FIRST ARGENTINE COURT RULING REGARDING THE ENFORCEMENT OF ICSID AWARDS

by JULIAN BORDACAHAR

A. INTRODUCTION

1. On August 18, 2015, the chamber A of the Buenos Aires Commercial Court of Appeals (the "Court of Appeals") decided on the case involving CCI - Compañía de Concesiones de Infraestructura S.A. ("CCI") and the Republic of Peru (the "CCI Case") in a groundbreaking decision that represents the first judicial precedent regarding the enforcement of ICSID awards in Argentina.

2. Despite being the State that has received the highest amount of ICSID claims (51 out of 543 registered cases), no decision concerning the enforcement of ICSID awards against Argentina was ever rendered in its own territory. As a result, even though the decision issued in the CCI Case does not involve the Argentine Republic as a party, it certainly becomes relevant in view of the impact that it may have on future enforcement proceedings against the Argentine State.

3. For this reason, this article aims to provide a brief overview and analysis of the decisions issued by the first instance judge (the "Judge") and the Court of Appeals vis-à-vis the potential effect of these decisions on future cases.

B. THE ARBITRATION PROCEEDINGS

4. On February 2, 2010, Convial Callao S.A. ("Convial") and CCI (the "Claimants") filed a request for arbitration before the International Centre for Settlement of Investment Disputes ("ICSID Centre") against the Republic of Peru.²

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² CCI - Compañía de Concesiones de Infraestructura S.A. s/ Pedido de Quiebra (por República de Perú), Juzgado Nacional en lo Comercial N° 3, Secretaría N° 6, Exp., N° 8030/2015.

³ Claimants relied on the Argentina - Peru BIT for bringing their claim. While CCI is an Argentine company, Convial is a company constituted under the laws of Peru. However, since CCI exercised effective control of Convial through its shares, the Tribunal found that Convial was an “Argentine national” according to the
The Claimants, highway construction companies, had concluded a concession contract with the Municipalidad Provincial del Callao. The purpose of the contract was the design, construction, administration, exploitation and maintenance of the "Vía Expresa del Callao", an important highway that leads to Peru’s main International Airport.

The Claimants alleged that such concession contract and all of the resources devoted to its implementation constituted a protected investment under the Bilateral Investment Treaty concluded between the Republic of Argentina and the Republic of Peru (the "BIT"). Furthermore, the Claimants alleged that through the illegal acts of one of its municipalities, Peru was liable for violating certain legal standards contained in the BIT, which granted Claimants specific legal protections for their investments.

Particularly, Claimants requested the arbitral Tribunal to find Peru liable for (i) expropriating Claimants’ investment; (ii) violating the Fair and Equitable standard; (iii) adopting unjustified and discriminatory measures against Claimants’ investment; (iv) violating the Full Protection and Security Standard; and (v) granting Claimants’ investment less favorable treatment vis-à-vis other investments from nationals of other States. As a result, Claimants requested the arbitral Tribunal to grant compensation in the amount of approximately USD105 million.

In addition, Claimants requested the Tribunal to grant USD1 million by way of moral damages. Even though this is not the first case where a legal entity seeks this kind of remedy in the context of investment arbitration, its admissibility remains highly controversial.

Peru, on the other hand, contested the Tribunal’s jurisdiction on the basis of two alternative grounds: (i) that Claimants’ investment was not made in conformity with Peru’s laws and regulations and hence, it could not benefit from the protections granted by the BIT; and (ii) that Claimants’ claims were merely contractual –as opposed to treaty claims– which precluded the Tribunal from exercising its jurisdiction. In addition, Peru denied having

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4 See, for example, Desert Line Projects LLC v. The Republic of Yemen (ICSID case ARB/05/17), Award issued on February 6, 2008.

5 Unfortunately, this case did not shed any light on the issue since the Tribunal did not get to address it because it found that Peru did not breach any treaty obligation towards the Claimants.
committed any breach and thus requested the Tribunal to dismiss the entirety of Claimant’s claims and reimburse Peru for the costs incurred in the proceedings.

C. THE ARBITRAL AWARD

10. On May 15, 2013, the Tribunal (composed by Prof. Brigitte Stern, Dr. Eduardo Zuleta, and chaired by Mr. Yves Derains), issued its final award (the "Award"). After having concluded that it had jurisdiction, the Tribunal found that Peru had not violated any legal standard of the BIT and that it should not therefore be held liable.

11. Finally, the Tribunal issued its decision on the costs of the proceedings. In so doing, the Tribunal considered that while Peru had been unsuccessful in proving the Tribunal’s lack of jurisdiction, it had prevailed in the merits of the claim.

