SOVEREIGN IMMUNITY AND TRANSNATIONAL ARBITRATION

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THESIS ABSTRACT

State participation in the arbitration of transnational commercial disputes is steadily increasing. It is estimated that arbitration of state contract disputes presently constitute one quarter of the disputes submitted to ICC arbitration. Where a state party is involved in an arbitration, the sovereign immunity doctrine - which in some cases exempts foreign states from the jurisdiction of municipal courts - may have adverse effect on the arbitration process. The thesis explores the impact of the immunity doctrine on the arbitration of state contract disputes.

State practice in selected jurisdictions is used to illustrate the methods adopted in an effort to mitigate the impact of the immunity doctrine on commercial arbitration. In this respect, focus is placed on both jurisdictional immunity and immunity from execution.

The thesis concludes that the private party may avoid unnecessary litigation by requiring the state party to expressly waive its immunity both during the recognition and enforcement stages. The waiver should be included in the arbitration agreement.

CONTENTS

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INTRODUCTION

1. STATEMENT OF THE PROBLEM

The level of commercial activities between the developed and the developing countries of the world is steadily on the increase. In the great majority of cases the commercial relations is between foreign private parties and the governments of developing countries. Developing countries are mostly dependent on foreign business concerns for the importation of capital and machinery needed for national development. Additionally, in many socialist and developing countries of the world, state monopoly of foreign trade and regulation of investment contracts is considered an inevitable part of their national economic life. In this respect, the state and its agencies become parties to commercial transactions with nationals of other countries. Commercial relations between the state and private parties are also evident in developed countries where governments and their agencies sometimes engage foreign experts in domestic projects.

Providing a suitable conflict resolution machinery to such commercial agreements may pose considerable problems. It is obvious that the nature of policy considerations engendered by transnational contracts involving state parties are not conterminous with those involving only private parties. First,

in the former case, political considerations creep in and a state may well refuse to submit the dispute between it and a foreign national to the municipal courts of another state. Again, the foreign national may not have confidence in the ability of the municipal court of the state party to do justice in the case.

This has led a commentator to state that where a state and a national of another state are parties to a commercial agreement, "arbitration imposes itself for lack of an acceptable alternative". [Park, "Arbitration of International Contract Disputes" The Business Lawyer (1984), 39] The willingness to submit such disputes to arbitration is as a result of the suitability of arbitration for the needs of international commerce. As one writer comments:

> "In the context of international trade, the discordant parties will be from different parts of the world, with corresponding different world views, culture and legal systems. Ideally arbitration provides a flexible mutually acceptable means of conflict resolution because the process is consensual: one party is not dragged unwillingly into court by another." [McLaughlin, "Arbitration and Developing Countries" 13 International Lawyer 211, 212 (1979)]

Today, arbitration of state contract disputes constitutes one quater of the disputes submitted to ICC arbitration. Participation of states in international arbitration gives rise to the problem of sovereign immunity and its possible effect on the efficacy of the arbitral process. The areas in which the concept may affect the operation of the arbitral process are wide. They include areas such as immunity from jurisdiction, application of interim measures of protection and state immunity from execution.

An arbitration cannot be entirely conducted without assistance from the municipal court system. Municipal courts may be resorted to for matters such as the appointment of arbitrators, control of the arbitral tribunal's jurisdiction and the setting aside of awards. A pertinent question in arbitration of state contract disputes is the effect of consent to arbitration on the principle of immunity. Does such consent amount to waiver of jurisdictional immunity and immunity from execution? It seems obvious that the objectives of an arbitration may be rendered nugatory if a claimant cannot obtain court assistance both in the conduct of the arbitration and in enforcing any ensuing award.

The goal of the thesis shall be to explore the inter-relationship between international commercial arbitration and the sovereign immunity principle. It shall also suggest ways in which the latter may be made amenable to the objectives of the former.

2. SCOPE OF STUDY

State immunity is twin faceted. It breaks down into jurisdictional immunity and immunity from execution. The thesis shall examine whether the plea of jurisdictional immunity can be raised before an arbitrator or a municipal court which seeks to assume jurisdiction for purposes auxiliary to the arbitration. It shall also examine the permissible extent to which an award may be enforced against a state party. The International Convention for the Settlement of Investment Disputes shall further be examined because part

of its objective is to mitigate the rigors attendant in the arbitration of state contract disputes.

In some instances a state may seek to grant immunity to itself by enacting legislation precluding its agencies from entering into arbitration agreements. The objective of such legislation is to make it impossible for third parties to arbitrate any dispute with the state agencies concerned. The thesis shall not consider the effect of such legislations. The immunity sought to be claimed in such instances does not relate to the doctrine of sovereign immunity in international law.

3. METHOD OF STUDY

Etymologically, international commercial transaction is connotative of a transaction which transcends municipal boundaries. It follows that any meaningful study of the law in this area must be comparative in character. In line with this goal, the thesis shall make a comparative survey of legislative and judicial practice in selected common and civil law jurisdictions.

The thesis shall confront each problem from both practical and theoretical perspectives. Practically, the thesis shall analyze state practice in selected countries with the objective of discovering which method best accords with the practical needs of society. Where appropriate, a theoretical evaluation of the present state of the law will be carried out.

4. PLAN OF STUDY

The thesis shall be structured into three broad parts. The first part shall deal with the impact of jurisdictional immunity on international commercial arbitration. Can a state plead jurisdictional immunity before municipal courts?

Enforcement of an ensuing award is the ultimate objective of a claimant in an arbitral proceeding. To what extent can awards be enforced against a state party? If such awards are enforceable against a state, can they be enforced in all jurisdictions where the state has assets? What nature of state property is susceptible to measures of execution? Providing answers to these questions shall be the task of the second part.

The legal regime under the International Convention for the Settlement of Investment Disputes shall be examined in the third part. The centre is, to a certain extent, an institutional response to the problems of sovereign immunity in transnational arbitration relating to investment? Is it successfully so?

CHAPTER ONE

THE SOVEREIGN IMMUNITY DOCTRINE

A. THE GENEROUS DOCTRINE

Sovereign immunity is a doctrine of international law under which domestic courts, in approaching cases, relinquish jurisdiction over a foreign state.[1] Under the doctrine, a sovereign state cannot be impleaded in the municipal courts of another state, except in cases where it attorns to jurisdiction.

The Anglo-American concept of sovereign immunity derives its roots from international comity and the concept of national sovereignty. The doctrine was largely a legacy of the maxim: "The King can do no wrong". Under the common law, it was considered a constitutional impossibility to implead a domestic sovereign. In the words of Mr Justice Holmes, state immunity is based "on the logical and practical ground that there can be no legal rights as against the authority that makes the law on which the rights depend".[2] No proceeding, civil or criminal, was maintainable against the sovereign in person, for, it was said, the courts, being the King's own, could have no jurisdiction over him. Constitutionally speaking, the King personified the state; therefore, the courts which formed part of the central government of the state could not logically exercise jurisdiction over the sovereign, in whose name and in whose name only, they could

act.[3] Before 1947 in England, one of the methods by which redress could be sought against the crown in the courts was by way of petition of rights.[4] This principle of immunity was transposed into international law, thereby making foreign states immune from the jurisdiction of municipal courts.

The doctrine is also justified on the basis of international comity. It was felt that it would be an affront on the principle of sovereign equality of nations and an erosion of its dignity for a foreign state to be impleaded before municipal courts. In The Prins Fredrik[5], the court declined jurisdiction on the ground that the foreign state, as personified by the foreign sovereign, was equally sovereign and independent and that to implead him would insult his "real dignity". Lord Campbell C.J. was of a similar view in Haber v. The Queen of Portugal[6]:

> "To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent."[7]

The U.S. was the first to apply the sovereign immunity principle. In The Schooner Exchange v. McFadden[8], a vessel owned by a United States citizen was seized by the French government and remodeled in France as a public armed ship. When a storm forced the ship into a U.S. harbour, the U.S. citizen commenced an admiralty action against the French government. The court granted immunity to the government. Marshall, C.J., said:

> "One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his

> nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."[9]

The Parlement Belge[10] offered the first authoritative statement of the principle in England. The court granted immunity to a mail packet owned by the Belgian monarch and operated by Belgian navy personnel:

> "The principle to be deduced from the cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and the dignity of every other state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any state which is destined to public use..."[11]

The U.S. Supreme Court in Berizzi Bros v. The Steamship Peraso[12] followed the English decision in the Parlement Belge by holding that public property destined for public use was immune from the jurisdiction of municipal courts. They allowed an expansive definition of "public purpose" in relation to the activities of sovereigns.

The doctrine was re-affirmed in The Porto Alexander[13]:

> "A sovereign state cannot be impleaded directly or by being served in person, or indirectly by proceeding against its property and that in applying that principle it matters not how the property was being employed."[14]

The thrust of this generous theory of immunity was that immunity was granted irrespective of the nature of transaction engaged in by the sovereign. The courts granted a very broad

interpretation to the concept of public use of governmental property. The effect of this doctrine was that it was practically impossible to implead a sovereign state in the municipal court of another country.

As a matter of policy, the absolute doctrine of sovereign immunity is grounded on the principle of the independence, the equality, and the dignity of states. The maxim par in parem non habet imperium follows directly from this consideration. Assumption of jurisdiction over a foreign state was considered a subjugation of her sovereign status and an affront to her dignity.

B. THE RESTRICTIVE THEORY

Since the second world war, there has been a gradual decline in the application of the absolute immunity doctrine. An important factor in this development is the increased participation of states in commercial activities. In many socialist and developing countries of the world, state monopoly of foreign trade and regulation of investment contracts is considered an inevitable part of the national economic life. It was believed that it would be unconscionable for states to partake in commercial activities without having to contend with the everyday realities of the market place.

In England, individual judges expressed opposition to immunity in the context of commercial activities.[15] In Rachimtoola v. Nizam of Hyderabad[16], Lord Denning challenged the absolute immunity doctrine and suggested that immunity should depend essentially on the nature of the dispute:

> "If the dispute brings into question, for instance, the legislation or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such disputes canvassed in the domestic courts of another country; but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own department or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."[17]

An opportunity was afforded the Privy Council to deal with the issue in The Philippine Admiral Case[18]. The Council adopted the restrictive immunity doctrine by registering its opposition to the application of sovereign immunity to "ordinary trading transactions".[19] The English Court of Appeal in Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria[20] held, by a majority decision, that sovereign immunity was no longer applicable to ordinary trading transactions, and that the restrictive doctrine of immunity should be applied to both actions in personam as well as those in rem.

The restrictive theory of immunity grants immunity to public acts of states (i.e. acta jure imperii), but denies immunity to their private acts (i.e. acta jure gestionis). Under this theory, a state loses its immunity whenever it engages in commercial activities.

In the U.S. there has been a decline in the adherence to the absolute immunity doctrine since the 1940's. To mitigate the hardships of the doctrine in commercial activities, the U.S. used treaties of friendship, commerce and navigation to

regulate the application of the immunity doctrine. For example, Article XVIII of the Treaty of Friendship, Commerce and Navigation between the U.S. and Denmark[21] provides:

> "3. No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial ... activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein."

In 1952, the Tate Letter[22] officially declared the State Department's abandonment of the absolute immunity theory and its adoption of the restrictive theory. Immunity was only to be granted where the sovereign state engaged in non-commercial activities.

This restrictive theory of immunity has been accepted by a majority of countries.[23] The modern rationale for the theory of sovereign immunity was stated by Monroe Leigh as being:

> "to promote the functioning of all governments by protecting a state from the burden of defending law suits abroad which are based on its public acts. However, when the foreign state enters the market place or when it acts as a private party, there would be no justification in the modern international law of sovereign immunity for allowing the foreign state to avoid the economic costs of the agreement it breaches or the accidents it creates; the law should not permit the foreign state to shift these everyday burdens of the market place unto the shoulders of private parties."[24]

The position then is that a state is only immune from jurisdiction in respect of its public acts. This theory is subject to the criticism that the immunity granted to sovereign states was not due to their public activities, but rather as a result of their character as sovereign states, and

the need to promote international comity. Furthermore, the distinction between public and private acts is as arbitrary as it is unreal. The primary objective of states is the promotion of the welfare of its people. This objective is intrinsically of a public nature. Consequently, the means by which a state seeks to actualize this objective should not be used as a reason to categorize its activities as private in nature. A state does not cease to exercise sovereign public functions when it enters into commercial activities in order to meet the needs of its citizens.

The theoretical attraction of the above argument is diluted by the realization that a state may injure its commercial partners by exercising its absolute immunity from jurisdiction where disputes arise between them. It is only fair that where a state engages in commercial activities, those dealing with it should have an avenue of seeking redress should the need arise.

It was the extensive engagement of states in industry and trading activities, and the increasing acceptance of the concept of "the rule of law" by a majority of the developed countries that hastened the acceptance of the restrictive theory.[25] The absolute immunity principle was designed to cover the political activities of the state as a sovereign entity; it is thus ill-suited for an era where state participation in commercial activities is the rule rather than the exception. When government activities were limited largely to military affairs, police matters, administration of justice and providing the financial means of such operations, there

was little need for a review of the orthodox theory. State participation in commercial activities has transformed the horizon. The increasing contact between private parties and states in the arena of commercial activities argued the need for a review of the doctrine exempting states from the jurisdiction of foreign courts. The restrictive theory attempts to modify the absolute theory in line with the contemporary role of states in society.

The doctrine of the rule of law was also instrumental to the shift to the restrictive theory of immunity. The rule of law was particularly helpful in upholding the right of citizens to sue their states before municipal courts. In the United Kingdom, the Crown Proceedings Act of 1947 abolished the petition of rights and made the crown liable to private law and liabilities, including liability in tort and, to a large extent, suit in the ordinary courts. In the U.S., Justice Franfurter observed in 1939 that "the present climate of opinion...has brought governmental immunity from suit into disfavour".[26] In 1949 the U.S. Supreme Court stated that "The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend".[27]

This development which enabled citizens to bring legal proceedings against the crown in a large number of cases, cleared the path for the extension of the principle to foreign states. As indicated in the earlier part of this paper, the absolute immunity doctrine was partly an adjunct of the theory that the crown could do no wrong and could therefore not be

sued in domestic courts. With the decline in the scope and application of that municipal doctrine, there was the need to adjust the absolute immunity granted to foreign states. In the words of Lauterpacht:

> "The dignity of foreign states is no more impaired by their being subjected to the law, impartially applied, of a foreign country, than it is by submission to their own law".[28]

The restrictive theory of immunity does not enjoy universal acceptance. Soviet international legal theory rejects the application of the restrictive theory to acts of a socialist state, on the basis that a distinction cannot be made between acts of a socialist state which are of a public nature and acts which are of a private nature. The prevailing Soviet political theory insists that a state does not cease to be a sovereign merely because the state is performing functions that are traditionally reserved for private persons in a non-socialist legal system.[29]

C. WAIVER OF IMMUNITY UNDER THE COMMON LAW

There is no fundamental principle prohibiting the waiver of jurisdictional immunity. A municipal court may assume jurisdiction over a foreign sovereign if the latter waives its jurisdictional immunity. If a foreign state commences an action as a plaintiff or appears without protest as a defendant in an action, he is deemed to attorn to jurisdiction with respect to those proceedings.

English courts required a genuine and unequivocal submission to the jurisdiction of the court. In Duff

Development Co. v. Kelentan[30], the House of Lords held that a clause in a contract whereby the respondent sovereign agreed to the provisions of the Arbitration Act, 1889, and itself attempted to take advantage of the clause by going to arbitration, was not sufficient waiver of its immunity. In the courts view, for a waiver to be effective, the undertaking constituting the waiver must be made to the court itself and not to a third party. Lord Sumner said:

> "The Sultan's contract to arbitrate in accordance with the Arbitration Act is not, either in itself or in combination with anything else in this case, a submission to the jurisdiction of the High Court. It is not an undertaking given to the court itself. It is an agreement inter partes, and no more ... Sovereigns, however, are not amenable at all, except by their own consent, and there is no principle upon which such consent can be deemed to have been given short of action taken towards the court itself, such as is commonly called a submission to jurisdiction."[31]

Lord Carson, in a dissenting opinion, posited that the arbitration clause constituted a waiver of immunity. His lordship contended that since the Kelentan Government would have sought to enforce the award if it were the successful party, it would be unjust not to enforce the award against the government when it is the unsuccessful party.[32]

The English Court of Appeal in Kahan v. Pakistan Federation[33] refused to hold that a clause expressly stating that the Pakistani Government "agree to submit for the purpose of this agreement to the jurisdiction of the English court" was an effective waiver. Jenkins L.J. said:

> "... no mere agreement inter partes to the effect that a foreign sovereign should submit to the jurisdiction of the court can suffice to give the

> court jurisdiction in the event of the foreign sovereign choosing to resile from it. Actual submission before the court itself, and nothing short of that is required."[34]

It could be deduced form the above cases that for a waiver to be effective under the common law, the foreign sovereign must waive its immunity by an action directed towards the court itself. Nothing less than that would suffice. This point is further illustrated by the decision in Mighell v. Sultan of Johore[35]:

> "What is the time at which he can be said to elect to whether he will submit to the jurisdiction? Obviously, as it appears to me, it is when the court is about or is being asked to exercise jurisdiction over him, and not any previous time. Although up to that time he had perfectly concealed the fact that he is a sovereign, and has acted as a private individual, yet it is only when the time comes that the court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shown that he is an independent sovereign and does not submit to the jurisdiction, the court has no jurisdiction over him. It follows from this that there can be no inquiry by the court into his conduct prior to that date."[36]

It may be concluded that under the common law, a foreign sovereign can only attorn to the jurisdiction of a municipal court by an act of submission before the court itself. In the words of Lopez, L.J., "the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the court".[37] It should be noted that, as we shall see in the following discussion, this rule has been changed by the U.K. State Immunity Act.[38]

FOOTNOTES

[1] U.S. H.R. Rep. No. 94-1487, 94 Cong., 2d Sess. 8 (1976).

