAGES OF AN INVESTMENT ARBITRATION

A state could raise challenges even from the moment when an investor make efforts to invoke an arbitration clause. The challenge of the state at the very outset will give raise to a crucial question, namely, whether there is any obligation to arbitrate? This will in turn call for the interpretation of a dispute resolution clause in an investment contract or other relevant sources like a

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Bilateral Investment Treaty (BIT), in order to examine whether an obligation to arbitrate exist. Even if an obligation to arbitrate is established, various other pre-award questions could be raised. For example, whether the nature of the dispute or a claim could be a subject matter of arbitration or whether the subject matter of the dispute satisfies the definition of an 'investment' (which is protected) could be raised.

The jurisdiction of an investment tribunal could also be challenged on the ground that the party seeking to enforce the arbitration clause does not satisfy the definition of an 'investor' or does not fulfill the conditions of 'nationality' etc., who has been granted the exclusive right to invoke the arbitration clause. Even if the above conditions are satisfied, challenges to stall the arbitration proceedings could be raised on the grounds of non-exhaustion of local remedies, which may be a condition precedent for invoking investment arbitration. In cases where the initiation of an arbitration do not face the above questions, parties could still challenge the appointment of an arbitrator or constitution of a tribunal or the scope of its jurisdiction or procedures to be adopted etc.

In some cases, the jurisdiction of an arbitration tribunal have also been challenged on the ground that the initiation of an alternative remedy (like the litigation in a domestic court) precluded the option of seeking to arbitrate the dispute subsequently. Generally, BITs seek to limit the choice of dispute resolution methods through fork-in-the-road provisions. By virtue of those provisions, although investors could seek to resolve their disputes through national courts of the host states or international arbitration, their choice of either of those methods in a particular claim could preclude the recourse to seek a remedy through the other in an identical claim[1]. International arbitration tribunals have often distinguished claims arising under a BIT (treaty claim) governed by international law, from claims arising from an investment contract (contractual claim) governed by the domestic law. But sometimes the claims under the two categories are found to be intricately connected and essentially indistinguishable[2]. Such cases could exacerbate the concern of foreign investors that any failure to categorically distinguish the claims will deprive them the possibility to arbitrate the disputes before an international arbitration panel.

As fork-in-the-road typically limits the choice of the investors to only one of the potential method of settling investment disputes recognized under the BIT, it will force the investor to consciously make a choice when an investment dispute arises. Facing such a clause, foreign investors will have to weigh the pros and cons of choosing one method over the other. Under such circumstances, especially when the foreign investors do not trust the national courts to be neutral or independent, it is highly crucial to ensure that foreign investors do not perceive any formidable challenges in realizing the fruits of international arbitration awards. If not, relevant host markets will risk foreign investors losing confidence on international investment arbitration, which in turn could affect investment flows to a host market.

The two key sets of challenges that may arise subsequent to the rendering of an international investment arbitration includes challenges seeking to annul the investment awards and challenges to resist the enforcement of investment awards. Although for the purpose of clarity of discussion the set of challenges is demarcated in this paper as pre and post award challenges, it is important to note that some of the above mentioned grounds of challenge arising before an award is rendered could also be the genesis for the post award challenges. For example, typical grounds of annulment of an award could be related to various issues that arise before an award is rendered including issues like improper constitution of the tribunal, lack of jurisdiction, failure to provide sufficient opportunity to the parties, etc. Similarly, the two sets of post-award challenges could manifest distinctly depending on whether the award in question resulted from ICSID or Non-ICSID arbitration. Moreover, the concerns about the potential role national courts, especially national courts of host states could play will also differ depending on whether the challenges pertain to annulment or enforcement. The reminder of this section will briefly highlight some of those distinctions, before the differences arising in the context of recognition and enforcement is addressed in detail in the next section.

One of the major challenges arising subsequent to rendering of an award is the request for annulment of the award on specific grounds. This challenge is normally raised in domestic courts and the award will be subjected to a judicial review. In case of investor state arbitration award, this challenge gains a distinct characteristic for several reasons. Firstly, the challenge may not be raised in any national courts or subjected to a judicial scrutiny if the award in question was rendered by an arbitration proceedings governed under the ICSID Convention. As the ICSID mechanism has a built in annulment procedure, the challenge to set aside an investment arbitration award will be raised in and handled by the ICSID itself and not in any national courts[3]. In such cases, as there is no scope for judicial review, concerns about standards of review by the courts of the host states and the ensuing need to ensure investor confidence may not arise.

Secondly, even if the investment arbitration proceedings are not held under the auspices of the ICSID Convention, the possibility of challenging the resulting award before national courts may not involve the host state courts. If an international investment arbitration is held through any other arbitration mechanism like *adhoc* arbitration or other institutional arbitration, the role of

[1] For typical forms of interaction between the two systems see C. Schreuer (2010). Interaction of International Tribunals and Domestic Courts in Investment Law. In A. W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*. Boston, (pp. 71-94).

