The enforcement of arbitral awards against a state: the problem of immunity from execution

Giorgio Bernini and Albert Jan Van den Berg*

Legal rules relating to sovereign immunity in international commercial arbitration

This contribution to the survey of sovereign immunity issues in international commercial arbitration addresses the specific problems associated with the execution of an international arbitral award sought by a private party against a state. At the outset, we should stress that, in our opinion, only actual execution constitutes a separate phase from the arbitral proceedings. By contrast, recognition and enforcement of the award are the direct consequence and logical final step of the arbitral proceedings. Therefore, issues of immunity raised during recognition and enforcement procedures should be viewed as issues of immunity from jurisdiction.[1] Hence, we shall consider the case of a state claiming immunity at the moment of actual enforcement of an award, once jurisdictional issues have been resolved and the arbitral award has been recognised. We shall refer to this case as immunity from execution. The immunity plea would then refer only to the state's alleged immunity from enforcement by measures of execution against its property.

We must point out that such a 'pure' immunity from execution case seldom arises in practice, since the issue of immunity from jurisdiction tends to reappear at the stage of recognition of the award. This means that the state will more frequently rely on a plea of immunity from jurisdiction when recognition and enforcement of the award is sought, rather than wait until actual measures of execution are requested and raise the exception of immunity from execution.

We should also consider the role played in this field by diplomacy and out-of-court settlements. As we shall see in examining the *LIAMCO* case

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1 See the Swiss *LIAMCO* case, *Libyan American Oil Company* v *Socialist People's Libyan Arab Jamahirya*, decided by the *Tribunal Federal* on June 19, 1980, reported in VI *Yearbook: Commercial Arbitration* (1981). See also *Cour d'Appel* of Paris, June 26, 1981, *Benvenuti and Bonfant* v *The Government of the People's Republic of the Congo*, reported in G Delaume, *Transnational Contract*, (Dobbs Ferry 1978–1984), Vol V, Booklet F at 81.

below, settlement negotiations can achieve results that would be difficult to obtain in court.

The current state of affairs regarding immunity can be summarised as follows. Most nations distinguished between immunity from jurisdiction and immunity from execution. With respect to immunity from jurisdiction, a distinction is made between acts *iure gestionis* and acts *iure imperii*. Only as far as acts *iure imperii* are concerned can a state claim immunity. The doctrine of restrictive immunity is not applied to immunity from execution by most states. In this field, most states continue to apply an absolute immunity. In those states where the doctrine of restrictive immunity is applied to execution, different tests are either cumulatively or alternatively used for determining whether immunity from execution can be invoked, ie, the nature-of-funds test (use for sovereign or commercial purposes) and the nature-of-activity test (sovereign or commercial activity). Further, some states require that there is a connection between the legal relationship on which the award is based and the territory of the state where execution is sought.

As will be explained hereafter, we do not think that the distinction *iure imperii/iure gestionis* should be made for immunity from jurisdiction in matters relating to arbitration. By agreeing to arbitration, a state must be deemed to have waived immunity. For the same reason, we deem it inappropriate to distinguish between immunity from jurisdiction and immunity from execution in relation to arbitration. It is, in our opinion, illogical that by agreeing to arbitration a state would have waived its right to invoke immunity from jurisdiction only but not its right to invoke immunity from execution.

As mentioned, the dualism of immunity from jurisdiction and immunity from execution is accepted in the large majority of western legal systems. As far as sovereign immunity from jurisdiction is concerned, the theory of restrictive immunity has, beyond doubt, ousted absolute immunity principles. This change is shown in almost all western countries' legislation, doctrine and case law since the beginning of this century. The basic distinction between acts *iure imperii* and acts *iure gestionis*, on which restrictive immunity is founded, is still widely accepted and only the socialist countries reject it on the grounds of their own concept of state and state property.[2] We have already pointed out, and we shall return to the subject later, that this distinction should not be held valid in the field of arbitration, albeit for reasons different from those put forward by the socialist systems.

In principle, the theory of restrictive immunity is not applied to immunity from enforcement by means of execution measures. The reason for this much less enthusiastic response to the restrictive immunity theory in the field of immunity from execution is obviously political and economic. In this context prestige plays an even greater role than in the case of immunity from jurisdiction. Enforcement of execution is commonly felt to be a 'more intensive interference with the rights of the state'.[3] From the economic point of view,

2 See M Boguslavsky, 'Foreign State Immunity: Soviet Doctrine and Practice', 10 *Netherlands Yearbook of International Law* (*NYIL*) (1979), and F Enderlein, 'The Immunity of State Property from Foreign Jurisdiction and Execution: Doctrine and Practice of the German Democratic Republic', 10 *NYIL* 111 (1979). It must be mentioned that a slightly discordant opinion has been expressed as regarding Yugoslav law by T Varady, 'Immunity of State Property from Execution in the Yugoslav Legal System' 10 *NYIL* 85 (1979). However, the author also refers to Yugoslav doctrine to the contrary.

3 K H Böckstiegel, *Arbitration and State Enterprises* (Deventer 1984), at 50.

restrictive immunity principles applied to execution could result in foreign states refraining from investment in countries in which they know their property could be subject to execution.