[2] See Kawananakoa v. Polyblank (1907) 205 U.S. 349, 353.

[3] Sucharitkul, State Immunities and Trading Activities in International Law (Steven & Sons, London, 1959), 4.

[4] Halsbury's Laws of England, Vol. 11, Para. 1411.

[5] (1820) 2 Dods. 451.

[6] (1851) 17 Q.B. 171.

[7] Id. at 207.

[8] 7 Cranch 116 (1812).

[9] Id.

[10] (1880) 5 P.D. 197.

[11] Per Brett L.J. Id. at 214-215.

[12] 271 U.S. 562 (1926).

[13] [1920] P. 30.

[14] Id. at 31.

[15] See Baccus S.R.L. v. Servicio del Trigo [1958] 1 Q.B. 438 (per Singleton L.J.); Rachimtoola v. Nizam of Hyderabad [1958] A.C. 379 at 415-24 (per Lord Denning).

[16] [1958] A.C. 379.

[17] The majority of the House of Lords did not endorse this approach.

[18] [1976] 2 W.L.R. 214.

[19] Id. at 232-3.

[20] [1977] Q.B. 529.

[21] 421 U.N.T.S. 105.

[22] 26 Dept. State Bull. 984 (1952). The State Department gave its reason for adopting the restrictive theory as follows:

"The Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of immunity."

See 26 Dept. State Bull. 985 n. 13.

[23] On Italian Law, see Borga v. Russian Trade Delegation 22 I.L.R. (1955) 235; for Egypt, see F. P. R. of Yugoslavia v. Kafr El-Zayat Cotton Ltd. 18 I.L.R. (1951) 54: for Netherlands, see Krol v. Bank of Indonesia 26 I.L.R. (1958, 11) 180; for Canada, see Venne v. D.R. of Congo [1969] 5 D.L.R. (3d) 128.

[24] Testimony before the Subcomm. on Administrative Law and Government Relations, U.S. House Judiciary Comm. (1976); reprinted in 70 Am. J. Int'l L. 13, 14 (1983).

[25] See lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States" 28 Brit. Y.B.I.L. 220 (1951).

[26] Keifer & Keifer v. Reconstruction Finance Corporation 306 U.S. 381 (1939).

[27] Larson v. Domestic and Foreign Commerce Corp. 337 U.S. 682, 703.

[28] Lauterpacht, supra note 25, 231.

[29] See Osakwe, "A Soviet Perspective on Foreign Sovereign Immunity : Law and Practice" 23 Virginia J. Int'l L. 13, 14 (1983).

[30] [1924] A.C. 797.

[31] Id. at 829.

[32] Id. at 834-35.

[33] [1951] 2 K.B. 1003.

[34] Id. at 1016.

[35] [1894] 1 Q.B. 149.

[36] Id. at 159.

[37] Id. at 160.

38 S. 9 of the Act provided:

"(1) Where a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

S. 2 of the Act provides:

"(1) A state is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the United Kingdom.

(2) A state may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to governed by the law of the United Kingdom is not to be regarded as a submission."

CHAPTER TWO

APPLICABILITY OF SOVEREIGN IMMUNITY BEFORE INTERNATIONAL TRIBUNALS.

Arbitration arises out of the consent of the disputing parties. Unlike litigation within a municipal legal system, no person can be compelled against his will to enter into an arbitration agreement. Indeed one of the most obvious advantages of arbitration is party autonomy resulting from the fact that arbitration is the creation of a contract between the parties.[1] Without an arbitration agreement, the arbitrator lacks jurisdiction. It is the arbitration agreement that confers jurisdiction on the arbitrator. Apart from it the arbitrator has no power to render a binding award.

The sovereign immunity principle was, as we have seen, aimed at preventing a state from being impleaded in a foreign state against its will. The core of the principle was that in the absence of consent, a state cannot be subjected to the jurisdiction of the courts of a foreign state. It is not uncommon for states to plead jurisdictional immunity before international tribunals. Such pleas are based on the argument that, as an incident of the sovereign status of states, they cannot be defendants in an arbitration.

It seems apparent that the plea of sovereign immunity as a jurisdictional bar has little relevance in an arbitral proceeding.[2] Firstly, an arbitration proceeding has nothing

to do with municipal courts. The jurisdiction of the arbitrator is founded on the agreement of the disputing parties. Although the agreement is accorded legitimacy by the municipal legal system, absent the mutual consent of the parties, there can be no valid international commercial arbitration. Although the arbitral proceedings may have some contacts with municipal legal systems (for example, with regard to the law applicable to procedure, recognition and enforcement of awards), an arbitration is basically conducted within the framework of the system created or adopted by the parties. Therefore, a sovereign cannot claim that it is being impleaded in a municipal court against its will.

Secondly, an arbitration can only take place with the consent of the parties. This element of consent is crucial to the validity of an arbitration. Without it there can be no valid arbitration.[3] As Redfern and Hunter point out:

> "The arbitral proceedings are seen as an expression of the will of the parties and, on the basis of party autonomy it is sometimes argued that international commercial arbitration should be freed from the restraints of national law and treated as denationalised or delocalised".[4]

If arbitration proceeds from the consent of the parties, a state cannot plead immunity before arbitrators. Assuming, but not conceding, that the theory of sovereign immunity is applicable to arbitral proceedings, it ought to be held that a state by consenting to arbitration waives its immunity before the arbitral tribunal. Even within the municipal court system, a state may waive its jurisdictional immunity by attorning to the jurisdiction of the court.[5]

It should, however, be pointed out that the onus to prove the existence of the arbitration agreement lies on the claimant. If the existence of such an agreement is established in evidence, the state party cannot be heard to plead immunity from jurisdiction. In the words of the arbitrators in SPP (Middle East) Ltd. v. Arab Republic of Egypt[6]:

> "In approaching this general question of jurisdiction, one must begin by noting that the onus of proving an agreement to submit a particular dispute or disputes to arbitration rests upon the claimant. At least in the normal case, special care is required where an independent sovereign is alleged to have made a submission for it would amount to a waiver of any immunity that it would otherwise possess."[7]

There is an overwhelming consensus among arbitrators that a plea of sovereign immunity does not have application in arbitral proceedings. Although the conclusion arrived by arbitrators is basically the same, the approaches adopted have been dissimilar. A review of some arbitral awards will reveal this fact.

In ICC Case 2321[8], the arbitrator was sitting in Sweden in a dispute between two enterprises as claimants and, as defendants, a foreign state and a public authority of the latter. The claim against the state was based on the fact that it had in a contract guaranteed a commercial transaction entered into by the public authority. Before going into the merits of the case, the arbitrator was called upon to decide, inter alia, the issue of his jurisdiction.

The defendant claimed immunity based on its national law because it was the proper law of the contract. The claimant, on the other hand, submitted that Swedish law should apply as

the arbitration proceedings were taking place in Sweden. Swedish law was said not to grant immunity in situations such as the present.

The arbitrator refused to apply any set of national laws:

> "I myself do not see the need for referring to any particular set of national law rules or the court practice of any particular country in this respect. Whichever the proper law of the contract may be, this has nothing to do with the defense of sovereign immunity."[9]

He went ahead to stress the fact that an arbitrator does not conduct the arbitral proceeding within the framework of a municipal legal system:

> "As arbitrator I am myself no representative or organ of any state. My authority as arbitrator rests upon an agreement between the parties to the dispute and by my activities I do not, as state judges or other state representatives do, engage the responsibility of the state of Sweden. Furthermore, the courts and other authorities of Sweden can in no way interfere with my activities as arbitrator, neither direct me to do anything which I think I should not do nor to direct me to abstain from doing anything which I think I should do."[10]

He further stated that the doctrine of immunity has no application in arbitral proceedings:

> "As I do not consider the doctrine of immunity to have any application whatsoever in arbitration proceedings which are, as in Sweden, conducted independently from the local courts, it would not be necessary to enter upon the question of waiver of immunity and the view apparently held by some English judges that any waiver must be in facie curiae."[11]

He concluded by pointing out that the question of immunity is irrelevant in arbitral proceedings, irrespective of whether the subject matter of the dispute is a matter jure gestionis or jure imperii. The distinction, he pointed out ,

is not relevant once the parties have agreed upon arbitration.[12]

In SPP (Middle East) Ltd. v. The Arab Republic of Egypt[13], the arbitrators appear to be of the view that the doctrine of sovereign immunity is applicable to arbitration proceedings, although they held that consent to arbitration amounted to a waiver of such immunity:

> "The issue is whether submission to international arbitration by states and public entities should be regarded as an implicit waiver of immunity thus preventing concurrent application of other international or municipal rules granting sovereign immunity. In finding upon the governing law, we implicitly answered in the affirmative. It would indeed be frustrating to recognize full force and effect of general principles of international law aimed at protecting foreign investors and then admit that a state may, before an arbitral tribunal, rely upon domestic or international principles granting sovereign immunity as an excuse for acts amounting to contractual breaches."[14]

In ICC Case 1803[15], the arbitrator posited that the lex arbitri should determine the applicability of the sovereign immunity doctrine to the arbitration. He held that under Swiss law (the lex arbitri) the defendant could not plead immunity:

> "...I find as a matter of law that, according to the case law of the Swiss Federal Court, the principle of the immunity of foreign states from legal process is not an absolute rule of general application. The Federal Court draws a distinction between the foreign state as a sovereign (jure imperii) or as a subject of a private right (jure gestionis). Only in the first case can it invoke the principle of immunity from process. In the second case the foreign state can be sued before the Swiss Courts; even execution can be levied against it... It is plain, in my opinion, that in holding the assets acquired from the Bangladesh Corporation, the People's Republic of Bangladesh is acting jure gestionis..."[16]

It may be asked if the circumstances in which an arbitrator can assume jurisdiction over a foreign sovereign

are conterminous with those where the courts of the forum will do so? The arbitrator in ICC Case 1803[17] would answer in the affirmative. That result is inaccurate. As pointed out by the arbitrator in ICC Case 2321[18], the doctrine of sovereign immunity has no application whatsoever in proceedings before arbitrators. Arbitration being a product of the agreement of the parties, is not conducted under the auspices of the municipal court process. The arbitrator works within the framework created by the parties themselves. As far as proceedings before arbitrators are concerned, there is no question of the state party being impleaded in the municipal courts of another country against its will.

An even stronger opposition to the approach adopted in ICC Case 1803 is why, if indeed a national law should determine the jurisdiction of an arbitrator over a state party, the lex arbitri should be applicable? The seat of arbitration is often chosen for the reason of convenience rather confidence in the lex arbitri. In most cases the seat of arbitration has no connection with either the parties to the arbitration or the underlying contract. If any national law at all should determine the jurisdiction of an arbitrator in such cases, it should be the proper law of the contract, that is the law which has the closest and the most substantial connection with the contract.[19] Even then, we must reiterate that resolution of the problem does not invite reference to any system of national law.

In LIAMCO v. Libya[20], the arbitrator was of the view that a state waives its sovereign rights by consenting to an

arbitration agreement. In the instant case he found fortification for this view in Islamic law and practice:

> "...a state may always waive its so-called sovereign rights by signing an arbitration agreement and then by staying bound by it. Moreover, that ruling is in harmony with Islamic Law and Practice, which is officially adopted by Libya. This is evidenced by many historical precedents. For instance, Prophet Muhammed was appointed as an arbitrator before Islam by the Meccans, and after Islam by the Treaty of Medina... He himself resorted to arbitration in his conflict with the tribe of Banu Qurayza. Muslim rulers followed this practice in many instances..."[21]

The arbitration applied Islamic law and practice as the applicable law since it was part and parcel of the Libyan law which was chosen by the parties as the proper law of the contract.[22] A clause in the LIAMCO concession agreement provided that the applicable law was "the principles of law of Libya common to the principles of international law ..."[23] The arbitrator considered this choice of law valid.

It should be pointed out that this approach of determining the jurisdiction of an arbitrator over a state party by reference to the proper law of the contract is not appropriate. Since the doctrine of sovereign immunity was not designed to cover arbitration, the provisions of the proper law of the contract cannot alter the position. Although the proper law may be relevant to the capacity of the parties to enter into a contract[24], and the substance of obligations arising from such contract[25], it cannot afford the basis for a plea of sovereign immunity before an arbitral tribunal. This is because considerations of sovereign immunity do not arise in proceedings before arbitrators.

This view is supported by the authors of Arbitration in Sweden (1984). They are of the view that:

> "State immunity is based on the concept of sovereignty, in the sense that a sovereign may not be subjected without its approval to the jurisdiction and exercise of power of the courts and authorities of another sovereign. In Sweden, however, the arbitrators are regarded as deriving their authority from the arbitration agreement. They are not considered to be engaged in any exercise of sovereign power, and they do not represent the Swedish state. The generally accepted view in Sweden is that a sovereign state may not claim immunity from the jurisdiction of arbitrators sitting in Sweden."[26]

Even though the doctrine of sovereign immunity has no application before arbitrators, it is sometimes contended by state parties that their consent to arbitration should be construed restrictively because it constitutes a limitation on the state's sovereignty. The arbitral tribunal in Amco Asia et al v. The Republic of Indonesia[27], was faced with this argument. The tribunal held that an agreement to arbitrate:

> "...is not to be construed restrictively, nor as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle pacta sunt servanda, a principle common, indeed, to all systems of internal law and to international law."[28]

FOOTNOTES

[1] McClendon and Goodman, International Commercial Arbitration in New York, 3 (1986).

[2] See Fox, "Sovereign Immunity and Arbitration" in Contemporary Problems in International Arbitration 323 (1986).

[3] Redfern and Hunter, International Commercial Arbitration 4 (1986).

[4] Id.

[5] See, for instance, S. 2 of the U.K. State Immunity Act.

[6] 22 I.L.M. 752 (1983). Although the court of cassation of France set aside the award (see 26 I.L.M. 1004), that decision does not affect the point being illustrated.

[7] Id. at 762. It should, however, be reiterated that, as noted in the body of the essay, the issue of sovereign immunity does not arise at all in proceedings before arbitrators. That doctrine only has relevance within municipal legal systems.

[8] 1 Yearbook Comm. Arb. 133 (1976).

[9] Id. at 134.

[10] Id.

[11] Id.

[12] Id. at 135.

[13] supra, note 6.

[14] Id. at 772.

[15] V Yearbook Comm. Arb., 179 (1980).

[16] Id. at 185.

[17] supra, note 15.

[18] supra, note 8.

[19] see Vita Foods Inc. v. Unus Shipping Co. Ltd. [1939] A.C. 277; Amin Rasheed Shipping Corpn. v. Kuwait Insurance Co. [1984] A.C. 50. For a discussion of the topic, see Mann 3 I.L.Q. 60 (1950), replied to by Morris 3 I.L.Q. 197 (1950).

[20] VI Yearbook Comm. Arb. 89 (1981). The U.S. court refused to enforce the award based on the act of state doctrine. The jurisprudence of the award relating to jurisdictional immunity was not discredited in the judgment. See 482 F. Supp. 1175 (1980).

[21] Id. at 96.

[22] Id. at 92.

[23] Id.

[24] see Charron v. Montreal Trust Co. [1958] 15 D.L.R. (2d) 240; Bodley Head Ltd. v. Flegon [1972] 1 W.L.R. 680.

[25] Montreal Trust Co. v. Stanrock Uranium Mines Ltd. [1966] 1 O.R. 258.

[26] Arbitration in Sweden, 14 (1984).

[27] 23 I.L.M. 351 (1984).

[28] Id.

CHAPTER THREE

ARBITRATION CLAUSES AND JURISDICTIONAL IMMUNITY OF STATES BEFORE MUNICIPAL COURTS.

INTRODUCTION

Arbitration is conducted within the framework created or adopted by the parties. The proceedings are conducted outside the municipal legal system. One of the advantages of arbitration is the opportunity it affords the international business community to resolve its disputes without substantial interference by municipal courts.

Be that as it may, an arbitration proceeding cannot be entirely conducted without any contact with one municipal legal system or the other. To illustrate, the parties may have to seek the assistance of a municipal court in appointing arbitrators or in connection with the recognition and enforcement of the award. Arbitration can only be effective if it receives support and assistance from municipal legal systems:

> "Arbitral tribunals have no sovereign powers equivalent to those of the states with which to enforce their awards; nor do they always have adequate powers to ensure the proper and efficient conduct of arbitration proceedings. For this reason, it has long been recognized that the effectiveness of the arbitral process is dependent upon a defined relationship, often described as a 'partnership', between arbitration and the courts"[1]

Articles 5 and 6 of the UNCITRAL Model Law on International Commercial Arbitration[2] are innovative general provisions on the fundamental subject of court assistance and supervision. Article 6 calls upon each state adopting the Model Law to entrust a particular "court" with the performance of certain functions of arbitration assistance and supervision, relating to appointment of arbitrators (article 11), decision in termination of arbitrator's mandate (articles 13,14), control of arbitral tribunal's jurisdiction (article 16) and setting aside of award (article 34).