[2] See *Pantechniki S.A. Contractors & Engineers (Greece) v Republic of Albania* ICSID Case No. ARB/07/21 (30 July 2009), where the international arbitral tribunal dismissed certain claims of the foreign investor against the host state Albania were inadmissible on the ground and to the extent that they were "subsumed by the Claimant's election to seize the Albanian courts".

[3] See J. Fernandez-Armesto (2011). Different Systems for the Annulment of Investment Awards. *ICSID Review—Foreign Investment Law Journal,* 26 (1), 128–146.

national courts of the host states could still be limited as the chance of host state courts having jurisdiction to review an application seeking to annul an investment award is expected to be minimal. In case of non-ICSID investment arbitration, any challenges to annul the resulting award will be governed by the law of the place or seat of arbitration. If the place or seat of arbitration in investment disputes is not the host state[4], the standards and practice of judicial review in host states will not be of a concern. Therefore, with regard to the category of post award challenges seeking annulment of investment awards rendered either by an ICSID or non-ICSID panel, concerns about judicial review powers of the host state courts may not be pronounced.

Although the role of national courts of the host states could be minimal with regard to annulment proceedings, the practice of the host state courts in the context of seeking recognition and enforcement of investment awards would still be a subject matter of concern. This is because enforcement of investment awards is typically sought in the courts of the host states except in cases where an investor finds it feasible or more effective to enforce the award against the assets of the host state which is held outside its territory in another state. But even if the assets of a host state are found in a third state, the potential to challenge the enforcement there on the grounds of sovereign immunity and the nature of sovereign immunity (absolute or restrictive) recognized in that state could impact the decision on whether to seek recognition and enforcement of an investment award in a third state. Due to the various circumstances raised above, the potential role national courts of the host state could play in the process of seeking recognition and enforcement of investment awards is much higher. This in turn makes the assessing and addressing of concerns related to recognition and enforcement in a host state an essential task in improving investor confidence.

RESISTENCE TO RECOGNITION AND ENFORCEMENT OF AN INVESTMENT AWARD

The expectations of independent and impartial judicial review in actions seeking annulment of investment awards would prompt investors to choose institutions or jurisdictions (through appropriate choice of place or seat of arbitration) that are perceived to be more neutral. However, such a choice may not exist for investors in the context of seeking recognition and enforcement of investment awards and therefore the assessment of host state environment relating to recognition and enforcement gains added significance. Although the issue of recognition and enforcement is generally a subject matter of national laws of a host state, international obligations could be determinative. For example, the international obligations under the New York Convention 1958 will determine relevant standards in the host states that are party to that Convention. In addition, the recognition and enforcement of ICSID awards in the member states of the ICSID Convention will be influenced by specific ICSID standards. A closer analysis of the relevant standards in the ICSID and New York Conventions reveals some key differences.

Chapter IV, Section 6 of the ICSID Convention provides the key obligation and standards relating to enforcement. First and foremost, the binding nature and the finality of the ICSID awards are emphasized[5]. The finality standard dictates that an award or its interpretation, revision and annulment[6] resulting from the ICSID mechanism cannot be subjected to any appeal or other challenges save those recognized within the framework of the Convention. Contracting states of ICSID have the obligation to recognize and enforce the ICSID awards on a similar footing with the final judgement of their courts[7]. However, on the question of execution of an investment award, the ICSID Convention recognizes a greater role for the domestic laws.

The party seeking the recognition and enforcement can trigger the process by simply furnishing a certified copy of the ICSID award to the competent court or a designated authority in the member state, where the recognition and enforcement is sought. Although the obligation to recognize and enforce and the procedure to initiate the process are categorically provided by the ICSID Convention, it does not prescribe the rules governing the actual execution of the award. The ICSID Convention leaves the execution of the award to be governed by the domestic laws applicable to the execution of the judgements in the concerned member states. Moreover, the obligation of recognition and enforcement prescribed by the ICSID Convention is also explicitly subjected to the national laws of the member state governing sovereign immunity of states from execution[8].

Although, ICSID Convention recognizes the role of domestic laws at the execution stage, the scope of challenging the execution of an ICSID award is more limited in comparison with the awards governed by the New York Convention. New York Convention imposes a general obligation over the member states to recognize arbitration awards as binding and enforce them[9]. However, the obligation is subject to a) the rules of procedure in the territory where the award is relied upon as well as b) the conditions arising from provisions of the Convention. Moreover, the obligation could be subjected to some explicit exclusions recognized by the Convention. Firstly, one of the potential exclusion recognized by the New York Convention is the right of a signatory state to restrict the application of the Convention only to the awards made in the territory of another contracting state

[4] The determination of the place or seat of arbitration will normally be based on the agreement of the parties and the parties in an investment arbitration normally choose a neutral jurisdiction. If no such agreement is reached, then the place or seat of arbitration will be determined by the rules governing the arbitration proceedings. In such a scenario the chance of a host state being determined as a place or seat of arbitration may be rare. For example, even in arbitration proceedings governed by the Arbitration Rules of United Nations Commission on International Trade Law (UNCITRAL), where the arbitrators appointed could determine the place or seat of arbitration based on the relevant facts of the case, the chance of host state being determined as a place or seat of arbitration may be rare.

