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Enforcement of Arbitral Awards Against States - a Risk to Peaceful Relations?

Abstract

The aim of this paper is to present and critically appraise the norms of international law relating to the enforcement of arbitral awards against States. It canvasses the main international instruments governing the recognition and enforcement of foreign arbitral awards (notably the New York Convention). It then elucidates the doctrine of sovereign immunity in customary international law – and an attempt to codify it – as a hurdle to enforcement of such awards in domestic courts. The analysis investigates whether the doctrine acts as a safeguard against jeopardizing peaceful relations between States while promoting international commerce, foreign direct investment and trade relations between State and foreign non-State actors. Diplomatic protection is examined as an alternative to international and national adjudication.

Keywords: recognition and enforcement of arbitral awards, sovereign immunity, peaceful settlement of international disputes, diplomatic protection

Introduction

A non-State entity seeking to resolve a dispute with a State of which it is not a national has a range of options in principle available to it. The traditional method, termed diplomatic protection, involves an espousal of the claim by the home State of the entity. The States invokes, through diplomatic action or other means of peaceful settlement, the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.[1] Other methods revolve around adjudication of such claims – before national or international dispute resolution bodies. An important obstacle

[1] International Law Commission, Draft Articles on Diplomatic Protection with commentaries (UN Doc. A/RES/61/35 (2006)) („Draft Articles on Diplomatic Protection").

to bringing and subsequently enforcing claims against foreign States in domestic courts is the doctrine of sovereign immunity. The doctrine would not ordinarily prevent a claim from being heard by an international court or tribunal. It may, however, be a considerable complicating factor when enforcement of an award rendered by an arbitral tribunal is sought against a foreign State in domestic courts. If an award is not complied with voluntarily by the party against which it is rendered, the common method is to rely on the machinery of enforcement available within municipal legal systems (in the absence of available international mechanisms of enforcement), which normally requires the involvement of domestic courts to engage the apparatus of coercive enforcement measures to satisfy the claim of the judgment creditor[2]. Such enforcement would then be ordered against the assets of the judgment debtor which are within the jurisdiction in which enforcement is requested.

The following analysis will start by setting out the international normative framework of enforcement of foreign arbitral awards in domestic courts, most of which is applicable to State and non-State defendants. Next, the doctrine of sovereign immunity will be examined in its two iterations: absolute and restrictive. A distinction will be drawn between the two levels of immunity, jurisdictional immunity and immunity from execution. Certain theoretical underpinnings of the doctrine will be illuminated, and its practical implications will be considered, including those relating to the avoidance of confrontation between States. Finally, an alternative avenue of seeking redress for injury against foreign States will be examined, namely the mechanism of diplomatic protection, in the light of its comparative merits and demerits.

1. Recognition and enforcement of foreign arbitral awards

The most important instrument in this field is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). As of May 2021, the Convention has 168 state parties, which includes 165 of the 193 United Nations member states.[3] It applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. It also

[2] A significant exception may be the enforcement of awards rendered by tribunals established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), to which note bene Poland is not a party.

[3] https://www.newyorkconvention.org/countries [accessed on 12.06.2021].

applies apply to arbitral awards not considered domestic awards in the State where their recognition and enforcement is sought.[4] Under Art I(3), States are entitled to make two reservations: first, the reciprocity reservation, according to which any State may declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State; and second, the commercial reservation, which permits a State to declare that it will extend the benefit of the Convention only to those differences arising out of legal relationships that are considered as commercial under the national law of the state making such declaration.

Another important document relevant to the question of enforcement of arbitral awards is the ICSID Convention. The enforcement of awards rendered within its regime is governed by the provisions of the Convention. As noted above, Poland is not a party to the Convention and for this reason its provisions will not be discussed here in detail. It will be referred to in the following discussion to provide contrast with the New York Convention.

