Non-Enforcement of Arbitral Awards:
Only A Pyrrhic Victory?
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The recognition and enforcement of arbitral awards requires the cooperation of national institutions. These might not always be supportive. To the contrary, they might even take active steps to reverse or annul arbitral awards. A certain comfort can be gained by the country in question being a signatory to the New York Convention. However, in certain jurisdictions even that is no guarantee of swift enforcement, unfettered by administrative or judicial actions. Importantly, individuals have no standing before international courts to assert violations of the New York Convention. Does this mean that an arbitral award is nothing more than a pyrrhic victory under these circumstances?

In the following, it will be shown that this is not the case. Both international human rights law and international investment law provide strong protections. Until recently, these guarantees have been under-estimated or even entirely ignored in the context of enforcing arbitral awards. As will be set out below, there are however some judgements of the European Court of Human Rights (“ECtHR”) and decisions of tribunals which confirm their applicability.

I. ECtHR Judgments

1. Stran Greek Refineries and Stratis Andreadis v. Greece

One of the important cases of the ECtHR which concerned arbitral awards is the Case of Stran Greek Refineries and Stratis Andreadis v. Greece. Here, the ECtHR ruled that a State might violate Article 6 and Article 1 of Protocol No. 1 of the European Convention on Human Rights and Fundamental Freedoms (“ECHR”) by declaring an arbitral award void.

Factual Background

The case arose out of a dispute concerning a contract for the construction of a crude oil refinery which was concluded in 1972, at a time when Greece was governed by a military junta. Following the restoration of democracy, Greece enacted Law 141/1975 which provided for the termination of certain

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contracts concluded under the military regime. As a consequence, the contract with the applicants was terminated.

The applicants did not accept this and claimed compensation for what they said constituted a breach of the state’s obligations under the contract. After first attempting to sue Greece before national courts, the applicants finally obtained an arbitral award. The award ordered Greece to compensate the applicants.

Greece applied to the Athens Court of First Instance for an order setting aside the award. The application was dismissed. Greece’s appeal to the Athens Court of Appeal was also dismissed. In 1986, Greece appealed to the Court of Cassation. Before the final hearing, the Greek Parliament passed Law 1701/1987, Article 12 of which declared invalid and unenforceable any arbitral awards concerning contracts terminated under Law 141/1975 and declared time-barred any claims against the state arising out of such contracts. The Court of Cassation found that Article 12 of Law 1701/1987 was not unconstitutional. For this reason, it quashed the Court of Appeal’s judgment and declared the arbitral award void.

In 1987, the applicants lodged an application against Greece with the European Commission of Human Rights. They alleged a breach of both their right to a fair trial under Article 6(1) ECHR and their right of property under Article 1 of Protocol No. 1. The Commission agreed with the applicants and referred the case to the ECtHR.

Judgement

The ECtHR found that Greece had violated its obligations under Article 6(1) ECHR and under Article 1 of Protocol No. 1.

As to Article 6(1), the ECtHR noted that Law 1701/1987 was introduced after the opinion of the judge-rapporteur recommending the dismissal of the state’s appeal, and that Article 12 of the Law was “in reality aimed at the applicant company”. It reasoned that the effect of Article 12 was to effectively exclude any meaningful examination of the case by the Court of Cassation. The ECtHR held that “the State infringed the applicants’ rights under Article 6 para. 1 by intervening in a manner which was decisive to ensure that the - imminent - outcome of proceedings in which it was a party was favourable to it”.

As the applicants were not foreigners, but had the same nationality as the respondent State, the ECtHR assessed whether there had been a breach of the right to property pursuant to Article 1 of Protocol No. 1 by applying the three-stage proportionality test. The ECtHR held, first, that the arbitration award

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was a “possession”. In reaching this conclusion, it relied on the fact that arbitral awards have the force of final decisions and are deemed to be enforceable under Greek legislation.

The ECtHR held, secondly, that there had been an “interference” with the applicants' property right. Article 12 of Law 1701/1987 and the judgment of the Court of Cassation based on that provision had the effect of closing the proceedings at issue once and for all and made it impossible for the applicants to secure the enforcement of the arbitration award.