[5] See Article 53 of the ICSID Convention.

[6] M. B. Feldman (1987). The Annulment Proceedings and the Finality of ICSID Arbitral Awards. *ICSID Review—Foreign Investment Law Journal,* 2 (1), 1-18.

[7] See Article 54 of the ICSID Convention.

[8] See Article 55 ibid.

[9] See Article III of the New York Convention 1958.

(i.e. party to the New York Convention). Secondly, a member state could make a declaration limiting the application of the Convention only to disputes that are commercial in nature according to the law of the declaring state. The Convention also foresees the possibility that member states may not extend the obligations to all parts of its territory. Therefore, the scope of obligation to recognize and enforce of individual member states under the New York Convention should be assessed in the light of the relevant rules of procedures as well as the exclusions (reservations) declared by individual member states.

In comparison with the ICSID Convention, the scope of the obligation to recognize and enforce seems to be subjected to more exclusions under New York Convention. On a similar note, the requirements to initiate the recognition and enforcement proceedings under the New York Convention exceeds those prescribed in the ICSID Convention. The party seeking recognition and enforcement is not only required to submit the authenticated original award or a certified copy but also the original or certified copy of the agreement that gave rise to the obligation of the parties to arbitrate the dispute in question[10].

The New York Convention recognizes two sets of grounds under which an application for recognition and enforcement of awards can be refused. The first set of grounds mainly pertains to certain defects in the arbitration agreement or procedural shortcomings in the arbitration proceedings or factors affecting the enforceability of the award. The party against who the enforcement is sought can invoke the first set of grounds with the production of relevant proof. The first set consist of five potential grounds of refusal. Firstly, a party may challenge the application on the ground of invalidity of an arbitration agreement or the incapacity of the parties to that agreement. The second ground arises when the party challenging the application proves that no notice of appointment of the arbitrator or the arbitration proceedings was served upon the party or the party was unable to present its case. The third ground is mainly related to the award that deals with a dispute that is neither contemplated by the terms of submission nor fall within its scope or when a concerned award decides on matters that are beyond the scope of submission to arbitration. The fourth ground pertains to situations where the composition of the arbitral authority or the arbitral procedure does not accord with the agreement of the parties to the arbitration or with the law of the country where arbitration was held. The final ground ascends in situations when the award sought to be enforced is yet to become binding or had been set aside or suspended by a prescribed authority.

The second set of grounds pertains to the question of arbitrability of the dispute and public policy concern, which unlike the first set could be invoked by the competent authority in the country where the recognition and enforcement is sought. The first ground of refusal arises when the dispute in question cannot be a subject matter of arbitration under the law of the country where enforcement is sought and the second ground is triggered when the recognition or enforcement sought will be contrary to the public policy of that country. The seven different grounds of refusal discussed so far obviously shows that challenges facing recognition and enforcement sought under the New York Convention are greater than those arising under the ICSID Convention. Such a conclusion can be supported not only because the number of grounds of challenge are more in New York Convention but also due to the wide scope of such grounds giving rise to diverse interpretations by national courts that cause various uncertainties. For example, the recognized grounds in the first set contemplates the involvement of diverse set of laws and dependency on domestic legal standards. This makes parties face various uncertainties during the stage of recognition and enforcement.

The above mentioned uncertainties relating to the first set for example could arise in determining a) which is the law applicable to the parties to an arbitration agreement and whether they suffer any incapacity under that law; b) which is the law the arbitration agreement is subjected to by the parties and whether the agreement will be valid under that law; c) what is the law regarding the validity of arbitration agreements in the country where the award was made and whether the arbitration agreement in question is valid under that law; d) what is the law regarding the composition of the arbitral authority or the arbitral procedure in the country, where the arbitration took place and whether the composition of the arbitral authority or the arbitral procedure in the instant case was in accordance with that law; e) which is the law under which the award in question was made and whether the award has become binding on the parties under that law. Similarly in the second set of grounds of refusal, the dependency on the public policy and the law of the country where recognition and enforcement is sought and the potential diversity among countries on those issues adds to the uncertainty. The analysis of the challenges facing investment awards that are sought to be recognized and enforced under the ICSID regime and the New York Convention regime indicates that they could differ[11] depending on the facts and the arbitration proceedings of different cases as well as jurisdictions where the recognition and enforcement will be sought.

THE RECOGNITION AND ENFORCEMENT ENVIRONMENT IN BRICS

Based on the earlier finding that the scope of challenging recognition and enforcement of awards could differ between the ICSID and the New York regimes it is obvious that challenges in the five BRICS member states are bound to differ. Among the BRICS, only China is a party to the ICSID Convention. The remaining four states are not parties to the ICSID Convention[12]. As a

[10] The said award and the agreement should be in or translated into the official language of the country in which the award is relied upon. See Article IV of the New York Convention 1958.

