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Subject: States and State entities in international arbitration

Title of Work: State immunity and incapacity of State or State entity to enter into arbitration as obstacles to arbitration

Main Supervisor: Prof. Dr. Dr. h.c. Peter Gottwald

Submission Date: 21/12/2013
## Dissertation Thesis

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Contents

Introduction

Part I  The sovereignty of the State as an obstacle to arbitration
1. The principle of State immunity
2. Absolute and restrictive approach of the principle of State immunity
3. State entity as a means of conducting commercial transactions of the State
   3.1. The principle of State immunity invoked by State entities
   3.2. The extension of the binding force of contracts signed by State entities to the non-signatory States
4. Waiver of immunity
   4.1. Arbitration agreement as a waiver of immunity
   4.2. Waiver of immunity and enforcement of arbitral awards

Part II  The States’ and State entities’ capacity for arbitration
1. Examining the capacity of State and State entities to conclude arbitration agreements
   1.1. The applicable law for determining State’s and State entity’s capacity for arbitration
   1.2. Lack of power of State’s and State entity’s apparent representative
2. Enforcement of awards annulled because of State’s or State entity’s incapacity for arbitration

Conclusion
Table of Cases
Judgments


Chromalloy Aeroservices v. Arab Republic of Egypt, Judgment of 31.07.1996 of U.S. District Court, District of Columbia,


Democratic Republic of the Congo and others v. FG Hemisphere Associates LLC, Court of Final Appeal (FACV Nos. 5, 6 & 7 of 2010)


Dralle v Government of Czechoslovakia, Judgment of 10 May 1950 of Austrian Supreme Court; ILR (Sup. Ct. of Austria 1961)


German v. Italy-Greece Intervening, Judgment of 3 February 2012 of International Court of Justice

Holoubek v. United States, 2 Ob. 243.60, 84 Juristische Blätter (Wien), Vol. 84, 1962, p. 43


Kalogeropoulou and others v. Greece and Germany, Application No. 59021/00, Decision of 12 December 2002 of the European Court of Human Rights, ECHR Reports 2002-X, p. 417

Libyan American Oil Company v State of Libya, Judgment of 18 June 1980 of Court of Appeal (Svea hovrätt)


NML Capital Limited (Appellant) v Republic of Argentina (Respondent), Judgment of 6 July 2011 of Supreme Court


Philippine Embassy Case, Judgment of 13 December 1977 of Federal Constitutional Court, 46 BVerfG, 342; 65 ILR 146, at 164.

PT Garuda Indonesia Ltd v Australian Competition & Consumer Commission, Judgment of 7 September 2012 of Australian High Court, HCA 33 (7 September 2012


Szczesniak v. Backer et Consorts, Judgment of 14 July 1955 of Court of Appeal, Pas. 1957 II 38

Tekno-Pharma AB of Stockholm v State of Iran, Judgment of 21 December 1972 of Supreme Court (Högsta domstolen),


**Arbitral Awards**

Societe des Grands Travaux de Marseille v. East Pakistan Industrial Development Corporation -ICC award No 1803 (12 December 1972)

Libyan American Oil Company v. The Libyan Arab Republic-Arbitral award of 12 April 1977- Arbitrator Dr. Sobhi Mahmassani

Selected Bibliography

Alfons Claudia, Recognition and enforcement of annulled foreign arbitral awards- An analysis of the legal framework and its interpretation in Case law an Literature, Peter Lang Internationaler Verlang der Wissenschaften (2010)


Poudret Jean-François, Besson Sébastien, Comparative Law Of International Arbitration, translation in English by S. Berti & A. Ponti, Sweet & Maxwell (2007)


Van den Berg Albert Jan with the assistance of the Permanent Court of Arbitration the Hague, New Horizons in International Commercial Arbitration and Beyond, ICCA International Arbitration Congress, Kluwer Law International (2005)


Yang Xiaodong, State immunity in international law, Cambridge University Press (2012)

**Articles in Periodicals**


Cairns David J. A., TRANSNATIONAL PUBLIC POLICY AND THE INTERNAL LAW OF STATE PARTIES, Transnational Dispute Management, Vol. 6, issue 1 (March 2009)

Dalton Penelope, Sovereign Immunity: The Right of the State Department and the Duty of the Court, 6Wm. & Mary L. Rev. 70 (1965)


Foakes Joanne and Wilmshurst Elizabeth, “State Immunity: The United Nations Convention and its effect” Chatham House, INTERNATIONAL LAW PROGRAMME ILP BP 05/01


Maniruzzaman A F M, STATE ENTERPRISE ARBITRATION AND SOVEREIGN IMMUNITY ISSUES: A Look at Recent Trends, Dispute Resolution Journal, vol. 60, no. 3 (August-October 2005)

Maniruzzaman A F M, Sovereign immunity and the enforcement of arbitral awards against state entities: Recent trends in practice, American Arbitration Association Handbook on International Law Practice, Juris, 2010

Maw Marlar, Recent trends in the Principle of State immunity, Modern Cultural Studies Society No.35, 2006


Reinisch August, European Court Practice concerning State immunity from enforcement measures, The European Journal of International Law Vol. 17 no.4 © EJIL 2006,

Reish Andrew, The Status of State trading entities in France, Law and Contemporary problems, (1972) Vol. 37 No. 4,

Starr Kenneth M., THE FRAMEWORK OF ANGLO-SOVET COMMERCIAL RELATIONS: THE BRITISH VIEW, Law and Contemporary problems, Volume 37, Number 3 (Summer 1972)


Periodicals

American Arbitration Association Handbook on International Law Practice
Arbitration International (Arb Int’l)
Dispute Resolution Journal
European Journal of International Law (EJIL)
Global Arbitration Review
INTERNATIONAL LAW PROGRAMME
Law and Contemporary problems
Modern Cultural Studies Society
Review of International Studies
Oxford International Arbitration Series
The American Journal of International Law
The Seinan Law Review
Transnational Dispute Management
Yearbook of the International Law Commission (ILM)
**Introduction**

Over the years the role of the State has changed, it has evolved. Today, the State has not just regulatory or authoritative (eg police, military) powers. The State in its current form deals with private enterprises, enters into commercial transactions, gets loans and establishes investment agreements. It is a State-provider for its nationals, which participates in the global market in terms of private economy. Some of these State functions are exercised and fulfilled by State-owned companies, which are established solely for this purpose.

The aforementioned commercial activities of State are carried out under contracts, which, in many cases contain an arbitration clause, providing for arbitration as a means of resolving any legal dispute, which may arise under these contracts. The preference of the arbitration instead of the courts should not be surprising, taking into account that arbitration has gained ground over the years and is considered to be the preferred method of resolving international commercial. As in the contracts between private persons, so in the contracts between a State or State entity and a private party, the arbitration clause is not activated if both parties fulfill their contractual obligations. However, in case of initiation of arbitration proceedings on behalf of the private party, because of the breach of the contract by the State or State entity, the latter has some weapons, which are proved to be sometimes very effectively, in order to avoid its participation in the arbitration proceedings or the enforcement of the arbitral award issued against them.

