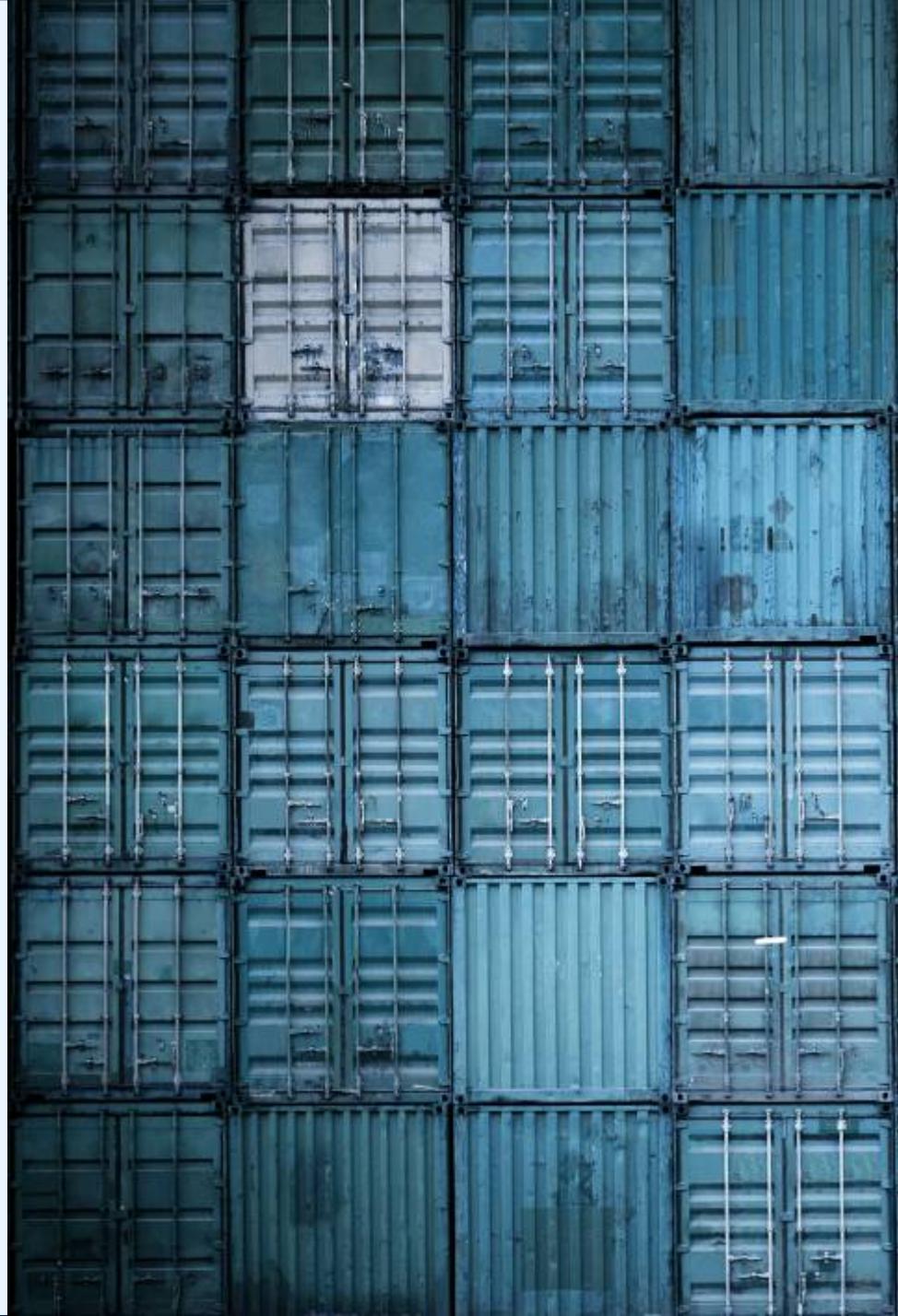

The Impact of Arbitration on Sovereign Immunity

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Introduction

The doctrine of sovereign immunity has its origins in the notion that all States are equal. Each State is bound to refrain from exercising its territorially limited jurisdiction over a foreign State.