[11] See for a systematic discussion on problems faced in enforcement of investment awards under the two system as well as some relevant suggestions to solve the problems See K. Huseynli (2017). Enforcement of Investment Arbitration Awards: Problems and Solutions. *Baku State University Law Review,* 3 (1), 40-74.

[12] However, among other BRICS members, Russia is a signatory to the ICSID Convention since 1992 but is yet to ratify the Convention. The situation that majority of the BRICS member states are not parties to the ICSID Convention in spite of the fact the Convention commands a wider acceptance of 153 parties (as of January 2018)

consequence, the advantages relating to recognition and enforcement of investment awards arising out of ICSID Convention will not be available in majority of the BRICS member states. Although it is possible for investment disputes involving any of the remaining BRICS states could still utilize the ICSID Additional Facility to resolve investment disputes, the resulting ICSID Additional Facility award will not be able to benefit from the advantages of recognition and enforcement under the ICSID Convention. ICSID Additional Facility Rules categorically declares that the provisions of ICSID Convention does not apply to the proceedings held under the Additional Facility or any recommendations, reports or awards resulting from such proceedings[13]. Moreover, neither the ICSID Additional Facility Rules nor the ICSID Arbitration (Additional Facility) Rules have comparable provisions on recognition and enforcement. Although, there is such a conspicuous absence, by virtue of the fact that ICSID Arbitration (Additional Facility) Rules limits the choice of the forum to conduct its arbitration proceedings to states that are parties to the New York Convention[14] indicates that recognition and enforcement challenges relating to New York Convention discussed earlier in this paper will become pertinent when relevant BRICS states use additional facility arbitration.

In addition to the general distinction alluded above, it is necessary to examine specific issues of recognition and enforcement arising in individual BRICS members. Firstly, among all the BRICS members, Brazil was the last to undertake obligations under the New York Convention as it acceded to the Convention only in 2002. However, Brazilian accession is not subject to any reservation, which is clearly distinct from the position of India, Russia and China that have subjected their obligations to different reservations. Although this increasing willingness to accept international arbitration could improve investors confidence, the continued reluctance of Brazil to enter into BITs could potentially offset any such gain in confidence. Apart from the international obligations of Brazil, other pertinent domestic legal factors influencing recognition and enforcement should also be taken into account to assess the position of Brazil. The key domestic instruments pertinent to the process of seeking recognition and enforcement includes the Arbitration Act 1996 (Law No 9307/96) and the Civil Procedure Code of Brazil.

Before seeking enforcement of any foreign arbitral award, a formal recognition by the Superior Tribunal of Justice of Brazil is required, which may be refused on several grounds permitted by the domestic law as well as the New York Convention. The potential grounds for refusal of recognition includes invalidity of the agreement containing the arbitration clause; lack of proper notice about arbitrators appointment or the related arbitration proceeding or lack of opportunity to present the case; award resulting from excess of arbitral jurisdiction; composition of the panel or adoption of the procedure not in accordance with parties' agreement or law of the place of arbitration; lack of binding effect or annulment or suspension of an award by a competent authority, and non-arbitrability of the subject matter of the dispute under Brazilian law[15]. In addition, the recognition and enforcement could be denied not only on grounds of public policy of Brazil but also its sovereignty[16]. Although, Brazilian courts are said to mandate strict procedural compliance aimed at providing sufficient opportunity to the losing party to challenge the application seeking recognition and enforcement, they are generally found to have upheld the applications of the wining party to recognize and enforce in most cases[17].

Russia is a founding signatory to New York Convention and has undertaken to apply the provisions of the Convention even to arbitral awards made in the territories of non-contracting states to the extent such states are willing to provide a reciprocity treatment. In comparison with other two BRICS states, namely China and India that have made reservations under the New York Convention limiting their obligations only towards other contracting states, the Russian undertaking could be positively regarded by investors from any non-contracting states. However, any assessment of recognition and enforcement environment in Russia has to take into account all pertinent domestic laws and international obligations that could influence the related process.

The key domestic instruments in Russia include Arbitration Procedural Code 2002[18] (APC 2002) as amended subsequently and the Law on International Commercial Arbitration 1993[19] as amended in 2008. Moreover, the Presidium of the Supreme Arbitrazh Court of Russia has issued an Information Letter in 2005[20] that is focused on the practice of Arbitrazh Courts' in cases of recognition and enforcement of foreign awards, which is also an important source relevant for assessment of the related environment in Russia. Russia's related international obligations not only arise from the New York Convention but also the European Convention on International Commercial Arbitration 1961 to which Russia is also a founding member. Studies have shown that the Russian obligations arising under the European Convention could under certain circumstances have the effect of limiting the application of the New York Convention[21].

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shows that the recognition and enforcement challenges in those BRICS states that are not parties to ICSID Convention needs special attention.

[13] See the title 'Convention Not Applicable' under Article 3 of the ICSID Additional Facility Rules.

[14] See Article 19, 'Limitation on Choice of Forum', ICSID Arbitration (Additional Facility) Rules.