With regards to arbitration between states and private parties, when some of the above matters come before municipal courts, the state party may seek to rely on immunity from judicial proceedings before municipal courts. A pertinent question then is whether an arbitration clause should be construed as a waiver of jurisdictional immunity before municipal courts. This part of the thesis shall analyze the provisions of some national laws and international conventions on the issue.

1. UNITED STATES.

(A) HISTORICAL OVERVIEW

The U.S. Foreign Sovereign Immunities Act of 1976 (FSIA)[3], did not specifically address the issue of arbitration clauses as waiver of jurisdictional immunity. Section 1604 laid down the general rule that foreign states were immune

from the jurisdiction of U.S. courts. Exceptions to the general rule were provided by Sections 1605-1607. According to Section 1605(a)(1):

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver."

The provision did not clarify the issue whether consent to arbitration constituted an implicit waiver within the meaning of the section. An insight into the interpretation of the provision was afforded by the legislative history regarding implicit waivers of jurisdictional immunity:

> "With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern the contract."[4]

The implications of the phrase "another country" was not free from doubt. There was considerable divergence of opinion whether by referring to "another country", the authors of the legislative history had in mind the U.S., or considered that so long as the seat of arbitration was outside the territory of the state involved, submission to arbitration constituted an implicit waiver of immunity.[5] A literal interpretation of the passage would suggest that there is a waiver of immunity from jurisdiction of the U.S. courts if a foreign state has agreed to arbitrate in "another country" anywhere in the world. The legislative history does not indicate the need for any jurisdictional nexus between the arbitration and the U.S.

Such literal interpretation of the passage was inconsistent with the position of the law before the enactment of the FSIA. A review of the pre-FSIA case law reveals that an arbitration clause must directly or indirectly connect the U.S. before it could constitute a waiver of jurisdictional immunity.

In Victory Transport, Inc. v. Comisaria General de Abastecimientos[6], the court denied the appellant's plea of sovereign immunity because its acts were jure imperii. The court then went on to state that by consenting to arbitration in the U.S., the appellant had consented to in personam jurisdiction:

> "We hold that the district court had in personam jurisdiction to enter the order compelling arbitration. By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, the Comisaria General must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York."[7] (emphasis supplied)

The court in Petrol Shipping Corp. v. The Kingdom of Greece[8] was of the opinion that if a party agrees to arbitrate in a certain state, he makes himself as amenable to suit as if he were physically present there. In cases where the arbitration agreement did not specify a seat for the arbitration, but provided the mechanism for its selection, the forum selected was regarded as the choice of the parties:

> "The contract between the parties, while providing for arbitration, does not fix the place thereof. The rules of the American Arbitration Association are by reference made a part of the contract. Under these rules the association has the power to fix the place

> of arbitration . It can thus be said that the parties contracted to fix the place of arbitration in New York."[9]

The preceding cases illustrate the fact that under the pre-FSIA case law consent to in personam jurisdiction in the U.S. only presumed in cases where parties consent to arbitration in the U.S. It was therefore wrong to read the legislative history as implying that consent to arbitration in any country amounted to waiver of jurisdictional immunity in the U.S. The legislative history should be interpreted in the light of pre-FSIA case law. In the words of Bruno Ristau:

> "It should also be stressed that the long-arm feature of the bill will ensure that only those disputes which have relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small "international courts of claims". The bill is not designed to open up our courts to all comers to litigate any dispute that any private party may have with a foreign state anywhere in the world."[10]

The only case that placed a literal interpretation on the legislative history was Ipitrade International, S.S. v. Federal Republic of Nigeria.[11] The contract between Ipitrade and Nigeria included a Swiss choice of law clause and an agreement to arbitrate disputes under the auspices of the International Chamber of Commerce in Paris. When a dispute arose, Ipitrade invoked the arbitration agreement and proceedings took place in France, Nigeria refusing to participate on the ground of sovereign immunity. Ipitrade then sought to enforce the award in the U.S. The court held that Nigeria had waived its jurisdictional immunity within the meaning of S. 1605(a)(1) of the FSIA by agreeing to arbitrate under the ICC rules. The court relied entirely on the literal

meaning of the legislative history of the section.[12]

A restrictive interpretation of S. 1605(a)(1) was offered in Verlinden v. Central Bank on Nigeria.[13] There the court stated, obiter, that an agreement by a foreign state to arbitrate with another non-American private party in a tribunal seating in another country does not constitute an implicit waiver of its sovereign immunity in the U.S. It disagreed with the interpretation given to the FSIA's legislative history in Ipitrade:

> "It may be reasonable to suggest that a sovereign state which agrees to be governed by the laws of the United States - which in both "another country" and "a particular country" - has implicitly waived its ability to assert the defense of sovereign immunity when sued in an American court. But it is quite another matter to suggest, as did the court in Ipitrade, that a sovereign state which agrees to be governed by the laws of a third-party country - such as the Netherlands - is thereby precluded from asserting its immunity in an American court."[14]

The court further stated that the approach adopted in Ipitrade will expose the courts to "matters involving sensitive foreign relations" by throwing open the doors of the court to claimants irrespective of the connection between the suit and the U.S.

In Chicago Bridge & Iron CO. v. Islamic Republic of Iran[15], the court rejected some arbitration clauses as the basis of jurisdiction because they did not contain either a U.S. choice of law or a U.S. choice of forum provision:

> "We agree with Judge Weinfeld's precise holding in Verlinden v. Central Bank of Nigeria that the presence of third-party nation choice of law and forum clauses does not in any sense implicitly consent to United States jurisdiction."[16]

Libyan American Oil Co. v. Socialist People's Libyan Jamahirya[17], provides a different dimension to the issue. It addressed the question of waiver where the arbitration agreement does not provide a seat for the arbitration, but the arbitration actually takes place in a country outside the U.S. The arbitration agreement in the instant case did not specify the seat of arbitration. When a dispute arose under the underlying contract, LIAMCO invoked the arbitration clause and a sole arbitrator was appointed. The arbitrator selected Geneva as the seat of arbitration. In an action to enforce the arbitrator's award, the court held, inter alia, that Libya waived its sovereign immunity by agreeing to submit to arbitration. The court centered on the fact that because the seat of arbitration was left open in the arbitration agreement, the parties anticipated that proceedings could have occurred in the U.S.

> "Although the United States was not named, consent to have a dispute arbitrated where the arbitrators might determine was certainly consent to have it arbitrated in the United States."[18]

This decision is difficult to reconcile with the pre-FSIA case law. By holding that agreement to arbitrate in the U.S. constitutes waiver of immunity in that jurisdiction, it accords both with pre-FSIA case law and the preponderance of post-FSIA decisions. The holding that there is submission to jurisdiction where the parties consent to arbitrate where the arbitrators determine, and the latter chooses a seat outside the U.S. is, however, against the current of judicial authority. The court did not consider the existing case law which indicates that an arbitration clause which leaves the

designation of the locale of arbitration to a third party is tantamount to a clause providing for arbitration in the locale actually designated by the third party.[19] It seems reasonable to assume that by leaving the designation of the seat of arbitration to the arbitrators, the disputing parties only contemplate proceedings in the situs actually chosen by the arbitrators and, probably, in their own places of residence. The fact that the parties mandate the arbitrators to determine the seat of arbitration does not make countries outside the situs any more justified to assume jurisdiction in matters relating to the arbitration than in cases where the parties themselves selected the seat of arbitration.

The above survey underscores the conflicting interpretation given to the legislative history of S. 1605. The expansive interpretation offered in the Ipitrade case does not require any jurisdictional nexus between the U.S. and either the seat of arbitration or the underlying commercial transaction. Acceptance of that viewpoint may lead to far-reaching consequences in cases where the dispute has no connection with the U.S. However, such an interpretation may be justified at least in cases where the U.S. has a treaty obligation to recognize such an award.[20] Strict adherence to the interpretation rendered in Verlinden and its progeny involves the breach of U.S. obligations to recognize and enforce foreign awards which come within the purview of the New York Convention.

(B) AMENDMENTS TO THE U.S. FSIA

In May 1985 Senator Charles Mathias introduced legislation in the U.S. Congress to clarify and strengthen the FSIA. The amendments were to perfect the jurisdiction of the court and provide for better enforcement and execution of judgments once they are rendered by the court.[21]

The amendments were adopted in November 1988.[22] Paragraph (6) was added to S. 1605. It provides:

> "(a) A foreign state shall not be immune from jurisdiction of courts of the United States or of the States in any case -
>
> (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if
>
> (a) the arbitration takes place or is intended to take place in the United States
>
> (b) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards
>
> (c) the underlying claim, save for the agreement to arbitrate, could have been brought in an United States court under this section or section 1607; or
>
> (d) paragraph (1) of this subsection is otherwise applicable"

Clause (a) is consistent with the Verlinden line of cases in that it requires arbitration in the U.S. or intention to do so before a U.S. court can assume personal jurisdiction in matters relating to an arbitration. It is not clear what the

position may be in cases where although the parties intended to arbitrate in the U.S., the arbitration actually takes place in another country. Clearly if the country in which the arbitration takes place is a signatory to the New York Convention or a party to any other agreement in force for the U.S. calling for the recognition and enforcement of arbitral awards, the U.S. courts may assume jurisdiction under Clause (b). But where the agreement or award is outside the purview of Clause (b), it would seem that mere intention to arbitrate in the U.S. would not suffice if in fact the arbitration does not take place in the U.S. Reference to intention to arbitrate in Clause (a) appears to be designed for cases where personal jurisdiction is sought in U.S. courts before an arbitral tribunal is constituted. An example would be where a party seeks to compel arbitration under the agreement. In such a case U.S. courts may assume personal jurisdiction if the arbitration agreement reflects an intention to conduct the arbitration proceedings in the U.S.

Refusal to assume personal jurisdiction except in cases where the arbitration actually takes place in the U.S. (a proposition suggested by the Verlinden case) may be inconsistent with U.S. obligation under international conventions which require it to recognize and enforce certain kinds of foreign arbitral awards. Clause (b) ensures that U.S. courts will recognize an award governed by an international convention in force in the U.S., irrespective of where the arbitration took place. Treaties and international agreements contemplated by the section include, inter alia, the New York

Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[23].

Clauses (c) and (d) make clear that an action to enforce an arbitration agreement or to confirm an award may also be brought if the underlying claim could have been brought in the U.S., thereby ensuring that a sufficient connection with the U.S. exists and that immunity may also be denied if the waiver exception is found to be otherwise applicable.[24] Thus jurisdiction over the underlying conflict would ensure jurisdiction over enforcement of any arbitral agreement between the parties relating to the dispute, or confirmation of any resultant award.

The amendments have streamlined the U.S. law regarding arbitration agreements and assumption of personal jurisdiction in U.S. courts. It is only in cases where the arbitration agreement or award falls within Clauses (a) to (d) that personal jurisdiction could be assumed in a proceeding involving a state party.

2. THE UNITED KINGDOM.

S. 1(1) of the U.K. State Immunity Act[25] lays down the general rule that a state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the statute.

S. 9 specifically addresses the issue of consent to arbitration as waiver of jurisdictional immunity. It reads:

> "(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relates to the arbitration.
>
> (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States."[26]

The language of the section does not seem to require any jurisdictional nexus with U.K. The section, literarily read, suggests that waiver exists even where the arbitration takes place outside the U.K. As one writer has suggested that:

> "Before immunity or its absence falls to be considered, an English court must have [territorial] jurisdiction and this will frequently be a serious hurdle for the plaintiff."[27]

The preponderance of juridical opinion is that the section should be interpreted as removing immunity only in respect of agreements to arbitrate in the U.K.[28] This would appear to follow from the legislative history of the Act which states that where the dispute has no connection to the U.K., "the courts will normally not entertain proceedings and the question of claiming immunity will not arise".[29] Such an interpretation would, however, render the U.K. in contravention of its obligation under both the New York and the Washington Conventions.[30]

3. CANADA.

S.3 of the Canadian State Immunity Act, 1982,[31] states the general rule that foreign states are immune from the jurisdiction of Canadian courts. Sections 4 - 8 provide for

exceptions to the rule. Unlike the British Act, no reference is made to consent to arbitration as waiver of immunity.

Section 4 provides for waiver of immunity. The three situations envisaged by this waiver provision are (1) express submission to jurisdiction by written agreement or otherwise, (2) initiation of proceedings, and (3) intervention or taking any step in proceedings before the court. The section does not contemplate implicit waiver by consent to arbitration. In Canada, therefore, it is not clear whether arbitration clauses constitute waiver of immunity.

However, because most arbitrations relate to disputes arising from commercial activity[32], an arbitration clause may qualify as a waiver under the commercial activity exception (S.5). There is, to the writer's knowledge, at present no Canadian judicial decision on the effect of arbitration clauses on sovereign immunity.

4. INTERNATIONAL CONVENTIONS.

(A) INTERNATIONAL LAW COMMISSION DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY.[33]

The I.L.C. at its 1986 session completed and adopted draft articles on jurisdictional immunities of states and their property. The articles deal with the general principles of jurisdictional immunity and its limitations, and the immunity of state property from measures of constraint.

Under Article 19, the jurisdictional immunity of states is inapplicable to arbitrations concerning civil or commercial disputes, and only in relation to proceedings in municipal courts which is otherwise competent to hear the case. It reads:

> "If a state enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that state cannot invoke immunity from jurisdiction before a court of another state which is otherwise competent in a proceedings which relates to:
>
> (a) the validity or interpretation of the arbitration agreement,
>
> (b) the arbitration procedure,
>
> (c) the setting aside of the award,
>
> unless the arbitration agreement otherwise provides" (Emphasis supplied.)

The articles therefore require a jurisdictional nexus between a forum and an arbitration before an arbitration clause can constitute waiver of jurisdictional immunity.

(B) THE EUROPEAN IMMUNITY CONVENTION.

Under the European Convention on State Immunity, an arbitration clause can only constitute waiver of immunity in the country where the arbitration takes place. However, unlike the I.L.C. draft articles, a choice-of-law law clause suffices to establish a waiver of immunity. The relevant provision is Article 12:

"1. Where a contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another contracting State in the territory or according to the law of which the arbitration has taken or will take place, in respect of any proceedings relating to:

(a) the validity or interpretation of the arbitration agreement;

(b) the arbitration procedure:

(c) the setting aside of the award,

unless the arbitration agreement otherwise provides."

CONCLUSION.

The preponderance of state practice, as the above survey indicates, would seem to support the view that arbitration clauses constitute a waiver of jurisdictional immunity before municipal courts. This position accords with logic and common sense. A state that consents to arbitration must have anticipated that where necessary court assistance would be sought to ensure the efficacy of the arbitral process.

An interesting issue in this respect is whether there should be a requirement of jurisdictional nexus between the arbitration and the forum whose municipal court is being resorted to. This would curtail any tendency for the parties to engage in jurisdiction jockeying. As we have seen, before the amendments to the U.S. FSIA, there were conflicting judicial decisions as to whether this requirement was built into the statute. The amendments clarify the position by

setting out the situations where U.S. courts may assume jurisdiction. It seems clear that where the arbitration agreement or award is governed by either the New York or Washington convention, municipal courts in countries that are signatories to the conventions should be guided by their provisions. The Washington convention prevents municipal courts from intervening in an ICSID proceeding, at least until the recognition and enforcement stage.[34] Under both the New York and the Washington conventions, state signatories are obligated to recognize and enforce awards that meet the requirements of the respective conventions, irrespective of the country where they were obtained. A party to either of the conventions would be breaching its treaty obligations by requiring jurisdictional links between the arbitration and its country before it can enforce such awards.

FOOTNOTES

[1] Redfern and Hunter, International Commercial Arbitration (1986), 231.

[2] Adopted by the United Nations Commission on International Trade Law on June 21, 1985.

[3] 28 U.S.C. S.1330; S.1602 et seq.

[4] H.R.Rep. No. 1487, 94th Cond., 2d Sess. at 18.

[5] Delaume, "Foreign Sovereign Immunity: Impact on Arbitration" 38 Arb. J. 34, 36 (1983).

[6] 336 F. 2d 354 (1964).

[7] Id at 363.

[8] 360 F 2D 103 (1966).

[9] Bradford Woolen Corp. v. Freedman 71 N.Y.S. 2d 257,259 (1947). The court found that there was consent to in personam jurisdiction in New York because the American Arbitration Association chose New York as the seat of arbitration.

[10] 94th Cong., 2d Sess. 31, 31 (1976).

[11] 465 F. Supp. 824 (1978).

[12] Id. at 826.

[13] 488 F. Supp. 1284 (1980).

[14] Id. at 1301.

[15] 506 F. Supp. 981 (1980).

[16] Id. at 987.

[17] 482 F. Supp. 1175 (1980).

[18] Id. at 1178.