We must anticipate now an incongruity that will become evident in the discussion presented below and from the examination of the statutes and case law. On the one hand we have the Executive, concerned with political and economic issues, and on the other hand the Judiciary, which incorporates the system's equally fundamental desire and necessity to base its activities solely on the law. In the field of immunity in general, and immunity from execution in particular, these two branches of the same tree inevitably conflict. A fair example of this internecine war is the Swiss situation, in which the courts are applying restrictive immunity from execution while the political authorities are seeking to codify the absolute immunity theory.[4]

The aforementioned delicate political and economic issues in the enforcement of international awards are reflected in some legal systems which require the intervention of political and administrative authorities of the state where execution is sought as a necessary step in the execution procedure, thereby implicitly recognising the dichotomy outlined above. In Italy, Article 1 of the Law No 1263 of July 15, 1926, states that enforcement proceedings against assets of a foreign state in Italian territory cannot proceed without the intervention of the Minister of Justice on the issue. The Minister's decision, however, can be challenged in civil and administrative courts.[5] The ultimate result of this provision is to shift the political responsibility of ruling on an execution against property of a foreign state from the courts to the political body.[6] This mechanism is particularly important since Italy theoretically does not recognise the existence of a principle of international law granting the states immunity from execution on assets located outside their territory. The Minister bases his decision primarily on reciprocity considerations, but since he is not obliged to do so, any political and economic aspects may be taken into account. Similar procedures exist in Greece,[7] in Yugoslavia, where execution is granted upon the consent of the Federal Secretariat of Justice,[8] and in The Netherlands, where the bailiff (*deurwaarder*) is prohibited from serving a writ against a state if the Minister of Justice has informed him that the service 'would be contrary to the obligations of the state under international law'.[9]

Mandatory intervention of political and administrative authorities at the stage of execution tends to frustrate the principles of restrictive immunity laid down by the judiciary. To recall again the example of Italy, the participation of the Minister of Justice in the enforcement against a foreign state's assets located in Italian territory appears incongruous as against a consistent weight of opinion, expressed by the courts, by which Italy 'in common with modern

4 J F Lalive, 'Swiss Law and Practice in Relation to Measures of Execution Against the Property of a Foreign State', 10 *NYIL* 153 (1979).

5 This is possible since the 1963 decision of the Italian Constitutional Court declaring unconstitutional the last paragraph of Article 1, which excluded such challenge.

6 L Condorelli and L Sbolci, 'Measures of Execution against the Property of Foreign States: The Law and Practice in Italy', 10 *NYIL* 197 (1979).

7 Law No 15 of 1938.

8 Yugoslav Law on Enforcement Procedure of 1978.

9 Article 13, paragraph 4, of the *Deurwaardersreglement*, as translated by C Voskuil, 'The International Law of State Immunity as Reflected in the Dutch Civil Law of Execution', 10 *NYIL* 245, (1979) at 261.

states, now allows herself to be sued'.[10] On the basis of this assumption, 'the courts have reasoned that the principle of equality of states is not violated by allowing foreign states to be sued in Italy on terms similar to those on which Italy may be sued in her own courts'.[11]

The Italian courts have therefore restricted the field of immunity from jurisdiction, thereby following the widely accepted tendency mentioned above. As we have already pointed out, the restrictive immunity theory is based on the distinction between acts *iure imperii* and acts *iure gestionis*. We believe that legislation and case law should go a step further and recognise that a state, by agreeing to arbitration, waives its right to claim immunity from jurisdiction independently from the nature of the activity carried out by the state in the underlying legal relationship. The fundamental principle of *pacta sunt servanda* should be the only relevant element in the issue. As pointed out by Luzzatto[12]:

> 'Sovereign immunity has been frequently invoked by states with a view to getting rid, either of the obligation to arbitrate, or of the duty to execute the award. There should be, however, no doubt, in this connection, that an agreement to arbitrate constitutes an implicit waiver and that therefore international or municipal rules granting sovereign immunity should not apply. This view, which had already been taken by some writers and courts, has been upheld recently by the United States District Court for the District of Columbia, in *Ipitrade International SA* v *Federal Republic of Nigeria*. The court relied upon the Foreign Sovereign Immunity Act of 1976 and on its legislative history, particularly on a statement in the Congressional Committee Report on the Jurisdiction of the United States Courts in Suits Against Foreign States of 9 September 1976, but the principle would seem to apply anyhow as a general rule. The *jure imperii* or *jure gestionis* character of the subject-matter of the agreement should therefore be irrelevant.'