The grounds for refusal of enforcement are listed exhaustively in Art V in the New York Convention (and the grounds for annulment are listed exclusively in Art 52 of the ICSID Convention). It promotes certainty by offering a clear guidance to the courts (or annulment tribunals) and an advance warning to the parties and arbitral tribunals. One particularly troublesome ground for refusal is the public policy exception under Art V(2)(b). It is interesting to note a divergence of views in the ILA Committee expressed in its Report on Public Policy as a Bar to Enforcement.[5] Some members considered that court interference in the enforcement process should be strongly discouraged, and that the public policy exception to enforcement should be "restricted to the greatest extent possible"[6]. Some members, mainly from developing countries, were of the view that State courts should be entitled to protect the State from perverse and/or prejudiced awards, and there should be no attempt to restrict the scope of public policy[7]. The majority of the Committee, however, considered that court intervention should be limited, and approved the pro-enforcement policy referred to above[8]. The Report also postulates that greater consistency in the application of the public policy exception would lead to a better ability to predict the outcome of a public policy challenge, irrespective of the court in which enforcement proceedings are

4 See Art I (1).
5 P. Mayer, A. Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, "Arbitration International" 2003, Issue 2.
6 Ibid, 253.
7 Ibid.
8 Ibid.

brought. This, in turn, should discourage speculative challenges and facilitate the finality of arbitral awards[9].

The conventional wisdom held that the ICSID enforcement regime is superior to the one under the New York Convention because it does not permit challenges before national courts. This has been challenged, however, by the availability of annulment procedures under Art 52 of the ICSID Convention. The ICSID system is designed to be divorced from national systems of law[10]. The only step necessary to receive recognition and enforcement of an award within the territory of a Contracting State is to deposit with the designated competent court (or other relevant authority) of that State a copy of the award certified by the Secretary General of the Centre. Thus, review by the national courts where enforcement is sought is not permitted[11].

Art 52 of the ICSID Convention, however, provides for grounds on which the award may be annulled. Nonetheless, they are all procedural in nature and exhaustively listed in the provision and so ICSID awards are not subject to any policy review analogous to that under Art V(2) of the New York Convention[12]. Errors in the award, whether of fact or law, are irrelevant in ICSID annulment proceedings. The fact that annulment proceedings under ICSID and review by domestic court under Art V of NY Convention has been seen as a drawback of the systems might indicate that the parties (or at least claimants) or the 'legal industry' expects a quick and reasonably unrestrained procedure of enforcement. This, however, makes one ask what the intensity of practice of identifying and reviewing defective awards should be in the interest of justice. But if the speed of enforcement is a criterion against which the system should be measured, limited grounds for challenge or, respectively, annulment are to be appreciated.

Importantly, there may be further provisions concerning recognition and enforcement under the relevant local law or bilateral or other multilateral agreements. This may lead to fragmentation or, in a less extreme form, divergence between the enforcement reality across jurisdictions. For example, although the UNCITRAL Arbitration Rules provide no right of appeal, English law as *lex fori* adopted a right of review which was never intended, in addition to the grounds for refusal of enforcement under the New York Convention. In *Ecuador*

[9] Ibid., 255.
[10] S. Jagusch, J. Sullivan, *Part I Chapter 4: A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern*, [in:] *The Backlash against Investment Arbitration*, ed M. Waibel, A. Kaushal, London 2010, p.71.
[11] Ibid., 100.
[12] Ibid., 104.

v Occidental[13], the court held that although the right to commence arbitration under a BIT has its origins in public international law, the performance of that right (i.e., the arbitration procedure and tribunal) is made subject to minimal law and hence the public international law nature of the right does not prevent the English courts from examining a challenge to an award rendered in London under the 1996 Arbitration Act.

2. Sovereign immunity

State immunity is a standard form of defence - even though it is not mentioned in the New York Convention, it is mentioned in Art 55 of the ICSID Convention (which nota bene applies to enforcement but not recognition) and is often encountered in practice - where the unsuccessful party is either a sovereign state or a state agency. The two avenues through which it may appear in enforcement under the New York Convention are the public policy exception under Art 5(2)(b) and Art III, which subjects the rules of recognition and enforcement to "the rules of procedure of the territory in which the award is relied on". Sovereign immunity is grounded in the notion of sovereign equality of States, which, as Art 2, para 1, of the UN Charter provides, is one of the fundamental principles of the international legal order. This principle has to be 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[14].