[19] See Kahale, "Arbitration and Choice-of-Law Clauses as Waivers of Jurisdictional Immunity" 14 N.Y.U.J. Int'l L. & Pol. 29, 54 (1981). See also the decision in Bradford Woolen Corp. v. Freedman 71 N.Y.S. 2d 257 (1947).

[20] An example will be under the Convention on the Recognition and Enforcement of Foreign Arbitral Award 21 U.S.T. S.2517; 330 U.N.T.S. S.3 signed at New York on June 10, 1958. (Hereinafter called the New York Convention)

[21] S. 1071, 99th Cong., 1st Sess., 131 Cong. Rec. S. 5370. See Feldman, "Waiver of Foreign Sovereign Immunity by Agreement to Arbitrate: Legislation Proposed by the American Bar Association" 40 Arb. J. 24; Rothstein, "Recognition and Enforcing Arbitral Agreements and Awards against Foreign States: The Mathias Amendments to the Foreign Sovereign Immunities Act and Title 9" 1 Emory J. Int'l Dispute Reso. 101 (1986).

[22] See 102 Stat. 3969.

[23] 17 U.S.T. S.1270; 575 U.N.T.S. S.159 signed at Washington, D.C., March 18, 1965.

[24] Kahale, "New Legislation in the United States Facilitates Enforcement of Arbitral Agreements and Awards Against Foreign States" 6 J. Int'l Arb. Vol. 2, 57, 62 (1989).

[25] 1978, Ch. 33.

[26] For similar provisions in national laws, see S. 10 Pakistan State Immunity Ordinance, 1981; S. 10 South African Foreign States Immunities Act, 1981; S. 11 Singapore Sovereign Immunity Act, 1979.

[27] Mann, "The State Immunity Act 1976" 50 Brit. Y. Int'l. L. 43 (1979).

[28] Fox, "States and Undertaking to Arbitrate" 37 I.C.L.Q. 1 (1988); Triggs, "An International Convention on Sovereign Immunity: Some problems in Application of the Restrictive Rule" 9 Monash U.L.R. 75 (1982). For a different view, see Delaume, "The State Immunity Act of the U.K." 73 Am. J. Int'l. L. 185.

[29] 949 Parl. Deb. 409.

[30] See the discussion above with regard to the amended U.S. FSIA.

[31] For a discussion of the statute, see Molot and Jewett, "The State Immunity Act of Canada" 20 Canadian Y. Int'l L. 79 (1982).

[32] S. 2 of the Canadian State Immunity Act defines commercial activity as any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.

[33] 26 I.L.M. 625 (1987).

[34] See Article 26 of the convention. The article is discussed in greater detail in Section Two, Chapter three.

SECTION TWO

CHAPTER ONE

STATE IMMUNITY FROM EXECUTION

The term jurisdiction as it concerns states can be used in two ways. First, it refers to the competence of a court to determine a suit in a proceedings where a state is sued eo nomine. Again, it contemplates situations where measures are taken or proceedings instituted in respect of state property. Legal proceedings may, therefore, be directed either at the state itself or it may entail measures of arrest, attachment or execution against its property.

The conventional doctrine of sovereign immunity, as we have seen, grants absolute immunity from suits to states. Under this doctrine, a state could not be sued except with its consent. As a concomitant of this rule, the courts accorded absolute immunity from execution to states. It was considered inconsistent with the comity of nations and the smooth conduct of governmental affairs to issue execution on the property of a state. In Porto Alexander[1] the court restated the law:

> "A sovereign state cannot be impleaded directly or by being served in person, or indirectly by proceeding against its property, and that in

> applying that principle it matters not how the property was being employed."[2]

The issue in The Parlement Belge[3] was whether a vessel belonging to Belgium and used by that government in carrying mail and in transporting passengers and freight for hire could be the subject of litigation in the Admiralty Court in Great Britain. After reviewing many cases bearing on the question, the court said:

> "The principle to be deduced from these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every other state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the property of any ambassador, though such sovereign, ambassador, or property be within its jurisdiction, and therefore, but for the common agreement, subject to its jurisdiction."[4] (emphasis supplied)

The twin aspects of state immunity was well illustrated by Lord Atkin in Compania Naviera Vascongado v. S.S. Cristina[5] In an often cited dictum, he referred to:

> "...two propositions of international law engrafted into our domestic law which seems to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is , they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitation of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both."[6]

Contemporary international law theory repudiates the doctrine of absolute immunity of states from suit. With the entrance of states into trading and other commercial activities, it was thought unreasonable to grant them immunity from the everyday consequences of commercial transactions. There is now a general acceptance that the doctrine of sovereign immunity from suit does not extend to the trading activities of sovereign states.[7] This principle is accepted in many countries.[8] As we have seen[9], under the restrictive theory of immunity, the immunity of foreign states from suit is restricted to suits involving their public acts (jure Imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).

As we shall see, this restriction on state immunity from suit to only the public acts of states does not entirely translate into a removal of immunity from execution in all cases where states engage in commercial activities. This is due to the distinction drawn between immunity from suit and immunity from execution.

DISTINCTION BETWEEN IMMUNITY FROM SUIT AND IMMUNITY FROM EXECUTION

Immunity from suit refers to exemption from the judicial competence of the court having power to adjudicate or settle disputes by adjudication. In this sense a state is immune from court proceedings resulting in judgment. On the other hand, immunity from execution is connotative of the immunity of state property from pre-judgment attachment and arrest, and

also from execution of the attendant judgment. This distinction was acknowledged even in countries such as Italy and Belgium where the restrictive doctrine of immunity had its ancient roots.[10]

The distinction has its rationale in the fact that while proceedings against a foreign state leading to judgment is not a clog on the continued operation of the state, execution on state property may impair the conduct of governmental activities. Execution of judgment may also involve the use of force against a state by seizure of its assets. Such action, it is believed, would engender political differences between governments. Also, from an economic point of view, such execution may result in foreign states refraining from investment in countries where their property is susceptible to execution. Execution is then seen as a "more intensive interference with the rights of a state".[11]

In Duff Development v. Kelantan[12], the House of Lords held that execution could not be taken out on an arbitrator's award although by statute that award had the effect of a judgment. This was in spite of the fact that the Government of Kelantan had in a previous proceeding submitted to the jurisdiction of the English courts on the merits.

In the U.S. case of Dexter & Capenter v. Kunglig[13], the Circuit Court of Appeals refused attachment of the property of the Swedish State Railways, regardless of the fact that Sweden had previously submitted to jurisdiction:

> "But consenting to be sued does not give consent to seizure or attachment of the property of a sovereign government"[14]

This position was recognized by the French court in Yugoslavia v. SEE[15]. SEE secured an award against Yugoslavia, obtained an ordonnance d'exequatur and seized Yugoslavian assets in the hands of the world bank in Paris. Yugoslavia argued that the ordonnance d'exequatur violated French public policy by ignoring the former's immunity from execution. The court said:

> "... in accepting an arbitration clause, the Yugoslavian state accepted to waive its immunity with respect to the arbitrators and their award up to and including the procedure of exequatur necessary to give the award full force ... waiver of jurisdictional immunity in no way results in waiver of immunity from execution...the ordonnance d'exequatur...is not an action of execution..."[16]

This principle was accepted by the Special Rapporteur to the International Law Commission's committee on the Jurisdictional Immunities of States and their Property.[17] It was also recognized by the French Court of Cassation in Islamic Republic of Iran v. Societe Eurodif[18]:

> "On this point both legal literature and jurisprudence ... combine in taking the view that waiver of immunity from jurisdiction does not in any way imply the waiver of immunity from execution and that the object of an arbitration clause is limited to entrusting the settlement of the disputes to the arbitral tribunal and submitting the parties to its jurisdiction."[19]

The State Immunity Act of Great Britain also adopted the distinction.[20] The Act draws a distinction between the adjudicative jurisdiction and the enforcement jurisdiction of courts of law in the United Kingdom. The adjudicative jurisdiction of court is dealt with in Sections 2 to 11, while Sections 13(2) to (6) and 14(3) and (4) deal in particular with enforcement jurisdiction. Under the U.S. foreign

Sovereign Immunities Act of 1976[21], waiver of immunity from jurisdiction is not conterminous with waiver of immunity from execution. Sections 1330 and 1604-1607 deal with immunity from jurisdiction, while immunity from attachment and execution of property of a foreign state is dealt with in Sections 1607-1611.

The Canadian State Immunity Act is modeled on that of the U.K. Like the latter, the former recognizes the distinction between immunity from suit and immunity from execution. Sections 3-8 deal with immunity from jurisdiction while Sections 10-12 deal with immunity from execution.

Conventions such as the European Convention on State Immunity and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention) acknowledge the fact that waiver of immunity from jurisdiction does not eo ipso amount to waiver of immunity execution. While Articles 1-14 of the European Convention provide exceptions to the immunity of states from suit, Article 23 makes it clear that:

> "No measures of execution against the property of a contracting state may be taken in the territory of another contracting state except where and to the extent that the state has expressly consented thereto in writing in any particular case."[22]

Article 54 of the Washington Convention prevents a contracting state party to a dispute from raising the defense of immunity from jurisdiction at the time of recognition and enforcement of an ICSID award. The article obliges contracting states to recognize an award rendered pursuant to the Convention as binding and to enforce the pecuniary obligations

imposed by that award as if it were a final judgment of a court in that state. Article 55, however, stresses that the preclusion of considerations of sovereign immunity at the recognition stage does not extend to immunity from execution. The Convention surrenders measures of execution to domestic rules of immunity obtaining in contracting states. Within the framework of the Convention, the recognition stage is considered the ultimate stage of the arbitration process and a contracting state party is deemed to waive its immunity up to that phase. Because the execution stage is posterior to the recognition stage, the immunity principles applicable in various contracting states may be relied on at that stage. In sum, depending on the state concerned, consent to ICSID arbitration while constituting waiver of immunity from jurisdiction may not amount to waiver of immunity from execution. This principle is illustrated by LETCO v. Government of Liberia[23], where although Liberia was held to have waived its immunity from suit by consenting to ICSID arbitration, the court stated that its bank accounts were immune from attachment under the F.S.I.A.

A different view has been advocated by the jurisprudence of some civil law jurisdictions. Swiss law refuses to recognize a dichotomy between immunity from suit and immunity from execution. It maintains that the one follows inexorably from the other.[24] In Kingdom of Greece v. Julius Bar[25], the Swiss Federal Tribunal said:

> "As soon as one admits that in certain cases a foreign state may be a party before Swiss courts to an action designed to determine its rights and

> obligations under a legal relationship in which it had become concerned, one must admit also that that foreign state may in Switzerland be subjected to measures intended to ensure the forced execution of a judgment against it. If that were not so, the judgment would lack its most essential attribute, namely that it will be executed even against the will of the party against which it is rendered ... There is thus no reason to modify the case law of the Federal Tribunal in so far as it treats immunity from jurisdiction and immunity from execution on a similar footing."[26]

This view equally finds support in Swedish judicial practice. In LIAMCO v. Libya[27], the Swedish Court of Appeal held that Libya waived its right to invoke immunity from suit by accepting an arbitration clause. In the view of the court, a waiver of immunity from execution is implicit in a waiver of immunity from jurisdiction.

Some legal writers share the view that the distinction between immunity from jurisdiction and immunity from execution is impractical.[28] They believe that if a state consents to arbitration it must be deemed to have accepted all its consequences, including compliance with an unfavorable award. In such circumstances, if a state does not comply with an award, its assets should be as susceptible to execution as that of a private person. This rule is said to be an application of the principle of pacta sunt servanda.

It should be pointed out that this latter view, by attempting to equate the legal consequences of the actions of a state with that of private persons, ignores the peculiar nature of state activity. Implicit in that view is the assumption that the political and social consequences of enforcement of awards are the same in both cases. It is an analytical error to gloss over the fact that unrestricted

execution on state property may ultimately grind the machinery of government to a halt. This may result in states refraining from investing in those countries where its assets are easily subject to execution.

More importantly, no state can afford to have a reputation of neglecting to fulfill its international obligations. The political and economic consequences of such an attitude are too great to ignore. Not only will such a state drive away potential investors, it also stands the risk of political isolation. There equally exists diplomatic channels of resolving disputes arising from such financial relations.

While the writer does not suggest that state property should be totally immune from execution, it is submitted that only state property utilized in commercial activities should be open to execution. If a state sets out particular funds for the conduct of commercial activity, there exist no reasons of policy why such a fund cannot be attached to settle obligations arising from the states commercial activities. But to suggest that all state property should be open to execution, as some writers do[29], is to carry beyond acceptable limits the analogy between private parties and states in international commerce. Even in countries such as Sweden and Switzerland where the courts refuse to draw a distinction between immunity from suit and immunity from execution, it is generally accepted that only funds used for commercial activities may be attached.[30] The rationale for this is that to levy execution on state property not used for commercial

activity will constitute an intense interference with the conduct of the public activities of the state in question.

We shall see in the following discussion that there is little practical difference between the state practice in countries where a distinction is made between immunity from jurisdiction and immunity from execution and those that reject such a distinction. In both cases, once a state waives its immunity from suit, its assets used for commercial activity are normally open to execution.

FOOTNOTES

[1] [1920] P. 30.

[2] Id. at 31.

[3] (1880) 5 P.D. 197.

[4] Id. at 214.

[5] [1938] A.C. 485.

[6] Id. at 490.

[7] See Victory Transport Inc. v. Comisaria General de Abasteciementos 25 I.L.R. 110; Alfred Dunhill v. Republic of Cuba 15 I.L.M. 735; Philippine Admiral Case [1976] 2 W.l.R. 214; Trendtex Trading Corp Ltd v. Central Bank of Nigeria [1977] 2 W.L.R. 356.

[8] On Italian law, see Borga v. Russian Trade Delegation 22 I.L.R. 235 (1955); for Egypt, see F.P.R. of Yugoslavia v. Kafr El-Zayat Cotten Ltd 18 I.L.R. 18 (1955); for Netherlands, see Krol v. Bank of Indonesia 26 I.L.R. 180 (1958); for Canada , see Venne v. D.R. of Congo ((1969) 5 D.L.R. (3d) 128.

[9] See Chapter One of Section One.

[10] See Condorelli and Sbolci, "Measures of Execution against the Property of Foreign States: The Law and Practice in Italy" 10 Neth. Y. B. Int'l. L. 197.(1979).

[11] Bockstiegel, Arbitration and State Enterprises 50 (1984).

[12] [1924] A.C. 797.

[13] 43 F. (2d) 705 (1931).

[14] Id. at 708.

[15] (1971) J. Du Dr. Int'l. 131.

[16] Id. at 132-3.

[17] See Crawford, "Execution of Judgment and Foreign Sovereign Immunity" 75 Am. J. Int'l. L. 820 861 (1981).

[18] 77 I.L.R. 513.

[19] Id. at 524.

[20] 1978, Ch. 33.

[21] 28 U,S.C. S.1330; S.1602 et seq.

[22] Note, however, that Article 24 of the Convention allows contracting parties, when signing or ratifying the Convention, to make the reservation that:

> "Its courts shall be entitled to entertain proceedings against another contracting state to the extent that its courts are entitled to entertain proceedings against states not party to the present Convention."

The United Kingdom and Belgium have made this declaration. In those countries, therefore, it is possible to apply their restrictive principles of immunity from execution to contracting parties.

[23] 659 F Supp. 606.

[24] See Lalive, "Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State" 10 Neth. Y. B. Int'l L. 153, 154 (1979).

[25] 23 I.L.R. 195.

[26] Id. at 198-199.

[27] 6 Y. Comm. Arb. 359 (1982).

[28] See Albert van den Berg, "Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions" 2 ICSID Review 439, 449 (1987); Delaume, "Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration" 2 ICSID Review 403 (1987); Bernini and Jan van den Berg, "The Enforcement of Arbitral Awards against a State: The Problem of Immunity From Execution" in Lew, Contemporary problems in International Arbitration 359 (1986); McGovan, "Arbitration Clauses as Waivers of Immunity from Jurisdiction and Execution under the Foreign Sovereign Immunities Act of 1976" 5 N.Y. Sch. J. Int'l. & Comp. L. 409,425 (1984).

[29] For example, Bernini and Jan van den Berg, Id at 366, suggest that apart from state property which enjoy immunity under international treaties, such as the Vienna Convention on Diplomatic and Consular Relations, other state property should be open to execution.

[30] See Lalive, "Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State" supra, note 23.

CHAPTER TWO

INTERIM MEASURES OF PROTECTION

It may be necessary in some situations for parties to an arbitration agreement to require provisional measures to preserve the status quo pending the determination of the dispute. This need may arise where one of the parties seeks to frustrate the enforcement of the award by hiding its assets. He may seek to relocate his funds so as to place it outside the reach of the claimant should there be need for compulsory enforcement. The aim of provisional measures of protection is to avoid a situation where a claimant is denied the fruits of his victory by factors which transpire before the award is rendered.

The need for interim measures of protection may arise before the arbitration is initiated. In such a case municipal courts may be resorted to for the grant of interim measures. Barring the question of immunity, a municipal court in a country which is a signatory to the New York Convention[1] may only assume jurisdiction in such a case if to do do would be consistent with the treaty obligations of its country under the Convention. Particularly germane here is the question whether the New York Convention limits courts' power to order provisional relief.