In many cases, States and State entities invoke State immunity or incapacity to enter into an arbitration agreement under their internal law. In particular, State immunity has two forms: jurisdictional immunity, which limits the adjudicatory power of national courts or arbitral tribunals and immunity from execution, which restricts the enforcement powers of national courts or other organs. As stated “it is an axiom of international law that foreign States should be immune from suit in the national tribunal unless they expressly or
impliedly waive their immunity and submit to the jurisdiction”\(^1\). Therefore the question that arises is whether the arbitration agreement constitutes a valid and binding waiver of immunity and establishes the arbitral tribunal’s jurisdiction. Furthermore, it must be examined whether the waiver of immunity from enforcement measures can be inferred implicitly by arbitration agreement or requires a separate declaration by the State or State entity.

On the other hand, incapacity equals to inability of a State or State entity to validly bind itself by an arbitration agreement. It is not unusual the States to invoke their incapacity to enter into an arbitration agreement after its conclusion and, usually, at the time that arbitration proceedings begin. Does this tactics constitute an abusive application of State’s internal law against the legal rights and good faith of the other contracting private party or is the only and legal way to restore the legality that was disrupted by the signing of the arbitration agreement?

The objective of this dissertation thesis is to examine whether State immunity and State’s or State entity’s incapacity to conclude an arbitration agreement are obstacles to arbitration proceedings, by presenting the position of the relevant jurisprudence of national and international courts and arbitral tribunals and the basic legal instruments regulating these issues at national and international level.

**Part I The sovereignty of the State as an obstacle to arbitration**

1. The principle of State immunity

Although the main and common characteristics of sovereign States are not clearly defined by the theorists, the Montevideo Convention on rights and duties of States of 1933 considers that all sovereign states have (a) a permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into relations with other States\(^2\). These are the elements that compose the sovereignty of a State, regardless the dimensions, number of

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2 Montevideo Convention on Rights and Duties of States of 1933, Article 1
people, or form of its government. Indeed, a United Nations General Assembly Resolution declared that neither small size, nor remote geographical location, nor limited resources constitutes a valid objection to sovereign statehood.\(^3\)

The sovereign States are judicially equal, pursuant to article 2 paragraph 1 of the Charter of the United Nations. From the principle of sovereign equality derives the rule of State immunity, which was adopted by the International Law Commission as a customary international law.\(^4\) States have incorporated the principle of sovereign immunity into their domestic legal order in two ways: domestic courts do not exercise jurisdiction in actions brought against foreign states; and States have allowed foreign States a privilege, as a matter of comity, to appear as plaintiffs in domestic courts, if they so choose.\(^5\)

The close link between the principle of sovereign equality and the principle of State immunity is clearly stated in a recent Judgment of International Court of Justice as follows: “this principle [of State immunity] has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it”.\(^6\)

State immunity has been pleaded by the States and State entities in order also to avoid their obligations under the contracts or transactions that they have entered into, to stop court or arbitral proceedings against them or to avoid the enforcement of an arbitral award or judgment.

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\(^4\) *Yearbook of the International Law Commission, 1980, Vol. II (2)*, p. 147, para. 26

\(^5\) *Schreiber v. Federal Republic of Germany, [2002] Supreme Court Reports (SCR), Vol. 3*, p. 269, paras. 33-36

The rule of State immunity is regarded as proportionate restriction of the right on effective judicial protection, taking into account that extending immunity to another State regularly has the legitimate aim of complying with the relevant principles of international law. Therefore, measures taken by the Contracting States of the European Convention on Human Rights (ECHR) which reflect generally recognised rules of public international law cannot in principle be regarded as imposing a disproportionate restriction. Nevertheless, the courts must not grant, automatically, the foreign State immunity, without examining the merits of the case and, especially, without examining if the foreign State acted as “imperium” or performed private law actions. In Oleynikov v. Russia case, the European Court of Human Rights held that “the domestic courts did not undertake any analysis of the nature of the transaction underlying the claim” and “thus made no effort to establish whether the claim related to acts of [North Korea] performed in the exercise of its sovereign authority or as a party to a transaction of a private law nature” and therefore “the Russian courts failed to preserve a reasonable relationship of proportionality and impaired the very essence of the applicant’s right of access to court”.

2. Absolute and restrictive approach of the principle of State immunity

The scope and extent of the rule of State immunity vary depending on the nature of State’s acts. More specifically, in respect of sovereign or public acts (acta jure imperii), States enjoy absolute immunity, whereas in respect of commercial or private-law acts (acta jure gestionis) States have limited the immunity which they claim for themselves and which they accord to others.

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11 That approach has also been followed in the United Nations Convention and the European Convention (see also the draft Inter-American Convention on Jurisdictional Immunity of
(restrictive immunity). The principle of absolute immunity reflects a “structuralist” approach (ratione personae), which is concerned with the status of the party claiming sovereign immunity. On the contrary, the principle of restrictive immunity reflects the “functionalist” approach (ratione materiae), which is concerned with the subject matter (e.g., the conduct) forming the basis for the claim of sovereign immunity. The necessity of the distinction between acta jure imperii and acta jure gestionis and the exclusion of the latter from immunity are analyzed in Dralle v Government of Czechoslovakia case, where the Austrian Supreme Court observed: “This subjection of the acta jure gestionis to the jurisdiction of the States has its basis in the development of the commercial activity of the States. The classic doctrine of immunity arose at a time when all commercial activities of States in foreign countries were connected with their political activities, either by the purchase of commodities for their diplomatic representatives abroad or by the purchase of material for war purposes. Therefore, there was no justification for any distinction between private transactions and acts of sovereignty. Today the position is entirely different; States engage in commercial activity and, as the present case shows, enter into competition with their own nationals and with foreigners. Accordingly, the classic doctrine of immunity has lost its meaning and, ratione cessante, can no longer be recognized as a rule of international law”.

The result of addressing the exercise of any State activity as a practice of State sovereignty was the preference of absolute approach, as shown by the jurisprudence of several courts. In Le Gouvernement espagnol v. Casaux case, the Cour de Cassation granted the Spanish government immunity from jurisdiction on the basis of the reciprocal independence of sovereign states, by rejecting the attempted distinction between “Etat puissance publique” (state as a public power) and “Etat personne privee” (state as a private person). The

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States drawn up by the Inter-American Juridical Committee of the Organization of American States in 1983 (ILM, Vol. 22, p. 292)

Dralle v Government of Czechoslovakia, Judgment of 10 May 1950 of Austrian Supreme Court; an English translation of the judgment is given in the UN Publication ST/LEG/SER.B/20 at page 183; See also, B. Sen, “A diplomat’s handbook of International law and Practice-Third Revised Edition”, Martinus Nijhoff Publisher (1988), p. 465
Court held that any and all contractual obligations of a foreign State, regardless of the nature, are immune from jurisdiction\(^\text{13}\).

