

Enforcing ICSID Convention arbitration awards in Canada: overview

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This note describes the legal framework in Canada for the enforcement of investment treaty arbitration awards rendered under the ICSID Convention. It considers whether Canada has implemented specific laws and procedures addressing ICSID awards, including whether there are any grounds on which enforcement may be refused or stayed. The note also discusses the approach to state immunity in Canada and the available methods of execution.

Scope of this note

This note sets out the national laws and procedures in Canada relevant to the enforcement of investment treaty arbitration awards rendered under the ICSID Convention. The enforcement of arbitration awards rendered under the ICSID Convention has a number of notable differences from the enforcement of non-ICSID awards under, for example, the New York Convention. Accordingly, this note addresses whether Canada has enacted any specific legislation implementing the ICSID Convention, and which courts are competent to hear applications to enforce ICSID awards. It considers whether the law of Canada recognises any grounds on which the enforcement of an ICSID award may be stayed or refused, as well as whether enforcement may be made conditional on the granting of security for costs.

Since the enforcement of ICSID Convention awards will always be sought against state assets, the note also considers the national law position on state immunity in Canada, as well as what methods of execution are available to an award creditor.

ICSID Convention background

ICSID arbitration

Investment treaty arbitration, sometimes referred to as investor-state dispute settlement (ISDS), refers to arbitrations between a company or individual investor, on the one hand, and a foreign state on the other, concerning the alleged breach of the state's obligations arising under an investment protection

treaty, whether a bilateral investment treaty (BIT) or a multilateral investment treaty (MIT). For an introduction to investment treaty arbitration, and its key concepts, see [Video, International arbitration \(7\): resolving disputes under investment treaties](#) and [Practice note, Investment treaty arbitration: overview](#).

The most common forum for resolving ISDS cases is under the ICSID Convention, with arbitrations administered by the International Centre for Settlement of Investment Disputes (ICSID). There are various peculiarities to ICSID arbitrations, notably that they have no seat of arbitration and that national courts have no supervisory jurisdiction over the proceedings (see [Practice note, Investment treaty arbitration: overview: ICSID Convention and arbitration](#)).

Recognition and enforcement versus execution

The ICSID Convention regime shields awards from review by national courts at the recognition and enforcement stage, and requires that:

“Each Contracting State shall recognise an award rendered pursuant to [the ICSID] 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.” (*Article 54(1), ICSID Convention.*)

It follows that, in principle, there are no grounds on which the courts of a contracting state to the

ICSID Convention should refuse to recognise an ICSID award, and enforce the pecuniary obligations imposed by it.

However, while recognition and enforcement are insulated from national laws, execution of the award against specific assets is not. This is governed by the laws on the execution of judgments in the state where execution is sought (*article 54(3), ICSID Convention*). Therefore, the host state's consent to ICSID arbitration does not amount to a waiver of immunity from execution and, unless otherwise agreed by the state (in a form of express waiver from immunity, for example), the state is free to raise sovereign immunity as a shield to the execution of the award against its assets. Sovereign immunity laws vary between jurisdictions and these are unaffected by the ICSID Convention (*article 55*). Some jurisdictions apply the doctrine of absolute immunity from execution. Others apply qualified immunity, which may allow execution against sovereign assets, which are used for commercial purposes, or against assets related to the obligation to be enforced. (See [Practice note, Procedural steps in an ICSID arbitration \(2022 Rules\): Recognition, enforcement and execution of ICSID awards](#) and [State immunity and arbitration](#)).

For further resources, see:

- [ICSID arbitration toolkit](#).
- [Investment treaty arbitration toolkit](#).

Status of the ICSID Convention in Canada

Ratification and exclusions

Canada ratified the ICSID Convention on 1 November 2013, after signing the ICSID Convention on 15 December 2006. It entered into force on 1 December 2013 (see [Legal update, Canada ratifies ICSID Convention](#)).