The preliminary award in the ICC Case No 2321 (1974)[13] came very eloquently to the same conclusions:

> 'I must admit that I have found some difficulties to follow a line of reasoning that a state, just because of its supreme position and qualities, should be unable to give a binding promise. The principle of *pacta sunt servanda* is generally acknowledged in international law and it is difficult to see any reason why it should not apply here. A sovereign state must be sovereign enough to make a binding promise both under international law and municipal law. As to the latter aspect of the question I was informed by the Counsel of the First Defendant that according to both ... and English law the capacity of the state to enter into arbitration clauses was not restricted as such and that also the state could be sued in its own courts. To require or assume then that a promise of a state to submit to arbitration, in order to be binding, has to be confirmed in the face of the arbitrator, would probably impair the sovereignty of a state and its dignity more than the arbitrator's

10 Cappelletti-Perrillo, *Civil Procedure in Italy* (The Hague 1965), at 96.
11 *Ibid.*
12 M Luzzatto, 'International Commercial Arbitration and the Municipal Law of States', 157 *Recueil des Cours de l'Academic de Droit International* (1977), at 93.
13 Reported in I *Yearbook: Commercial Arbitration* 133 (1976), at 135.

performance of his task, conferred upon him in accordance with what the parties once have agreed upon. The issue whether the subject-matter of the present dispute is a matter *jure gestionis* or *jure imperii* has also been argued by the parties on each side. From what I have said above it follows that this distinction is of no relevance once the parties have agreed upon arbitration.'

We have suggested that the so-called 'nature-of-the-activity test' (sovereign or commercial) should no longer be applied to establish whether a state is immune from jurisdiction. Once a state has agreed to arbitrate, the waiver of immunity implied in the signature of the arbitration agreement should not be confined to the realm of acts carried out by the state as if it were a private party.

As far as immunity from execution is concerned, however, we must consider two additional problems. First, most legal systems distinguish between waiver of immunity from jurisdiction and waiver of immunity from execution, ie, they do not imply the latter in the former. Second, the distinction between acts *iure imperii* and acts *iure gestionis* reappears almost unavoidably, at the state of execution, in the so-called 'nature-of-funds test'. As we shall see when examining statutes and case law more in detail, most legal systems prohibit execution against a state's property used for sovereign purposes, while they allow execution against property meant for commercial use. Consistently with our opinion that only the principle of *pacta sunt servanda* should be considered, we do not agree with this distinction, the last stumbling-block in the century-old frustration of the private party's claims towards a state.

It is a plain fact that the private party trying to execute an international arbitral award against a state encounters many obstacles, even if jurisdiction is no longer contested. If the state does not comply voluntarily with an award rendered against it, the private party can be left with no means of enforcing the decision in his favour. Lack of sanctions is actually a constant *leit-motiv* of public international law and takes, in commercial arbitration practice, the form of an almost total absence of means of enforcement. The feeble position of the private party has been improved, however, by the Washington Convention of 1965 which instituted the International Centre for the Settlement of Investment Disputes. A party who obtains an ICSID award enjoys a certain protection against the risk of the foreign state's assertion of immunity from execution. A contracting state does not waive its right to raise the exception of immunity from execution, as explicitly stated in Article 55 of the Washington Convention but it agrees to comply with the award[14] and to enforce the pecuniary obligations thereunder, in its territories, as if the award were a final judgment of a court of the state itself.[15] On the other hand, the Washington Convention provides that, in case the state does not abide by the award, the state of the private party has the right to exercise diplomatic protection, a right which is suspended during the ICSID arbitration.[16]

The ideal correspondence between immunity aspects of jurisdiction and execution, as pointed out above, is not so much real as desirable. As already noted, most legal systems distinguish between immunity from jurisdiction and immunity from execution, excluding that a waiver of the latter be implied in a waiver of the former. Many legal systems do not recognise that an agreement to

14 Washington Convention, Article 53.
15 *Ibid*, Article 54(1).
16 *Ibid*, Article 27(1).

arbitrate constitutes a waiver of immunity from jurisdiction. Most states also adopt in principle an absolute concept of immunity as far as execution is concerned, although admitting exceptions.

Socialist countries do not make this distinction, since they do not stray at any point from the absolute immunity theory. One author has stressed that it is only for the state itself to decide whether it is subject to the jurisdiction of a court, and whether enforcement should be granted: 'It is not the business of foreign courts to judge whether a certain object of state property enjoys immunity or not. The question is subject to regulation by the legal provisions of the GDR.'[17]

Among the countries that take an equal approach to the issues of immunity from jurisdiction and immunity from execution, it is in Switzerland that the extended theory of restrictive immunity has been most clearly applied. Swiss courts, albeit in the absence of a statute dealing with the issue, have consistently refused to distinguish between jurisdiction and enforcement from the point of view of immunity. Switzerland brings this theory to the point of implying a waiver of immunity from execution as well as a waiver of immunity from jurisdiction in an arbitration agreement signed by a state.[18] The Swiss Federal Supreme Court held[19] that, since powers of execution directly derive from powers of jurisdiction, there is no reason that Swiss courts should treat immunity from execution differently from immunity from jurisdiction. Once the jurisdictional issue has been decided and an award has been rendered, the state cannot be allowed to create a new obstacle for the private party by claiming to be immune from execution against property held for commercial purposes or simply for no specified public purpose. The distinction between commercial and sovereign nature, as we have stressed above, reappears when the character of the property to be executed is considered. Swiss case law also requires that there be a connection between the legal relationship on which the award has been rendered and Swiss territory (the so-called *Binnenbeziehung*) such as, for instance, Switzerland being the place of performance of the contract or the location in Switzerland of property of the foreign state.[20] This widens considerably the scope of the discretion left to both judiciary and political authority.