As States became involved in commercial activities, some national courts began to apply a more restrictive law of immunity by reference to the type of activity carried out by the state\(^\text{14}\). The restrictive immunity recognized by some national courts in such cases was treated as confined to acta jure gestionis. In Companie des chemins de fer Liégeois Limbourgeois case, the plaintiff company sued for reimbursement of sums advanced by it to the Netherlands government under a contract for the enlargement of a railway station in the Netherlands. The Belgian Court de Cassation held that, when a State was not exercising public power but was acting like a private person pursuant to private law then it could not enjoy immunity\(^\text{15}\). In another case, the Austrian Supreme Court used not the private nature of State’s wrongful acts but the place, where these acts happened, as criterion for grounding court’s jurisdiction and denying the foreign State’s immunity. More specifically, in a suit against the United States for damages inflicted by a car owned by the United States and driven by a United States embassy agent, the Austrian Supreme Court entered judgment against the United States and justified it as follows: "There exists no doubt that the foreign government could sue a local citizen in a local court for damages to its vehicle arising out of an accident.... The matter lies differently with a local citizen. The latter would be left remediless vis-\-a-vis the foreign State ... !"\(^\text{16}\). Moreover, in X. v Iran case the German Federal Constitutional Court adopted the restrictive approach and set the criteria, which characterize the act jure gestionis as follows: "As a means for determining the distinction between act jure imperii and act jure gestionis one should rather refer

\(^{15}\) Xiaodong Yang, State immunity in international law, Cambridge University Press, 2012, p. 13
\(^{16}\) Holoubek v. United States,2 Ob. 243.60, 84 Juristische Blätter (Wien), Vol. 84, 1962, p. 43; ILR (Sup. Ct. of Austria 1961)
to the nature of the State transaction or the resulting legal relationships and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law or as a private person, that is in private law”.

After the growing acceptance of restrictive immunity approach, United Nations finalized its own restrictive approach to State immunity through UN Convention on Jurisdictional Immunities of States and their property. This Convention avoided setting the criteria, which distinguish acta jure gestionis from acta jure imperii and, instead, listed the category of acts that constitute an exception to immunity. Generally, these exceptions include personal injury, damage of property, contracts of employment, commercial transactions, intellectual and industrial property, participation in companies, ships owned by State and ownership of property.

The restrictive approach was clearly adopted by the Federal State Immunity Act, according to section 1605 (a) (2) of which “a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case – ……… (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States”. The same position is reflected in article 3 of State immunity Act 1978, which provides that “a State is not immune as respects proceedings relating to (a)a commercial transaction entered into by the State; or (b)an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom”.

3. State entity as a means of conducting commercial transactions of the State

17 Entscheidungen des Bundesverfassungsgerichtes (Tubingen), vol. 16 (1964), p.27; International Law Reports (London), vol.45 (1972), p.57
18 UN Convention on Jurisdictional Immunities of States and their property, passed by UN General Assembly on 2 December 2004
The State, in its modern form, may exercise its powers and serve its own purposes through State enterprises, organs or agencies, which deal with private persons and draw up agreements with them. Under these conditions, two issues arise. Firstly, can State entities invoke State immunity? Secondly, are the contracts signed only by State entities binding for the States?

3.1. The principle of State immunity invoked by State entities

The distinction between the absolute and restrictive immunity theories is also reflected in the protection extended to State entities as an extension of a State’s sovereignty.

According to the structuralist approach, State entities are entitled to immunity when they are organically linked to the State. Criteria for establishing this link with the State are the public form of the entity, the extent of government control over the entity, the entity’s ability to own and manage property. A strict structuralist approach will lead to absolute immunity if the entity is established as a public entity that is inseparable from the State. Then, everything the entity does will be entitled to immunity. Therefore, the creation of a separate State entity gives rise to a presumption that the entity is effectively separate from the State and, thus, the fact that a State entity has a distinct legal personality would defeat any claim to immunity. Yet, there are cases, in which the court did not consider the separate legal personality of a State entity as legal ground to deny immunity. The landmark decision regarding immunity from suit of a state enterprise was handed down in 1949 in the case of Krajina v. The Tass Agency. In that case, plaintiff instituted a libel action against defendant, which published a weekly newspaper in the U.K.. Tass, after entering a conditional appearance, applied to set aside plaintiff’s writ on the ground that it was a department of the Soviet government entitled to immunity from suit. The Soviet ambassador certified

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that the agency constituted a department, although it was empowered to exercise the rights of a legal entity. The Court of Appeal allowed dismissal of the action, holding that even if Tass was a governmental department enjoying a separate legal status, it did not automatically follow that it was deprived of the right to assert sovereign immunity22.

The functionalist approach focuses primarily on the nature of the transaction at issue, not on the status or structure of the foreign entity. An entity carrying out a sovereign act is immune regardless of its public or private status23. In a very recent case, the Australian High Court clarified the prerequisites, under which a State entity enjoys immunity. The criteria that the Court used in order to determine whether an individual or a corporation is a separate entity of a foreign State, are: ownership, control, the functions which the corporation performs, the foreign State’s purposes in supporting the corporation, and the manner in which the corporation conducts itself or its business. Thus, courts must not treat ownership and control as determinative, but will also consider factors such as the foreign State's purposes in supporting the entity. All these elements must be taken into account to answer the question “whether the corporation or individual is being used to achieve some purpose for that State in the relevant circumstances”. In case of a positive answer the State entity enjoys jurisdictional immunity24.

The functionalist approach was adopted by the UN Convention of Jurisdiction Immunities of States and their Property, which in article 2 paragraph 1b (iii) provides that the term State means agencies or instrumentalities of the State and other entities, including private entities, but only to the extent that they are entitled to perform acts in the exercise of

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24 PT Garuda Indonesia Ltd v Australian Competition & Consumer Commission, Judgment of 7 September 2012 of Australian High Court, HCA 33 (7 September 2012)
prerogative ‘de la puissance publique’. Beyond or outside the sphere of acts performed by the exercise of the sovereign authority of the State, they do not enjoy any jurisdictional immunity.

3.2. The extension of the binding force of contracts signed by State entities to the non-signatory States

The extension of the binding force of contracts signed by State entities to the States plays an important role when these State entities are not vested with the legal right to own and dispose of assets and, as a consequence, the execution of arbitral awards, rendered against them, becomes impossible. Arbitral tribunals and courts have many times faced this issue. One can distinguish between two distinct lines of jurisprudence – one seeking to extend the applicability of the arbitration clause to the non-signatory “core” State, and another one seeking to respect the corporate veil between the “core” State and State agencies and instrumentalities, when they possess a separate legal personality.