Finally, the ECtHR held that the interference was not justified. While the Court acknowledged that it might have been necessary for Greece to terminate the contract, it stressed that such a unilateral termination does not take effect in relation to certain essential clauses such as the arbitration clause. Otherwise, parties would be able to evade arbitration clauses. Since Greece had originally accepted the arbitration clause, it could not ex post refuse to comply with an award.

In the view of the ECtHR, Greece therefore upset the required balance between the protection of the right of property and the requirements of public interest by intervening in ongoing proceedings with the aim to declare void the arbitration clause and annul the arbitration award. It found that Greece had violated Article 1 of Protocol No. 1 and ordered Greece to pay compensation in the same amount as originally ordered by the arbitral tribunal, plus interest from the date of the award.

2. **Regent Company v. Ukraine**

In the more recent case *Regent Company v. Ukraine*, which concerned the prolonged non-enforcement of an arbitral award, the ECtHR came to a similar conclusion.

**Factual Background**

The case arose out of a dispute between the company COM s.r.o., a limited liability company registered in the Czech Republic, and the Ukrainian state-owned company Oriana, which in December 1998 resulted in an arbitral award of nearly US$ 2.46 million in COM’s favour. COM’s initial attempts to enforce the award in Ukraine through state bailiffs were unsuccessful. In 2002, Oriana entered bankruptcy proceedings. In 2003, COM transferred the right to claim the debt awarded by the arbitral tribunal to Regent Engineering International Limited, a Seychelles company (“Regent”). In 2004, Regent applied successfully to be registered as Oriana’s creditor in respect of the debt resulting from the arbitral award. However, its efforts to enforce the award were also unsuccessful.

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Repeatedly, the bailiff’s service started attaching the property owned by Oriana, but each time its actions were suspended or revoked by judicial authorities. In February 2006, the Regional Commercial Court eventually ordered that Oriana’s administrator include Regent on the list of creditors. In spite of that, more than seven years after the award had been made, the enforcement proceedings were still pending.

Regent applied to the Strasbourg authorities alleging that the failure by the Ukrainian state authorities to enforce the award in reasonable time and in full was a breach of both its right under Article 6(1) and its right under Article 1 of Protocol No. 1.

Judgement

The ECtHR’s judgment focused on Article 6(1) ECHR. Ukraine had argued that Article 6(1) was not applicable to arbitration proceedings, and that the arbitration agreement amounted to a partial waiver of Article 6(1), which consequently was not applicable to the enforcement of the arbitral award. The ECtHR disagreed. It held that as a matter of general principles and interpretation of the domestic arbitration law, an arbitral tribunal was a “tribunal established by law” for the purposes of Article 6(1) and thus the provision was directly applicable. On the merits, the ECtHR held that the continued non-enforcement constituted a violation of Article 6(1).

In relation to the allegation of an interference with the right of property, the ECtHR discussed whether Regent’s assignment of the debt constituted in the award qualified as a “possession”. It held that it did: considering that an assignment of a debt is capable in principle of amounting to such a possession, and since the domestic courts had acknowledged that Regent was the creditor in proceedings to enforce the award, the ECtHR held that Regent had an enforceable claim which constituted a possession. The ECtHR came to the conclusion that there had been a violation of Article 1 of Protocol No. 1 and ordered Ukraine to pay the outstanding amount of the arbitral award.

The ECtHR in Regent Company did not apply the three-stage proportionality test applied in Stran Greek Refineries as Regent was not a Ukrainian firm. Article 1 of Protocol No. 1 provides for different standards for nationals and non-nationals of the respondent in case of an expropriation. Non-nationals are entitled to the international law standards (including compensation under the Hull doctrine), whereas nationals are only entitled to protection under the proportionality principle. Having found a breach under Article 6, the Court did not elaborate on this.