12. In this context, while Claimants should in principle bear the costs of the proceedings for being the losing party, the Tribunal concluded that the Claimants would only have to pay for half of the costs incurred by Peru. Since Peru’s costs in the arbitration amounted to USD4,234,978.53, Claimants were ordered to pay the sum of USD2,117,489.27.

D. THE ENFORCEMENT PROCEEDINGS IN ARGENTINA

13. After several unsuccessful attempts to collect payment of the costs awarded, Peru decided to enforce the Award in Argentina against CCI.

1. Peru’s Claim

14. On April 4, 2015, the Republic of Peru initiated enforcement proceedings before a first instance commercial court sitting in Buenos Aires. In addition, Peru requested the Judge to declare CCI’s bankruptcy. Only a few weeks later, on April 23, 2015, the Judge issued its ruling on the enforcement of the Award.

15. Peru argued that pursuant to Art. 54(1) of the ICSID Convention, the Award should be enforced as if it were a final judgment issued by an Argentine Court. Thus, there was no need for an *exequatur* proceeding.

16. Art. 54(1) states that: "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting
State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state” (emphasis added).

17. According to Peru’s position, to the extent that it was able to furnish a copy of the Award certified by ICSID’s Secretary-General –in accordance with Art. 54(2) of the ICSID Convention– the Judge would be compelled to directly enforce the Award.

2. **The First Instance Judge’s Ruling**

18. Relying on the National Civil and Commercial Procedural Code (the "NCCPC"), the Judge concluded that foreign awards are not exempted from going through the *exequatur* enforcement proceedings. He then went on to explain the rationale behind this by citing several European Union Regulations (all of which address the principle of mutual recognition between foreign judicial judgments as opposed to foreign arbitral awards).

19. In addition and after analyzing the second sentence of Art. 54(1) of the ICSID Convention, the Judge concluded that the ICSID Convention does not provide for any direct enforcement mechanism that would justify avoiding the *exequatur* proceedings.

20. Finally, the Judge stated that even if —for the sake of argument— he were to accept the idea that the Award enforcement would be exempted from *exequatur* proceedings, the existence of a liquid and enforceable credit (a necessary prerequisite for declaring bankruptcy) had not been proven by Peru because (i) CCI had not been served notice of the Award in accordance with Art. 49(1) of the ICSID Convention; and (ii) the Award did not stipulate that CCI and Convial were severally liable for reimbursing Peru’s costs.

3. **Where did the First Instance Judge get it wrong?**

21. It seems that the Judge bypassed the first sentence of Art. 54(1) of the ICSID Convention. Moreover, he may have also misconstrued its second sentence.

22. In its ruling, the Judge did not make any reference whatsoever to the first sentence of Art. 54(1) nor to 54(3), *i.e.* to the binding nature of the Award for each Contracting State [Argentina] and to the enforcement proceeding to be applied "as if it were a final judgment issued by an Argentine Court".
23. Not only that, but the Judge concluded that the ICSID Convention does not provide for any direct enforcement mechanism that would justify avoiding going through the *exequatur* proceedings. However, the prevailing view is that if there is one thing that distinguishes ICSID awards from other arbitral awards, it is the self-sufficient enforcement proceeding provided by the ICSID Convention, whose main effect is precisely to avoid *exequatur* proceedings. Irrespective of that, any award should be enforced as if it were a local judgment and therefore, local laws may come then into play.

24. Then, the Judge quoted and assessed the second sentence of Art. 54(1). To my view, the Judge relied on the non-compulsory language evidenced by the wording "*a Contracting State with a federal constitution may enforce such an award ... as if it were a final judgment of the courts of a constituent state*" (emphasis added).

25. But this provision aims solely towards States that have a federal constitution and allows Contracting States for a certain degree of discretion—not for ignoring the binding nature of the award but only for enforcing it through a federal court. In this context, the Judge's finding that it was not bound to recognize the Award as if it were an Argentine judgment because it was within its discretion not to do so may have been the result of a misconstruction of the provision.

26. Additionally, it seems that the Judge considered that the final part of the second sentence of Art. 54(1) allowed Argentina to treat the Award as if it were a final judgment issued by a court of another ICSID Contracting State, instead of treating it as a final judgment issued by an Argentinean national court, which is in fact what such provision states. This is probably the reason why the Judge analyzed certain European Union Regulations dealing with the recognition of foreign judgments, a treaty not applicable to the enforcement of ICSID awards.