Sometimes, the States express in a written form their intention to be bound by contracts signed by their State entities. Svenska case is one such case. Svenska, a Swedish company concluded an agreement with a Lithuanian State-owned entity, which provided for arbitration in Denmark under the rules of the International Chamber of Commerce and contained an express irrevocable waiver of all sovereign immunity rights by the Lithuanian government and the State-owned entity. The Lithuanian government was not a signatory party, though it had manifested its intention in writing to be bound as if it were a signatory. After a dispute arose, Svenska referred to arbitration against both the later privatized entity and the Lithuanian government and succeeded in getting an award in its favour. Later, Svenska sought to enforce the award in UK. During the court proceedings the Lithuanian government invoked State immunity due to the fact that it was not a signatory party to the contract contained the arbitration clause and,

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therefore, it had never waived its immunity. After analyzing the parties' common intentions, which it considered the correct approach under the applicable Lithuanian law, the Court of Appeal held that the Lithuanian government was bound by the arbitration agreement.27

The existence of a Government’s member’s signature in a contract concluded between a private party and a State entity is not sufficient to prove that the Government agreed to be a contracting party and to submit any dispute to arbitration. That is illustrated in Pyramids Plateau case. In this case, the Government of Egypt, represented by the Minister of Tourism, had signed with South Pacific Properties (SPP) and Egyptian General Organisation for Tourism and Hotels (EGOTH) the “heads of agreement” as a party but these contained no arbitration clause. The final joint venture agreement, which contained such a clause – providing for ICC arbitration in Paris – was signed by SPP and EGOHT. The Minister of Tourism added his signature in this joint venture agreement and a notation that he had “approved, agreed and ratified” the document.28 The Court of Appeal faced the issue whether the Minister of Tourism’s signature was sufficient to create arbitral tribunal’s jurisdiction over the Government. The Court annulled the award given in favour of SPP on the ground that Arab Republic of Egypt was not a party to the arbitration agreement because the Minister’s signature under the words “approved, agreed and ratified” did not imply the Government’s intention to be bound by the arbitration agreement.

In other cases, when the State did not expressly consent to be bound by an arbitration agreement signed between a State entity and a private party, it is not always easy to identify the required legal connection and dependence of the signatory State entity by the State. In Bridas case, the US District Court held that the arbitral tribunal had exceeded its powers by considering that it

had jurisdiction over the Government of Turkmenistan, although it was not a party to the underlying contract. This judgment was reversed by the US Court of Appeal, which held that “the Government acted as the alter ego of Turkmenneft in regard to this Joint Venture Agreement with Bridas”. The Court came to this conclusion after examining all the relevant actions on behalf of the Government of Turkmenistan, which evidenced that “the Government, as Turkmenneft’s owner, made it impossible for the objectives of the joint venture to be carried out”.

4. Waiver of immunity

4.1. Arbitration agreement as a waiver of immunity

Waiver of immunity means the act of giving up the right against self-discrimination and proceeding to testify\(^\text{30}\). Waiver may occur, inter alia, in a treaty, in a diplomatic communication, by actual submission to the proceeding in the local courts or in an arbitration agreement. Indeed, arbitrators and courts alike have ruled that a State’s submission to arbitration evidences an explicit or implicit waiver of sovereign immunity at the jurisdictional level\(^\text{31}\). It is contended that State immunity does not prevent State or State entity from agreeing to submit to the authority of an arbitral tribunal\(^\text{32}\). But when the State agrees to an arbitration clause, it “waives its immunity from jurisdiction vis-à-vis both the arbitral tribunal and the local courts are competent to exercise judicial review and supervision over the arbitral proceedings”\(^\text{33}\). Consequently, after the signing of an arbitration agreement or


\(^{33}\) V. Heiskanen, “STATE AS A PRIVATE: THE PARTICIPATION OF STATES IN INTERNATIONAL COMMERCIAL ARBITRATION”, MILLETLERARASI TAHKIM SEMINERI (2009), available at
of a contract containing an arbitration clause, the State or State entity cannot claim immunity in order to avoid participating in the arbitration proceedings.

Pursuant to another view, the subjection of a State or State entity to the jurisdiction of an arbitral tribunal does not violate their immunity, because the arbitral tribunal does not exercise sovereign powers, unlike to the courts. An arbitral tribunal in contrary to the court of a forum State does not derive its powers or jurisdiction from statutory provisions but from the arbitration agreement entered into by the parties. Therefore, because of the absence of sovereign powers, which is the basis of the doctrine of State immunity, it is supported that this doctrine should not be relevant in relation to the exercise of the jurisdiction of the arbitral tribunal34.

The issue when an arbitration agreement is binding and valid waiver of immunity divided the jurisprudence. In Tekno-Pharma v. Iran case35, the Swedish Supreme Court held that Iran could invoke immunity, regardless the fact that an arbitration agreement was signed between the parties, because the quoted arbitration clause was not equal to an explicit waiver of immunity. The Second Circuit Court of Appeals in Petrol Shipping Corp. v. Kingdom of Greece granted absolute immunity from suit to the Kingdom of Greece, which had agreed to arbitrate all contract claims arising from the transaction36.

On contrary, in Libyan American Oil Company v Libya case37, the Swedish Court of Appeal found that Libya, by the approval of arbitration clause, had waived its immunity. In this case, one of the judges demonstrated the problematic around the plea of State immunity after the conclusion of an

36 Penelope Dalton, Sovereign Immunity: The Right of the State Department and the Duty of the Court, 6 Wm. & Mary L. Rev. 70 (1965), http://scholarship.law.wm.edu/wmlr/vol6/iss1/7
arbitration agreement as follows: “It has become even more common during recent years that States and State-owned organs act as parties to agreements of a commercial nature. If such agreements provide for arbitration, it is shocking per se that one of the contacting parties later refuses to participate in the arbitration or to respect a duly rendered award. When a State party is concerned, it is therefore a natural interpretation to consider that said party, in accepting the arbitration clause, committed itself not to obstruct the arbitral proceedings or their consequences by invoking immunity”\textsuperscript{38}. In another case\textsuperscript{39}, the arbitral tribunal justified its competence, rejecting the plea of immunity on the basis of the private nature of the underlying transaction and not on the basis of the existence of the arbitration agreement.

The legal uncertainty created by conflicting judgments was restored in many jurisdictions by the legislative determination of the arbitration agreement as a valid method to waive jurisdictional immunity. For example, section 1605(a)(6) of the Foreign Sovereign Immunities Act (FSIA) 1976 provides as follows: “A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case.....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”. In relation with English law, the 1978 Act, Section 9 provides 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”. Furthermore, according to article 17 of UN Convention on Jurisdictional Immunities of the State and their Property, if a State enters into

\textsuperscript{39} ICC award No 1803 (12 December 1972) -Societe des Grands Travaux de Marseille v. East Pakistan Industrial Development Corporation
an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State. Similarly, article 12 of European Convention on State Immunity provides that “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 on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to: the validity or interpretation of the arbitration agreement; the arbitration procedure; the setting aside of the award, unless the arbitration agreement otherwise provides”.

