SOVEREIGN IMMUNITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A CLAMPDOWN ON ENFORCEMENT OF FOREIGN AWARDS?

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Introduction

The *"Doctrine of Sovereign immunity/State immunity"* is a principle of international law which grants immunity to a State from the adjudication and enforcement of a claim in a foreign Court. This principle is founded on the concept that all states are equal and hence, the Courts of one State do not have the jurisdiction over another State. Regarding the extent of immunity enjoyed, the said doctrine has given way to two schools of thought namely – a) absolute immunity and b) restrictive immunity.

The absolute immunity approach holds that all acts of a State are completely immune from the adjudication and enforcement in a foreign Court. This approach hinges on the rule that a state's sovereignty cannot be violated by subjecting it to a foreign Court, unless it specifically consents to submit it to the latter's jurisdiction.

However, post-1950's, with increasing governmental involvement in trade and commerce, the international community felt the need to restrain immunity of States in commercial disputes. As a result, the 'restrictive immunity' approach which granted limited sovereign immunity came to the foreground. Under this principle, a State could only afford immunity from foreign Courts when it carries out a *"public act"* or in other words, a sovereign function. Since it is well-settled law that a commercial function is not entitled to a sovereign status, the restrictive immunity automatically deprives a State of immunity in cases of commercial claims.[1]

[1] *Victory Transport Inc v Comisaria Genera* 336 F 2d 354 (2d Cir 1964)*; Trendtex v Bank of Nigeria* [1977] QB 529*; The Philippine Admiral* [1977] AC 373*; The I Congresso Del Partido* [1983] AC 245 (HL).

With numerous international conventions and domestic legislations adopting the framework of restrictive immunity,[2] the said approach has gained international consensus. Hence, with limited exceptions[3], the doctrine of absolute immunity has been largely replaced with that of restrictive immunity.

Sovereign immunity vis-a-vis international commercial arbitration

International arbitration is often seated at a country which may not be a direct party to the dispute. Ipso facto, the jurisdiction and enforcement of the arbitral award that involves a sovereign nation now rests with a foreign Court. Now, in an International Commercial Arbitration dispute, a State is bound by the principles of restrictive immunity since the said area of law deals with commercial disputes exclusively. Notwithstanding this, there have been numerous instances where States have claimed immunity to negate a foreign Court's jurisdiction and enforcement power in the arbitration process. States often claim immunity, citing that the assets sought to be attached is sovereign and non-commercial in nature[4] or in exceptional cases, that absolute immunity is attracted.[5]

In this article, the authors attempt to identify the issues involved and the contemporary position of law as regards sovereign immunity in International Commercial Arbitration. In addition to an analysis of the Indian scenario, the authors will analyse international legal instruments, with specific focus to the New York Convention, 1958 and various precedents which have contributed to this much relevant issue.

Sovereign immunity & enforcement of awards

When a dispute arises regarding the validity of an arbitration award against a State, an award holder has two major hurdles to cross. The preliminary hurdle is whether the State which is the seat of arbitration (foreign state/foreign court) has jurisdiction over the defendant State. With the support of numerous domestic legislations and international conventions, a State's consent to arbitration itself is considered a waiver of immunity from supervisory jurisdiction.[6] Hence, the foreign Court

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[2] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, English State Immunity Act 1978, c 33; The Foreign Sovereign Immunities Act of 1976, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *European Convention on State Immunity, 1972*.

[3] *FG Hemisphere Associates Limited v Democratic Republic of the Congo and Ors* [2011] 14 HKCFAR 226.

[4] Lawrence A Collins, 'The Effectiveness of the Restrictive Theory of Sovereign Immunity' (1965) 4 Colum J Transnat'l L 119.

[5] *FG Hemisphere* (n 3).

[6] European Convention on State Immunity 1972, art12; Foreign Sovereign Immunities Act, 1977, s 1605 (a)(1); United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, art 17.

in most cases are able to deny the defendant's claim of jurisdictional immunity and can adjudicate the dispute.

The primary hurdle faced by the award-holder is the enforcement/execution stage. This is due to the absence of international consensus regarding the implied waiver of immunity in the enforcement stage of an award.[7]There are divergent opinions whether an arbitration agreement constitutes an implied waiver of sovereign immunity in the enforcement phase.