Once ratified, the ICSID Convention applies to all territories for whose international relations a contracting state is responsible, unless the state submits a written notice indicating otherwise, whether at the point of ratification or subsequently (*article 70*). Canada has not notified any territorial exclusions.

For further details, see [List of ICSID Convention contracting states and other signatories of the Convention](#) and the [ICSID Database of ICSID Member States: Canada](#).

Implementing legislation

The [Settlement of International Investment Disputes Act S.C. 2008, c. 8 \(SIIDA\)](#) was enacted to implement Canada's obligations under the ICSID Convention. It was assented to on 13 March 2008. Among other things, it sets out the jurisdiction of the Canadian courts to recognise and enforce awards under the ICSID Convention. It should be noted that, in the event of any inconsistency, SIIDA prevails over the provisions of the [United Nations Foreign Arbitral Awards Convention Act R.S.C., 1985, c. 16](#) (giving effect to the New York Convention) and the Commercial Arbitration Act R.S.C., 1985, c. 17 (*section 3, SIIDA*).

Framework for enforcing ICSID Convention awards

Competent courts for enforcement applications

Section 8(1) of [SIIDA](#) provides that the superior courts of Canada have jurisdiction to recognise or enforce an ICSID Convention award. Section 8(2) stipulates that the court "shall" on application recognise and enforce such awards as though they were a final judgment of that court.

Procedure for recognition and enforcement

Section 8(2) of [SIIDA](#) provides that, on application by a party, a competent Canadian court shall recognise and enforce an ICSID Convention award (defined in section 2 of the SIIDA) as if it were a final judgment of that court. Article 54(2) of the ICSID Convention (set out in the [Schedule to SIIDA](#)) provides that a person seeking recognition and enforcement of an award will provide a copy of the award certified by the ICSID Secretary-General to the relevant court.

The SIIDA does not make any further provision in respect of the procedure to be followed on an application for recognition and enforcement. Nor, unlike the [United Nations Foreign Arbitral Awards Convention Act R.S.C., 1985, c. 16](#) (giving effect to the *New York Convention*) does it make provision for regulations to be made to give effect to the provisions of the ICSID Convention.

In addition to the federal SIIDA, most of the individual Canadian provinces and territories have enacted independent civil procedure legislation that governs the enforcement of ICSID awards. In

Canada, with only some exceptions, provinces must enact legislation to give international law local effect.

For example, Ontario enacted the [Settlement of International Disputes Act, SO 1999, c 12, Sch D](#), which stipulates that “[o]n production to the Superior Court of Justice of a certified copy of an award it shall be registered in that court, and when registered it has the same effect, and all proceedings may be taken to enforce it, as if it were a final judgment obtained in that court” (section 6).

See also:

- Alberta: [International Commercial Arbitration Act, RSA 2000, c I-5](#).
- British Columbia: [The International Commercial Arbitration Act, R.S.B.C. 1996, c. 233](#).
- Manitoba: [International Commercial Arbitration Act, S.M. 1986-87, c. 32](#).
- New Brunswick: [International Commercial Arbitration Act, R.S.N.B. 2011, c. 176](#).
- Newfoundland and Labrador: [International Commercial Arbitration Act, R.S.N. 1990, c. I-15](#).
- Northwest Territories and Nunavut: [International Commercial Arbitration Act, R.S.N.W.T. 1988, c. I-6](#).
- Nova Scotia: [International Commercial Arbitration Act, R.S., c. 234, s. 1](#).
- Prince Edward Island: [International Commercial Arbitration Act, R.S.P.E.I. 1988, c. I-5](#).
- Saskatchewan: [The International Commercial Arbitration Act, S.S. 1988-89, c. I-10.2](#).
- Yukon: [International Commercial Arbitration Act, R.S.Y. 2002, c. 123](#).

Grounds for refusing recognition and enforcement

Article 54 of the [ICSID Convention](#) requires contracting states to, on application, recognise awards as binding and enforce the pecuniary obligations imposed by an award as if it were a final judgment of a court in that state.