4. **The Court of Appeals’ Ruling**

27. On June 10, 2015, Peru appealed the first instance ruling. Before the Court of Appeals, Peru essentially argued that the Judge failed to apply Arts. 53 and 54 of the ICSID Convention and applied instead certain provisions of the NCPCC—mainly Art. 517—which should not have been applied. In fact, not only because the ICSID Convention has a higher hierarchy than local norms, but because Art. 517 NCPCC establishes that the enforcement proceedings
should have been carried out according to the provisions of the applicable international treaty, is the Award thereby exempted from going through *exequatur* proceedings.

28. The Court of Appeals started by mentioning that this case did not involve enforcement proceedings against Argentina but rather a claim for enforcement from a Contracting State [Peru] against a national [CCI] from another Contracting State [Argentina]. Then, it analyzed the provisions of Arts. 53 and 54 of the ICSID Convention expressing the binding nature of ICSID awards arising out of them.

29. In addition, the Court of Appeals stated that ICSID awards are not technically "foreign" awards but rather "international" awards. In this vein, the Court found that *exequatur* proceedings were not required for the enforcement of the Award.

30. Then, the Court of Appeals concluded that since Peru had (i) furnished a copy of the Award certified by ICSID’s Secretary-General—in accordance with Art. 54(2) of the ICSID—Convention; and proven that (ii) the Award had been duly notified to CCI—in accordance with Art. 49(1) of the ICSID Convention— the First Instance Judge had erroneously denied the enforcement of the Award. Therefore, the ruling should be reversed.

31. Irrespective of the above, the Court of Appeals made some interesting remarks as to the control that may be (and should be) exercised by local courts while enforcing ICSID awards. In this sense, it noted that every judge should proceed carefully and cautiously while exercising its jurisdiction in order to identify possible violations to Argentine public policy, especially when it comes to issues of due process, which forms part of Argentine international public policy.

32. Therefore, Argentine courts must guarantee that any decision issued by international tribunals, which are potentially enforceable in Argentina, respects those principles. In order to sustain its affirmations, the Court relied on two recent Supreme Court precedents, the "Chevron"\(^6\) and "Claren Corporation"\(^7\) cases.

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\(^6\) "A.S.M. c/ Chevron Corporation", Supreme Court decision issued on 4/6/13.

\(^7\) "Claren Corporation c/ Estado Nacional –arts. 517/518 CPCC exequátur- s/varios ", Supreme Court decision issued on 6/3/14.
5. **Analysis of the ruling by the Court of Appeals**

33. *Firstly*, it is interesting that the Court of Appeals has decided to distinguish and categorize the Award as "international" rather than "foreign", This goes in line with a common interpretation made by the leading authorities⁸ and case-law,⁹ which consider that ICSID proceedings are delocalized, *i.e.*, they have no legal seat. Thus, the proper view to construe Arts. 62 and 63 is as them referring to the venue for conducting the hearings (geographical concept) as opposed to the seat of the arbitration (legal concept).

34. This is supported by the fact that ICSID arbitrations would not have a national *lex arbitri* applied to the proceedings because the *lex arbitri* is the ICSID Convention itself.¹⁰ Thus, the rules of law pursuant to which the arbitration is conducted are supplied by the Convention as interpreted under principles of public international law.¹¹

35. In this sense, one of the main consequences of acknowledging that ICSID awards are international and not foreign is that it may be argued that they are not enforced "horizontally"—from the State in which they were rendered towards the State in which they will be enforced—¹² but rather "vertically,"¹³ from an international legal entity [a tribunal acting under the ICSID Centre]¹⁴ towards a Contracting State of the ICSID Convention.¹⁵

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¹² As would be the case for other arbitral awards where the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards would apply.

¹³ J. A. Rueda García, op. cit., pag. 421, ¶22(b).

¹⁴ According to Art. 18 of the ICSID Convention: "[t]he Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity: (a) to contract; (b) to acquire and dispose of movable and immovable property; (c) to institute legal proceedings."
36. **Secondly**, it is worth noting that the Court of Appeals did not hesitate to consider that the enforcement of the Award did not need to undergo through *exequatur* proceedings and should be directly enforced as if it were a final judgment of one of its own courts; recognizing therefore the self-contained enforcement mechanism prescribed by the ICSID Convention. Had the Court of Appeals not done so, it could be argued that Argentina could have been potentially liable for the breach of an international obligation.