[15] See F. Hermanny, et.al. (2018). Enforcement of Foreign Arbitral Awards in Four Key Latin American Jurisdictions. *The Arbitration Review of the Americas,* 48-54 available online at https://globalarbitrationreview.com/edition/1001050/the-arbitration-review-of-the-americas-2018.

[16] Ibid.

[17] Ibid.

[18] See Law No. 95-Fz of 24 July 2002.

[19] See Law No 5338-1 of 7 July 1993.

[20] See Supreme Arbitrazh Court's Information Letter No. 96 of 12 December 2005.

[21] See how the obligations arising under Article IX of the European Convention could impact the application of the ground of refusal of recognition of an award under Article V (1) (e) of the New York Convention in V. Khvalei and

The party seeking recognition and enforcement of foreign awards in Russia has to file the application at the Arbitrazh Court at the place where the defendant or the assets related to the enforcement are located. The resulting decision although could not be formally appealed on merits but could still be subjected to review on certain grounds of error by a higher cassation level Arbitrazh court and ultimately by the Supreme Arbitrazh Court[22]. The review procedure provides safeguards against potential errors that could result from the inexperience of dealing with foreign awards by regional Arbitrazh courts. Studies have found such disparity among Arbitraz Courts in certain regions in comparison with similar courts in the capital Moscow, which have more experience in dealing with foreign awards[23]. In spite of the review procedures, the Russian courts have faced criticism for refusal to recognize and enforce on certain broad grounds like public policy. For example, in *SPIG s.p.a v ZAO PK Promcontroller* 2017, the refusal of the Supreme Court of Russia and the lower courts to recognize and enforce the foreign arbitral award rendered by the Stockholm Chamber of Commerce in favour of SPIG against Promkontroller, which is said to be partly and indirectly own by the Russian State has been considered as protectionism by the judiciary[24]. Moreover, public policy as a ground of denial of recognition and enforcement is found to be defined broadly and vague in judicial practice[25].

Review of various cases involving public policy defence against recognition and enforcement has revealed that the usage of the term has largely remained unpredictable in Russia[26]. Public policy as a ground of denial of recognition and enforcement has been employed by courts in unique circumstances like when the award is considered to be contravening mandatory rules in Russia or highly punitive without observing the principle of proportionality recognized in the civil law[27]. Similarly, denial of recognition and enforcement has been found to have resulted from other unique circumstances including denial on the grounds of a) non-arbitrability in an award mandating renewal of lease by terming it as a matter of public and administrative law; b) procedural violation in cases involving lack of notarization of translation of letter correspondence between parties, lack of written arbitration clause, etc. and c) arbitration (clause) arising from a contract invalidated by a third party action[28].

Some recent reforms introduced to the Russian Arbitration laws have potential to address certain limitations and potential concerns. The revisions introduced in 2016 has enabled international arbitration tribunals to hear cases involving corporate disputes as well as investment disputes based on arbitration agreement in different forms including electronic documents. Specific improvements relating to recognition and enforcement have also been introduced. They include, recognition of the waiver of the right to challenge an award by parties to arbitral proceedings before permanent arbitration institutions, reduction in processing time of applications for recognition and enforcement by state courts, etc.

The major domestic law governing recognition and enforcement in India is the Arbitration and Conciliation Act 1996 (ACA 1996), which also explicitly incorporates within itself the related international obligations of India. India is a party to not only the New York Convention 1958 but also Geneva Convention on the Execution of Foreign Arbitral Awards 1927. Under the New York Convention, India has made reservations, where by its obligations are limited only to the awards made in the territory of the parties to the Convention. Moreover, it has also made a commercial reservation, whereby it will only apply the New York Convention to the disputes that are considered to be commercial under the Indian law. Similar commercial reservation has also been made by India with regard to its obligations under the Geneva Convention. The challenges to the enforcement of arbitral awards in India could be made on several grounds that are recognized under the New York Convention. However, India has made an important contribution to delimit the scope of public policy as a ground to annul an award under Section 34(2) (b) (ii) of the ACA 1996 or to challenge the enforcement of a foreign award under Section 48 (2) (b) of the ACA 1996.

In actions seeking annulment, the recent 2015 amendment to ACA 1996 provides that an award will be considered as conflicting with the public policy of India only on a specific set of circumstances involving fraud or corruption or violation of confidentiality

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I. Varyushina (2011-2012). Russian Federation. *The Baker and McKenzie International Arbitration Yearbook,* 375-395 at 393.

[22] B. Karabelnikov and D. Pellew (2008). Enforcement of International Arbitral Awards in Russia-Still a Mixed Picture. *ICC International Court of Arbitration Bulletin*, 19(1), 65-85 at 66.

[23] Ibid.