Austrian law also accepts the restrictive immunity theory regarding execution. Legislation permits enforcement by means of execution measures against a foreign state's immovable assets located in Austria, or its vested rights in domestic immovables belonging to other persons.[21] Case law has specified that the assets must be used for commercial purposes,[22] which confirms the observations made above on the nature-of-funds-test. In a decision of 1961,[23] the Austrian Supreme Court made an important statement advancing an additional step in the direction of restrictive immunity from execution. The Court held:

17 Enderlein, *op cit*, at 120.
18 See JF Lalive, *op cit*, at 162.
19 *United Arab Republic* v *Mrs X*, Tribunal Federal, February 10, 1960, *Clunet* 458 (1961).
20 See *SA Sogerfin* v *Yugoslavia* (1938), 61 Semaine Judiciaire 327 (1939), and *Kingdom of Greece* v *Julius Bar & Co* (1956), ATF 82 I 75.
21 Article IX of the Introductory Law to the Rules on Jurisdiction Law of August 1, 1895, as translated by I Seidl-Hohenveldern, 10 *NYIL* 97 (1979).
22 *Neustein* v *Republic of Indonesia*, August 6, 1958, case No 6.
23 Austrian Supreme Court, February 10, 1961, 84 *Juristische Blatter* 63 (1962).

'So far as concerns the lack of means to execute a judgment, we need only to point out that such means exist under international law within the framework of municipal law. There can be no violation of sovereignty because the binding force of a judgment operates only within the territory of the forum state and the judgment can be enforced only within that territory'.[24]

In the Federal Republic of Germany, the Constitutional Court has also accepted the restrictive immunity theory in the field of immunity from execution. In a 1977 decision,[25] it held that no international law principle prohibits enforcement against a state in cases in which the state is not immune from jurisdiction. The court relied on the distinction between sovereign acts and acts *iure gestionis*. In a 1983 decision, the court applied the nature-of-funds test, holding that immunity could be granted to a state's bank accounts only if the funds were used uniquely for governmental purposes.[26]

The United States Foreign Sovereign Immunities Act of 1976 (FSIA) heads in the direction of equality of treatment for immunity from jurisdiction and immunity from execution, without reaching that goal completely. In this statute the dualism of nature-of-funds test/nature-of-activity test is very clearly exemplified, and its provisions illustrate our observations on the issue. Immunity of a foreign state from enforcement by execution against its property in the United States is limited by a number of exceptions based on the commercial nature of that state's activity. The FSIA, however, provides for the further requirement that the property to be executed against 'is or was used for the commercial activity upon which the claim is based'.[27] The Act therefore endorses solely the criterion of the nature of the funds when the foreign state itself is the party claiming immunity. In contrast, when immunity from execution is claimed by an 'agency or instrumentality of the foreign state' a different criterion is used, which brings the FSIA closer to that ideal equality of immunity from jurisdiction and immunity from execution. Section 1610(b) draws an explicit link between them, stating that no immunity from execution can be claimed by an agency or instrumentality where there is no immunity from jurisdiction. This provision, by omitting the requirement that the property to be executed against be used for the commercial activity upon which the claim is based, makes use of the criterion based on the nature of the state's activity involved in the dispute.

The solution offered by the FSIA calls for some considerations. The statute provides that the state or state entity can waive its right to immunity from execution thereby distinguishing such waiver from a waiver of immunity from jurisdiction. However, the former can be made 'either explicitly or by implication',[28] which leaves the issue open. The FSIA further shows that the *iure gestionis/iure imperii* criterion still holds in the ambit of the nature-of-the-funds-test, although the application of this distinction is limited to funds

24 As translated by I Seidl-Hohenveldern, *op cit*, at 107.
25 Federal Constitutional Court, December 13, 1977, *Philippine Embassy Bank Account* case, 46 BVerfGe 342 (1977).
26 Federal Constitution Court, April 12, 1983, *National Iranian Oil Company* case, 37 Westpapier-Mitteilungen Zeitschrift fur Wirtschafts- und Bankrecht 722 (1983).
27 Foreign Immunities Act 1976, s1610(a).
28 *Ibid*, s1610(a)(1) and (b)(1).

owned by a state and not by a state agency or instrumentality. It is needless to say that the requirement that the funds to be executed against be used 'for the commercial activity upon which the claim is based' consistently limits the private party's chances against the state.

At this juncture it should be noted that the dichotomy nature-of-funds test/ nature-of-activity test has been discussed thoroughly in an important French decision, *EURODIF*, which shall be examined in the second part of this paper. We can mention here that the FSIA has been closely followed in *EURODIF*.