The doctrine exists at two levels: at the level of jurisdiction and at the level of execution. They differ as to whether and how the defence can be waived. The arbitration can proceed validly only on the basis that the state concerned has agreed to arbitrate. Such an agreement is generally held to be a waiver of immunity[15]. In contrast, a waiver is generally not held to extend to immunity

[13] *The Republic of Ecuador v Occidental. Exploration & Production Company* [2007] EWCA Civ 656 (United Kingdom).

[14] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, para 57.

[15] See Arts 7 and 17 of UN Convention on the Jurisdictional Immunities of States and their Property ("the UNCSI"). Even though the Convention is not in force, its provisions are relevant in so far as they shed light on the content of customary international law (*Jurisdictional Immunities (Germany v Italy)*, para [66]) on occasions, the Court referred to the UN Convention as representative of rules deriving from custom, e.g. in relation to Art 6. More generally, the Court looked at the history of the adoption of the Convention and statements made in that process to determine what States considered to be customary international law on state immunity. The provisions of the Convention, even if they do not invariably codify custom, are an important point of reference and reflect some of the most recent thinking on the topics.

from execution[16]. The rationale behind this is that a seizure of state property is regarded as a greater intrusion into the state sovereignty than submitting a state to litigation in a foreign jurisdiction. There are, however, two general exceptions to state immunity from execution: certain waivers which are recognised and state assets used exclusively for commercial purposes.

In the classical model, immunity can be seen as a useful device to reconcile the right of independent states to exercise sovereign power and the rule of non-intervention into domestic affairs of another state[17]. Under classical international law the proper procedure for securing responsibility of another state for injury of a national flowing from an internationally wrongful act is diplomatic protection[18]. This suggestion is examined in greater depth in the next section.

There is another, more practical, consideration, namely the inability of national courts to enforce their judgments against a foreign state. The current law of immunity from execution retains an (largely) absolute bar on enforcement against state property. It is practically impossible to force another state to fulfil the order a domestic court in one country. It has a legal side to it - any forcible measures of constraints against the property of another state would amount to an unfriendly act generally prohibited by international law. The plea of state immunity thus avoids the forcible confrontation between States[19].

3. Diplomatic protection

Even if enforcement of an arbitral award – or bringing a claim in a municipal court – is thwarted by a plea of sovereign immunity, there remains a further (or a parallel) avenue available to the claimant, namely diplomatic protection. Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted[20].

The first observation to make is that the language used by the International Law Commission in its study of diplomatic protection follows that of the articles on the responsibility of States for internationally wrongful acts[21]. It would

[16] See Arts 19 and 20 of the UNCSI.
[17] H. Fox and P. Webb, *The Law of State Immunity*, Oxford 2013.
[18] Ibid, 28.
[19] Ibid, 32.
[20] Draft Articles on Diplomatic Protection, commentary to Art 1, para (2).
[21] Ibid, para (6).

therefore appear that this form of claim espousal is not available in respect of claims which do not concern internationally wrongful acts. Thus, a claim under a contract governed by domestic law would, in the absence of an umbrella clause elevating the breach of contract to a breach of international obligation, would not fall within the realm of diplomatic protection. The significance of this reading is limited in two respects. First, the claim relating to a commercial contract with a State, or a similar relationship not based on an international obligation, would not fall within the restrictive doctrine of sovereign immunity and could thus be heard, or an arbitral award relating to it could be enforced, in courts of States which subscribe to this version of the doctrine. Second, there appears no reason in principle why a State could not support a claim by its national, which is not based on an injury to an alien as understood by public international law, through its diplomatic methods (even though the rules set out for it in the ILC study and those of customary international law may not be applicable).

An important limitation on the practical usefulness of diplomatic protection is that a State has a right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so[22]. The municipal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation[23]. The International Court of Justice in the *Barcelona Traction* case explained: "within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. […] The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case"[24]. Accordingly, the espousal of the claim is contingent upon factors beyond the claimant's control, which compares unfavorably with the availability of direct action brought by the claimant against another State. There may be a range of reasons why the State of which the injured

[22] Ibid, commentary to Art 2, para (2).
[23] Ibid.
[24] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3, at p. 44.

party is a national does not intend to initiate diplomatic protection, for example in order to avoid deteriorating its relations with the other State.