4.2. Waiver of immunity and enforcement of arbitral awards

Immunity from execution or immunity from enforcement measures is distinct from jurisdictional immunity. The fact that a national court can have jurisdiction with regard to acta jure gestionis of a foreign State does not necessarily imply that measures of constraint can be taken\(^\text{40}\). Immunity from jurisdiction refers to a limitation of the adjudicatory power of national courts, whereas immunity from execution restricts the enforcement powers of national courts or other organs\(^\text{41}\). In République islamique d'Iran, Organisation pour les investissements et les aides économiques et techniques de l'Iran (O.I.A.E.T.I.) et Organisation de l'énergie atomique de l'Iran (O.E.A.I.) v. Sociétés Eurodif et Sofidif et Commissariat à l'énergie atomique case\(^\text{42}\), the Paris Court of Appeal held that "immunity from execution is not

\(^{40}\) Nout Van Woudenberg, State immunity and cultural objects on Loan, Martinus Nijhoff Publishers 2012, p.53


\(^{42}\) République islamique d'Iran, Organisation pour les investissements et les aides économiques et techniques de l'Iran (O.I.A.E.T.I.) et Organisation de l'énergie atomique de l'Iran (O.E.A.I.) v. Sociétés Eurodif et Sofidif et Commissariat à l'énergie atomique, Judgment of 21 April 1982 of Court of Appeal, Clunet, 110 [1983], p.145ff. The exact words of this decision are as follows: "l'immunité d'exécution n'est pas absolute et qu'elle peut être exceptionnellement écartée lorsque le bien saisi se trouve affecté par la volonté de l'Etat étranger, à la réalisation d'une opération purement commerciale poursuivie par lui-même ou par un organisme qu'il a créé à cet effet".
absolute and can be exceptionally discarded when the property seized is affected by the willingness of the foreign state, the realization of a purely commercial transaction pursued by himself or by a organization he created for this purpose". Therefore, the States have the capability to waive their immunity from execution. Generally, a waiver of immunity from jurisdiction does not encompass a waiver of immunity from enforcement measures, rather a separate waiver is required for that purpose. Nevertheless, there are judgments, which do not support this view. A landmark decision was issued by US District Court of Columbia in Libyan American Oil Company (LIAMCO) v Socialist People’s Libyan Arab Jamahiriya case. LIAMCO commenced an action before the District Court of Columbia to enforce an arbitral award against People’s Libyan Arab Jamahiriya. During the court proceedings Libya claimed that the District Court lack jurisdiction because of State immunity. The District Court of Columbia rejected Libya’s jurisdictional argument and found that Libya had waived its defence of sovereign immunity for the purpose of the FSIA by expressly agreeing to the specific amendments to the arbitration and choice of law clauses in the deeds of concession. The waiver of immunity from enforcement measures must be explicit and unequivocal. This is the view adopted, for instance, by the Paris Court of Appeal in Société Noga v. Russian Federation case. In Court’s decision it is stated that “the simple statement in the contracts in dispute that ‘the borrower waives all rights of immunity with regard to the execution of the arbitral award rendered against it in relation to this contract’

did not manifest an unequivocal intention on the part of the borrower State to waive in favor of its private contractual partner, its right to rely on immunity.” Though, according to relevant court decisions, the waiver of immunity from enforcement can also be implied. In Ipitrade Intl S.A. v Federal Republic of Nigeria\(^{47}\), the US District Court found that by signing the New York Convention 1958 Nigeria waived immunity from execution and had to have contemplated the confirmation and enforcement of arbitral awards under the framework of the Convention\(^{48}\). Moreover, in Creighton v Qatar case\(^{49}\) the Cour de Cassation held that Qatar waived its immunity from execution because the agreement to submit their dispute to an International Chamber of Commerce tribunal equalled to waiver of immunity from execution due to the fact that at that time article 24 of the ICC Arbitration Rules provided that: “by submitting the dispute to the jurisdiction of the tribunal, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal in so far as such waiver was validly made”.

As in jurisdictional immunity, the absolute and restrictive approach of State immunity principle have also been applied at the stage of execution of arbitral award and the restrictive approach prevailed, at the end. In Szczesniak v. Backer et Consorts case\(^{50}\), the Brussels Court of Appeal held that foreign States acting as private persons are not exempt from enforcement measures to secure claims. In a very recent decision\(^{51}\) the English Supreme Court held that States cannot claim immunity when facing enforcement in England of foreign adverse judgments in commercial cases. This case related to bonds issued by the Republic of Argentina and bought by NML in respect

\(^{47}\) *IPITRADE INTERNATIONAL, S.A., (Petitioner) v FEDERAL REPUBLIC OF NIGERIA (Respondent), Judgment of 25 September 1978 of United States District Court, District of Columbia.*

\(^{48}\) Dhissadee Chamlongrasdr, supra N.28

\(^{49}\) *Creighton Limited (Cayman Islands) v Minister of Finance and Minister of Internal Affairs and Agriculture of the Government of Qatar (2000), Judgment of 6 July 2000 of Cour de Cassation, XXV Ybk Comm. Arb. 458*

\(^{50}\) *Szczesniak v. Backer et Consorts, Judgment of 14 July 1955 of Court of Appeal, Pas. 1957 II 38*

of which, together with all its other debt, Argentina declared a moratorium in December 2001. Between June 2001 and September 2003 affiliates of NML purchased, at a little over half their face value, bonds with a principal value of US$ 172,153,000 (“the bonds”). On 11 May 2006, NML, as beneficial owner, obtained summary judgment on the bonds for a total, including interest, of US$ 284,184,632.30, in a Federal Court in New York. Later, NML sought to execute the judgment of New York Court in UK, by bringing a common law action on that decision, which was accepted by Commercial Court. Court of Appeal reversed that judgment supporting that Argentina was protected by State immunity. Basically, two main issues were raised before the Supreme Court; (1) whether the proceedings to enforce a foreign judgment could be considered as “proceedings relating to a commercial transaction” within the meaning of section 3 (1) (a) of the 1978 Act, which provides that “a State is not immune as respects proceedings relating to – (a) a commercial transaction entered into by the State”; (2) whether section 31 of the Civil Jurisdiction and Judgments Act 1982 provides an alternative scheme for restricting state immunity in the case of foreign judgments. The members of the Supreme Court divided on the first issue and by a majority three to two the Supreme Court decided that section 3 of the 1978 Act did not extend to enforcement of foreign judgments. On the contrary, on the second issue the Supreme Court decided unanimously that State immunity could not be raised as a bar to the recognition and enforcement of a foreign judgment if, under the principles of international law recognised in the UK, the state against whom the judgment was given was not entitled to immunity in respect of the claim.

