

WHAT DO THE TURKISH COURTS THINK ABOUT ARTICLE 54 ICSID CONVENTION?

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It is trite to suggest that the awards rendered under the aegis of the International Centre for Settlement of Investment Disputes (“ICSID”) are insulated from national court review. In the context of recognition and enforcement, national courts are not permitted to examine ICSID arbitral awards. In 2006, 50 years after the ICSID Convention came into force, commentators noted that no court of the Contracting State had ever denied enforcement of an ICSID award. This very effective enforcement system also contributed to the prevailing practice of voluntary compliance with the ICSID awards.

To the surprise of many, questions have arisen regarding a national court’s scope of examination (if any) of ICSID awards. Article 54(1) of the ICSID Convention has started to be understood as allowing the courts of a Contracting State to examine awards from substantial and jurisdictional perspectives. The EU and its member states are prime examples. In the *Achmea* judgment, for example, the European Court of Justice has in effect directed Member State courts to examine ICSID awards in terms of substance or jurisdiction if the parties raise these matters.

This post examines how the Turkish Court of Cassation has interpreted Article 54 of the ICSID Convention in a recent case in 2021.¹ To the best of the authors’ knowledge, this was the first decision in which the Turkish Court of Cassation has discussed the meaning of Article 54 of the ICSID Convention after the *Achmea* judgment. Hence, this decision may shed some light on how the Turkish courts will treat the question of the availability of national court examination of ICSID awards in Turkey going forward.

Legal Proceedings in Turkey

The dispute arose out of the failed investment arbitration claim made against Turkmenistan by a Turkish construction company (İçkale İnşaat Limited Şirketi (“İçkale”))². The arbitral tribunal dismissed the claim as meritless and ordered the claimant to pay 20 per cent of the legal and expert fees and expenses of Turkmenistan (approximately US\$1.75 million). The claimant did not comply with the adverse cost award, and Turkmenistan initiated legal proceedings in Turkey in 2016.

¹ Turkish Court of Cassation, 12th Civil Division, Case No: 2021/875 Decision No: 2021/4586 dated 28.04.2021

² İçkale İnşaat Limited Şirketi v. Turkmenistan (ICSID Case No. ARB/10/24)

However, when the claimant commenced the legal proceedings in 2016, Turkey had not yet designated a competent court or other authority as per Article 54(2) of the ICSID Convention. In the absence of a designated competent court and authority, Turkmenistan sought to execute the ICSID award using the procedure applicable to the execution of a judgment of a local court. Accordingly, the claimant commenced the proceedings before the Turkish execution offices and sent an execution order, as if the ICSID award is a Turkish court judgment. The basis for this, presumably, was that, given Article 54(1) requires the contracting states to enforce an ICSID award “as if it were a final judgment of a court in that State”, in the absence of a designated competent court and authority, Turkmenistan could rely on the procedure available for local court judgments.

İçkale sought to dismiss execution proceedings commenced by Turkmenistan on two grounds: *first*, the procedure for the execution of a judgment of a local court does not apply to the execution of an ICSID award; and *secondly*, an ICSID award cannot be executed in Turkey without a competent court or authority being first designated in accordance with Article 54(2). Whilst these arguments were rejected at first instance, and on appeal to the regional appellate court, in 2021, the Turkish Court of Cassation overruled these decisions.

The Court confirmed that Turkey, as a Contracting State, shall recognise an ICSID award 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 Turkey, pursuant to Article 54(1). Nevertheless, the Court found that such obligations can only be triggered where the procedural requirements set out in Article 54(2) have been satisfied; that is, where the award-creditors have applied to a competent court or other authority designated by Turkey, and have furnished a copy of the award certified by the Secretary-General of ICSID.

Predicting potential criticism of the Turkish Court of Cassation taking a formalistic approach,³ the Turkish Court of Cassation went on to suggest that any other interpretation would be contrary to the wording of the ICSID Convention. The Court noted that the ICSID Convention aims to facilitate the conciliation and arbitration of investment disputes and, in this respect does not make ICSID awards subject to the procedures that are applicable for the recognition and enforcement of a judgment of a foreign court. Instead, the ICSID Convention makes these awards subject to the procedure as set out in Article 54(2) ICSID Convention, which provides less restrictive requirements for execution.

In the Court’s view, the ICSID Convention could not provide for such a procedure, nor could it be suggested that, if the Contracting State has failed to designate a competent court or authority, an ICSID award could be executed as if it were a judgment of a local court. The fact that the ICSID Convention does not regulate such provisions supports the conclusion that an ICSID award cannot be executed without first complying with the procedure set out in Article 54(2).

Although Turkey designated the competent court in accordance with Article 54(2) in 2017, there was still no use for the claimant. This was because Turkey required

³ See for example Nuray Ekşi, ICSID Hakem Kararlarının Tanınması Tenfizi ve İcrası, İstanbul-2009

award creditors to furnish a copy of the award to the competent commercial courts of first instance, whilst the claimant, in this matter, provided such award to the Turkish execution office.

Finally, the Court concluded its reasoning with a puzzling (and rather worrying) reference to the domestic law of Turkey. The Court stated that, given that a judgment of a foreign court can only be enforced in Turkey by an enforcement decision of a Turkish court, it would be contrary to both Turkish law and the ICSID Convention to suggest that an ICSID award can be enforced in Turkey without any examination by any national authority.

Evaluation

Somewhat unexpectedly, serious divergences have recently arisen over the exact import of the ICSID Convention provisions on the enforcement of ICSID awards. It is, therefore, no longer sufficient to proceed solely on the basis of a prior assumption that all ICSID awards can be successfully enforced if not complied with voluntarily.

With regards to Turkey, the Turkish Court of Cassation clarifies that Turkey's failure to designate a competent court or other authority as per Article 54(2) does not entitle the award creditors to trigger procedures available to the local court judgements when executing an ICSID awards. According to the Turkish Court of Cassation, Turkey is required to enforce ICSID awards "as if it were a final judgment of a court in that State", only if the procedure under Article 54(2) is followed, and failure to designate such competent court or authority would bar enforcement under ICSID Convention.

Whilst the Court's reasoning can be adopted by other national courts in circumstances where such a designation has not been made, this judgment seems no issue for Turkey as it made such a designation on [1 February 2017](#).

What is worrying is that in the same decision, the Turkish Court of Cassation implied that some sort of "examination" by the national authorities is necessary before executing ICSID awards in Turkey. The Court did not explain the scope of such examination. It may adopt its EU counterparts' reasoning and examine the ICSID awards both on jurisdiction and substantive grounds, or it might simply consider this examination to the confirmation of the certification of the award by the Secretary-General of ICSID.

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