Section 1611 of the FSIA lists certain types of property that are in any case immune from execution. By granting absolute immunity to the funds held by the foreign central banks or monetary authorities 'for their own account', the FSIA further defines its position concerning the complicated issue of the identity of the entities allowed to claim immunity, already extensively dealt with in Section 1603. Since the issue concerns immunity from jurisdiction as well as of immunity from execution, however, we shall only point out that the sovereign identity of central banks has been widely discussed in case law. The last part of Section 1611 further recognises the absolute immunity from execution of all property connected *lato sensu* with military activities. This exception recurs in all western legislation and can be said to be a logical consequence of the principle of absolute immunity for acts *iure imperii*. Since we cannot agree with the acts *iure gestionis*/acts *iure imperii* distinction once the state has waived its right to immunity by agreeing to arbitrate, we find it difficult to accept this distinction either. Once immunity has been explicitly or implicitly waived, the principle of *princeps in alterius territorio privatus* should be held fully valid. We should remember, however, that international treaties grant absolute protection to special categories of assets. Such is the case of the Vienna Conventions on Diplomatic and Consular Relations, and the Convention on State-Owned Vessels.[29]

A tempered recognition of absolute sovereign immunity from execution is the solution offered by the European Convention on state immunity.[30] This Convention states expressly that no measures of execution can be taken against the property of a contracting state without the state's consent.[31] However,

29 Article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations of 1961 grants immunity from execution to 'the premises of the mission, their furnishings and other property thereof, and the means of transport of the mission'. Article 31, paragraph 4, of the Vienna Convention on Consular Relations of 1963, provides for the immunity of consular premises, property and means of transport from requisition. However, immunity from execution 'may be justified on the basis of the inviolability of the consular archives and documents'. Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution', 10 *NYIL* 3 (1979). The Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, of 1926, prohibits execution against warships, government yachts, patrol vessels, hospital ships, auxiliary and supply ships, and on cargoes carried on board the said vessels, as well as cargo owned by the state and not used for commercial purposes, carried on board merchant vessels (Article 3). Aircraft used for governmental service (ie, also postal service), and on regular flights are immune from execution according to the Rome Convention on Precautionary Attachment on Aircraft 1933 (Article 3).

30 European Convention on State Immunity with Additional Protocol, done at Basle on May 16, 1972.

31 *Ibid*, Article 23.

Article 24 of the Convention on state immunity allows the contracting states to declare, when signing or ratifying the Convention, 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'.

Hence, the United Kingdom and Belgium, for instance, which have both made this declaration, will be able to apply their restrictive principles of immunity from execution, although within the framework of Article 26. According to this article, property of a foreign state can be executed against in the forum state if such property has been solely used for the commercial activity upon which the claim is based. We have already mentioned that we shall find a recent discussion of this double criterion (nature of the property and of the activity) in the *EURODIF* decision of the French *Cour de Cassation* discussed below. As we have seen, the requirement of a link between the property to be executed against and the state's commercial activity is also accepted in the United States FSIA. Indeed, it is clear that the European Convention on state immunity sets out rules which were subsequently developed in both the FSIA and the United Kingdom State Immunity Act 1978.

The State Immunity Act bases its acceptance of the restrictive immunity theory on the distinction between property used for commercial and for public activities, ie, on the *iure gestionis/iure imperii* distinction applied to the nature-of-funds-test. The Act does not require that the property be used for the commercial activity upon which the claim is based, as do the European Convention on state immunity and the United States FSIA (only as far as the property of a foreign state is concerned). The property must be 'in use or intended for use for commercial purposes'.[32]

An interesting aspect in the United Kingdom Act, which is left open by the United States FSIA, is how the commercial or public use of the property to be executed against is to be determined. The Act provides for the issue to be decided by a certificate issued by the head of the state's diplomatic mission, unless the contrary is proved.[33] The United Kingdom can thus be said to be, since the Act has been enacted, one of the countries in which the ideal coherence in the treatment of sovereign immunity as a whole comes closer to reality.[34]

The French *Cour de Cassation* has criticised this nature-of-the-property-test, as applied independently from the nature-of-the-activity-test, in the EURODIF case. Indeed, the application of the former test alone tends to widen the field of immunity, as we have already pointed out. However, the French Court has followed the distinction between acts *iure imperii* and acts *iure gestionis*, a principle which, as discussed above, we do not hold applicable.

By way of conclusion of the first part of this paper, and before passing on to the examination of the relevant case law, we must mention that a general incentive to the voluntary compliance by states with awards rendered in connection with their commercial activities is given by the New York Convention. The contracting states must recognise and enforce (but nothing

32 State Immunity Act 1978, s13(4).
33 *Ibid*, s13(5).
34 See recent House of Lords decision, *Alcom Limited* v *Republic of Columbia* [1984] AC 580.

is said about actual execution) the foreign awards complying with the requirements of the Convention. Although awards to which a state is a party fall within the ambit of the New York Convention,[35] it is silent with respect to the actual execution of awards against a state, but does not impede it either.

This brief survey shows that the rules relating to immunity from execution are, as stated by Professor Delaume, in even greater disarray than the rules on immunity from jurisdiction.[36] Forum-shopping is the logical consequence of this diversity. A further element to be considered in this context is the existence of a 'territorial connection' in the legal systems accepting a restrictive immunity theory. We have already seen that Swiss case law requires a *Binnenbeziehung*, a contact between the legal relationship upon which the award is rendered and Swiss territory. The necessity of such a connection is also recognised by the United States FSIA, which requires that the commercial activity of the foreign state or state entity be performed in the United States.[37] In contrast, the United Kingdom State Immunity Act does not require any connection except that the assets be within the territory of the United Kingdom.

Case law concerning sovereign immunity in international commercial arbitration

We turn now to an examination of some cases that illustrate in practice some of the points made above.