When we compare codified international law to that of domestic sovereign immunity legislations and precedents, a marked digression is observable. In international treaties such as the *United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004*(UNCSI) and the *European Convention on State Immunity, 1972* ["**ECSI**"], a waiver in terms of adjudication does not automatically translate to a waiver in terms of enforcement and execution. According to these treaties, a State's waiver of immunity from execution has to be express in nature.[8]

Contrary to this approach, certain common law States follow the *"double-waiver principle"*, wherein the consent to arbitrate implies a waiver of immunity even from the enforcement and execution stage. These States argue that if the scope of the implied waiver fails to extend to these stages, it would render the arbitration otiose, as an unenforceable judgment would merely be a determination of the validity of an award devoid of enforceability.[9]

For instance, in *Svenska Petroleum Exploration AB v AB Geonafta and the Republic of Lithuania,* the England and Wales, Court of Appeal scrutinized the scope of Section 9 of the *State Immunity Act 1978*.[10]

Section 9 states that -

"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."

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[7]Ylli Dautaj, 'Sovereign Immunity from Execution – Caveat Emptor' (Kluwer Arbitration, 4 June 2018) <http://arbitrationblog.kluwerarbitration.com/2018/06/04/sovereign-immunity-execution-caveatemptor/>accessed November 28, 2020.

[8]European Convention on State Immunity, 1972, art 12; United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, art 17.

[9]Frederic Bachand, 'Overcoming Immunity-Based Objections to the Recognition and Enforcement in Canada of Investor-State Awards' (2009) 26 (1) Journal of International Arbitration.

[10]*Svenska Petroleum Exploration AB v AB Geonafta and the Republic of Lithuania* [2007] QB 886.

The Court observed that as per Section 9, the waiver of sovereign immunity extends to all proceedings which are necessary to render the arbitration effective. Hence, a State would not enjoy immunity from enforcement and execution of an arbitral award.

In another instance, the Swiss Federal Court held that since the powers of enforcement derive from powers of jurisdiction, immunity from enforcement should not be differentiated from that of jurisdiction.[11]

The implied waiver of immunity extends to execution of the award even under the rules of the *International Chamber of Commerce* ["**ICC**"]. According to the rules of the ICC, upon submission to arbitration, the parties undertake to carry out any Award without delay and are deemed to have waived their right to any form of recourse where such waiver can validly be made.[12] It is worth noting that the US Court of Appeals of the Fifth Circuit in held that submission to ICC rules is an explicit waiver of sovereign immunity rather than an implied one. [13]

Hence, by considerable state practice and national legislative support, it can be said that the major trading States are making a conscious effort to enforce the "double-waiver" principle. Further, with the reinforcement of the double waiver principle, there is a growing understanding that once a State agrees to commercial arbitration with a private party, it waives its sovereign immunity from jurisdiction and for enforcement of the award.[14]

Role of 'The New York convention' in the enforcement of awards

The New York Convention (1958) ["**The Convention**"] is one of the fundamental instruments in International Arbitration. With 166 contracting States, the primary aim of formulating an international framework to govern arbitral awards was to relieve the parties from the defence of state immunities and the trouble of multiple post-judgment court actions. The Convention prevents States Parties from neutralising the sanctity of an arbitral award by invoking sovereign immunity. Further, it forces national Courts to recognise, enforce and execute arbitral awards uniformly. According to the Convention, there is a general obligation of contracting States to

[11] *United Arab Republic v Mrs X* [1960] 65 ILR 384, 392.
[12] ICC Rules 1998, art 28(6).
[13] *Walker International Holdings Ltd v Republic of Congo (ROC),* [2004] 395 F 3d 229, 234.
[14] Stephen J Toope, 'Mixed International Arbitration: Studies in Arbitration Between States and Private Persons' (Cambridge University Press, 1990); The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention 1958, art V.

recognize arbitral awards from other signatory States as binding and enforce them under the rules of procedure of the territory where the award is being enforced.[15]

The obligation of contracting States is however not unconditional. Enforcement can be refused by submitting proof of satisfying any grounds which come under the exhaustive list laid by Article V (1). Invalidity of arbitration agreement,[16] failure to give proper notice of appointment of the arbitrator or of the arbitration,[17] award contrary to public policy,[18] are some of the grounds that can be raised by a contracting State for refusing the enforcement of the award.