52 Section 31 of the Civil Jurisdiction and Judgments Act 1982 provides in relevant part, as follows: “(1) A judgment given by a court of an overseas country against a state other than the United Kingdom or the state to which that court belongs shall be recognised and enforced in the United Kingdom if and only if... (a) it would be so recognised and enforced if it had not been given against a state; and (b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978” – available at http://www.legislation.gov.uk/ukpga/1982/27

Although the restrictive approach is the prevailing, in a very recent decision there the Court of Final Appeal in Hong Kong applied the absolute approach in Congo case, by ruling clearly that an arbitration clause will not act as an implied waiver of the jurisdiction of the courts of Hong Kong in relation to the enforcement of an arbitral Award by the courts. At a very fundamental level, the Court of Appeal has engaged in judicially deciding the type of sovereign immunity principle applicable in Hong Kong, which should be decided by the executive branch of government, which is responsible for foreign affairs relating to Hong Kong. The reason for applying the absolute approach in the stage of execution can be justified by the fact that “enforcement against State property constitutes a greater interference with State’s freedom to manage its own affairs and to pursue its public purposes than does the pronouncement of a judgment or order by a national Court of another State”.

The decisive criterion for denying or accepting the enforcement of an arbitral award is the purpose of the object of execution. If the assets, that are going to be attached, satisfy official or sovereign purposes, then the arbitral award cannot be enforced. As it was clearly stated in Parlement Belge case: “The principle ...is that, as a consequence of the absolute independence of every sovereign authority,...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 public property of any State which is destined to public use...”.

Similarly, in Philippine Embassy Bank Account Case, the German Constitutional Court stated that “there is a general rule of international law that

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54 Democratic Republic of the Congo and others v. FG Hemisphere Associates LLC (FACV Nos. 5, 6 & 7 of 2010)
58 Philippine Embassy Case, Judgment of 13 December 1977 of Federal Constitutional Court, 46 BVerfG, 342; 65 ILR 146, at 164.
execution by the State having jurisdiction on the basis of a judicial writ of execution against a foreign State, issued in relation to non-sovereign action (acta iure gestionis) of that State upon that State’s things located or occupied within the national territory of the State having jurisdiction, is inadmissible without assent by the foreign State, insofar as those things serve sovereign purposes of the foreign State at the time of commencement of the enforcement measure”. The German Court’s position was followed by the Court of Rotterdam, which in Azeta case held that “- pursuant to an (unwritten) international law – a foreign State is entitled to immunity from execution when execution measures are employed against the state concerned involving the attachment of property intended for the public service of that State. Establishing, maintaining and running embassies is an essential part of the function of government and hence of the public service. Moneys intended for the performance of this function must therefore be treated as property intended for the public service”.

As evidenced by the Dutch Court’s judgment and many other judgments, the diplomatic assets became many times the target of execution. Diplomatic buildings and any kind of property serving diplomatic functions are the paradigmatic examples of property serving non-commercial purposes and thus being immune from execution. The aforementioned NML case occupied also the French Supreme Court for private and criminal matters (Cour de cassation), which held that the waiver of immunity, contained in the relevant financial contracts did not cover diplomatic assets, that were firstly attached by NML Capital and, therefore, the attachments were void. The Supreme Court justified this position by explaining that diplomatic immunity is governed by special rules which require a waiver to be both express and specific. On the contrary, in Russian Federation v. FJS case, the Swedish Supreme Court rejected a State immunity claim as grounds for

60 August Reinisch supra N. 32
61 Supra No 50
refusing the enforcement of an arbitral award through the attachment of real property that had been used mainly to house non-diplomats, but also to store diplomatic documents as well as a few diplomatic cars. The main issue was whether either the Russian real property itself or the rental payments which it received from the tenants of the property were attachable to satisfy a monetary award not connected to the property\textsuperscript{63}. The Court did not recognise State immunity, explaining that limited diplomatic use is not alone enough to guarantee State immunity.

The State immunity in relation with public property is clearly enshrined in several national legislations and international treaties with some exceptions. In particular, 19 of UN Convention on Jurisdictional Immunities of States and their Property provides that execution, against property of a State may be taken in connection with a proceeding before a court of another State only if the State has expressly consented to the taking of such measures as indicated: (i) by international agreement; (ii) by an arbitration agreement or in a written contract; or (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or only if the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or only if it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed. Similarly, article 23 of the European Convention on State Immunity allows measures of execution against the property of a State taken in the territory of another State to the extent that the State has expressly consented thereto in writing in any particular case. From the provisions of the aforementioned Conventions it is clearly stated that no implicit waiver of immunity from enforcement can be accepted.

\textsuperscript{63} Edith Palmer, “Sweden:Supreme Court rejects State immunity claim against Enforcement measures” available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402851_text
The necessity of an explicit and unconditional consent only for execution measures against State property, which is for the time being in use or intended for use for commercial purposes, is also provided in section 13 (3) of UK State Immunity Act 1978. According to the relevant provisions enforcement measures can be sought “with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection”. On contrary, the FSIA accepts as valid also the implied waiver of immunity from enforcement measures against State property used only for commercial activity in USA. More specifically, section 1610 (1) (a) of FSIA provides that “the property in the United States of a foreign state,……..., used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver…."

Part II The States’ and State entities’ capacity for arbitration

The capacity for arbitration is linked with the issue of the validity of the arbitration agreement. As the Swiss Federal Tribunal has explained: “The question of jurisdiction of the arbitral tribunal also comprises the question of the subjective scope of the arbitration agreement. Whether all parties to the proceedings are bound to it is a question of their capacity to be a party to the arbitration proceedings and thus a prerequisite for a decision on the merits or the admissibility [of the claims]…”64. “Considering that “a State’s submission to arbitration evidences an explicit or implicit waiver of sovereign immunity at the jurisdictional level”65, in

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some States, there are domestic provisions, which restrict the State’s or State entity’s capacity to agree to arbitration. In this case, restrictions on a State’s entitlement to enter into arbitration agreements are justified “by the old concept that it is against sovereign dignity to submit to any type of dispute resolution system not controlled by the state itself”\textsuperscript{66}. It is supported that restrictions on State’s capacity to conclude an arbitration agreement do not raise issues of capacity but instead relate to issues of arbitrability. This view is criticized with the argument that the relevant legislative provisions all purportedly concern the power or right of particular types of entities (eg States and State entities) to conclude binding contracts and that this sort of rule falls relatively clearly within classic definitions of legal capacity\textsuperscript{67}. However, the invocation of these restrictions from the side of a State or a State entity, after the conclusion of an arbitration agreement, “can lead to abuses of public power where the State party attempts unjustifiably to frustrate or deny a contract”\textsuperscript{68}.

