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Enforcement of Arbitral awards Against a State: Exploring the Interplay of Award Enforcement Sanctity and Sovereign Immunity

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ABSTRACT

The enforcement of arbitral awards against sovereign states presents a multifaceted challenge that hinges on the delicate balance between the sanctity of award enforcement and the doctrine of sovereign immunity. Given the interconnected nature of the global economy, states engage in numerous bilateral and multilateral agreements, as well as contracts with private entities, making international arbitration a preferred mechanism for resolving cross-border disputes. An arbitral award, representing the tribunal's decision, marks the culmination of the arbitration process. However, when one party is a sovereign state, enforcement becomes challenging due to the shield of sovereign immunity that states often invoke to avoid compliance. The true test of arbitration lies in the enforceability of this award, as the essence of arbitration is undermined if sovereign states circumvent award enforcement through claims of sovereign immunity. This research examines the legal frameworks and judicial interpretations governing the enforcement of arbitral awards, focusing on the New York Convention (NYC) and the UNCITRAL Model Law. It highlights the inconsistency and lack of clarity in state immunity laws and their application by national courts, which complicates the enforcement procedure. Key questions addressed include: To what extent can sovereign immunity be invoked to resist the enforcement of arbitral awards? How do courts balance the respect for state sovereignty with the imperative to uphold international arbitration agreements? The paper also explores the practical implications for international arbitration practitioners and the states involved, providing a critical analysis of legal precedents and theoretical perspectives. By examining these issues, this paper aims to offer a nuanced understanding of the enforcement mechanisms available against states and the evolving jurisprudence in this area. The findings underscore the necessity for a coherent and predictable approach that reconciles the enforcement of arbitral awards with the doctrine of sovereign immunity, thereby contributing to the stability and effectiveness of international arbitration.

***Keywords**: Arbitration, Arbitral Award, Enforcement, Sovereign immunity, State.*

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I. INTRODUCTION

It is not a subject of speculation, that a state, country, or a nation for that matter, does not operate in isolation; each rely on bilateral and multilateral agreements with other nations, as well as state contracts with private entities, to sustain its economic viability. Given this reality, it is inevitable that conflicts will arise from such interactions and with the growing cross-border disputes, international arbitration is often the mechanism opted by the parties for the disputes to be efficiently resolved amicably.[2] Having said that, an arbitral award – record of the tribunal's decision, is the end result of arbitration. However, the arbitration mechanism does not stop there - enforcement of the award becomes the last but the most important stage of arbitration. It is to be noted that the end goal of arbitration is to render an enforceable award – the keyword here being 'enforceable'. With the growing cross-border disputes, the essence of arbitration seems to be defeated in handling disputes with these sovereign states circumventing enforcement of arbitral awards through the defence of sovereign immunity.[3] Additionally, the lack of clarity in state immunity laws and the inconsistent application of these laws by national courts further complicate the award enforcement procedure. On one hand with the award successfully been decided in one's favour against a state and the award faced with the plea of sovereign immunity on the other hand- the question to ask is - whether the arbitration proceeding has really been a success to them afterall?

Enforcing these awards depends on how they are recognized and allowed to be effective in resolving disputes by being enforced by the parties involved. A major challenge in enforcing awards is the limitations imposed by each state's national laws on recognizing and enforcing such awards. The New York Convention (NYC) -the most resorted convention for enforcement of arbitral awards[4], has made award enforcement rules subject to national law, complicating uniform enforcement because many states have placed restrictions on implementing the convention. This research aims at undertaking an analysis of enforcement of arbitral awards against a state through the lens of sovereign immunity challenge.

Before moving further, clarity on the conceptual meaning and theoretical perspectives of sovereign immunity is necessary.