THE NEW YORK CONVENTION AND INTERIM MEASURES OF PROTECTION

Article 11(3) of the New York Convention has afforded the subject of considerable controversy in the U.S. regarding the ability of courts to grant interim measures of protection in disputes submitted to arbitration. The article provides:

> "The court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The U.S. Court of Appeal, Third Circuit, in McCreary Tire & Rubber Co. v. CEAT[2] held that Article 11(3) completely stripped the courts of the power to order interim measures of protection. The court found that the language of the article precluded the court from ordering any provisional relief:

> "The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate. Thus the contention that arbitration is merely another method of trial, to which state provisional remedies should equally apply, is unavailable."[3]

The court anchored its holding on two grounds. First, the court will be bypassing the parties' agreed method of settling their disputes if it awarded the relief. Second, since provisional relief vary from state to state, court interference will frustrate the uniformity of laws that the Convention was designed to achieve. This view was endorsed by the Fourth Circuit in I.T.A.D. v. Podar Bros[4]. The court discharged a pre-award attachment on the ground that the attachment was "contrary to the parties' agreement to

arbitrate and the Convention".[5]

In Cooper v. Ateliers de la Motobecane S.A.[6], the court affirmed the principle in McCreary and its progeny. The court summarized the rationale of the principle:

> "The essence of arbitration is resolving disputes without the interference of the judicial process and its strictures. When international trade is involved, this essence is enhanced by the desire to avoid unfamiliar foreign law. The UN Convention has considered the problems and created a solution, one that does not contemplate significant judicial intervention until after an arbitral award is made. The purpose and policy of the UN Convention will be best carried out by restricting prearbitration judicial action to determining whether arbitration should be compelled."[7]

Some courts in the U.S. have refused to follow the reasoning in McCreary and have contended that the New York Convention does not limit the powers of the court to grant provisional relief. The District Court for the Northern District of California in Carolin Power & Light Company v. Uranex[8] was of the view that the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate. It further stated that there was no indication in either the text or the apparent policies of the Convention that resort to pre-award attachment was to be precluded.

This latter view has been approved in a couple of other cases.[9] These decisions reject the contention that availability of provisional remedies would disserve the Convention's purposes by obstructing the course of arbitration proceedings. Rather they view court awarded provisional measures as a necessary support mechanism for the arbitration process.

There is nothing in Article 11(3) of the Convention that makes court awarded provisional measures incompatible with the framework of arbitration. The purport of Article 11(3) is to preclude courts from determining the merits of dispute which is the subject of an arbitration agreement.[10] It is compatible with the spirit of the Convention for courts to assist the process of arbitration provided such assistance does not interfere with the competence of the arbitrators to determine the merits of the dispute. Article 6 of the UNCITRAL Model Law on International Commercial Arbitration[11] calls upon each state adopting the Model Law to entrust a particular 'court' with the performance of certain functions of arbitration assistance and supervision, relating to appointment of arbitrators (article 11), decisions in termination of arbitrator's mandate (articles 13, 14), control of arbitral tribunal's jurisdiction (article 16), and setting aside of award (article 34). These provisions illustrate the fact that court assistance is indispensable to the efficient conduct of the arbitral process. Far from interfering with the jurisdiction of arbitrators, court ordered provisional measures may in appropriate cases help in fulfilling the objectives of arbitration in cases where time is of the essence of the safeguard measure.

The controversy regarding the interpretation of Article 11(3) is absent in jurisdictions outside the United States. Judicial authorities in other countries support the view that court awarded provisional relief is not incompatible with the New York Convention. In The Rena K[12] the English Queen's Bench

Division held that the court was competent to maintain an attachment pending arbitration where necessary to secure satisfaction of an award. The Italian Corte di Cassazione in Sherk Enterprises A. G. v. Societe des Grandes Maeques[13] ruled that the court had power to order pre-award attachment. In Eurodif v. Iran[14] the French Court of Cassation recognized the possibility of pre-award attachment of commercial assets of a state party.

It may therefore be concluded that court awarded provisional relief is consistent with the spirit of the New York Convention. The contrary view expressed in some U.S. decisions is an unjustifiable extension of the pre-arbitration bias of U.S. courts. It is appropriate to enter the caveat that recourse to courts for provisional relief should be restricted to cases where it is inconvenient or impossible to obtain the relief from arbitrators either because the arbitral tribunal has not been constituted or that irreparable injury will be occasioned by the delay associated with convening a meeting of arbitrators. This is the approach adopted by the Rules for the ICC Court of Arbitration. Article 8(5) provides in part:

> "Before the file is transmitted to the arbitrators, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures,and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator."

The provision recognizes the fact that recourse to national courts may be the only means of obtaining provisional relief in an emergency situation. Before the constitution of

the arbitral tribunal a party seeking provisional relief has no option than recourse to courts. But when the tribunal is constituted it is only in "exceptional circumstances" that a party may have recourse to courts for provisional relief. It envisages situations where it will be difficult to convene the tribunal where the remedy is sought urgently.

STATE PRACTICE IN RELATION TO PROVISIONAL MEASURES

1. UNITED STATES

Section 1610(d) of the U.S. Foreign Sovereign Immunities Act prohibits the attachment of the property of a foreign state before judgment unless that state has expressly waived its immunity from attachment prior to the judgment and the purpose of the attachment is to secure satisfaction of a judgment that has been or may be entered against the foreign state. Where a state waives its immunity from pre-judgment attachment, only its property used for a commercial activities in the U.S. may be attached:

S. 1609 provides for state immunity from attachment:

> "Subject to existing international agreements to which the United States is a party at the time of Enactment of this Act, the property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter."

The exceptions to this general rule of immunity from attachment is provided in S. 1610(d):

> "(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activities in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a state ... if -
>
> (1) the foreign state has expressly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and
>
> (2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to obtain jurisdiction."

A variety of cases have arisen in the U.S. over the meaning of "explicit waiver" in S. 1610(d)(1). The courts have come to require clear evidence of the intention to waive the immunity from pre-judgment attachment, although that actual phrase need not be used. In Libre Bank Ltd. v. Banco Nacional de Costa Rica[15], the court considered the following waiver contained in some promissory notes:

> "The Borrower hereby irrevocably and unconditionally waives any right or immunity from legal proceedings including suit judgment and execution on grounds of sovereignty which it or its property now or thereafter enjoys"

The issue was whether the provision was an "explicit" waiver within the meaning of S. 1610(d)(1). The court stated that the section does not require recitation of the words "pre-judgment attachment" as an operative formula. It found that the instant provision constituted "explicit" waiver of immunity:

> "The provision in the promissory notes quoted above evinces a clear and unambiguous intent to waive all claims of immunity in all legal proceedings. "Suit judgment" and "execution" are referred to only by way of examples of legal proceedings. This

> enumeration clearly is not intended to be exhaustive. If anything, it suggests that pre-judgment attachment is a form of "legal proceedings". The waiver is "explicit" in the sense that it is clear and unambiguous. Banco National intended to reserve no rights of immunity in any legal proceedings."[16]

In S & S Machinery Co. v. Masinexportimport[17] the plaintiff claimed that an explicit waiver of immunity could be found in the following clause:

> "Nationals, firms, companies and economic organizations of either party shall be afforded access to al courts, and, when applicable, to administrative bodies as plaintiffs and defendants, or otherwise, in accordance with the laws in force in the territory of such other Party. They shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial or financial transactions except as may be provided in other bilateral agreements."

The court indicated that waivers of immunity from suit or from execution of judgment have no bearing upon the question of immunity from pre-judgment attachment. It was of the view that the only language in the above provision that might be construed as a waiver of immunity from pre-judgment was the waiver of immunity from "other liability in the territory of the other party". It held that the waiver of immunity from "other liability" does not explicitly waive immunity from pre-judgment attachment because that phrase was ill-suited to encompass pre-judgment attachments. The court reiterated the fact that an asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from pre-judgment attachment in the U.S., and it distinguished the instant provision from that in the Libra Bank case on the ground that in the latter case the language of the agreement

was virtually all-inclusive by waiving "any right or immunity from legal proceedings".

The issue of pre-judgment attachment also arose in Security Pacific National Bank v. Government of Iran[18]. The issue for determination was whether a provision of the Treaty of Amity between the U.S. and Iran constituted explicit waiver of immunity. The Treaty provided in part:

> "No enterprise of either [the U.S. or Iran]...shall, if it engages in commercial...activities within the territory of the other [country], claim or enjoy , either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein."

Judge Kelleher noted that the FSIA creates a strong presumption against pre-judgment attachments. His Honor then held that the above-quoted provision of the Treaty of Amity explicitly waived Iran's immunity from execution of judgment, but not its immunity from pre-judgment attachments.

The preceding survey of American decisions suggests that a distinction exists in U.S. jurisprudence between immunity from execution of judgment and immunity from pre-judgment attachment. A waiver of the one does not imply a waiver of the other. To constitute a waiver of immunity from pre-judgment attachment in the U.S., the words must be unambiguously consistent with the fact of waiver although the particular words need not be used, and a waiver of immunity from execution will not suffice in this respect.

The approach adopted by U.S. statute and case law may impede the realization of an award obtained against a state party. There is no compelling reason why immunity from pre-

judgment attachment should be granted to state property used for commercial purposes. Instead of requiring a waiver of pre-judgment immunity, U.S. law should have demanded from a claimant cogent and compelling evidence that a state seeks to shuffle its commercial assets in a manner that will make it difficult for him to realize any ensuing award. Such a burden of proof will ensure that state property is not unnecessarily interfered with during the pendency of an arbitration. This appears to be the same objective which U.S. law seeks to uphold by granting pre-judgment immunity to state property.

2. UNITED KINGDOM

Under the U.K. State Immunity Act, pre-judgment attachment is only permissible with the consent of the state involved. S. 13(2) provides in part:

> "(2) Subject to subsections (3) and (4) below-
>
> (a) relief shall not be given against a state by way of injunction or order for specific performance or for the recovery of land or other property..."

Subsection (3) provides that a state may consent to the giving of such provisional relief. The exception to immunity from execution in section 13(4) which deals with property used for commercial transactions does not apply to section 13(2)(a). It is therefore not possible in the U.K. to obtain a mareva injunction[19] ordering that assets of a state remain within the jurisdiction pending the outcome of an arbitration proceeding, unless the state party consented to such a measure.[20]

Like the U.S. FSIA, submission to the jurisdiction of the court is not regarded as consent to provisional relief. It would also seem that consent to execution does not necessarily imply consent to provisional relief, because section 13 treats them as two distinct stages.

3. CANADA

The State Immunity Act of Canada, 1982, contains similar provisions to its British counterpart as regards pre-judgment attachment. S.10 provides that no relief by way of an injunction, specific performance or the recovery of land or other property may be granted against a foreign state unless the state consents in writing to such relief. It further provides that where a state so consents, the relief granted shall not be greater than that consented to by the state.

S. 10(2) makes it clear that submission by a foreign state to the jurisdiction of court does not amount to consent for the purposes of the section. For consent to be valid as a waiver under S. 10(1), such consent must relate directly to provisional relief.

The provisions of S. 11 entitled 'execution' relate only to post-judgment measures. Reference to the term attachment in that section, it is submitted, relates exclusively to post-judgment attachment measures. This is because the section contemplates measures posterior to an award or a judgment. Pre-judgment attachment is not of the same nature with post-judgment execution. It is submitted that the exception in S.11

making state property used for commercial activity susceptible to attachment relates only to post-award or post-judgment attachment. A different interpretation will render nugatory the provisions of S. 10.

4.FRANCE

In France there is judicial authority for the proposition that states are not immune from pre-award attachment. Only commercial assets are attachable and such assets must have a link with the transaction out of which the claim arises.

Islamic Republic of Iran v. Societe Eurodif[21] affords support for this proposition. Eurodif was established by entities of four European states to facilitate the construction and exploitation of an uranium plant in Iran. Iran entered into Co-operation agreement with the french government for the construction of an atomic plant. Under the agreement the Iranian government agreed to make loans to Eurodif. the Iranian government defaulted on various payments under the agreement. Eurodif submitted its claim to ICC arbitration and garnished funds due to Iran. On appeal to the Court of Appeal, the attachment was set aside on the ground that there was no evidence that the funds attached were in use for commercial purposes. On further appeal to the Court of Cassation, the court rejected Iran's argument that the attachment infringed its immunity from execution. The court held that immunity could be set aside where the assets attached had been allocated for a commercial activity of a

private nature upon which the claim is based.

The effect of this judgment is that pre-award attachment of commercial assets of a state is possible in France, provided the assets are allocated to the commercial activity upon which the claim is based.

CONCLUSION

The above survey reveals that there are basically two approaches to the issue of provisional measures: some countries require a waiver of immunity from pre-judgment attachment before such a measure could be granted, whereas the rest grant such measures in respect of property used for commercial purposes. It is apparent that indiscriminate use of such measures against state property may lead to abuse with the attendant adverse consequences on the operation of the government concerned.

What is not so clear is whether the only method of protecting state property from such abuse is by granting them immunity from pre-award attachment. Situations may arise where a state seeks to relocate its assets in such a manner that the claimant would not be able to get to them should he obtain a favorable award. To require a waiver of immunity from pre-judgment award in such a situation is to inflict an unnecessary burden on the claimant. It is consistent with the ends of equity that a state should be prevented from acting in such a manner that would negate the essence of the arbitral process. No harm would be done to the interests of the state

by requiring it to guarantee that it would not frustrate the arbitral process.

Such provisional measures should only be granted in situations where the claimant clearly establishes that irreparable injury will be done to his claim if the injunction is not granted. The court should require unambiguous evidence that the state involved seeks to frustrate the objectives of the arbitration by placing its assets beyond the reach of the claimant should his claim be successful. Even then, such attachment should only be ordered in respect of commercial assets of the state party.

In summary, the availability of provisional measures against a state party to arbitration is an area where state practice differs. The view that provisional measures is an indispensable adjunct of the arbitral process appears to be the better view. To require a waiver of immunity in such cases will enable states to shuffle their assets so as to place them beyond the reach of successful claimants. There is no reason why the restrictive theory of immunity should not be extended to pre-judgment measures of attachment.

Some level of caution is advocated. The private party must establish an attempt by the state party to frustrate the realization of the impending award by an action contemplated or taken during the pendency of the arbitral proceedings. Unrestricted award of such relief may tie down funds needed for urgent government affairs.

FOOTNOTES

[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 U.N.T.S. 38.

[2] 501 F. 2d 1032 (1974).

[3] Id. at 1038.

[4] 636 F. 2d 75 (1981).

[5] Id. at 77.

[6] 456 N.Y.S. 2d 728.

[7] Id.

[8] 451 F. Supp. 1044 (1977).

[9] Andros Compania Maritima v. Andre & Cie. 430 F. Supp. 88 (1977); Compania de Navigacion y Financiera Bosnia v. National Unity Marine Salvage Corp. 457 F. Supp. 1013 (1978).

[10] See Jan van den Berg, "Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions" 2 ICSID Review 439, 452 (1987).

[11] Adopted by the United Nations Commission on International Trade Law on June 21, 1985.

[12] [1978] 3 W.L.R. 431.

[13] 4 Y. B. Comm. Arb. 286 (1979).

[14] 23 I.L.M. 1062.

[15] 676 F. 2d 47 (1982).

[16] Id. at 49.

[17] 706 F. 2d 411 (1983).

[18] 513 F. Supp. 864 (1981).

[19] The injunction is named after the case of Mareva Compania Naviera v. International Bulkcarriers [1975] 2 LL.R. 509. The injunction restrains defendants from selling, disposing, or otherwise removing assets from the jurisdiction.

[20] See Crawford, "Execution of Judgment and Foreign Sovereign Immunity" 75 Am. J. Int'l L. 820, 869 (1981).

[21] 77 I.L.R. 513 (1988). In Guinea v. Atlantic Triton Company 26 I.L.M. 373 (1987),the French Court of Cassation confirmed pre-award attachment on the property of Guinea. The court was of the opinion that the ICSID Convention does not exclude the power of a state court to order conservatory measures in connection with ICSID arbitrations, unless the parties expressly exclude such interference.

CHAPTER THREE

MEASURES OF EXECUTION

1. DIFFERENCE BETWEEN RECOGNITION AND EXECUTION

Execution of an award can only ensue after recognition of the award by the courts of the country concerned. Recognition may take the form of confirmation, an exequatur or similar proceedings. Recognition accords the award a seal of approval and assimilates it to the status of a municipal court judgment in the country concerned.

The execution stage, on the other hand, involves the enforcement by execution of the award against the property of a state. It is this latter act that necessitates the use of coercive powers of one state against the property of another.

Recognition of an award is considered the ultimate phase of the arbitration process in those countries where a distinction is made between immunity from jurisdiction and immunity from execution. In such legal systems the waiver of immunity constituted in an arbitration clause extends to the recognition of the award, but not to its execution. This distinction is recognized by the ICSID Convention. Under Article 54 of the Convention, a state cannot raise the defense of sovereign immunity at the time of recognition of an ICSID

award. Article 55, however, leaves the issue of execution to the immunity rule obtainable in particular contracting states.