1. Examining the capacity of State and State entities to conclude arbitration agreements

1.1. The applicable law for determining State’s and State entity’s capacity for arbitration

Article V (1) (a) of the 1958 New York Convention provides that recognition and enforcement of an award may be refused when the parties to an arbitration agreement were under the law applicable to them under some incapacity. In contrast to New York Convention the UNCITRAL Model Law does not make any reference at all to the choice of applicable law governing issues of capacity. In particular, according to article 34 (2) (a) (i) of Model Law

\begin{itemize}
  \item \textsuperscript{67} Stavros L. Brekoulakis, Third Parties in International Commercial Arbitration, Oxford International Arbitration Series (2010), para. 1.72
\end{itemize}
an arbitral award may be set aside by the court only if the party making the application furnishes proof that a party to the arbitration agreement “was under some incapacity”. The question which law is applicable for determining the capacity of a State or State entity to enter into arbitration agreement has not been answered in the same way in theory.

According to one view, the capacity of a State to bind itself by an arbitration agreement is a question governed by its own legislation. Indeed, the choice of law rule applies to the capacity to enter into a valid arbitration agreement. Under the choice of law rule, the capacity to contract is governed by the personal law of the party in question. On the other hand, it is supported that once a State party has accepted arbitration in a contract, even if its domestic law prohibits it to conclude binding arbitration agreements, “both the capacity to contract and to enter into an arbitral agreement are governed by an “internationalized” lex contractus or lex arbitrii (and not by the personal law of the parties, including the state party). Therefore, no account is taken on national public law governing the contracting powers of States and any ensuing limitations (including constitutional and administrative law limitations) on contracting and on the entry into an arbitration agreement.” In Benteler v. Belgium case, the lex contractus (but not in its aforementioned “internationalized” form) was considered to be the governing law of the capacity of State and State entities. As it is stated in the relevant Preliminary Award “with respect to State or parastatal entities in international contracts, the capacity of the State or its subdivisions to conclude arbitration agreements is governed by the proper law of the contract rather than the internal law of the State”.

Whatever the law applicable is for the determination of a State’s capacity to enter into arbitration agreement, it is generally accepted that “international

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ordre public would vigorously reject the proposition that a State organ, dealing with foreigners having openly, with knowledge and intent concluded an arbitration clause that inspires the co-contractant’s confidence could thereafter, whether in the arbitration or in execution proceedings invoke the nullity of its own promise”73. The opinion that international public order disapproves the practice of States to rely ex post on their internal law and to claim invalidity of an arbitration agreement due to their incapacity is adopted by several court decisions. Indicatively Paris Court of Appeal held that “whatever the basis, the prohibition of a State to submit to arbitration is limited to domestic agreements and is not part of international public policy, which on the contrary prohibits a public entity from invoking restrictive provisions of its own national law or the law of the contract in order to evade arbitration a posteriori”. 74

The reliance on State’s and State entity’s incapacity in order to avoid their obligations derived from an arbitration agreement equals to abuse of private counterparty’s good faith. Therefore, if the counterparty showed the required diligence and was in good faith at the time of arbitration agreement’s conclusion, then the State or State entity cannot invoke incapacity. There is a very important decision of Cour de Cassation in Lizardi case, related to the matter of the validity of a contract, in case that one of the parties is incapable of signing the contract and the other party acts in good faith75. Pursuant to the facts of this case, a Mexican bought jewels in Paris but refused to pay invoking his lack of capacity under Mexican law, whereas under French law was considered to be an adult and, therefore, capable to conclude the sale contract. The Cour de Cassation held as follows: “……in this case, the French can not be required to know the laws of the various nations of their provisions concerning in particular the minority, the majority and the extent of liabilities that

may be taken by foreigners to the extent of their civil capacity; then it is sufficient for the validity of the contract, that the French have treated without levity, without negligence and in good faith."

Several jurisdictions have enacted statutory provisions which reflect the general assumption that a State or State entity cannot rely on its national law to escape its obligation arising from an arbitration agreement in an international contract. For example, article 177 (2) of the Swiss PILA provides that “if a party to arbitration agreement is a State or an enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of the dispute covered by an arbitration agreement.” Moreover, European Convention clarifies the ambiguity and confusion that exists as to the capacity of States and State entities to enter into an arbitration agreement by providing in article II (1) that “legal persons considered by the law which is applicable to them as legal persons of public law have the right to conclude valid arbitration agreements”. Therefore, in cases, which fall into the scope of European Convention, States and State entities cannot invoke national legislation that is contrary to European Convention, which has superior regulatory power.

1.2. Lack of power of State’s and State entity’s apparent representative

Another skilful way of resisting to arbitration to which State or a State entity had previously agreed is the invocation of the absence of representative power of the person signing the agreement and, therefore, the lack of any commitment by the State or State entity. It is almost impossible for the contracting private party to know the national provisions governing the
executive duties and responsibilities of each member of the Government and the statutory provisions of State entities regulating the bodies which have power of legal representation. In many cases, these provisions are not codified in a single legal text, but they are contained in more than one legal instruments. Therefore, this legislative “chaos” can create serious problems even to the most careful and diligent contracting private party.

Moreover, internal law may require a designated procedure to be followed before or after the conclusion of arbitration agreement. Even though the compliance with this procedure falls within the competence and liability of State’s or State entity’s representatives, the person who will be “punished” in case of violation is the contracting private party. As already mentioned, the abusive use of internal law by State and State entities led the courts and the arbitral tribunals to establish an internationally recognized rule that a Government or Governmental body cannot rely on its national law to invalidate an agreement of international arbitration. Consequently, “a judge or an arbitrator could overlook the lack of capacity of one of the parties ........or the absence of power of a party’s representative........if it were established that the other party entered into the contract in circumstances in which it could legitimately have been unaware of the lack of capacity or absence of power”79.

These views were well expressed and justified in a recent decision of Netherlands Supreme Court. In this case, Defence Industries Organisation of the Ministry of Defence and support for Armed Forces of the Islamic Republic of Iran concluded with International Military Services a contract for the construction of a combat vehicles maintainance facility and agreed to submit disputes to ICC Arbitration. The State organisation did not pay IMS and violated its contractual obligations. IMS initiated arbitration proceedings, which took place in Hague and ended with an award against State organisation. Subsequently State Organisation sought an action before the Court of The Hague to set aside the arbitral award arguing that the arbitration agreement was invalid because Art. 130 of the Iranian Constitution stipulated

79 Fouchard, Gaillard, Goldmann supra No. 68, p. 252
arbitration agreements between government bodies and foreign parties shall only be valid if approved by Parliament. Thus this approval had never been given. The Netherlands Supreme Court affirmed the decision of Court of Appeal, which ruled that it is an internationally recognized rule that a Government or Governmental body cannot rely on its national law to invalidate an agreement of international arbitration and that the IMS acted in good faith as to the capacity of Ste Organisation to enter into the arbitration agreement80.