[2] Ekpe, Joseph, Olom & Antai, 'sovereign immunity from legal and arbitral proceedings and execution against the assets of a sovereign state: the evolving paradigm sovereign immunity from legal and arbitral proceedings' (November 2023), 19 www.researchgate.in

[3] Bello, Temitayo, 'Sovereign Immunity and Enforcement of Arbitral Awards: Breaking the Barrier' (June 17, 2019) https://deliverypdf.ssrn.com

[4] New York Convention on the Recognition and Enforcement of Arbitral Awards, 1958

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II. DOCTRINE OF SOVEREIGN IMMUNITY

"*Par in parem no habet imperium*" – an equal has no power over an equal rank.[5] The said phrase is closely linked to the doctrine of Sovereign immunity ('(De Jure sovereignty'). Grounded in customary international law, the doctrine finds legitimacy in the equal status of sovereign states globally.[6] It's a well-established principle that asserts the immunity of a sovereign entity, like a state, from any legal actions, whether civil or criminal, in the courts of another sovereign entity.[7] Sovereign immunity stems from the principle of sovereign equality among states, a fundamental principle of international law outlined in Article 2, paragraph 1, of the UN Charter.[8] Regardless of the status of a state agency or enterprise compared to the state, if the enterprise acts on behalf of the state's sovereign authority, it can claim sovereign immunity as it's seen as an instrument of the sovereign state exercising its powers.[9] This principle is to be viewed in the in the light of each State's authority over its own territory, which includes jurisdiction over events and individuals within that territory.[10] Essentially, sovereign states cannot exert legal, executive, or judicial authority over other sovereign states or their properties within their jurisdiction and enforcement proceedings cannot be initiated against the properties of a sovereign in the courts of another sovereign- Rationale being that seizing state property is seen as being intrusive of state sovereignty.[11] The doctrine operates on two levels: jurisdictional and execution - the former theory is deemed less robust because arbitration is only feasible when parties have consented to arbitration in the first place. [12] Even though the doctrine is not explicitly mentioned in the New York Convention, it is noted in Article 55 of the ICSID Convention, which applies to enforcement (but not recognition).[13] This defense is frequently encountered in practice, especially when the losing party is a sovereign state or a state agency. Under the New York Convention, sovereign immunity can surface in enforcement through the

[5] Lew, J. D.M., Mistelis, L.A. and Kröll, S.M., "Comparative International Commercial Arbitration", Kluwer International Law, 2003, p. 744.
[6] Ylli Dautaj, 'Sovereign Immunity from Execution of Foreign Arbitral Awards in India: The "New" Kid on the (Super) Pro-Arbitration Block', (2024) Arbitration Law Review 19 vol 15 https://elibrary.law.psu.edu
[7] Alexis Blane, 'Sovereign Immunity as a Bar to Execution of International Arbitral Awards' International Law and Politics [2009] (41) 459
[8] UN Charter, 1945 Art.2
[9] M.M. Boguslavsky, 'Foreign State Immunity: Soviet Doctrine and Practice,' (1979) 10 Netherlands Y.B. Int'l L.167
[10] Michael Karolak, 'Enforcement of Arbitral Awards Against States - a Risk to Peaceful Relations?', (2021) Oxford University Press ISSN 2543-6961 https://www.google.com/url?sa=
[11] Id.
[12] Id.
[13] International Convention on Settlement of Investment Disputes, 2006 Art.55

public policy exception under Article V(2)(b)[14] and Article III[15], which refers to the procedural rules of the territory where the award is being enforced.

III. THEORIES OF SOVEREIGN IMMUNITY UNDER INTERNATIONAL LAW

There are two main theories regarding the extent of Sovereign Immunity enjoyed by a State under international law: Absolute Immunity (or the structuralist approach) and Restrictive Immunity (or the functionalist approach).[16] Absolute Immunity gives complete protection to a State or State agency from legal actions, regardless of the reason behind the dispute. On the other hand, restrictive immunity only grants immunity for government or sovereign acts (acta jure imperii), while acts related to commercial transactions (acta jure gestionis) are not covered.[17] However, there is no consensus among courts and legislative bodies on what constitutes government or sovereign acts versus commercial acts. For instance, there's disagreement in courts' decision of Europe and United states regarding the issue of whether activities like natural resource exploration are considered sovereign or commercial.[18] In the past, Absolute Immunity was more widely accepted, but now Restrictive Immunity is more commonly adopted.[19] Many countries have specific laws reflecting this, such as the UK's State Immunity Act of 1978[20] and the US's Foreign Sovereign Immunities Act of 1976[21] (amended in 1988).