LIAMCO is one of the most blatant examples of the problems created by the incoherence of the national and international rules on sovereign immunity. Seeking to enforce an award against Libya, LIAMCO tried to execute property of Libya in four different countries. In the country where execution would have been easiest, Switzerland, the courts refused to deal with the case since the legal relationship upon which the award had been rendered was not in any way connected with Switzerland. The fact that the sole arbitrator had been sitting in Geneva did not fulfil the requirement of the *Binnenbeziehung*.[38]

In the United States, the point of view was not sufficiently clarified, since only a District Court explicitly expressed its opinion on the suit.[39] The court refused to deal with the case on the ground of the Act of State doctrine. This reasoning was attacked in *amicus curiae* briefs to the Court of Appeals, filed by the American Arbitration Association and others. The United States Government took the position that it agreed with the District Court's statement that Libya had, according to the FSIA, waived its right to claim immunity from execution by submitting to arbitration in Geneva. The case was

35 A J Van den Berg *The New York Arbitration Convention of 1958* (Deventer 1981), at 51–3.

36 G Delaume, 'Foreign Sovereign Immunity: Impact on Arbitration', 38 *Arbitration Journal* 34 (1983) at 45.

37 A United States seat of the arbitration was held insufficient as a nexus in *Verlinden BV* v *Central Bank of Nigeria*, 488 F Supp 1284 (SDNY 1980). The decision was affirmed, but on different grounds by the United States Court of Appeals for the Second Circuit, on April 16, 1981. This decision is reported in 20 *ILM* 639 (1981). The Supreme Court reversed this decision on May 23, 1983, 22 *ILM* 647 (1983).

38 See *supra*, n1.

39 United States District Court for the District of Columbia, January 18, 1980, reported in VI *Yearbook: Commercial Arbitration* 248 (1981).

settled out of court, whereupon the *amici curiae* requested the Court of Appeals to vacate the order of the District Court. The order was vacated *per curiam* on May 6, 1981. Since the order of the Court of Appeals did not contain reasons, the reasoning of the decision can only be surmised.

The same uncertain situation was left open in France, where the *Tribunal de Grande Instance*[40] refused to grant any measure of execution, but nominated an independent committee to ascertain the public or commercial use of the funds (bank accounts) against which execution was requested. Finally, the Swedish Court of Appeal of Svea adopted the equation 'no immunity from jurisdiction: no immunity from execution', holding that Libya had waived both by submitting to arbitration.[41]

Another decision of the Paris *Tribunal de Grande Instance* should also be mentioned. This decision is one of the innumerable steps in the never-ending story of the case *SEEE* v *Yugoslavia*. On this occasion, SEEE tried to enforce in France the award obtained in Lausanne against Yugoslavia. The French court, while recognising that Yugoslavia had waived its right to claim immunity from jurisdiction by submitting to arbitration, held that a waiver of immunity from jurisdiction does not automatically result in the state's waiver of its right to immunity from execution as well. This principle was affirmed by the Court of Appeal.[42] The *Hoge Raad* came to the same conclusion in the Dutch proceedings between the parties.[43]

In the *Ipitrade* case in 1978,[44] again one small piece of the complicated litigation between Ipitrade and Nigeria, the French *Tribunal de Grande Instance* held that Nigerian bank accounts in France enjoyed absolute immunity from execution following the recognition in France of an arbitral award rendered in Switzerland.

The three French decisions examined above were lower courts' decisions. In 1984, the *Cour de Cassation* had the chance to define the French position on the subject, in the *EURODIF* case.[45] The facts of the case are, in a simplified version, the following. Within the framework of cooperation agreements stipulated in 1974 between France and Iran, the SERU (Uranium Research and Study Corporation), a subsidiary of the Atomic Energy Commission (CEA), and EURODIF, a French law corporation established in 1973 by SERU and similar organisations from three other European countries, entered into industrial cooperation agreements with the Iranian Government and the Iranian Atomic Energy Organisation (OEAI). The latter was replaced in 1978 by the OIAETI (Iranian Organisation for Economic and Technical Investment and Assistance). The OEAI and the CEA established in 1975 a French law corporation, SOFIDIF, which became in its turn a member of EURODIF.

40 Tribunal de Grande Instance of Paris, March 5, 1979, *Procureur de la Republique* v *Société LIAMCO*, 106 *Clunet* 857 (1979).

41 Court of Appeal of Svea, June 18, 1980, reported in VII *Yearbook: Commercial Arbitration* 359 (1982).

42 Tribunal de Grande Instance of Paris, July 8, 1970, *Societe Europenne d'Etudes et d'Enterprises* v *People's Federal Republic of Yugoslavia*, 96 *Clunet* 131 (1971), and *Court d'Appel* of Paris, January 29, 1975 [1975] *Revue de l'Arbitrage* 328.

43 Hoge Raad, October 26, 1973, in *Netherlands Jurisprudentie* No 361.

44 Tribunal de Grande Instance of Paris, September 12, 1978, *Procureur de la Republique* v *SA Ipitrade International*, 106 *Clunet* 857 (1979).