The Convention through Article XVI follows the principle of reciprocal reservations.[19] In other words, States can only avail the Convention against a Contracting State to the extent that it is itself bound to apply the Convention. The Convention goes a step further in the pro-arbitration approach through Article VII, commonly referred to as the *more-favourable-right* provision. By virtue of Article VII, contracting states can base its request for enforcement on more liberal and arbitration friendly provisions than that of the Convention[20]. The Parties may invoke these provisions from the domestic law of the Country where the award is being enforced or from a bilateral/multilateral treaty in force in the said Country. [21]

Impact of the convention on the defence of sovereign immunity

The Convention has created a major impact on the viability of this defence. Courts have consistently held that a State party to the Convention waives its immunity regarding enforcement actions in a foreign signatory State. As recent as May 2019, the United States Court of Appeals in *Pao Tatneft v. Ukraine* held that by signing the Convention, the State must have contemplated arbitration-enforcement actions in other signatory States.[22]In the same vein, the Court found that signing the Convention is as an implied waiver of the sovereign immunity of the Contracting state against the enforcement of an arbitral award in another signatory state.[23]

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[15]The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention, 1958, art III.
[16]The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention, 1958, art V (i) (a).
[17]The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention, 1958, art V (i) (b).
[18]The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention, 1958, art V (2) (b).
[19]The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention, 1958, art XVI.
[20] United Nations Commission on International Trade Law, Thirty-ninth session (7 July 2006).
[21]ibid.
[22]*Pao Tatneft v Ukraine*, Fed R App P 36; DC Cir R 36(d).
[23]ibid *at 2*.

Being party to the Convention, contracting states are bound to enforce a foreign arbitral award and cannot invoke the defence of sovereign immunity. However, if the defendant state is not a Contracting State, there is no presumption of an implicit waiver. This principle is clear from the case of *S Davis Int'l v. Republic of Yemen*, wherein a Yemeni corporation consented to arbitration of a dispute in UK.[24]Although the award was enforceable under the Convention, it could not be enforced as Yemen could raise sovereign immunity since it was not a signatory to the Convention. Further, in *Creighton Limited, Appellant v. Government of the State of Qatar*, the D.C. Circuit Court held that a mere agreement to arbitrate a case in France (a signatory to the Convention) does not amount to a waiver of immunity against enforcement in the Unites States, as Qatar is a non-signatory to the Convention. [25]

In totality, there is no question whether the Convention constitutes a successful move towards a global pro-enforcement regime. Juxtaposing the defence of sovereign immunity with a State's obligation under the Convention, we can say that the latter overrides the former. However, with few States still abstaining from signing the Convention, the possibility of invocation of the sovereign immunity defence to deny enforcement of a foreign arbitral award remains.

Sovereign immunity in India

India does not have a separate legislation on state immunity. The Civil Procedure Code, Section 86[26]states that no foreign state may be sued in domestic courts without consent from the Central government. However, over the years, case law and practice depict a restrictive approach in issues relating to sovereign immunity.

The apex court in *Ethiopian Airlines v. Ganesh Narain Saboo,*[27] dealt with the invocation of section 86. In the said case, the petitioner approached the Court on late delivery of reactive dyes resulting in damaged goods. The Court relying on a strict understanding of Section 86 had construed the phrase 'sued in any court' to not include arbitration proceedings. For arriving at the aforesaid decision, the Court considered *Nawab Usmanali Khan v. Sagarmal*[28] which deemed the nature of an arbitration award not in the nature of a plaint and therefore not under the ambit of a 'suit' under section 86. The Court further emphasized on the legislative intent in the formation of the Section 86 being a restriction, and limitation on sovereign immunity. It reiterated the restrictive immunity

[24]218 F3d 1292.
[25]181 F3d 118 (DC Cir 1999).
[26] Code of Civil Procedure 1908, s 86.
[27][2011] 8 SCC 539.
[28] 1965 AIR 1798.

approach, holding that State-owned entities are not entitled to immunity for commercial transactions, as they are subject to market norms and rules.[29]

India is also a signatory to the UNCSI which indicates an inclination to adopt the principle of Restrictive Immunity. The above decisions have relied on foreign judgments that discuss and uphold said principle. Though there has not been an explicit state enactment or a legislation that would solemnize the position in India, the practice and general trends show a preference to move away from absolute immunity.