IV. WAIVER OF SOVEREIGN IMMUNITY

State sovereign immunity can be waived either expressly, through a written agreement or impliedly, though the latter is more challenging to determine.[22] Once an arbitration agreement is validly reached, it is recognized as a waiver of jurisdictional immunity, compelling the state to engage in arbitration proceedings.[23] Various laws reflect this principle. For example, the European Convention of 1972 states that a contracting state can't claim immunity if it agrees in writing to the jurisdiction of another state's court, either through an international agreement, an

[14] Id. at 3 Art V(2)(b)
[15] Id. at Art. III
[16] Badmus-Busari, Faizat, 'Sovereign Immunity and Enforcement of Awards in International Commercial Arbitration'. (2016) SSRN Electronic Journal. 10.2139/ssrn.2336664.
[17] Supra note 1
[18] Id. at 15
[19] George K, Foster, 'Collecting From Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments against States and their Instrumentalities and Some Proposals for its reform', Arizona Journal of International & Comparative Law (2008) (25) (3) 681
[20] State Immunity Act, 1978
[21] Foreign Sovereign Immunities Act, 1976
[22] Wagner, Jessica' 'Waiver By Removal? An Analysis Of State Sovereign Immunity' (2016) Virginia Law Review 102, no. 2 549–97. http://www.jstor.org/stable/43923318.
[23] Andrea M, 'Consent in International Arbitration' (2012), Oxford University Press 17

express written term, or consent after a dispute arises.[24] Similarly, the UK's State Immunity Act 1978 and the US's Foreign Sovereign Immunities Act specify that a state's agreement to arbitrate can waive immunity from the jurisdiction of their courts. This was demonstrated in the case of Libyan American Oil Company v Socialist People's Libyan Arab Jamahiriya, where Libya's argument of sovereign immunity was rejected because it had expressly agreed to arbitration.[25] However, In an other case, Ipitrade International, S.A v Federal Republic of Nigeria, Nigeria's refusal to participate in arbitration didn't prevent a unilateral arbitral award against the government.[26]

However, In the realm of international commercial arbitration, it's important to note that a state or state enterprise agreeing to arbitrate does not automatically mean they consent to court enforcement of the resulting award. Both the ICSID Convention and the New York Convention acknowledge that submitting to arbitration by a sovereign does not waive immunity from enforcement and execution of awards against the sovereign. However, it's crucial to recognize that national laws and practices concerning sovereign immunity from enforcement measures may vary.

V. SOVEREIGN IMMUNITY AS CHALLENGE FOR ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

Enforcing arbitration awards depends on international legal instruments governing the arbitration. The New York Convention (NYC) and ICSID Rules provide mechanisms for enforcement. The New York Convention,1958, is an universal legal framework for enforcing foreign arbitral awards in contracting states, regardless of whether the arbitration was conducted ad-hoc or through an institutional body. To enforce an arbitral award under the Convention, the state where the award was issued must be a party to the Convention and must treat awards from the enforcing country reciprocally and Article III of the New York Convention mandates countries to acknowledge arbitral awards as binding and enforce them according to national laws, in line with the Convention's provisions.[27] The enforcing court may still ahead with enforcement even when the opposing party has successfully argued their case and this is because the power given under this convention is discretionary with the use of the word "may".[28]

[24] European Convention, 1972
[25] Libyan American Oil Company v Socialist People's Libyan Arab Jamahiriya 482 F. Supp. 1175 (D.D.C. 1980)
[26] Ipitrade International S.A v Federal Republic of Nigeria 465 F. Supp. 824
[27] Id. at 3
[28] Id. at Article V

Further, the Convention does not include sovereign immunity as a basis for rejecting enforcement of an award involving a State as one of the parties.