37. **Thirdly**, the Court of Appeals felt the need to stress the fact that Argentina was not a party to the arbitration proceedings. Irrespective of that, Argentina was certainly compelled to enforce the Award in accordance with its international obligations. In this sense, while Art. 53 of the ICSID Convention imposes the obligation to comply with awards on the parties to the dispute [Peru and the Claimants], Art. 54 imposes the obligation on Contracting States to recognize its binding nature while enforcing them [any Contracting State in which Peru tries to enforce the Award].

38. In this case, while the Claimants were compelled to pay Peru as prescribed in the Award—by way of Art. 53—Argentina was compelled to recognize the binding nature of the Award, not because it was a party to the arbitration but because it is a Contracting State of the ICSID Convention. Therefore, under Art. 54 “[e]ach Contracting State” is compelled to enforce any “pecuniary obligations imposed” by the Award as if it were a final judgment issued by one of its courts.

39. **Lastly**, we cannot ignore the fact that the Court of Appeals, albeit *obiter dicta*, stressed the fact that any Argentine court enforcing ICSID awards has the power and the duty to ensure that such awards do not violate Argentine public policy. Although this view has been heavily criticized by several scholars and tribunals, the Court of Appeals' view is also

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15 A different approach would probably be necessary if the award were to be enforced in a non-ICSID contracting State.

16 Arguably, a different approach could be taken if, for example, foreign investors attempt to enforce other arbitral awards in Argentina that were not conducted under ICSID Rules. For example, *BG Group Plc. V. Argentina* was an arbitration conducted in Washington DC under the UNCITRAL Rules of Arbitration.

17 As it would certainly be the case if an arbitration award is trying to be enforced under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

shared by other authorities and it has been the subject of debate in several ICSID cases against Argentina.

E. CONCLUSIONS AND FINAL REMARKS

40. In light of the impact that this decision may have on future attempts of enforcement of ICSID award against Argentina, the Court of Appeals' decision becomes highly relevant. However, its relevance may be somehow limited by the fact that Argentina was not the party against whom the Award was trying to be enforced.

41. Argentina adopts the view that while ICSID awards are binding, any party attempting to benefit from them must commence enforcement proceedings in court. This is so because according to Argentina's view: (i) Art. 53 does not establish an obligation of voluntary payment, and (ii) under Article 54, not only must award creditors commence enforcement proceedings to collect payments but must also meet all the formal requirements that anyone should follow to obtain compliance with a final judgment of a local court against the State.

42. In this sense, Argentina has a different internal mechanism for enforcement of judgments against private parties as opposed to enforcement against the State, such as the planning of

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23 Ibidem.
annual budgets considerations. Therefore, since the ICSID Convention states that enforcement of awards should be treated as local judgments, ICSID awards against Argentina should be treated as local judgments against the State.

43. Notwithstanding the above, Argentina has reached several agreements with foreign investors regarding the payment of ICSID awards. This has helped remove certain commercial restrictions imposed to Argentina by, for example, the United States who used these sanctions to force Argentina to comply with awards rendered in favor of American investors.

44. This case also raises another interesting issue related to which the "competent court or authority" would be for the enforcement of ICSID awards in Argentina. According to subsections (1) and (2) of Art. 54 of the ICSID Convention, each Contracting State shall designate and notify the Secretary-General of the designation of the internal competent court or other authority for the purposes of enforcement of ICSID awards.

45. According to ICSID, "[t]he following courts and other authorities have been designated by Contracting States as competent for the recognition and enforcement of arbitral awards rendered pursuant to the Convention […] Argentina - Justicia Nacional en lo Contencioso Administrativo Federal (the proceeding to be initiated before the Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal)".

46. Despite the fact that not all of the Contracting States have designated a competent court or other authority, in those cases where States have done so, it appears that those courts would have exclusive jurisdiction to enforce ICSID awards. Therefore, this raises the question of whether the Judge and the Court of Appeals had jurisdiction at all to hear this case because

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25 On March 26, 2012, the Obama Administration announced that Argentina’s Generalized System of Preferences beneficiary designation would be suspended “because it has not acted in good faith in enforcing arbitral awards in favor of United States citizens.”


27 As to date, 74 Contracting States have done so.
Argentina has designated a specific—and different—internal forum for the enforcement of ICSID awards.

47. All in all, even though this case may serve as a valuable precedent for foreign investors attempting to enforce ICSID awards against Argentina, we must underscore the fact that Argentina was not the party against whom the Award was being enforced. Therefore, one cannot rule out the possibility that Argentine Courts may not follow the Court of Appeals' decision and adopt a wholly different approach when being faced with the potential enforcement of ICSID awards, which often involve multimillion sums, against their own State.