Judicial authorities in France and the U.S. recognize this distinction. In Benvuti & Bonfant v. Congo[1], Benvuti was successful in an ICSID arbitration against Congo. It sought to enforce the award in France. The President of the Court of First Instance of Paris, granted recognition of the award. He, however, added a caveat that "no measure of execution, or even a conservatory measure, can be taken pursuant to the said award on any assets located in France without our prior authorization". On appeal to the Court of Appeal of Paris, Benvuti contended that the caveat impeded any possible execution and that the lower court confused two stages: that of the exequatur, and that of the execution proper. The court held that an order to enforce an arbitral award does not constitute an act of execution. It further ruled that the caveat must be deleted because the lower court exceeded its jurisdiction by interfering with the execution stage which is subsequent to the exequatur proceedings.

Liberia Eastern Timber Corp. v. Liberia[2] concerned proceedings by LETCO to enforce an ICSID award against Liberia in th U.S. Liberia prayed the court to vacate the judgment entered by the District Court on the award or to vacate the execution of the judgment on Liberian registration fees and other taxes due by shippowners and levied by agents appointed by Liberia in New York. The court refused to vacate the judgment based on the award because as a signatory to the ICSID Convention, Liberia waived its sovereign immunity in the

U.S. with respect to enforcement of arbitration awards under the Convention. This is because Liberia must have contemplated the involvement of the courts of the U.S. [as a contracting state] in enforcing the pecuniary obligations of the ICSID award. The court, however, granted the prayer to vacate the execution order on the registration fees and other taxes due to Liberia, as they were not commercial property and thus were immune from execution under the FSIA.

Although the court recognized the award, it refused to grant the execution on non-commercial assets of Liberia. Liberia's waiver of immunity at the recognition stage did not extend to its immunity from execution. It is clear from the above decision that the recognition and execution stages are different. While the waiver of immunity by consent to arbitration extends to the former, the latter remains intact except where it is distinctly waived.

2. PROPERTY SUBJECT TO EXECUTION

State practice in relation to execution of awards on state property reflects the need to balance two conflicting interests: to afford a remedy to the private party and also to prevent political embarrassment of the state party. It seems likely that a state may be embarrassed by enforcement of an arbitral award which directly interferes with the exercise of its sovereign rights. If no restriction is placed on the nature of state property susceptible to execution, the state judgment debtor may have execution levied on its funds that

are allocated for sovereign and diplomatic activities. On the other hand, it will be unconscionable to leave the private party without an effective remedy in law. He should be able to have a reasonable expectation that the state party will fulfill its legal obligations. The immunity rules applicable in various states attempt to reconcile this conflict.

It is generally recognized that foreign state property indispensable in the exercise of sovereign acts by the foreign states is exempt from enforcement measures in the forum where execution is sought. In issue here is the criteria to be used in delimiting state property immune from execution.

The first one is based on the nature of the activity which has given rise to the proceedings. This criterion leads to immunity from execution being set aside in circumstances which are comparable to those in which immunity from jurisdiction is excluded, where private activities are involved.

Another criterion is based on the nature of the funds or assets against which the measure of execution is directed. Here a distinction is made between public funds, against which no measure of execution may be levied, and other funds of a private nature, which may be subject to attachment and are not protected by immunity from execution.

Most legal systems adopt the second test. It takes account of the increasing intervention of the state and its agencies in the economic sphere. One of the problems with the test, however, lies in determining the person on whom the burden lies to prove the commercial nature of the funds in

question. This problem is compounded by the need for the protection of state secrets and the difficulty attendant in requiring a private party to prove the commercial nature of state funds. As we shall see, legal systems give varying solutions to this problem.

A. UNITED STATES

Prior to the FSIA, foreign states were generally immune from execution.[3] The FSIA modified the rule so as to make immunity from execution conform closely with the provisions on jurisdictional immunity.

S. 1609 provides that the property of foreign states are immune from attachment, arrest and execution except as provided in the FSIA and international agreements to which the U.S. is a party at the time the FSIA came into effect. The reference to international agreements alludes to bi-national and multi-lateral treaties which provide for waivers of immunity from execution by the contracting parties.

Exceptions to the immunity from execution is contained in S.1610. It provides that the property of a foreign state used for a commercial activity in the U.S. are not immune from execution where, inter alia, the foreign state waives its immunity from execution either explicitly or by implication, or the property is or was used for the commercial activity upon which the claim is based. S. 1610(a)(6) makes it clear that the commercial assets of a state shall not be immune from attachment in aid of execution or from execution upon a

judgment entered by a U.S. court if the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution would not be inconsistent with any provision in the arbitral agreement. Therefore once an award is recognised by U.S. courts, it may be enforced agaisnt commercial assets of any state involved. In this sense, consent to arbitration by a state party precludes it from claiming immunity from execution.

In Birch Shipping Corp. v. Embassy of Tanzania[4], the parties submission agreement contained the following provision:

> "We further agree that we will faithfully observe this agreement and the Rules and that we will abide by and perform any Award rendered pursuant to this agreement and that judgment of the court having jurisdiction may be entered upon the Award."

The court held that the provision was an implicit waiver of immunity by Tanzania. The court further stated that while an agreement to entry of judgment reinforces any waiver, an agreement to arbitrate, standing alone, is sufficient to implicitly waive immunity.[5]

It should be remembered that the statute adopts a two-step analysis. First, the foreign state must have waived its immunity and, second, the property must be used for a commercial purpose. It follows that even when a state is held to waive its immunity by consenting to arbitration, only its commercial assets can be levied for execution.

It was held in Liberia Eastern Timber Corp. v. Liberia[6] that execution could not be levied on agents of Liberia to

collect tonnage fees, registration fees and other taxes due Liberia government from shippowners, because those fees were tax revenues, the execution upon which was prohibited by the FSIA. The court stated that LETCO could issue execution with respect to any properties which are used for commercial activities and fall within one of the exceptions to section 1610.

The FSIA does not state on whom the burden lies to prove the commercial nature of the funds in question. This issue has not been addressed in any U.S. decision within the knowledge of the writer. Given that the general rule under S.1610 is that of immunity from execution, it would seem that the burden is on the claimant to fit his case within one of the exceptions in S.1610. He should be able to establish the commercial use of the funds. Due to the difficulty of discharging such a burden, the standard of proof required should be considerably low. It should be the case that where the private party gives probable evidence of the commercial use of the fund's, the burden reverts to the state party to disprove such suggestion. Even then, proper regard should be given to the need to protect state secrets.

Another problem that has arisen out of the FSIA is that of mixed funds. It is sometimes the case that state funds are used for both commercial and non-commercial purposes. A state may use its foreign bank account to service the needs of its embassy and other consequential commercial activities. Can such funds be attached under the commercial activity exception?

Birch Shipping Corp. v. Embassy of Tanzania[7] was the first case to address the issue. The plaintiff got an arbitral award against Tanzania. The District Court of the Southern District of New York confirmed and registered the award. The plaintiff then obtained a writ of garnishment and served it upon American Security Bank where the defendant maintained a checking account. The defendant moved to quash the writ on the ground that the funds were immune from attachment under the FSIA. It submitted an affidavit that the funds were solely for the purpose of the maintenance and support of the embassy and its personnel. The affidavit further stated that the funds were used to "pay the salaries of the embassy officials, pay for incidental purchases and services necessary and incidental to the operation of the Embassy..."

The issue that fell for determination was whether it was proper to attach an account not used solely for commercial activities. The court held that mixed accounts were not immune from execution because the FSIA did not exempt such funds from execution. To hold otherwise, the court stated, would operate to defeat the express intention of Congress to provide parties a remedy in suits against foreign states.

This decision implies that commercial debts of states can be enforced out of their funds (other than monies in its Central Bank: S.1611) located for whatever purposes within the jurisdiction. If embassy funds utilized for commercial purposes consequential to the operation of the embassy is regarded as giving the funds a commercial taint, then virtually all state funds will be attachable. There will be no

need for a general rule of immunity because even state funds used for predominantly sovereign acts are also utilized for commercial activities incidental to the execution of such sovereign acts. Such measures of execution will no doubt lead to considerable political misunderstandings between states and states may remove their assets from jurisdictions that deny immunity to their funds.[8]

The District Court of the District of Columbia in Liberia Eastern Timber Corp. v. Liberia[9] refused to follow Birch. Pursuant to an ICSID award in favor of LETCO, writs were issued attaching Liberia's bank account at Riggs National Bank and at First American Bank. These accounts were used for the functioning of the Liberian Embassy and for its Central Bank. It was held that the account enjoyed diplomatic immunity under the Vienna Convention on Diplomatic Relations of 1961[10] and also because no exception in the FSIA applied to deprive the funds of immunity under the FSIA. The court rejected the view that once any portion of a bank account is used for a commercial activity, the entire account loses its immunity. It stated that commercial activities which are 'incidental' or 'auxiliary', not denoting the essential character of the use of the funds in question, would not cause the entire bank account to loose its immunity.[11] It further stated that the concept of commercial activity should be defined narrowly because sovereign immunity remains the rule rather than the exception, and for the further reason that courts should be cautious when addressing areas that affect the affairs of foreign governments.

This is the better approach to the problem of mixed funds. Where the commercial activity is merely incidental to the sovereign activity, the funds should be immune. If the sovereign activity is used for the singular purpose of masking the commercial use of the funds, it would seem consistent with the notions of fairplay and equity to deny immunity to such funds. The test should be whether the commercial use of the funds is essential to the conduct of governmental activity and the effect the attachment of the funds will have on the conduct of the sovereign activities of the state in question.

B. UNITED KINGDOM

S. 13(2)(b) of the U.K. State Immunity Act provides for the immunity of state property from measures of execution. It states, inter alia, that the property of a state shall not be subject to any process for the enforcement of a judgment or arbitration award.

A state may under S. 13(3) waive its immunity by consenting to measures of execution. Such consent, which may be contained in a prior agreement, may be expressed to apply to a limited extent or generally. The subsection clearly distinguishes between waiver of immunity from suit and waiver of immunity from execution. It states that submission to the jurisdiction of the courts does not constitute waiver of immunity from execution. The consent envisaged by the section is one that unambiguously contemplates waiver of immunity from execution. It would seem that an arbitration clause standing

alone does not constitute a waiver under the subsection.

State property which is in use or intended for use for commercial purposes is not immune from execution under S.13(4). This provision is akin to the commercial activity exception under S. 1610 of the FSIA

The problem of mixed funds is not addressed in the statute. The issue confronted the House of Lords in Alcom v. Republic of Colombia[12]. The plaintiff sought to enforce a court judgment against Colombia by garnishing its bank accounts held to the credit of its London embassy. It succeeded in obtaining a garnishee order nisi against the accounts. Colombia moved the court to discharge the orders, claiming immunity from execution under the State Immunity Act. The Colombian Ambassador certified that the funds in the accounts were not used or intended for use for commercial purposes but to meet the expenditure necessarily incurred in the day-to-day running of the diplomatic mission.

The court of first instance set aside the garnishee order on the ground that the primary purpose of the funds were for a non-commercial purpose, to wit, running the embassy, and was consequently immune under the State Immunity Act. The plaintiff, the court stated, did not establish that the funds were wholly or predominantly in use for commercial activities and, as the garnishee orders attached to the whole account without distinction, it ought to be set aside.[13]

On appeal to the Court of Appeal, the garnishee orders were restored. The court stated that the purpose of the bank account could not be to "run an embassy', but rather was to

pay for goods and services to enable the embassy to be run. That purpose, the court held, fell within the commercial purposes as defined in section 17 of the Act and was therefore not immune from execution. This decision is wide enough to make all embassy funds attachable. The political implication of this approach is no doubt considerable.

The House of Lords reversed the Court of Appeal's decision. Lord Diplock, reading the lead judgment, stated that unless it can be shown by the plaintiff that the bank account was earmarked by the foreign state solely (save for de minimis exceptions) for being drawn on to settle liabilities incurred in commercial transactions, it cannot be brought within the words of the exception provided in S.13(4). He further stated that attachment of mixed funds may hamper the day-to-day running of the diplomatic mission. The court restated the provisions of S. 13(5) which provided that evidence by the head of a state's diplomatic mission as to the use of particular state fund shall be accepted as sufficient evidence of that fact unless the contrary is proved.

The House of Lords decision acknowledges the need for the protection of funds held by states for sovereign purposes. It also affirms the fact that incidental use of such funds for commercial activities does not strip them of immunity from execution. The decision does not address the situations where the sovereign use is aimed at masking the commercial use of such property. It is submitted that in such situations, the funds should not be immune from execution.

Lord Diplock further stated that the onus of proving the commercial use of the property in question lies on the judgment creditor. The judgment creditor also has the burden of disproving the correctness of the ambassador's certificate under S. 13(5).

C. FRANCE

In France sovereign immunity bars execution on the property of a foreign state unless it is proved that the property is used for the commercial purpose upon which the claim is based. The requirement for a connection between the funds in dispute and the underlying commercial transaction follows the provision of S.1610(a)(20) of the U.S. FSIA. The section provides that state property used for commercial activity is not immune from execution if the property is used for the commercial activity upon which the claim is based.

The French Court of Cassation in Eurodif[14] held that although foreign states enjoyed immunity from execution as a matter of principle, the immunity could be set aside where the assets attached had been allocated for a commercial activity of a private law nature upon which the claim was based.

This restriction on the availability of commercial assets of states for execution is unwarranted. If a state uses a particular fund for commercial activities there is no justifiable reason why its financial obligations should not be met from that fund irrespective of the connection between the funds and the transaction in question. To hold otherwise may

imply that a private party may not have a remedy where a state closes the account from which it transacts the particular business. It should be the case that once the underlying financial agreement has a connection with the forum, a private party should be able to levy execution on the commercial assets of the state party.

D. CANADA

The Canadian State Immunity Act commences with the general rule that the property of a foreign state located in Canada is immune from execution, attachment, arrest, detention, seizure or forfeiture.[15] This provision is compatible with the general rule of immunity contained in both the American and the British legislations.

The immunity from execution could be waived either expressly or by implication under S.11(1)(a). An interesting issue is whether an implicit waiver can be interpreted to extend to non-commercial assets of the state. The section does not address this issue. It appears consistent with the principle of according immunity to non-commercial assets of states to require express and unambiguous waiver of the immunity accorded to such assets before process can be levied on them. Even then, most states would be reluctant to attach non-commercial state property, especially where such property is used for sovereign activities.

State property used or intended for a commercial activity is subject to measures of execution under S.11(b). Commercial

activity is defined in S.2 as any particular transaction, act, or any regular course of conduct that by reason of its nature is of a commercial character.

Given the general rule of immunity of state property from measures of execution, it seems to follow that the burden is on the judgment creditor to establish that the property in question is used or is intended for a commercial activity. The standard of proof required should be modest. The court should attempt to balance the need for the protection of state secrets and the difficulty attendant in a private party proving the commercial use of state funds. The difficulty of proving commercial use of particular funds becomes clear when it is remembered that a state may shuffle around its funds to conceal its commercial use.

3. NEED FOR JURISDICTIONAL LINK

Some countries require a link between the dispute under litigation and their territory before their courts can assume jurisdiction in the suit. Where measures of execution are sought against a state pursuant to an arbitration award, these countries require that the underlying contractual relationship should be connected to their country before local courts can entertain arguments on the merits of the case. This requirement is often grounded on economic and political considerations. Most countries are reluctant to levy execution on domestic and, particularly, foreign investments in their countries in enforcement of awards arising from contracts

which have no connection with the forum. This fact is particularly true of Switzerland which has a banking sector that holds a considerable amount of monetary deposits from foreign organizations and individuals. The fear is that these depositors may be compelled to close their accounts and remove their funds to other countries where greater protection is afforded against execution. It is also thought that "jurisdictional jockeying"[16] may lead to diplomatic repercussions which could embarrass the host country. If fora which have no connection with the underlying contractual relationship allow execution on state properly, there arises the possibility of retaliations and strained diplomatic relations between the countries involved.

Swiss law requires a clear connection between the commercial activities of the state in question and Swiss territory. This is known as the concept of 'Binnenziehung'.[17] In Kingdom of Greece v. Bar[18], a Swedish company loaned money to the Greek state. When the latter defaulted in its repayment obligations, the court of first instance of Geneva, at the instance of the Swedish company, attached some money standing in the name of the Greek state in various Genevese banks. Greece challenged the attachment before the Swiss Federal Tribunal. The court held, inter alia, that Swiss court could assume jurisdiction over the commercial acts of a foreign state if these acts had some connection with the Swiss territory:

> "Not every private law relationship entered into by a foreign state can give rise to proceedings in Switzerland. That relationship must at least have

> some links with Swiss territory ... In order that a legal relationship to which a foreign state is party may be considered to be connected with Swiss territory, it must either have its origin in Switzerland or fall to be performed in Switzerland, or the debtor must have at least taken certain steps which make Switzerland a place of performance"[19]

Under Swiss law, therefore, the mere fact that a foreign state engaged in a commercial activity which resulted in an arbitration award against it does not permit enforcement proceedings against the foreign state. In addition to the commercial activity, the legal relationship involved must have a sufficient domestic connection to the territory of switzerland. Where this domestic link is lacking, no Swiss court is competent to exercise jurisdiction even where a state has waived its immunity from execution.