Similarly, under the ICSID Rules, states must recognize awards made under the Convention as binding and enforce the financial obligations imposed by the award as if it were a court judgment. However, Article 55 of the ICSID Convention limits enforcement by acknowledging the applicability of sovereign immunity. Enforcement of an award isn't automatic under the Convention, as it doesn't override laws in contracting states regarding immunity from execution for that state or foreign states.[29]

An important exception to sovereign immunity is based on the nature of the transaction leading to the dispute, particularly in jurisdictions that adhere to the restrictive immunity theory.[30] Generally, it's acknowledged in international law that sovereign immunity doesn't apply to commercial transactions undertaken by a state. However, the precise definition of what qualifies as a 'commercial transaction' remains somewhat ambiguous. Courts often rely on three approaches to categorize legal transactions regarding state immunity: contractual parties, purpose of the transaction, and nature of the transaction.[31] Among these, the nature of the transaction is frequently preferred. For example, the U.N. Convention on Sovereign Immunity prioritizes the nature test in determining whether a transaction is commercial. There's no consensus on sovereign immunity theories, with states divided between absolute and restrictive immunity approaches. In jurisdictions adhering to absolute immunity, a plea of sovereign immunity can swiftly terminate enforcement proceedings, merely due to the involvement of a state or its agency. Even in jurisdictions following the restrictive approach, there's still the challenge of discerning whether the property in question is sovereign or commercial.

The judicial approach to sovereign immunity varies by country and depends on whether absolute or restrictive immunity is applied. In nations embracing absolute immunity, courts typically uphold sovereign immunity unless waived. For example, Nigeria's Supreme Court has ruled that sovereign immunity shields state entities from lawsuits regardless of the dispute's nature.[32] Even in countries with restrictive immunity, such as the U.S. and the UK, differences

[29] Article 54 shall not "be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign state from execution.

[30] Siagian, Dewi Susanti, 'Sovereign Immunity in Commercial Transaction Under International Law,' (2023) Indonesian Journal of International Law Vol. 20: No. 2, Article 6. https://scholarhub.ui.ac.id/

[31] Madhusoodhanan, V. 'Law Of Foreign State Immunity: Changing Patterns Of International Law And Indian State Practice' (1993) Journal of the Indian Law Institute, vol. 35, no. 3 pp. 95–107. *JSTOR*, http://www.jstor.org/stable/43951496 Accessed 5 Apr. 2024.

[32] Patricia E. Bergum, 'Verlinden B.V. v. Central Bank of Nigeria: Expanding Jurisdiction under the Foreign Sovereign Immunities Act;' (1984) Northwestern Journal of Int'l Law & Business 320 https://scholarlycommons.law.

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exist in how "commercial purposes" exceptions are treated. While the UK's State Immunity Act doesn't specifically mention the transaction's purpose, U.S. courts often consider it. English courts use various tests, including contextual and purpose-based approaches. In the case of Trendrtex v. Bank of Nigeria, the Central Bank of Nigeria issued a letter of credit for over $14,000,000 to a Swiss company for cement sold to an English company. When the cement shipment faced delays, the Swiss company sued the Central Bank for breach of contract.[33] The court initially granted an injunction, but the bank argued sovereign immunity as a government entity. On appeal, the Court of Appeal ruled that the bank did not qualify as a government department and should not claim sovereign immunity for commercial transactions. The court emphasized that organizations cannot selectively claim governmental status to evade liabilities arising from international commercial agreements they willingly entered into.[34] The UK House of Lords decision in Alcom Ltd v Republic of Columbia shows another obstacle to enforcing awards against State property. In this case, the ambassador of a foreign State declared that a bank account in London was not used for commercial purposes. The court accepted this declaration as proof, making it simple for a State to prevent execution against its property by stating it's for sovereign purposes.[35] Further, in the case of SPP v. Egypt a decision favored the claimant, but Egypt invoked sovereign immunity, preventing enforcement of the award.[36] However, in 1984, the claimant pursued action through ICSID, which awarded damages with interest and permitted enforcement against Egypt. ICSID's rules stipulate that by agreeing to use ICSID rules for arbitration, entities waive the right to claim sovereign immunity as a defense against award enforcement and hence, the claimant could enforce the award.[37]