There are two main sovereign immunity doctrines:

- Absolute – allows states to claim immunity for all their actions and property (many Eastern European states, some Asian states, some Arab states)
- Restrictive – under which immunity does not attach to states' commercial activities or assets (US, UK, Australia).

In recent years, there has been a shift from absolute to restrictive immunity in state practice in many developed countries

Introduction (cont')

The main distinction to be drawn is between state immunity from:

- Jurisdiction – whether a court can be prevented from deciding on a matter to which a state is a party (includes binding force of an award); and
- Execution – whether an organ of a state can be prevented from taking state property.

Sedelmayer v Russian Federation (2003, Germany)

Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (UK).

A Challenge to Achieving a Uniform Approach

The 2004 UN Convention on Jurisdictional Immunities of States and their Property (not in force, only 13 ratified, no CIS states)

- recalls that jurisdictional immunities of states and state property is generally accepted as a principle of customary international law (Art. 5);
- the State cannot invoke immunity in a proceeding arising out of a commercial transaction into which it has entered with a foreign natural or juridical person;
- explicitly allows waiver of state immunity to occur by contract between a private party and a state in advance of a dispute arising, reflecting the more common position in modern state practice (Australia, Canada, Germany, Sweden, UK, US).

Does an Arbitration Agreement Constitute Waiver of State Immunity?

While an agreement to entry of judgment reinforces any waiver, an agreement to arbitrate, standing alone, is sufficient, implicitly, to waive immunity.

The 1976 Foreign Sovereign Immunity Act in the US, the 1978 State Immunity Act in the UK, the Australian Foreign States Immunities Act support this position.

Case Law

Democratic Republic of the Congo v FG Hemisphere Associates (2011, Hong Kong)

An express waiver of state immunity does not constitute submission to the jurisdiction of any court for any purpose, including recognition of an arbitral award (such a waiver can only occur at the time of proceedings concerning recognition and enforcement, after the respondent state has lost the arbitration).

Figueiredo Ferraz v Republic of Peru (2011, US), Monegasque De Reassurances SAM v NAK Naftogaz of Ukraine et al (2002, US)

Application of the common law doctrine of *forum non conveniens* to the enforcement of awards.

Consent to arbitration does not (usually) constitute waiver of immunity from execution

ICSID Convention

Execution of the award shall be governed by the law concerning the execution of judgements in force in that State in whose territories such execution is sought (Art. 54);

Nothing in Art. 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution (Art. 55).

LETCO v Liberia (UK)

AIG Capital Partners v Kazakhstan (UK)

Sedelmayer v Russian Federation (Germany).

Does Submission to the ICC Rules Constitute Waiver of Immunity from Execution?

“Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made” (ICC Rules of 1998, Art. 28.6/ ICC Rules of 2012, Art. 34.6)

Creighton v Gouvernement de l'Etat du Qatar (France)

Walker International Holdings Ltd v The Republic of Congo (US)

Notwithstanding these two cases, the general practice is that a waiver from state immunity from execution does not imply waiver from state immunity from jurisdiction.

Examples of Waiver

“The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.” (ICSID Convention)

“It is understood that the rights and obligations under the present Agreement constitute commercial rather than sovereign obligations.”

Additional Points to Consider

- Oblige the State to comply with any award or other order issued by the Tribunal (including interim measures)
- Provide that the State irrevocably and unconditionally waives immunity for itself and all its organs over all property held now and in future
- Exclude *forum non conveniens* arguments
- Expressly state that the waiver is applicable to confirmation, recognition, enforcement *and execution*
- Require that the State take all actions necessary to satisfy any award, in particular, to designate assets sufficient to satisfy its obligations in any arbitral/national proceedings

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