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8 Ibid., para. 52.
9 Ibid., paras. 54, 56.
10 Ibid., paras. 59, 60.
11 Ibid., para. 61.
12 See e.g. ECtHR, Case of Lithgow and Others v. The United Kingdom, Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgement, 8 July 1986, paras. 112 ff.; ECtHR, Case of James and Others v. The United Kingdom, Application no. 8793/79, Judgement, 21 February 1986, paras. 59 ff.
II. Decisions by International Tribunals

1. Desert Line Projects LLC v. The Republic of Yemen

In Desert Line Projects, an ICSID tribunal held that the state's disregard of an arbitral award, and obliging the investor to agree to a compromise settlement for payment of less than the amount of the award, was a breach of its obligation to accord the investor fair and equitable treatment at all times.\(^{13}\)

**Factual Background**

The case arose out of a dispute between the claimant road construction company and the Yemeni state. The dispute was referred to arbitration and Desert Line Projects obtained an award of nearly 20 billion Yemeni Rials (YR) in its favour. The arbitration agreement provided that any arbitral award was to be “final and binding”. Yemen applied to the national courts for the annulment of the arbitral award and offered the claimant 3.5 billion YR in full and final settlement of the dispute. Desert Line Projects considered the proposal arbitrary and unfair but, in the face of the annulment application and with a view to receiving payment, signed the agreement. Yemen paid the settlement monies. Subsequently, Desert Line Projects wrote to the Yemeni government disputing the validity of the settlement agreement and requesting payment of the balance of the award. The government refused.

Desert Line Projects commenced an arbitration alleging breaches of various provisions of the Oman-Yemen BIT, including as to fair and equitable treatment and expropriation.

**Award**

The ICSID tribunal held that the Yemeni state had violated its obligation to accord fair and equitable treatment by disregarding the final and binding character of the arbitral award. The arbitral award had *res judicata* effect and was legally enforceable. By agreeing to arbitrate their disputes and submitting their dispute to arbitration, the parties had agreed that an award would be challenged only in exceptional circumstances. In the absence of such circumstances, the settlement agreement purported to resolve for a second time a dispute that had already been finally settled by the arbitral award. It was contrary to the spirit of arbitration if, at a time where a definitive arbitral award already existed, a party to arbitration could constrain the other party to negotiate in order to obtain a reduction of the amount effectively owed. An agreement can only be valid if it is the result of authentic, fair and equitable negotiations. In the case at issue, these conditions were not satisfied because the claimant had signed the agreement under duress. By overriding the arbitral award, Yemen had infringed its obligation to treat Desert Line Projects in a fair and equitable manner at all times. Because of the substantial overlap of facts and allegations with the other claims, the tribunal considered it unnecessary to determine whether the state’s conduct amounted also to violation of the right to full

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\(^{13}\) Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award of 6 February 2008.
protection and security and the prohibition of unreasonable and discriminatory measures or to a violation of the expropriation provision.

2. **Saipem S.p.A. v. The People’s Republic of Bangladesh**

In *Saipem v. Bangladesh*, an ICSID tribunal held that the action of the Bangladeshi courts, including an order revoking the authority of the arbitral tribunal and a decision setting aside the ICC award in the claimant’s favour, constituted illegal expropriation.\(^{14}\)

**Factual Background**

The case arose out of dispute between the Italian company Saipem and the Bangladesh Oil, Gas and Mineral Corporation (Petrobangla), a State entity of Bangladesh, under a pipeline construction contract.

As foreseen in the contract, Saipem initially commenced arbitral proceedings before the ICC. During the arbitration, various of Petrobangla’s procedural motions were dismissed by the ICC tribunal and, rather than await the outcome of the arbitration and then challenge the award or the enforcement of the award, Petrobangla brought an application in the Bangladeshi courts for revocation of the ICC tribunal’s authority. The Dhaka court revoked the authority of the tribunal on grounds that the tribunal had conducted the proceedings improperly. It also granted Petrobangla an injunction restraining Saipem from proceeding with the ICC arbitration.

The tribunal took the view that as the challenge of arbitrators in an ICC arbitration fell within the exclusive jurisdiction of the ICC Court, the Dhaka court’s revocation order was to be disregarded. It continued the arbitration and rendered an award in Saipem’s favour for nearly US$ 6 million plus interest from the date of the Request. On Petrobangla’s application to the Supreme Court of Bangladesh to set aside the award, the Supreme Court held that the award was non-existent and a "nullity" due to the earlier revocation of the authority of the tribunal. In response to this, Saipem commenced an ICSID arbitration based on the 1990 Italy-Bangladesh BIT.