However, Nations are increasingly taking steps to ensure the pro-enforceability approach thereby reducing the reliance on sovereign immunity by states. For example, the United States has implemented the Federal Arbitration Act, which restricts judicial interference in arbitration proceedings and prohibits states or their agencies from invoking sovereign immunity to avoid enforcing arbitral awards granted under the Act.[38]

VI. SUGGESTIONS

As seen, there is no universal mechanism followed in defending through sovereign immunity, with some jurisdictions adopting absolute immunity while others opt for restrictive immunity.

[33] Trendrtex v. Bank of Nigeria [1977] 1 All ER 881
[34] Id.
[35] Alcom Ltd v Republic of Columbia [1984] UKHL J0412-1
[36] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3
[37] Id.
[38] Federal Arbitation Act, 1925

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In places with absolute immunity, a claim of sovereign immunity can halt enforcement proceedings without further consideration. To bypass this, many agreements now include explicit waivers, showing the state's consent to arbitration jurisdiction.

Another tactic to bypass a claim of sovereign immunity involves securing a waiver of immunity from execution from the State party. This waiver is obtained either before or during the contract and arbitration agreement. While this method seems effective, recent rulings suggest that States can revoke such waivers, casting doubt on its reliability for individual parties seeking enforcement. To mitigate this risk, the waiver should explicitly cover "any" immunity from execution and be broad enough. A general waiver clause suggested by ICSID's Model Clauses of 1993 sounds instructive and is recommended for individual parties entering into arbitration agreements with State parties.[39] It states as follows: Clause 15: The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.[40]

Another method to enforce arbitral awards is by incorporating Multilateral and Bilateral Treaties (BITS) into arbitration agreements, providing a potentially more enforceable procedure advantageous to the private party. Additionally, BITS, being international agreements between States, may encourage compliance from the contracting State, aiming to maintain positive international relations and foster an environment conducive to foreign investment.

Alternatively, non-State parties may engage in forum shopping, seeking jurisdictions with favorable judicial attitudes towards sovereign immunity issues. Countries like the US, UK, France, and Switzerland are appealing due to their courts' liberal approach to sovereign immunity and existing laws facilitating enforcement of arbitral awards against State parties. To utilize forum shopping effectively, relevant contracts and arbitration documents should specify the laws of these jurisdictions as applicable for resolving disputes arising from the transaction or arbitration agreement.

Further, ratification of the New York Convention on the Enforcement of Arbitral Awards to ensure consistency in global enforcement laws for arbitral awards would work to follow with the pro-arbitration approach with the Convention explicitly stating that ratifying countries waive their right to invoke sovereign immunity as a ground to block the recognition and enforcement of awards.

[39] Supra note 16
[40] ICSID Model Clause 15, 1993

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There should be dedicated laws or judicial systems in each country specifically for handling arbitration, arbitral proceedings, and the enforcement of arbitral awards. Arbitration should not be bound by the same rules as litigation, as this would undermine its benefits over traditional litigation processes.

Furthermore, given the divergence in state practices regarding sovereign immunity, there is a need for a single international legal framework to standardize these practices and establish a unified approach among states.

VII. CONCLUSION

It is possible for states to enforce arbitral awards without compromising their sovereignty, which is crucial for maintaining control over their affairs and resisting foreign laws or judgments. National courts often apply the same principles used in judicial proceedings, which complicates the enforcement of arbitral awards. It's crucial to treat court judgments and arbitral awards differently. Allowing sovereign immunity to hinder the enforcement of arbitral awards could make ADR as a dependant mechanism defeating the essence of a reliable 'alternative' dispute resolution. Engagement with the states may be deterred where previous arbitral awards were unenforceable due to sovereign immunity. Therefore, it's advisable for states not to obstruct the enforcement of arbitral awards by invoking sovereign immunity.

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