[24] See M. Lazarova (17 November 2017) Why Russian courts refused to enforce SCC award against Tecon group company in SPIG s.p.a v ZAO PK Promcontroller. *CIS Arbitration Forum* available online at http://www.cisarbitration.com/category/recognition-and-enforcement-of-arbitral-awards/

[25] I. M. Smeureanu (26 June 2014) Five Facts about Recognition and Enforcement of Foreign Awards in Central and Eastern Europe. *Kluwer Arbitration Blog* available online at http://arbitrationblog.kluwerarbitration.com/2014/06/26/five-facts-about-recognition-and-enforcement-of-foreign-awards-in-central-and-eastern-europe/

[26] See M. Wietzorek (6 December 2010) Recognition and Enforcement of Foreign Arbitral Awards in Russia revisited: the case of Hipp GmbH & Co. Export KG (Austria) v. OOO SIVMA Detskoe Pitanie & ZAO SIVMA (Russia). *Kluwer Arbitration Blog* available online at http://arbitrationblog.kluwerarbitration.com/2010/12/06/recognition-and-enforcement-of-foreign-arbitral-awards-in-russia-revisited-the-case-of-hipp-gmbh-co-export-kg-austria-v-ooo-sivma-detskoe-pitanie-zao-sivma-russia/

[27] M. Kulkov (2009). Enforcement of International Arbitral Awards in Russia. in ABA, *Enforcement of International Arbitral Awards in Russia and Ukraine: Dream or Reality?* American Bar Association: Chicago, pp. 1-5.

[28] Ibid.

or admission of evidence from conciliation in other proceedings or contravention of fundamental policy of Indian law or conflict with morality or justice[29]. In actions challenging the enforcement of foreign awards, the ACA 1996 explains that an award will be considered as violating public policy if the rendering of the award was induced or affected by fraud or corruption[30].

The distinction in language used in the explanations of the public policy in the 2015 amendment and in Section 48 (2) (b) of ACA 1996 are important to note. The explanation of public policy in the context of challenging enforcement of foreign awards is not as specific as the explanation introduced in 2015 amendment and the explanation is also clearly said to be without prejudice to the generality of public policy clause as a ground for challenging the enforcement of foreign awards. Apart from the legislative efforts in the ACA 1996 to demarcate the scope of public policy as a ground to challenge enforcement of foreign awards, the evidence of judicial practice during the first decade since the introduction of the Act is also shown to indicate that challenges to enforcement of foreign awards in most of the other grounds have not been successful[31]. However, the more enforcement friendly elements arising from the legislative framework and judicial practice may not be sufficient to conclude that enforcement of investment awards would receive a similar treatment or reception. The issues facing enforcement could manifest distinctly when the award sought to be enforced is the result of an investment arbitration arising from an investment treaty. Studies have distinguished awards resulting from international commercial disputes and international investment disputes and have argued that the enforcement of the latter could be more challenging in India in spite of the legislative and judicial developments noted earlier[32].

In comparison with other BRICS members, any assessment of the enforcement environment of investment arbitration awards in China should be carried out in the light of its obligation under ICSID Convention as it is the only BRICS state that is a party to the Convention. ICSID awards in favour of investors from home states that are party to ICSID Convention could benefit from its relatively limited grounds of challenging recognition and enforcement. However, non-ICSID investment awards have to be still sought recognition and enforcement in China under the New York Convention and as a consequence would face the challenges typically recognized under the New York Convention. China has made two reservations to New York Convention, namely restricting its obligations only to the awards made in the states that are party to the Convention on the basis of reciprocity as well as to the awards that are commercial in nature.

Other than issues arising from the New York Convention, it is important to take note of some unique developments in China's judicial practice. In recent years the role of judicial review of arbitral decisions has received a distinct attention in China by virtue of specific provisions published to address the matter. The Supreme People's Court has recently issued two sets of specific provisions on the subject namely a) Provisions of the Supreme People's Court on Several Issues concerning Deciding Cases of Arbitration-Related Judicial Review 2017 and b) Provisions on Issues relating to the Reporting and Review of Cases Involving Judicial Review of Arbitration 2017, which came into effect since 1 January 2018[33]. These provisions based on relevant legislation and adjudicative practice in China covers both domestic and foreign arbitral awards and addresses a range of issues.

The first provisions mainly deal with the question of jurisdiction of courts on different issues like determination of the effect of an arbitration agreement and recognition of the arbitral awards as well as in situations where applications are filed in more than one competent court. It also enumerates the requirements for applications seeking recognition of effect of arbitration agreement or recognition and enforcement of arbitral awards. It prescribes the procedures and relevant time limits that has to be followed once an arbitration-related judicial review has been accepted by the courts. The provisions address the issue of determining the law applicable to the recognition of the effect an arbitration agreement, when an application for recognition and enforcement of a foreign arbitral award is made.

The second Provisions prescribes the relevant rules mandating the lower courts to report to the Higher People's Court and to the Supreme People's Court in certain situations like when a refusal of recognition of the validity of a foreign related arbitration agreement or enforcement of the resulting award or recognition and enforcement of a foreign arbitral awards occurs. Although, the initiative of the Supreme People's Court to address certain issues of judicial review of arbitration awards is a distinct effort, specific standards governing recognition and enforcement of investment awards needs to assessed on its own merits.