This principle was affirmed by the Swiss Federal Supreme Court in Libya v. Libyan American Oil Coy.[20]. A concession agreement between Libya and LIAMCO provided that all disputes in connection with the concession where to be resolved by arbitration. The arbitration clause provided that if one of the parties does not appoint an arbitrator when requested by the other party to do so, the Presiding Judge of the International Court of Justice shall appoint a sole arbitrator who shall choose the seat of arbitration and make a final decision in the dispute. When a dispute arose under the agreement, Libya refused to appoint an arbitrator and, pursuant to the the arbitration agreement, the Presiding Judge of the ICJ appointed an arbitrator who choose Geneva as the seat of arbitration. The award was rendered in favor of LIAMCO.

The Zurich District Court, at the request of LIAMCO, attached financial assets of Libya at certain Zurich banks. On appeal to the Federal Tribunal, the attachment was vacated on the ground that the legal relationship between the parties had no connection with Switzerland. The subject matter of dispute did not connect Switzerland:

> "Circumstances [must] exist which tie the legal relationship to such an extent with Switzerland that it is justified to bring the foreign state before Swiss authorities, as there is no reason, and does not substantially make any sense, to permit legal actions against foreign states if a somewhat intensive domestic relationship is lacking. The interests of Switzerland do not require such a procedure; they could, on the contrary, easily cause political and other difficulties."[21]

A sufficient domestic relationship existed, in the court's opinion, if the debt was contracted or was to be settled in Switzerland, or a foreign debtor state had engaged in actions suited to establish the venue in Switzerland. Such a relationship cannot be created by the mere location of the assets of the foreign state in Switzerland.[22]

The court concluded that the mere fact that the sole arbitrator located the seat of arbitration in Switzerland was too tenuous to found jurisdiction:

> "If the seat of the Arbitration Board is selected by third parties or by the Arbitration Board itself, this does not create a sufficient domestic relationship to Switzerland; in any case not if the Arbitration Board is ruling on a dispute arising from a legal relationship which, per se, has no contact points with Switzerland."[23]

It is not clear whether the court would have found sufficient connection with Switzerland if the parties had mutually chosen Geneva as the seat of arbitration. The question whether or not the arbitration agreement constituted

a waiver of immunity by Libya was considered immaterial because the existence of a jurisdictional link was a condition precedent to the determination of the merits of the dispute.[24] This approach is noteworthy because in proceedings to enforce the LIAMCO award in the U.S., it was held that Libya waived its immunity from jurisdiction by submitting to arbitration.[25] The U.S. court contended that since the seat of arbitration was left open in the arbitration agreement, the parties must have anticipated that proceedings could have occurred in the U.S.

It should be pointed out that a state signatory to either the New York or the Washington Conventions will find it difficult to justify insistence on jurisdictional links between an arbitration and its forum. Once the award meets the validity test under either of the conventions, state signatories are required to recognise and enforce the award irrespective of the country where it was obtained.

FOOTNOTES

[1] 20 I.L.M. 878 (1981).

[2] 650 F. Supp. 73 (1986).

[3] Goldman, "Enforcement of Foreign Arbitration Awards against Private Parties and Foreign States" in Aksen & von Mehren, International Arbitration Between Private Parties and Governments 397, 409 (1982).

[4] 507 F. Supp. 311 (1980).

[5] Id. at 312. The court found support for this view in the legislative history of the statute: H. Rep. No. 94-1487, 94th Cong., 2d Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 6604 at 6617, 6627; and the decision in Ipitrade v. F. R. Nigeria 465 F. Supp. 824, 826 (1978).

[6] 650 F.Supp. 73 (1986).

[7] Supra, note 4.

[8] When the English Court of Appeal held in Alcom v. Republic of Columbia [1983] 3 W.L.R. 906, that mixed funds were attachable, some diplomatic missions in the U.K. moved or threatened to move their accounts to the Channel Islands and others made representations to the Foreign Office that on the grounds of reciprocity, U.K. missions abroad might find their property liable to attachment. See, Fox, "Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity" 34 I.C.L.Q. 115, 121 (1985).

[9] 659 F. Supp. 606 (1987).

[10] 500 U.N.T.S. 95.

[11] 659 F. Supp. 606, 610.

[12] [1984] 2 All E.R. 6.

[13] [1983] 2 W.L.R. 750.

[14] 77 I.L.R. 513 (1988).

[15] S. 11(1).

[16] See Delaume, "Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration" 2 ICSID Review 403, 418 (1987).

[17] For a discussion of this rule, see Lalive, "Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State" 10 Neth. Y. B. Int'l. L. 153 (1979).

[18] 23 I.L.R. 195 (1956).

[19] Id. at 196-97.

[20] 20 I.L.M. 151 (1981).

[21] Id. at 158.

[22] Id. at 159.

[23] Id.

[24] Id.

[25] See Libyan American Oil Coy v. Libya 482 F. Supp. 1175 (1980). The court followed the decision in Ipitrade International S.A. v. Nigeria 465 F. Supp. 824 (1976). It should be noted that the court refused to enforce the award on the basis of the act of state doctrine. Pending appeal to the Court of Appeal of the District of Columbia, the parties settled out of court, and the court vacated the order of the District Court.

SECTION THREE

THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

1. INTRODUCTION

International investment is widely recognized as a cardinal factor in the economic development of the developing parts of the world. If properly utilized, such investment would lead to the economic growth of the recipient countries. The substantial part of the investment which flows from the developed to the developing countries are of a private nature. Such private investment may be in the nature of joint ventures, management contracts, turn-key contracts, international leasing agreements or agreement for the transfer of know-how and technology.

Incidentally most foreign investors are apathetic to investing in the developing countries for the fear of expropriation, government interference and breach of the investment contract by the host government. This fear was fortified by the fact that the existing dispute resolution machinery did not guarantee the private investor an effective remedy against the state where the later is in breach of the investment contract. The result was that private capital was not moving in sufficient volume to the developing countries.

The International Bank for Reconstruction and Development resolved that the obstacles to private investment could be dismantled by dislodging the unfavourable investment climate by the creation of an international machinery which would be available on a voluntary basis for the conciliation and arbitration of investment disputes. The creation of such an international machinery would be a giant step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private capital into those countries which wish to attract it.[1]

By a resolution adopted on September 10, 1964, the bank mandated its Executive Directors to "formulate a Convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting states and nationals of other contracting states through conciliation and arbitration".[2] The Executive Directors formulated a Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[3]

The Convention came into force on October 14, 1966. This is the only Convention specifically dealing with issues arising from arbitration between a private party and a sovereign state. As of June 30, 1988, there were 89 Contracting States and a further 8 signatories of the Convention which had not yet ratified the Convention. The Convention establishes the International Centre for Settlement of Investment Disputes as an autonomous international institution. The purpose of the Centre is to provide

facilities for conciliation and arbitration of investment disputes.[4] The ultimate objective of the Centre is to depoliticize investment disputes and to promote the flow of investments contributing to economic development.[5]

2. JURISDICTION OF THE CENTRE

Three conditions must exist before the ICSID machinery can be available in any proceeding:

1) the dispute must be between a Contracting State (or sub division or agency designated by a Contracting State) and a national of another contracting state.

2) the parties must have consented in writing to submit the dispute to ICSID.

3) the dispute must be a legal dispute arising from an investment.[6]

Consent is the cornerstone of the jurisdiction of the Centre. Consent results either from an arbitration clause or from an agreement to submit to ICSID an existing dispute. Such consent must be in writing and once given cannot be withdrawn unilaterally.[7]

To ensure the reciprocal performance of obligations arising out of the application of the Convention, the facilities of the Centre is available only in disputes between a Contracting State and a national of another contracting state.[8] The Centre can therefore not entertain any dispute involving a non-Contracting State or a national of such a state.[9] It should be noted that a juridical person which has

the nationality of the state party to the dispute would be eligible to be a party to the proceedings if the State had agreed to treat it as a national of another Contracting State because of foreign control.[10] This provision is intended to take into account the situation where a host government insists that foreign investors channel their investment through a locally incorporated company.[11] Holiday Inns v. Morocco[12] involved a claim filed against Morocco by a Swiss company and a U.S. corporation on their own behalf and on behalf of their subsidiary incorporated in Morocco. The tribunal declined jurisdiction as it concerned the local subsidiary because there was no explicit agreement by Morocco to treat it as being under foreign control within the meaning of the ICSID Convention.

The dispute must also be of a legal nature before it comes within the jurisdiction of the Centre. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for the breach of legal obligation. The Centre can handle only those disputes which raise questions of law as opposed to those which concern conflict of interests.

Finally, the dispute must relate to an investment. Nowhere in the Convention is the term investment defined. Several reasons account for this fact. It was difficult to fashion out a satisfactory definition of the term. It was feared that any definition tendered may be too narrow to contemplate the possible changes in the nature of investments which may be occasioned by the passage of time. This lack of

definition has enabled the Convention to accommodate both traditional types of investment in form of capital contributions, joint ventures, as well as modern kinds of investment resulting from new forms of association between states and foreign investors, such as profit-sharing and management contracts.[13] There was the further danger that a definition might provide a reluctant party with an opportunity to frustrate or delay the proceedings by questioning whether the dispute was encompassed by the definition.[14] Since consent was cardinal to the jurisdiction of the Centre, it was felt that the parties should be left to characterize the nature of their contract.

3. ICSID AND JURISDICTIONAL IMMUNITY

The municipal court system usually acts as a support mechanism for the conduct of arbitration proceedings. The effectiveness of the arbitration process is guaranteed by the assistance of municipal courts. The UNCITRAL Model Law recognizes this fact by calling upon each state adopting the Model Law to entrust a particular 'court' with the performance of certain functions of arbitration assistance and supervision, relating to appointment of arbitrators (Article 11), decision in termination of arbitrator's mandate (Articles 13 & 14), control of arbitral tribunal's jurisdiction (Article 16), and setting aside of award (Article 34).

Under the ICSID regime, however, consent to arbitration is exclusive of all other types of remedies. ICSID arbitration

is to a considerable extent freed from contacts with the municipal court system. If a dispute subject to an ICSID arbitration clause is brought before a municipal court whose country is a signatory to the ICSID Convention, such a court must decline jurisdiction. This flows from the provisions of Article 26 of the Convention:

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."[15]

The practical implication of the Article is that the ICSID machinery is self-contained. Once parties consent to an ICSID arbitration they must, unless a contrary intention is evident, content themselves with the remedies and procedures adopted under the Convention. Absent a contrary intention, no municipal court of a Contracting State can intervene in relation to appointment of arbitrators, regulation of the tribunal's jurisdiction or in setting aside of an ICSID award. The Convention contains in-house procedure for appointment of arbitrators (Articles 37-40), regulation of the tribunal's jurisdiction (Articles 36 & 41), and revision and annulment of awards (Articles 51 & 52).

It should be noted that Article 26 is a rule of interpretation rather than of substance. The section leaves a party free to stipulate that it reserves the right to have recourse to courts of law notwithstanding the ICSID arbitration clause. Article 26 only applies in the absence of any express stipulation to the contrary.

It is clear from the above discussion that absent a contrary intention by the Contracting Parties, no municipal

court can intervene in an ICSID proceeding, at least until the recognition and enforcement stage. Therefore, the issue whether consent to ICSID proceeding constitutes waiver of jurisdictional immunity before municipal courts may not arise until the recognition and enforcement stage.

In MINE v. Guinea[16] the parties entered into a contract for the establishment and provision of shipping services to transport Guinean bauxite to foreign markets. By a later agreement they expressly agreed to submit any dispute arising between them to ICSID arbitration. What took place next is disputed. By Guinea's account, MINE agreed to file a formal arbitration request with ICSID. MINE took no such step, rather three years later, it petitioned the U.S. Court for the District of Columbia to compel arbitration under section 4 of the Federal Arbitration Act (FAA), asserting jurisdiction under both the FAA and the Foreign Sovereign Immunities Act (FSIA). Guinea declined to attend the proceedings and the court ordered arbitration before the American Arbitration Association (AAA).

Guinea did not appear before the arbitrators who rendered an award in favour of MINE. On an application by MINE to the District Court to confirm and enter judgment on the award, Guinea contended that the court's earlier order to compel arbitration rested on an incorrect premise because ICSID arbitration had indeed been available. The court confirmed the award and entered judgment on the ground, inter alia, that by agreeing to ICSID arbitration, Guinea had impliedly agreed to submit to arbitration in the United States, since ICSID

headquarters are located in the U.S., and that consent to arbitration in the United States constituted a waiver of Guinea's immunity from suit under S. 1605(a)(1) of the FSIA.

The court ignored the fact that by virtue of S. 1604 of the FSIA, the Act applies "subject to existing international agreements to which the United States is a party". One such agreement is the ICSID Convention under which consent to ICSID arbitration is exclusive of any other remedy. The court ought to have relied on Article 26 of the Convention not only to refuse to order the initial AAA arbitration, but also in refusing to confirm the subsequent award. MINE breached the ICSID arbitration agreement by arbitrating under the auspices of the AAA. The District Court should have affirmed U.S. treaty obligations by using Article 26 of the ICSID Convention to strike down the award. As indicated above, where there is an ICSID arbitration agreement, the issue of sovereign immunity before municipal courts does not arise until the recognition and enforcement stage, unless the parties agree otherwise.

On appeal to the Court of Appeal of the District of Columbia, the lower court's decision was reversed on the ground that Guinea had not waived its immunity from suit in the context of the FSIA:

> "A key reason why pre-FSIA cases found that an agreement to arbitrate in the United States waived immunity from suit was that such agreement could only be effective if deemed to contemplate a role for United States courts in compelling arbitration that stalled along the way ... As this particular ICSID agreement concededly did not foresee such a role for United States Courts, we hold that it did

> not waive Guinea's sovereign immunity even though the agreed-to arbitration would probably take place on United States soil."[17]

A better approach would have been to decide the case based on the exclusive character of ICSID arbitration. This would have been consistent with the treaty obligations of the U.S. More importantly, since the FSIA applies subject to existing international agreements to which the U.S. is a party[18], it was incumbent on the court to enforce the rule of abstention contained in Article 26 of the ICSID Convention.

The only stage at which the issue of sovereign immunity and ICSID arbitration can arise is at the recognition and enforcement stage, or in situations where, pursuant to Article 26, the parties agree that their consent to ICSID arbitration does not preclude them from remedies obtainable in domestic courts. Where an issue relating to an ICSID arbitration is properly before a municipal court, can the state party plead jurisdictional immunity?

Article 54 obligates states to recognize an award rendered pursuant to the 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. Each Contracting State is thus obliged to assimilate an ICSID award to the status of a final judgment of its local court. This implies that every state party to an ICSID arbitration must contemplate the involvement of fellow Contracting States in enforcing any attendant award. When such an award is sought to be enforced against a state party, it can not therefore be heard to plead jurisdictional immunity.

In Liberia Eastern Timber Corp. v. Liberia[19], Liberia challenged the jurisdiction of U.S. courts to enforce an ICSID award on the ground that the FSIA deprived the court of jurisdiction because Liberia had not waived its sovereign immunity by entering into an ICSID arbitration agreement. The court held that since Article 54 requires Contracting States to enforce ICSID awards, Liberia clearly contemplated the involvement of the courts of any Contracting States, including the U.S. as a signatory to the Convention, in enforcing the pecuniary obligations of the award. The court concluded that Liberia waived its sovereign immunity before U.S. courts with respect to the enforcement of the ICSID arbitral award.

Where the parties elect to pursue both ICSID and domestic remedies at the same time, the issue whether the state party can plead jurisdictional immunity with respect to the domestic remedies has to be determined in accordance with the immunity rules in the state concerned.[20] This is because such domestic remedies are outside the scope of the ICSID Convention. Provisions of the COnvention are inapplicable in determining the validity of pleas of jurisdictional immunity in such circumstances.

Finally, it should be noted that a state party cannot plead jurisdictional immunity before an ICSID tribunal. A cardinal essence o the jurisdiction of the Centre is the consent of the parties. Absent such consent the tribunal cannot assume jurisdiction.[21] But once consent is given none of the parties may unilaterally withdraw its consent[22], neither can it stall the arbitration proceedings by refusal to

participate. Within the system of the Convention, therefore, the issue of immunity from suit does not arise once a state party has given its consent to arbitration.

Indeed, reference to jurisdictional immunity is inappropriate in proceedings before ICSID arbitrators because the concept was designed for application before municipal courts.[23] At no time was there ever an immunity granted to states from arbitral proceedings to which they had hitherto consented.

4. THE ICSID AND INTERIM MEASURES OF PROTECTION

We have seen that the exclusive character of the competence of ICSID tribunal is guaranteed by Article 26 which provides that consent of the parties to arbitration under the Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. The question whether this exclusivity of ICSID jurisdiction relates to interim measures of protection has been a subject of heated controversy.