45 Cour de Cassation, *EURODIF Corporation* v *Islamic Republic of Iran*, in *Semaine Juridique* 1984, II, 20205.

EURODIF was to provide enriched uranium to SOFIDIF, and the latter would then distribute it between CEA and OEAI. Under these agreements, Iran lent CEA US$1 billion, the repayment of which was guaranteed by the French Government. Iran also lent EURODIF FFr943 million, to be paid in instalments, and agreed to advance FFr130 million to SOFIDIF to cover the operating costs of EURODIF. Following the Islamic Revolution of 1978, the third instalment of the loan to EURODIF (FFr400 million) and 70 of the 130 million advance to SOFIDIF were never paid by Iran; subsequently, Iran elected to discontinue the cooperation agreements.

EURODIF initiated ICC arbitration proceedings as provided for in the agreements between the parties, requesting an award determining the consequences of this unilateral breach of contracts. In the meantime EURODIF petitioned the President of the Commercial Court in Paris to attach the Iranian funds held by CEA (the US$1 billion loan) for the total amount claimed in the arbitration proceedings. The attachment was granted on October 24, 1979, but on April 21, 1982, the First Chamber of the Paris Court of Appeal quashed the order, holding that Iran could invoke immunity from execution. The Court of Appeal held that the funds on which attachment was asked were public funds since, if not attached, they would revert to Iran 'without any earmarking and the Iranian Government shall be free to decide as a matter of sovereign prerogative how to use them'. The Court of Appeal further stated that, once the public nature of the property was determined, it was useless to enquire whether the activity carried out by Iran had been sovereign or commercial.

This decision was appealed by EURODIF, and gave the *Cour de Cassation* the opportunity to define French doctrine on immunity from execution in general. The Concluding Statement by the Advocate General contains a thorough survey of the issue, as well as interesting remarks on sovereign immunity in general. The judgment of the *Cour de Cassation* follows the lines of the Concluding Statement and contains two main points of interest to this paper. It must be noted in advance that, since the decision is not explicitly limited to prejudgment attachments, its reasoning can be held to apply equally to execution as means of enforcement of a foreign arbitral award. First, the court states that immunity from execution is a matter of principle, but that it can be limited in exceptional circumstances. Second, it holds that immunity can be refused, by way of exception, when the property to be attached is intended to be used for the state's commercial activity upon which the claim is based. By doing so, the court followed the example of the United States FSIA. In the case at issue the adoption of the further requirement that the property to be executed against must be used for the commercial activity upon which the claim is based did not result in an enfeeblement of the private party's position. However, we should underline the evidently negative role that this principle can play in the field of immunity from execution.

The Court of Appeal applied the nature-of-funds test and disregarded the criterion of the nature of the activity. The French *Cour de Cassation* held that the Court of Appeal ought to have determined the exact nature of the activity carried out by Iran under the agreements 'in order to deal with the question of immunity from execution'.[46] The application of both the nature-of-funds and

46 As translated in 23 *ILM* 1062 (1984).

the nature-of-activity tests is explained by the court's further requirement that the funds to be executed against be used for the activity upon which the claim is based. According to the French *Cour de Cassation* therefore, three conditions must be fulfilled for immunity from execution to be denied:

- the state's activity must be commercial;
- the funds must have a commercial nature; and
- the funds must be used for the activity upon which the claim is based.

In this context, the application of both criteria has the positive result that the decision on the sovereign or commercial nature of the funds is not left to the discretion of the state, as pointed out in the Concluding Statement by the Advocate General, since

> 'it would suffice for a foreign government to refrain from assigning a specific use to the funds in dispute or even from making known its intentions as to the use of such funds, for its immunity from measures of execution to become totally unchallengeable.'[47]

This remark applies to the problems which could arise and have arisen on this issue under the United States FSIA and the United Kingdom State Immunity Act. Once again we stress that the only way to ensure actual execution of an award against a state is to abandon the *iure gestionis/iure imperii* principle in its last stronghold, the nature-of-funds-test. As we have seen, the French decision clung to the abovementioned distinction and even set a further requirement, following the FSIA example, which dramatically limits the private party's chances to actually enforce an award in his favour against a state.

Another interesting and recent case is the *SPP* case. In 1974 a Hong Kong company, SPP, undertook to build two tourist villages in Egypt. The identity of the other party to the agreement is the major issue in the legal battle which has followed the rendition of the award by ICC arbitrators in 1983. To summarise the issue as much as possible, we shall say that in brief, SPP claimed that Egypt was a party to the main contract, whereas Egypt contended that it was not. SPP tried to enforce the award in three countries, with contrasting results, the examination of which would go beyond the scope of this paper.[48] During the proceedings before the High Court in London, the issue of immunity from execution was considered, since SPP had asked the Court to grant a prejudgment attachment by way of security on funds held by Egypt in English banks, according to Section 5(5) of the Arbitration Act 1975.[49] We must stress that this is a very superficial survey of the case before the English Court, made with the sole purpose to provide a background to the issue of immunity from execution. On March 19, 1984, the Court of Appeal

47 *Ibid.*

48 The exequatur was granted in The Netherlands (President of the District Court of Amsterdam, July 12, 1984, reported in X *Yearbook: Commercial Arbitration* 487 (1985)), whilst in France the award was annulled on the same day (Cour d'Appel of Paris, July 12, 1984, reported in X *Yearbook: Commercial Arbitration*, 113 (1985)).