Enforcement of foreign awards in India

The Indian arbitration regime has aptly recognised the need for a pro-enforcement approach for foreign awards. Prior to the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], there were two major statutes which governed the enforcement of foreign awards, the *Arbitration Act of 1940*[30]and the *1961 Foreign Awards Act*. [31] Currently, the law which governs enforcement of Foreign Awards is the Arbitration Act, 1996.

The Indian regime for the enforcement of foreign awards is heavily reliant on The Convention. Availing Article I (3) of The Convention, India has opted for only two reservations. The first reservation is concerned with the definition of the term 'commercial'. Under the Indian Act, awards should arise from disputes which are of 'commercial' nature. However, 'commercial' is based on the law in force in India. [32]Indian courts have interpreted 'commercial' in a very liberal sense. For example, in *Qatar Airways v. Shapoorji pallonji and Co.*, the Bombay High Court held that contractual relationships occasioned by an entity's business activities in India would be subject to the jurisdiction of a competent court in India.[33]

The second reservation is of the 'reciprocity' clause, which requires India to recognise and enforce awards made only in the territory of another signatory State.[34] Hence, if the award is made in a non-signatory country, the award will not fall within the meaning of a 'foreign award'.

Enforcement under the Arbitration and Conciliation Act, 1996

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[29] Appeal decision, [1977] QB 529.
[30]The Arbitration Act, 1940.
[31]The Foreign Awards (Recognition and enforcement) Act, 1961.
[32]Arbitration and Conciliation Act 1996, s 44.
[33] [2013] 2 Bom CR 65.
[34]Arbitration and Conciliation Act 1996, s 44(b).

According to the Act, foreign awards once enforceable would be binding on the parties.[35]The conditions to enforcement of the foreign award are mentioned under Section 48 which comes under Part II of The Act.[36]The limited grounds on which Court can resist enforcement are provided under section 48(1) of The Act. Under the limited grounds or defences offered under section 48, the most debated one is the "public policy" defence. [37]

However, the expression 'public policy of India' has been given a very narrow construction by both the Act and the Indian Courts. Hence, it can invalidate awards only if they are in contravention of-

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.[38]

Another significant indicator of the pro-enforcement approach under The Act is the restriction of appeal under Section 50.[39] If a court allows enforcement of the foreign award, no appeal shall lie for the same except under Article 136, which itself has very limited grounds. Hence, the legislation ensures that once enforcement is allowed, it cannot be delayed with frivolous appeals before various courts.[40]

Besides the pre-emption of delaying tactics, Indian Courts have been liberal in the decision regarding the forum selection for enforcement. In the case of *Wireless Developers Inc. v. India Games Limited*[41] , the Bombay High Court held that if a party has a foreign award in its favour, it can seek to enforce the award anywhere in the country where it is sought to be enforced as long as suit to recover money can be filed.

Conclusion

From the above analysis, the authors conclude that in International Commercial Arbitration, the foothold of the sovereign immunity defence is weakening. Albeit the defence is still relevant and utilised, the pro-arbitration approach embraced by numerous international conventions, domestic

[35]Arbitration and Conciliation Act 1996, s 46.
[36]*Bharat Aluminium Company v Kaiser Aluminium Technical Service Inc (Balco)* [2012] 9 SCC 552.
[37]Arbitration and Conciliation Act 1996, s 48(2)(b).
[38]*Renusagar Power Co v General Electric Company*, [1994] AIR 860 1994 SCC Supl.
[39]Arbitration and Conciliation Act 1996, s 50.
[40]*Kandla Export Corporation and Another v OCI Corporation and Another*, CA No 1661-1663 of 2018.
[41][2012] 114 BOM LR 1276.

legislations and judicial precedents have mitigated its negative impact on the effectiveness of arbitration process. This is evidenced by the emerging consensus with respect to the concept of implied waiver of sovereign immunity, in terms of jurisdiction and enforcement of foreign awards.

As regards the Indian perspective, Courts and the legislation alike have been progressing in the pro-enforcement trajectory. The Act, while being capable of meeting demands concerning the enforcement of foreign arbitral awards, is however silent regarding the aspect of sovereign immunity. Though case laws and the existing legislations do tangentially touch upon the topic, akin to State Immunity Acts of United States and UK, there is a present day need to enact a legislation that particularly addresses the same. Therefore, in the presence of a robust legal framework for regulating the sovereign immunity, the Indian arbitration regime can substantially grow in the field of International Commercial Arbitration.