A further complicating factor stems from the requirement that a State may not normally present an international claim in respect of an injury to a national before the injured person has exhausted all local remedies[25]. Local remedies refers to legal remedies which are open to the injured person before the judicial or administrative courts or bodies of the State alleged to be responsible for causing the injury[26]. Exhaustion of local remedies is a requirement of admissibility, which importantly is not required in most international investment arbitrations based on treaties, which give investor-claimants direct recourse against host States. If diplomatic protection is to be an alternative to arbitration, it may add considerable cost and delay to pursuing the claim. However, a common perception that pursuance of local remedies it to be *a priori* considered futile might be disputed as there is no reason to assume, as a general proposition, that a recourse to local adjudicative and administrative process will not give the claimant a fair redress in respect of her grievance.

It should be noted that diplomatic protection must be exercised by lawful and peaceful means. Diplomatic action could cover all lawful procedures employed by State to inform another State of its views and concerns, including protest and request for an inquiry or for negotiations aimed at the settlement of disputes as well as all other forms of lawful dispute settlement, including negotiation, mediation and conciliation[27]. Any attempt to return to "gunboat diplomacy" would then be contrary to international law.

It has been suggested that the granting of a standing to individuals to enforce her human rights or rights as an investor protected under a treaty at the international level reduced or eliminated the need for diplomatic protection[28]. However, as it should be apparent from the context of this discussion, obtaining satisfaction of a claim against foreign States is subject to a number of hurdles. Further, remedies under international law are limited, even if the recognition of rights has widened. Accordingly, diplomatic protection has been considered to continue to be the most effective means for the individual to secure redress for injury suffered abroad[29].

[25] This rule is subject to exceptions and does not apply to situation where the State has been injured 'directly', but those are beyond the scope of this article.

[26] Draft Articles on Diplomatic Protection, Art 14, which codifies the rule of customary international law recognized for example by the ICJ in *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959,* p. 6, at. 27.

[27] ibid, commentary to Art 1, para (8).

[28] J. Dugard, *Diplomatic Protection*, Max Planck Encyclopedias of International Law, Oxford 2009, para 9.

[29] Ibid, para 10.

Summary

The plea of state immunity remains a significant obstacle to the enforcement of arbitral awards rendered against States in municipal courts of other States. However, the doctrine is supported by sound theoretical and doctrinal underpinnings and contributes to the avoidance of forcible confrontation between States. It prevents a situation where one State would sit in a judgment of another State in its municipal courts. Even though it may be a source of disappointment to the judgment debtor, proposals to abolish the doctrine would be unfounded. The recognition of state immunity may carve out a prominent place for the operation of the mechanisms of diplomatic protection whereby States espouse claims of their nationals vis-à-vis another State. It may promote, and indeed it may help develop, peaceful and lawful means of settlement of disputes. Even if an award, which has been rendered, cannot be enforced in domestic courts, it retains significant value as it may provide important datum and an authoritative legal assessment of the factual situation involved to be used in the diplomatic processes between States.

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Wykonywanie orzeczeń arbitrażowych przeciwko państwom – ryzyko dla pokojowych relacji

Streszczenie

Celem tego artykułu jest przedstawienie i krytyczna ocena norm prawa międzynarodowego odnoszących się do wykonywania orzeczeń arbitrażowych wydanych przeciwko państwom. Zarysowane zostały główne instrumenty międzynarodowe rządzące uznawaniem i wykonywaniem zagranicznych orzeczeń arbitrażowych (z których znaczącym jest Konwencja Nowojorska). Następnie, naświetlona jest doktryna immunitetu państwa w zwyczaju międzynarodowym – oraz próba jej skodyfikowania – jako przeszkoda dla wykonywania takich orzeczeń w sądach krajowych. Analiza bada czy ta doktryna służy jako zabezpieczenie przed zagrażaniem pokojowym relacjom między państwami jednocześnie promując międzynarodową wymianę gospodarczą, bezpośrednie inwestycje zagraniczne i relacje handlowe między państwami a zagranicznymi podmiotami prywatnymi. Opieka dyplomatyczna została oceniona jako alternatywa dla międzynarodowych i krajowych postępowań sądowych i arbitrażowych.

Słowa kluczowe: uznawanie i wykonywanie orzeczeń arbitrażowych, immunitet państwa, pokojowe rozwiązywanie sporów międzynarodowych, ochrona dyplomatyczna