**Decision on Jurisdiction**

In its 2007 decision, the ICSID tribunal held that it had jurisdiction. In doing so, it rejected arguments by Bangladesh to the effect that a dispute arising out of an ICC award is not a dispute arising directly from the original investment.\(^{15}\) The tribunal emphasized that the notion of investment pursuant to


\(^{15}\) *Ibid.*, paras. 112 ff.
Article 25 ICSID is broad and covers all the elements of the operation. Likewise, it came to the conclusion that there was an investment in the sense of the BIT. Thus, it held:

“It can […] be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1 (1) (c) of the BIT.”

Since the dispute settlement clause in the BIT only related to disputes on expropriation and similar measures, the tribunal also had to address the question, whether the judicial acts in question were capable of constituting an expropriation. The tribunal answered in the affirmative. Relying on Stran Greek Refineries, it held that the ICC award and the rights determined by it were capable of being expropriated. It also confirmed that court decisions can and in this case did amount to expropriation.

Final Award
In its final award, the tribunal assessed whether the actions of the Bangladeshi courts in fact amounted to an expropriation. It held that “Saipem’s residual contractual rights under the investment as crystallised in the ICC Award” could be considered as property rights. In the view of the tribunal, interference by the Bangladeshi courts amounted to “measures having similar effects” to an expropriation. It emphasized that Bangladesh had no assets abroad so that there were no realistic prospects of enforcing the award under the New York Convention outside Bangladesh.

The tribunal clarified that the setting aside of an award in the ordinary course of business would normally not amount to expropriation, and that in order to be expropriatory the court action must also have been “illegal” according to international law standards. The tribunal held that the Bangladeshi courts’ action had been illegal because it constituted an abuse of rights and a breach of the New York Convention. As to the first, the revocation decision was grossly unfair because based on a manifestly unfounded finding of misconduct by the ICC arbitrators. While the Dhaka court had the competence to revoke an arbitrator’s authority, the Dhaka court had exercised that competence for an end different

16 Ibid., para. 127.
17 Ibid., para. 116.
18 Ibid., para. 130.
21 Ibid., para. 129.
22 Ibid., para. 130.
23 Ibid., para. 134.
24 Ibid., para. 155.
from that for which it was instituted. Moreover, the courts had acted in breach of Article II of the New York Convention in that their decisions had the effect of preventing or immobilizing the arbitration.

As compensation for the illegal expropriation, the ICSID tribunal awarded Saipem the same financial relief as the ICC tribunal.

III. Analysis

These judgements and decisions show that international human rights law and international investment law provide strong protections in case a State impedes the enforcement of an arbitral award. Under both regimes, there are not only material protections but also procedural avenues an individual or company might use in order to enforce its rights. This is an important distinction as compared with the New York Convention.

As regards international human rights law, the right to a fair trial as for example enshrined in Article 6 ECHR and the protection of property as for example enshrined in Article 1 of Protocol No. 1 provide strong safeguards. The direct applicability of Article 6 ECHR to arbitral proceedings is a novelty. Traditionally, Article 6 ECHR applied only indirectly through the courts’ role in safeguarding the fairness of arbitral proceedings and in enforcing awards.

As regards international investment law, the tribunals in the cases discussed above have confirmed that a dispute on the non-enforcement of an arbitral award can constitute a dispute arising out of an investment if the project underlying the dispute qualifies as investment.

Among the material guarantees of BITs, the above-mentioned tribunals dealt with the protection against unlawful expropriation and the obligation to accord investments fair and equitable treatment. As regards the first, the tribunal in Saipem felt some hesitation in identifying the property right. It came to the conclusion that it is the crystallisation of the residual contract rights which constitutes the

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25 Ibid., para. 161.
26 Ibid., para. 167.
29 In the recent decision Romak S.A. v. the Republic of Uzbekistan, PCA Case No. AA280, Award 26 November 2009, an ad hoc tribunal under the UNCITRAL Arbitration Rules confirmed this, but denied that the transaction underlying the dispute was an investment. It did so in spite of the explicit wording of the BIT. As a justification, it invoked criteria for the definition of an investment which were developed under the ICSID Convention. This approach seems very problematic: the ICSID Convention was not applicable in that case.
property right. Alternatively, one might rely either solely on the residual contract rights or on the arbitral award itself. Much depends on the exact wording of the pertinent BIT.

One guarantee which was not analyzed in detail in the above-mentioned decisions is the obligation of full protection and security. It is, however, well recognized that this protection includes a guarantee of regulatory and legal security for investments.\textsuperscript{31}