The provisions of the Convention dealing with interim measures does not indicate whether the tribunal has exclusive jurisdiction in such matters. It provides:

> "Except as the parties otherwise agree, the tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of the parties."[24]

One school of thought contends that the competence of an ICSID tribunal to grant interim measures is both general and

exclusive. In other words, by consenting to ICSID arbitration, the parties waive their right to seek interim measures of protection, including attachment, in domestic courts, whether before or after the institution of ICSID proceedings.[25]

For the proponents of the extensive theory, assistance from domestic courts may be sought only in three cases:

- If the parties so provide;

-If ICSID declines jurisdiction following a refusal by the Secretary-General to register a request or when an ICSID tribunal holds that an issue is not within its competence; and

-when an award is rendered, to ensure that it is executed.[26]

The second school of thought contends that the power of an ICSID tribunal to grant interim measures of protection is by no means exclusive. The provisions of the Convention in point, they contend, do not really support the extensive theory. They interpret the word 'remedy' in Article 26 as meaning that no court can consider the merits of a case which is subject to an ICSID arbitration, but not that a municipal court may not assist an ICSID arbitration.[27] In their view the provisions of Article 26 has no bearing on interim measures of protection because the legislative history of the section discloses that its objective was to specify the scope and meaning of consent to ICSID arbitration. No mention is made of the subject of provisional measures.[28]

The preponderance of judicial authority support the first school of thought. In Atlantic Triton Company Limited v.

Guinea[29] the Court of Appeal of Rennes, France, ruled that an ICSID tribunal had exclusive jurisdiction to grant interim measure:

> "The ICSID Rules specify that unless otherwise agreed by the parties, consent to arbitration by ICSID is exclusive of other remedy, and therefore the parties cannot apply to local administrative or judicial authorities to obtain provisional measures, but must have recourse to the arbitral tribunal ... The tribunal has the general and exclusive power to rule not only on the merits of the dispute but also on all provisional measures."

On further appeal to the Court of Cassation, it was held that the text of Article 26 did not intend to prohibit recourse to a judge to request conservatory measures designed to guaranty the execution of an anticipated award. The court held that the Convention does not preempt the power of municipal courts to order interim measures. This is about the only judicial decision known to the writer which favours a restrictive interpretation of Article 26.

The arbitration between MINE and Guinea led to an number of judicial decisions on the interpretation of Article 26. In May and June 1985, MINE initiated attachment proceeding against Guinea in Belgian and Swiss courts. The basis for the attachments was an award rendered in 1980 by the American Arbitration Association after a hearing in which Guinea did not appear. The U.S. District Court had ordered AAA arbitration on MINE's representation that Guinea had refused to consent to arbitration proceedings under the ICSID. The same court later confirmed the award, but it was reversed by U.S. Court of Appeal for the DIstrict of Columbia on the ground that Guinea did not waive its jurisdictional

immunity.[30] In May 1984, MINE initiated an arbitration proceeding against Guinea with the ICSID.

With regard to the attachment proceedings, the Belgian court held that it had no jurisdiction over the dispute because the ICSID is exclusively competent and excludes the intervention of municipal courts of a state which ratified the Convention.[31]

The Court of first Instance of the Canton of Geneva held that recourse to ICSID arbitration constituted a renunciation of all other means of settlement.[32] On a subsequent request to the Surveillance Authority in Geneva (a quasi-judicial authority dealing, inter alia, with attachments), it was held that in resorting to ICSID arbitration proceeding, MINE waived its ability to request interim measures of protection from municipal courts.[33]

The disadvantage of the expansive interpretation of Article 26 is that it may make the grant of interim measures merely illusory. In situations where such measures are sought urgently, it may be difficult to convene the arbitrators who may be living in different countries. It takes even more time for such awards to be enforced through a municipal court. The delay occasioned by these factors may enable the party against whom the measure is sought to safeguard his assets from the attachment.

The Administrative Council of the ICSID on September 26, 1984, amended the ICSID Arbitration Rules by adding a new Paragraph Five to Rule 36. It provides that:

> "Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceedings, or during the proceedings, for the preservation of their respective rights and interests."

The implication of the new rule is that, absent an express agreement on the jurisdiction of municipal courts to grant interim measures of protection, no municipal court can grant such remedy. Parties to an ICSID arbitration are well advised to include a provision allowing each party to seek conservatory measures before municipal courts. The ICSID recommends the following Model Clause:

> "The consent to arbitration recorded in [the basic clause] shall not preclude any party hereto from taking, or requesting any judicial or other authority to order, any provisional or conservatory measure, including attachment, prior to the institution of the proceeding or during the proceeding, for the preservation of its rights and interests."[34]

5. ICSID AND STATE IMMUNITY FROM EXECUTION

One of the primary objectives for setting up the ICSID was to afford foreign private investors a reliable means for settling investment disputes with host nations. It was believed that the guarantee of functional means of dispute resolution will help promote the flow of capital from the developed to the developing nations of the world. From a private investors viewpoint, the most satisfactory dispute resolution process must guarantee the realization of an award obtained against the state party. Without this guarantee the

hope for obtaining redress against a recalcitrant state party may be illusory.

The task before the drafters of the ICSID Convention was to balance the need for guarantee of enforcement of ICSID awards with the insistence of foreign states that domestic laws on state immunity should not be tampered with. How does the Convention realize this objective?

It makes a clear distinction between the recognition and execution stages. Article 54(1) empowers each Contracting State to recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by the award within its territory as if it were a final judgment of a court in that state. Thus the state party cannot raise objection, whether based on sovereign immunity, nature of the award or public policy, to the recognition and enforcement of the award. In this sense, an ICSID award is more easily enforceable than an award sought to be enforced under the New York Convention.[35]

The ICSID Convention treats the recognition stage as the ultimate phase of the arbitral process. Different rules apply to the execution stage. Execution of an ICSID award is governed by the laws concerning execution of judgment in force in the state in whose territories such execution is sought.[36] Thus while Article 54(1) establishes recognition and enforceability, Article 54(3) deals with the execution stage.

The distinction between the two stages is clearly brought out in Benvuti & Bonfanti v. Congo[37]. The Court of first instance of Paris granted recognition and enforcement of an

ICSID award with a caveat that "no measure of execution, or even a conservatory measure, can be taken pursuant to the said award or any assets located in France, without our prior authorization".[38]

On appeal, it was argued that the lower court mixed up the recognition and enforcement stage with the execution stage, which are separated by the ICSID Convention. The Court of Appeal stated:

> "But considering that the order granting recognition and enforcement to an arbitral award does not constitute a measure of execution but only a decision preceding possible measures of execution... the lower judge could not, therefore, without exceeding his authority, deal with the second step, that of execution, to which relates the question of the immunity from execution of foreign states."[39]

In SEE v. Yugoslavia[40], it was held that an exequatur decision was only the necessary sequel of an award and was limited to a confirmation of its validity. It in no way impugned on a states's immunity from execution.

The distinction, in the context of ICSID arbitration, ensures that although a state cannot plead sovereign immunity at the recognition and enforcement stage, it may rely on that plea at the execution stage if such a plea is available under the laws of the state where execution is sought. If a Contracting State admits immunity from execution in other circumstances, Article 55 allows the courts of that state to uphold that defense in the case of enforcement of an ICSID award against a state. As indicated by the Report of the Executive Directors of the World Bank:

> "Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed."[41]

The ICSID Convention does not eliminate the question of immunity from execution. It merely guarantees that ICSID awards can be recognized and enforced with relative ease. A private investor who wishes to execute an award on the property of a state party must contend with the immunity rules applicable at the forum where he seeks the execution.

The issue was considered in Liberian Eastern Timber Corporation v. Liberia[42]. The plaintiff got an award against Liberia. The award was enforced and execution ordered on tonnage fees, registration fees and other taxes due the Liberian government in the U.S. Liberia prayed the court to vacate the judgment enforcing the award or, in the alternative, the execution of that judgment on its property located in the U.S. Both prayers were based on its immunity under the FSIA. The court denied the motion to vacate the judgment on the ground that by consenting to ICSID arbitration, Liberia invoked Article 54 of the ICSID Convention which requires enforcement of such awards against Contracting States.[43] The court granted the motion to vacate the execution on the tonnage and registration fees due to Liberia because such assets were immune from execution under the FSIA. It, however, stated that LETCO was not enjoined from issuing execution "with respect to any properties which are used for commercial activities and that fall within one of the

exceptions delineated in Section 1619 [of the FSIA]".[44] LETCO later attached several Liberian Embassy bank accounts in satisfaction of the award. On application by Liberia, the U.S. District Court for the District of Columbia quashed the writs of attachment because the accounts enjoyed diplomatic immunity under the 1961 Vienna Convention on Diplomatic Relations, and no exception of the FSIA applied to deprive the accounts of their grant of sovereign immunity.[45]

The above cases illustrate the fact that immunity rules applicable in the place where execution is sought may prevent a forced execution on the property of the state party. The drafters of the ICSID Convention did not derogate from the rules of immunity from execution obtaining in Contracting States because of the views expressed by government representatives, an overwhelming majority of whom were in support of the retention of the rules.[46]

While capitulating to existing rules of immunity from execution, the Convention provides sanctions for defiance of ICSID awards. Where a dispute is subject to ICSID arbitration, no Contracting State can give diplomatic protection or bring an international claim on behalf of its national in respect of such a dispute. If the state party to the dispute refuses to comply with the ICSID award, the right to diplomatic protection is restored.[47] Furthermore, if the non-compliance derives from a dispute as to the interpretation or application of the Convention, any of the parties may refer the matter to the International Court of Justice, unless an alternative method of settlement is agreed upon.[48]

Agreeably, these sanctions are less effective than forcible execution against the state party. Although the objective of the Convention is to guarantee an effective remedy for claimants in an investment dispute, governments were quite reluctant to relinquish their immunity from execution. This may not be such a terrible short-coming as it may seem on a first look. First, the Convention guarantees state parties a fair hearing before independent arbitrators, without undue interference from the municipal court systems of other nations. This gives them confidence in the fairness of any ensuing award. There is then very little motivation on their part not to comply with the awards. Indeed the level of voluntary compliance with ICSID awards on the part of state parties is quite encouraging.[49] Second, even if a state party seeks to rely on its immunity from execution, it will realize that the efficacy of that immunity has eroded considerably with the emergence of the restrictive theory of immunity. In most countries (especially in those financial capitals of the world where considerable assets of most states are located), commercial assets of states are liable to attachment in satisfaction of their debts.[50] A successful claimant can always attach such commercial assets.

The Convention is largely successful in immuning ICSID arbitrations from interference from municipal legal systems. The rule of abstention ensures that all disputes subject to an ICSID arbitration clause are handled under the Convention. It is also a modest improvement on the New York Convention because it eliminates the grounds on which recognition and

enforcement of an award may be refused. Within the scheme of the ICSID Convention, once an award is not annulled, there is no ground for refusing to recognize and enforce the award, not even public policy considerations. Although the non-derogation from rules of immunity from execution may impede forcible execution on state property, the factors indicated above ensure that compliance with ICSID awards is not as problematic as it may appear on the surface.

FOOTNOTES

[1] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 I.L.M. 524, 525.

[2] Id. at 524.

[3] 17 UST 1270, TIAS No. 6090; 575 UNTS 159.

[4] Article 1(2).

[5] Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA" 1 ICSID Review (1986) 1.

[6] See Articles 25-27.

[7] Article 25(1).

[8] Id.

[9] For a detailed discussion on the jurisdiction of the Centre, see Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes" 19 Indian J. Int'l L. (1979) 166.

[10] Article 25(2)(b).

[11] Delaume, Transnational Contracts (1986) II, XV, 18.

[12] Lalive, "The First 'World Bank' Arbitration (Holiday Inns v. Morocco) - Some Legal Problems" 51 Brit. Y. B. Int'l L. (1980) 123.

[13] Delaume, Transnational Contracts (Law and Practice), 353.

[14] Comment by Broches in Convention on the Settlement of Investment Disputes between States and Nationals of Other States, History of the Convention (1968) Volume II, 54.

[15] The Article further provides that a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention.

[16] 693 F. 2d. 1094 (1982).

[17] Id. at 1103.

[18] S. 1604 of the FSIA.

[19] 650 F. Supp. 73 (1986).

[20] See generally the discussion in Chapter Four, Section One.

[21] See Article 25.

[22] Id.

[23] See note 20.

[24] Article 47.

[25] Delaume, Transnational Contracts (1986) 11, XV, 48.

[26] Marchais, "ICSID Tribunal and Provisional Measures - Introductory Note to Decisions of the Tribunal of Antwerp, and Geneva in MINE v. Guinea" 1 ICSID Review (1986) 372, 378.

[27] van den Berg, "Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions" 2 ICSID Review (1987) 439, 454.

[28] See generally, History of the Convention, supra note 8.

[29] 26 I.L.M. (1986) 373.

[30] 693 F. 2d. 1094 (1982).

[31] Guinea v. MINE 24 I.L.M. (1985) 1639.

[32] XII Y. Comm. Arb. (1987) 514, 521.

[33] 26 I.L.M. (1987) 382.

[34] Clause XVI, ICSID Model Clause, reprinted in 9 Y. Comm. Arb. (1984) 173.

[35] See Article V of the New York Convention for the various grounds on which recognition and enforcement of a foreign arbitral award may be denied. These include public policy and excess of jurisdiction.

[36] See Articles 54(3) and 55 of the ICSID Convention.

[37] 20 I.L.M. (1981) 878.

[38] Id. at 879.

[39] Id. at 881.

[40] 98 Journal du Droit International (1971) 131.

[41] Report of Executive Directors, supra note 1, at 530.

[42] 650 F. Supp. (1986) 73.

[43] Id. at 76.

[44] Id. at 78.

[45] 659 F. Supp. (1987) 606.

[46] See Broches, "Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution" 2 ICSID Review (1987) 287, 329 et seq.

[47] Article 27.

[48] Article 64.

[49] Delaume, "ICSID Arbitration Proceedings: Practical Aspects" 5 Pace L. R. (1985) 563, 589.

[50] See our discussion in Section II, Chapter Three.

CONCLUSION

The participation of states in commercial arbitration has witnessed a steady increase in recent years. This is the case both in the context of ICSID and other institutional arbitrations. States appear not only as defendants but also, in some cases, as claimants.

It is instructive to note that the issue of sovereign immunity, both as regards jurisdiction and execution, has arisen in a significantly few number of cases. In most of the cases the state parties actually participate in the arbitration process and, where they loose, fulfill their obligations under the award. Thus, the record of compliance by governments with international arbitral awards is very encouraging. Many reasons account for this fact.

First, the arbitration process ensures that disputes between a state and a private party are settled in a friendly and private arena, with very minimal interference by the courts of another state. Arbitration is conducted in a climate of mutual trust and good faith. Both parties play an active role in the arbitration process and confidentiality of the proceedings is guaranteed if they so desire. This atmosphere within which arbitration is normally conducted offers no incentive for distrust and consequent refusal to satisfy an award.

Again, states do not only appear as defendants but in some cases as claimants or counter-claimants. This

demonstrates the level of confidence which most states have in the arbitration process. Should the state be unsuccessful in the arbitration, its active participation in the proceedings is a contributory factor to its willingness to comply with the award.

The international business sector is a closely knit one. No state can afford the stigma of being unreliable in business affairs. Foreign investors will be less likely to do business with such a state. In this era when most countries are wooing foreign private investors with sundry incentives, it is difficult to imagine that any state can afford to paint itself as an unreliable business partner.

There are still some elements of discrepancy in state practice in relation to the scope of waiver of immunity constituted in an arbitration agreement. While some states insist that such waiver extends to the execution stage, others view the the recognition stage as the ultimate phase of the arbitration process. The practical significance of this difference in approach is very minimal. In both cases once an award against a state is recognized by the courts of another state, the commercial assets of the state party are normally liable to measures of execution.

The position could be put beyond doubt if the parties supplemented the arbitration agreement with an express waiver of immunity. Much of the time and money expended in litigating the impact of sovereign immunity on the efficacy of the arbitration process would be saved if only the parties could, at the time the arbitration agreement is drafted, make

provisions for the waiver of immunity both during the recognition, enforcement and execution stages in those jurisdictions where it is most likely that enforcement will be sought. This is normally the case in lending operations. International loan agreements always contain detailed provisions dealing with waivers of immunity. Drafters of arbitration agreements involving state parties should emulate this practice.

The extension of the restrictive doctrine of immunity to state immunity from execution ensures that only the non-commercial assets of states are protected. A private party can always attach the commercial assets of a state even where immunity from execution is available (with the exception of those jurisdictions, like the Soviet Union, which has not embraced the restrictive theory of immunity). As we have seen, the burden is on the claimant to prove that particular state assets are used for commercial purposes. Where such assets are real property, the burden may be easily discharged because the use of such property can be readily ascertained. But where financial assets are involved, the private party may find it exceedingly difficult to prove that they are being used for commercial purposes. A state may easily shuffle its financial assets in such a manner as to cloud its commercial usage. The solution may lie in lowering the standard of proof required from the claimant.

The position of U.S. and French law that execution is only permissible on the property used for the commercial activity upon which the claim is based constitutes an

unnecessary interference with the enforcement of an award against a state. The effect of this requirement is that a private party cannot realize an award if the commercial assets of the state utilized in the underlying transaction is no longer in existence. If a state uses a particular asset for commercial activities, there is no justifiable reasons why its financial obligations should not be met from that fund irrespective of the connection between the funds and the transaction in question.

The best means of limiting the impact of the immunity principle on the arbitration process is by making express provisions in the contract waiving the state party's immunity. It is ill-advised for a private party to leave his faith to local rules on immunity whose ramification often vary from one country to another. One clause dealing with waiver of immunity may well be the difference between expensive litigation and easy enforcement of an award.

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