Finally, as in the case of Brazil discussed earlier, South Africa also has not made any reservation regarding its obligation to recognize and enforce foreign awards under the New York Convention. After acceding to the Convention in 1976, South Africa introduced the Recognition and Enforcement of Foreign Arbitral Awards Act 1977[34] (REFAAA 1977), which was more or less

[29] See "Explanation 1 to the term 'public policy of India' substituted in Section 34(2)(b)" in The Arbitration and Conciliation (Amendment) Act 2015.
[30] See Explanation to Section 48 (2) (b) of the Arbitration and Conciliation Act 1996.
[31] See S. Kachwaha (2008). Enforcement of Arbitration Awards in India. *Asian International Arbitration Journal*, 4 (1), 64-82 at 81.
[32] See P. Ranjan and D. Raju (2011). The Enigma of Enforceability of Investment Treaty Arbitration Awards in India. *Asian Journal of Comparative Law,* 6(1), 1-33.
[33] See (5 March 2018) The Supreme People's Court (SPC) Issues New Interpretations on Arbitral Judicial Review Cases. *Hong Kong Lawyer* available online at http://www.hk-lawyer.org/content/supreme-peoples-court-spc-issues-new-interpretations-arbitral-judicial-review-cases
[34] See Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, which came into force on 13 April 1977.

reflective of the provisions of the Convention. However, the provisions of the Act have come under criticism for providing a wider discretion for courts in determining when recognition and enforcement could be refused. More scepticism arose in the following year when South Africa introduced the Protection of Businesses Act 1978[35] (PBA 1978) that sought to restrict the enforcement of arbitral awards relating to certain types of disputes[36] obtained in foreign jurisdictions. Apparent contradictions have been identified between REFAA 1977 and PBA 1978[37]. In addition, it is pertinent to observe that the concerns of the 1978 Act would have been particularly profound for foreign investors as the types of disputes referred in the1978 Act were mainly related to natural resources.

South Africa has in recent years introduced concrete measures to address the concerns relating to both enforcement of foreign arbitral awards as well as those arising out of the PBA 1978. The International Arbitration Act 2017[38] (IAA 2017) was introduced to address a range of related concerns by repealing the REFAAA 1987 and providing a new legal framework for recognition and enforcement of foreign arbitral awards as well as amending the PBA 1978. The IAA 2017 not only incorporates the provisions of the New York Convention but also the related recognition and enforcement standards in UNCITRAL Model Law on International Commercial Arbitration as amended in 2006. The elements of IAA 2017 relating to recognition and enforcement of foreign arbitral awards will also serve as an important addition to the recent measures introduced by South Africa to improve investor confidence[39].

CONCLUDING REMARKS

The basic premise of the paper is built on the argument that ensuring an effective resolution of investment disputes is one of the important factors determining the investment climate in any market. The paper introduced two major sets of post award challenges and examined the challenges arising in the context of recognition and enforcement of awards in detail. The paper demonstrated that both set of post award challenges manifest differently in ICSID and non-ICSID awards. It highlighted how the scope of challenging the execution of an ICSID award is more limited in comparison with the awards governed by the New York Convention. The paper investigated the recognition and enforcement environment in individual BRICS member states, which revealed diverse characteristics. The finding of this diversity calls for a specific assessment of related implications for the recognition and enforcement of investment awards in BRICS.

Although all the five BRICS member states are parties to the New York Convention, the differences in their reservations as well as in their related domestic legislation and judicial practice indicates that the implications for enforcing investment awards in five BRICS countries would be different. For example, one of the pertinent grounds to refuse recognition and enforcement of foreign arbitral awards arising from international commercial dispute resolution namely 'the public policy' has shown diverse legislative standards and judicial interpretations in individual BRICS member states. Studies have identified that these relevant public policy standards and interpretations could manifest differently when the award sought to be enforced is an investment award arising from international investment agreements. Similarly, other specific standards in domestic rules could make enforcement of investment award more challenging. For example, 'sovereignty' as a potential ground to challenge enforcement in Brazil or the more onerous enforcement procedure prescribed for awards resulting from natural resources related disputes in South Africa etc discussed earlier in this paper have potential to cause enforcement of investment awards more challenging in those jurisdictions.

It is evident from the analysis of the enforcement environment in individual BRICS members that all of them have made initiatives to undertake key international obligations to ensure due recognition and enforcement of foreign arbitration award. Moreover, most of these states have not only introduced relevant domestic law measures but also continued to introduce reforms and other explicit initiatives in order to improve the overall enforcement environment in their respective jurisdictions. However, the analysis in the paper reveals that such improvements were mainly aimed at international commercial awards and may not suffice to quell any potential concerns foreign investors may have in enforcing investment awards. Therefore, individual BRICS member states have to undertake studies aimed at assessing the implications of their respective legal framework and international obligations governing enforcement for foreign investors seeking to enforce investment awards.