Section 8(2) of [SIIDA](#) provides that an ICSID Convention award “shall” be recognised and enforced, and provides no exceptions to this. Further, the [SIIDA](#) expressly provides that an ICSID award will not be subject to any remedies “except as set out in the Convention”, meaning that there are no remedies or rights of recourse against the award under Canadian law.

For further information, see [Enforcement of Arbitral Awards in Canada: Overview](#).

Enforcement conditional on grant of security for costs

There are no grounds on which recognition and enforcement (as opposed to execution) of an ICSID award can be resisted, meaning there is nothing to which such an order to provide security could attach.

See [Arbitration Procedures and Practice in Canada: Overview](#).

Staying enforcement

Pursuant to section 8(3) of [SIIDA](#), the superior court can stay the enforcement of an award if it has been stayed under the ICSID Convention. It can do so by application to stay the enforcement.

See further, [Enforcement of Arbitral Awards in Canada: Overview](#).

Freezing assets in aid of enforcement

Although Canada’s [SIIDA](#) is silent on this matter, parties seeking to enforce ICSID awards may still be able to freeze assets in aid of enforcement by availing themselves of options generally available to litigants.

For example, such parties may be able to seek a Mareva injunction.

A Mareva injunction is a rare and exceptional remedy that plaintiffs can employ in cases where there are concerns about the dissemination of a defendant’s assets before the judgment can be enforced. A Mareva injunction is unilaterally requested by and granted to the applicant, and seldom allows for the defendant to have an opportunity to provide their own position. The process of obtaining a Mareva injunction is an onerous one, and requires that the applicant make out in as much detail as possible the assets that the injunction is being brought to obtain.

Canadian courts have permitted parties to obtain Mareva injunctions when enforcing awards obtained in international commercial arbitration. For example, in *Sociedade-de-Fomento Industrial Private Limited v. Pakistan Steel Mills Corporation (Private) Limited* 2014 BCSC 205, the British Columbia Court of Appeal overturned a lower court’s decision to deny the applicant a Mareva injunction in connection with its attempt to enforce an award obtained in an international commercial arbitration.

See [Practice Note, Injunctions: Mareva Orders](#).

Available methods of execution

Article 54(3) of the [ICSID Convention](#), set out in the Schedule to SIIDA, states that the execution of an ICSID Convention award shall be governed by the laws of the jurisdiction in which the execution is sought. Accordingly, a court does not specifically order execution measures, it only declares that the award is enforceable.

The most common methods of execution available to a party seeking to enforce their arbitration award in Canada include:

- Issuing a writ of seizure and sale of property.
- Issuing a writ of seizure and sale of land.
- Garnishment of wages.
- Garnishment of a bank account.

The procedures that must be followed are laid out in provincial legislation that have slight variations between them. See, for example:

- [Alberta's Civil Enforcement Act](#).
- [Newfoundland and Labrador's Judgment Enforcement Act](#).
- [Ontario's Creditors' Relief Act](#).

For further discussion, see [Enforcement of Judgments in Canada: Overview](#).

Canada's approach to state immunity

The starting point is that foreign states are immune from the jurisdiction of the Canadian courts (*section 3(1) of the State Immunity Act (R.S.C., 1985, c. S-18)* (SIA 1985)). However, that immunity is waivable by a foreign state, where it elects to submit to the Canadian court's jurisdiction (*section 4(1), SIA 1985*). In order to waive this immunity, the foreign state must explicitly submit to the jurisdiction of the court by written agreement (*section 4(2)(a), SIA 1985*).

In an exception to the general position on immunity, a foreign state will not be immune from any proceedings relating to any commercial activity of that state (*section 5, SIA 1985*).

Unlike the position in some jurisdictions, including the United States or England and Wales, the SIA 1985 does not include an exception from immunity for arbitration agreements.

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