Similarly, the Cairo Court of Appeal in Organisme des Antiquitiés v G. Silver Night Company case ruled as follows: “It is without doubt that such an allegation……..is not in conformity with the general principle of good faith in the performance of obligation, which does not distinguish between civil and administrative contracts. In addition, this runs counter to the jurisprudence and practice in international commercial arbitration according to which State or public law entities may not reject an arbitration clause contained in their contracts by invoking legislative restrictions, even if they are genuine……..Moreover, if public law persons were allowed to free themselves from arbitration clauses which they inserted in a contract with a foreign party, on the basis that administrative contracts cannot be submitted to arbitration, this would shake the confidence of parties which deal with such entities and could cause serious damage to foreign investment and to development projects”81.

2. Enforcement of awards annulled because of State’s or State entity’s incapacity for arbitration


The capacity of a State or a State entity to enter into an arbitration agreement is a major issue, mainly because there is a serious possibility that at the time of enforcement the court may refuse to recognize and enforce the arbitral award if the State or State entity was under some incapacity, pursuant to law applicable to it. For example, in Fougerolle SA v Ministry of Defence of the Syrian Arab Republic case, the Administrative Tribunal of Damascus refused enforcement of two ICC awards holding as follows: “In the present case, the two awards for which enforcement is sought were rendered without the preliminary advice on the referral of the dispute to arbitration, which must be given by the competent Committee of the Council of State. Consequently, Art. 44 of the Law No. 55 of 1959 of the Council of State has been violated. This norm is mandatory and pertains to public policy. The consequence of this violation is that [the two ICC awards] are non-existent....”82.

Furthermore, the problematic around State’s capacity to enter into an arbitration agreement gets more complicated, when the seat of arbitration is in this State and the competent court of the State party sets aside the arbitral award, by invoking to its internal law, which contains restrictions on State’s capacity for arbitration and on procedure of arbitration. In the light of European Convention the court asked for enforcement of a nullified award may refuse enforcement if the nullification was founded on the fact that the parties were under some incapacity according to their applicable law83. Moreover, article V (1) (e) of the 1958 New York Convention provides that recognition and enforcement of award may be refused if the award has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made. What is the luck of this annulled award? Can it be recognized and enforced in other countries, under

article V (1) (e) of New York Convention? There is no clear answer to these questions.

In Termorio case\(^8^4\), which concerned a Colombian state owned electrical utility, Electranta, U.S. Court of Appeal refused to recognize and enforce the arbitral award because the Colombia’s highest administrative Court, set aside this award on the ground that the arbitration clause violated Colombian law which, at the date of the agreement, did not expressly permit recourse to ICC arbitration. In contrast to this court’s decision, in Chromalloy case\(^8^5\), the U.S. District Court of Columbia recognized and enforced an arbitral award “against the state of Egypt on the basis of New York Convention, despite the fact that the award had been set aside by an Egyptian court where and under the law of which the award had been made. The federal court refused to recognize the Egyptian court’s decision nullifying the award, finding that to do so would violate U.S. public policy in favor of arbitration and reward Egypt’s breach of an express contractual provision not to pursue an appeal to vacate the award”. Subsequently, Chromalloy filed for seeking enforcement of the Egyptian arbitral award in France. Egypt invoked the nullification of the award by the Egyptian Court in order to stop the execution proceedings. Court of Appeal, in Paris ruled that French judges were not empowered to review the merits of the award and could refuse to grant exequatur only in those cases specified in the Code of Civil Procedure. The award made in Egypt was an international award, and its existence remained established despite its being annulled in Egypt and its recognition in France was not in violation of international public policy\(^8^6\).

Conclusion

States and State entities invoked many times (and continue invoking) before courts and arbitral tribunals immunity as a rule of public international law and incapacity to enter into arbitration as a rule of their internal law, in order to avoid satisfying their contractual obligations or participating in arbitration proceedings or to stop enforcement measures against them taken on the basis of an arbitral award. These claims are irreconcilable with the State’s obligations and principles of estoppel, when they are abusive and have no legal basis.

Courts faced effectively the abusiveness of the plea of State immunity, by gradually adopting the restrictive approach, pursuant to which States and State entities are not immune before a foreign court, if the dispute refers to commercial transactions and not to acts of sovereignty. In other words, if the State or State entity acts as a private person and deals in terms of private economy, it cannot invoke immunity.

Furthermore, when arbitration evolved into a popular means of resolving disputes, removing cases from the courts, more and more arbitration agreements were concluded between States or State entities and private persons. These arbitration agreements are considered by the courts and arbitral tribunals to be a valid waiver of immunity. In relation with the enforcement of the arbitral awards, courts seem to be more protective towards States, firstly because the execution is made against State property and secondly in order to avoid a possible conflict with immunities derived from consular or diplomatic law. Therefore, the decisive criterion for allowing the enforcement of an arbitral award is the purpose of the object of execution. If the assets, that are going to be attached, satisfy official or sovereign purposes, then the arbitral award cannot be enforced. In these cases, it is difficult for the private party seeking the execution to prove that the attached assets are not destined for public use, but they serve commercial purposes of the State or State entity.

Because of the fact that State immunity is a principle of public international law and every sovereign State can invoke it, private parties
ensure their financial interests and rights by concluding precise and explicit agreements, with which State or State entities waive both jurisdictional immunity and immunity from execution. Unfortunately, private parties cannot be fully protected against the plea of incapacity of the State or State entities to conclude arbitration agreements. Usually, the national statutory provisions that regulate the competences and powers of the Government’s members or the State entity’s Board of Directors’s members are not known to the private party and, in many cases, States or States do not inform the private parties about the existence of these provisions. Consequently, there is always a great risk that arbitration agreement will be declared as invalid because of State’s incapacity, although it is generally agreed that “it is fundamentally contrary to a State’s commitment to arbitrate subsequently to invoke its own legislative, constitutional or administrative acts as qualifications to or limitations on its international arbitration agreement\textsuperscript{87}”.

In addition to the legal aspect, the efforts of the States or State entities not to comply with the arbitration agreements and with arbitral awards rendered against them have also political and financial consequences. A State that shows inconsistency, breaches contracts without legal basis, invokes abusively immunity and avoids arbitration proceedings by claiming ex post its incapacity for arbitration is not a State with which investors and enterprises would cooperate. All these actions do not protect public money or public property. They only shake the confidence of private parties which deal with such States or State entities and cause serious damage to foreign investment and to development projects. States must respect the investors and the companies with which have commercial transactions and treat them as equals and not as subordinates. In other words, as it was beautifully stated by a well-known English judge: “It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it”\textsuperscript{88}.

\textsuperscript{87} Gary Born supra No 63, p.635