49 Arbitration Act 1975, s5(5) reads:
'Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in sub-section (2)(f) of this section, the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security'.

entertained the suit and held that it could order Egypt to give security under Section 5(5) of the 1975 Arbitration Act, 'were it not for the fact that the respondent is a foreign sovereign state'. The court expressed the opinion that, if it were faced with the issue of whether it is proper to make such an order, it certainly 'should want assistance from an *amicus curiae*'.

> 'In any event, before we could issue injunctive orders to the banks freezing the money, we should, it seems to me, have to be satisfied not only that SPP was arguably right in the relief it was seeking on appeal, but also that there was solid evidence that a major friendly foreign state with funds in this country was intending to remove them simply to avoid paying an arbitration award, albeit one for quite a large sum of money. For my part, I have seen no evidence which would justify my reaching any such conclusion.
>
> Accordingly, as I see it, it would be quite wrong for this Court to make an order of the type which SPP seeks, namely one freezing the assets of a friendly foreign state pending the hearing of this appeal, and I would decline to make such an order.'

The decision of the Court of Appeal specifically interprets the prejudgment attachment provisions of Section 5(5) of the 1975 Arbitration Act, but nevertheless presents interesting features for the discussion of the issue of immunity from execution is still considered independent of a waiver of immunity from jurisdiction, under United Kingdom legislation.

Finally reference is made to the recent English *Alcom* case.[50] According to Section 13(5) of the United Kingdom State Immunity Act 1978, the commercial or public nature of the state's property to be executed against is to be decided by a certificate issued by the head of that state's diplomatic mission in the United Kingdom, unless proof to the contrary is given. Alcom Ltd obtained a judgment by default against the Republic of Colombia, whereupon it sought execution against the Colombian Embassy's bank accounts in London. The Ambassador certified that the funds were 'not in use nor intended for use for commercial purposes but only to meet the expenditure necessarily incurred in the day-to-day running of the Diplomatic Mission'. The High Court set aside Alcom's request on these grounds, but the decision was reversed on appeal. The Court of Appeal held that 'the day-to-day running of the Mission' meant paying for goods and services, ie, including commercial transactions. Hence, the Embassy's funds could be attached. The Court of Appeal explicitly considered that the Ambassador's certificate itself supported the commercial nature of the funds. However, this decision was reversed by the House of Lords,[51] which held that funds used for defraying the day-to-day running expenses of a Diplomatic Mission are not on that account alone used for commercial purposes so as to be denied immunity from enforcement jurisdiction. For this it was necessary to show that (apart from *de minimis* exceptions) the funds were earmarked solely for the discharge of liabilities under commercial transactions. The Ambassador's certificate was conclusive evidence that in the case under consideration the funds were not so earmarked.

50 Court of Appeal, October 24, 1983, *Alcom Ltd* v *The Republic of Colombia*, [1984] AC 580 reported also in 78 *Am J Intl L* 451 (1984).
51 [1984] AC 580.

Conclusion

The foregoing survey of case law shows that: (a) the courts in general are reluctant to deny immunity from execution; (b) this situation can only be mended through the abandonment of the *iure imperii/iure gestionis* distinction, and the reliance upon the principle of *pacta sunt servanda*. Two of the decisions examined have explicitly or implicitly endorsed the theory of absolute immunity from execution (in *Ipitrade* and, to a certain extent, in *SPP*). The French decision in *LIAMCO* adopted as its cornerstone the *iure gestionis/iure imperii* nature of the funds to be executed against. The recent *EURODIF* judgment shows a development towards a further frustration of the private party's rights against a state, by holding that the general immunity from execution of a state can be exceptionally disregarded when the property against which execution is sought is used for the commercial activity upon which the claim is based. In Switzerland, where in principle a waiver of immunity from jurisdiction implies a waiver of immunity from execution, execution was denied in the *LIAMCO* case, on the grounds of lack of *Binnenbeziehung*.

Also the French and Dutch decisions in the *SEEE* case deny the existence of a necessary implication of the waiver of immunity from execution in the waiver of immunity from jurisdiction. Among the decisions examined, only the Swedish decision in *LIAMCO* explicitly endorses this theory, which is also followed by the *amicus curiae* brief of the United States' Government in the same case. We may also mention that the adoption of this principle is suggested, *de iure condendo*, by the Concluding Statement in *EURODIF* which recognises, however, its inapplicability *de iure condito*.

All these different approaches to the issue of immunity from execution (with the exception of the aforementioned Swedish decision) result in the weakening of the position of a private party *vis-à-vis* a state. The weakness of the private party has always been a feature in commercial transactions involving a state, in a situation which allows the state to violate the principle of *pacta sunt servanda*. We want to stress once again that, unless a state is held to have waived its right to immunity from execution together with its right to immunity from jurisdiction by signing the arbitration agreement, the main principle governing the commercial world, *pacta sunt servanda*, will always and undoubtedly be violated, and this confused and confusing situation will be perpetuated.