Examining concerns and issues facing enforcement of international investment awards in particular and initiating relevant measures to address them is crucial to improve investor confidence on individual BRICS members as host states. Although, individual member states of BRICS could strive to improve the enforcement environment for international investment awards on their own, BRICS as a cooperating platform could also serve to achieve such improvements aimed at improving intra-BRICS trade and investments. Therefore, it is crucial for individual BRICS member states as well as BRICS as a cooperating block to commission more systematic studies to assess the relevant challenges in recognition and enforcement of investment awards in order to enhance investor confidence and ultimately promote international investment flows as well investment flows between BRICS member states.

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[35] See Protection of Businesses Act 99 of 1978, which came into force on 4 August 1978.

[36] Arising from disputes involving acts or transactions relating to mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material (or) involving the question of liability for bodily injury of any person caused by the consumption or use of or exposure to any natural resource of South Africa. See sections 1(1), 1(3) and 1D ibid.

[37] See J. Ripley-Evans (17 August 2017). South Africa. *International Arbitration Review* (Edition 8) available online at https://thelawreviews.co.uk/chapter/1145748/south-africa.

[38] See International Arbitration Act No. 15 of 19 December 2017.

[39] See for example the Protection of Investment Act No. 22 of 15 December 2015.

REFERENCES

(5 March 2018) The Supreme People's Court (SPC) Issues New Interpretations on Arbitral Judicial Review Cases. Hong Kong Lawyer available online at http://www.hk-lawyer.org/content/supreme-peoples-court-spc-issues-new-interpretations-arbitral-judicial-review-cases

Feldman, M. B. (1987). The Annulment Proceedings and the Finality of ICSID Arbitral Awards. ICSID Review—Foreign Investment Law Journal, 2 (1), 1-18.

Fernandez-Armesto, J. (2011). Different Systems for the Annulment of Investment Awards. ICSID Review—Foreign Investment Law Journal, 26 (1), 128–146.

Hermanny, F., et.al. (2018). Enforcement of Foreign Arbitral Awards in Four Key Latin American Jurisdictions. The Arbitration Review of the Americas, 48-54 available online at https://globalarbitrationreview.com/edition/1001050/the-arbitration-review-of-the-americas-2018.

Huseynli, K. (2017). Enforcement of Investment Arbitration Awards: Problems and Solutions. Baku State University Law Review, 3 (1), 40-74.

Kachwaha, S. (2008). Enforcement of Arbitration Awards in India. Asian International Arbitration Journal, 4 (1), 64-82 at 81.

Karabelnikov, B. and Pellew, D. (2008). Enforcement of International Arbitral Awards in Russia-Still a Mixed Picture. ICC International Court of Arbitration Bulletin, 19(1), 65-85 at 66.

Khvalei, V. and Varyushina, I. (2011-2012). Russian Federation. The Baker and McKenzie International Arbitration Yearbook, 375-395 at 393.

Kulkov, M. (2009). Enforcement of International Arbitral Awards in Russia. in ABA, Enforcement of International Arbitral Awards in Russia and Ukraine: Dream or Reality? American Bar Association: Chicago, pp. 1-5.

Lazarova, M. (17 November 2017) Why Russian courts refused to enforce SCC award against Tecon group company in SPIG s.p.a v ZAO PK Promcontroller. CIS Arbitration Forum available online at http://www.cisarbitration.com/category/recognition-and-enforcement-of-arbitral-awards/

Pantechniki S.A. Contractors & Engineers (Greece) v Republic of Albania ICSID Case No. ARB/07/21 (30 July 2009)

Ranjan, P. and Raju, D. (2011). The Enigma of Enforceability of Investment Treaty Arbitration Awards in India. Asian Journal of Comparative Law, 6(1), 1-33.

Ripley-Evans, J. (17 August 2017). South Africa. International Arbitration Review (Edition 8) available online at https://thelawreviews.co.uk/chapter/1145748/south-africa.

Schreuer, C. (2010). Interaction of International Tribunals and Domestic Courts in Investment Law. In A. W. Rovine (ed.), Contemporary Issues in International Arbitration and Mediation: The Fordham Papers. Boston, (pp. 71-94).

Smeureanu, I. M. (26 June 2014) Five Facts about Recognition and Enforcement of Foreign Awards in Central and Eastern Europe. Kluwer Arbitration Blog available online at http://arbitrationblog.kluwerarbitration.com/2014/06/26/five-facts-about-recognition-and-enforcement-of-foreign-awards-in-central-and-eastern-europe/

Wietzorek, M. (6 December 2010) Recognition and Enforcement of Foreign Arbitral Awards in Russia revisited: the case of Hipp GmbH & Co. Export KG (Austria) v. OOO SIVMA Detskoe Pitanie & ZAO SIVMA (Russia). Kluwer Arbitration Blog available online at http://arbitrationblog.kluwerarbitration.com/2010/12/06/recognition-and-enforcement-of-foreign-arbitral-awards-in-russia-revisited-the-case-of-hipp-gmbh-co-export-kg-austria-v-ooo-sivma-detskoe-pitanie-zao-sivma-russia/

Muruga Perumal Ramaswamy*
University of Macau
Email:emailperu@gmail.com

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