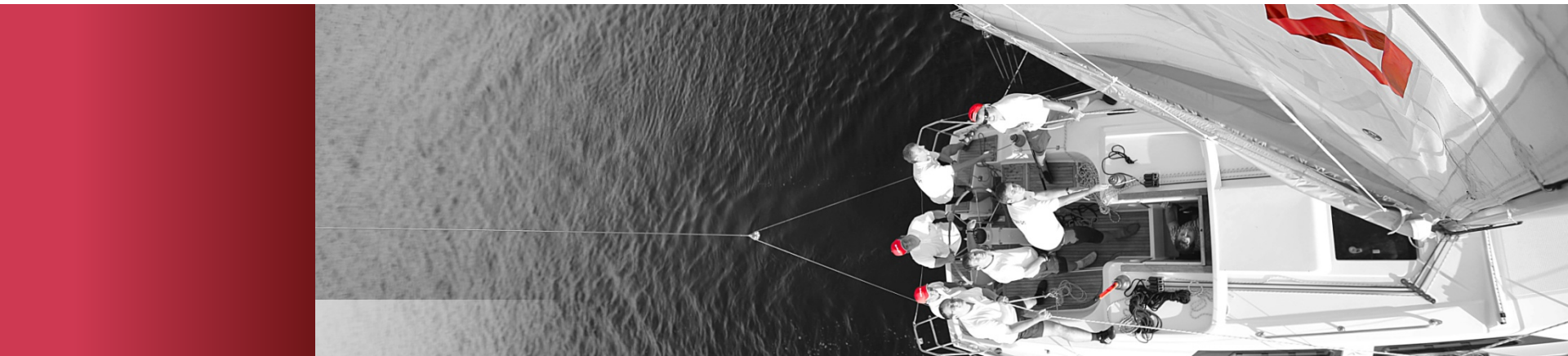


Sovereign immunity from suit and enforcement: waiver and limits



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Introduction

Basic principles

Absolute state immunity

E.g.: China (Mainland), Eastern Europe, Asia

- the sovereign is completely immune from foreign jurisdiction in all cases regardless of circumstances

E.g.: *Democratic Republic of the Congo v FG Hemisphere Associates LLC*

Functional state immunity

E.g.: United Nations Convention on Jurisdictional Immunities of States and Their Property, European Convention on State Immunity, and national sovereign immunities acts (USA, UK, Australia etc.)

- *de jure imperii* (claims arising out of sovereign activities)
- *de jure gestionis* (claims arising out of commercial activities)

E.g.: *United Mexican States v. Metalclad Corporation*, *Sedelmayer v. Russia*, *Maldives Airports v. GMR Malé International Airport*

Waiver

Arbitral proceedings

A state may waive its immunity either expressly or by implication, either before or after a dispute arises.

May be waived by (FCIA):

- ✓ initiation by a state of an action in a court;
- ✓ an agreement to arbitrate;
- ✓ an appearance on behalf of the state in an action; without challenge to the jurisdiction of the court.

- E.g.: *London Steam Ship Owners Mutual Insurance Association Ltd v. Kingdom of Spain and another*

Enforcement

A waiver from jurisdiction does not encompass a waiver of immunity from enforcement measures.

May be waived by (UN Convention):

- ✓ an international agreement;
- ✓ an arbitration agreement;
- ✓ a written contract;
- ✓ a written communication after a dispute has arisen.

- E.g.: *Embassy of the Russian Federation in France v. Compagnie NOGA d'Importation et d'Exportation, NML Ltd et al. v the Republic Argentina, Eurodif Corp. v. Islamic Republic of Iran*



Focus on enforcement

How to enforce against a State?

VOLUNTARY

If the State (its courts) does not agree, you have a problem...

How to enforce against a State, if the State resists enforcement?

Primary actions:

- to determine which assets are held for sovereign / public purposes and which are held for commercial / economic activities; and
- if the assets are held for sovereign / public purposes, to determine whether the State waived its sovereign immunity from execution.

However, to consider:

- forum non-convenience;
- decision against state = or ≠ state entity;
- type of property;
- mixed bank accounts;
- applicable law of the state of enforcement.

E.g. *Société NML Capital Ltd v. République Argentine*

Types of property

Immune from enforcement:

- the property of a foreign central bank or monetary authority;
- the property is used in connection with a military activity;
- the property is used in connection with other activity of a sovereign.

Subject to enforcement:

- waiver immunity from attachment;
- the property is used for the commercial activity;
- property which is acquired by succession or gift; or
- immovable property situated in the state of enforcement (except a diplomatic or consular mission).

E.g.: GECAMINES case, TMR Energy Ltd. v. State Property Fund of Ukraine, Thai Lao Lignite Co. v. Gov-t of Lao's people Democratic Republic, Aurelius Capital Partners LP v Republic of Argentina, Frontera Res. Azer. Corp. v. State Oil Co. of the Azerbaijan Republic

Enforcement against state entities

YES

- ✓ *Walker International v Republique Populaire du Congo, 2005*
- ✓ *Kensington International Ltd v Republic of Congo, 2005*
- ✓ *TMR Energy Ltd. v. State Property Fund of Ukraine, 2003*

NO

- ✓ *Continental Transfert Technique Ltd v Federal Government of Nigeria & others, 2009*
- ✓ *VTB Capital plc v Nutritek International Corp and others, 2013*
- ✓ *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC, 2012*

TMR Energy Ltd. v. State Property Fund of Ukraine

“If State chooses to send into the world a valuable asset subject to mode of ownership exclusive to that State, Ukraine and Antonov run risk their respective rights will stand or fall together”

Canada, Prothonotary Tabib Order, 23/12/03

How to enforce against Russia?

Sedelmayer v. Russia

- 15 January 1996 – request for arbitration
- 07 July 1998 – arbitral award
- Approximately 80 different legal proceedings throughout the world
- 01 July 2011 – Decision of Swedish Supreme Court on enforcement of arbitral award



February 2014, the Swedish government agency for debt collection, Kronofogden, had sold through auction the 2,800-square-metre building for €2.3 million (\$3.2 million) to a Swedish investor, Billy Uney.

YUKOS v. Russia

- ICC Awards of 2006-2007 (~ USD 540 million)
- SCC Awards of 12/09/10 (~ USD 3,5 million) and of 20/07/12 (~ USD 2,7 million)
- ECHR Award of 31/07/14 (~ EUR 2 billion)
- PCA Award of 18/07/14 (~ USD 50 billion)



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YUKOS USD 50 billion PCA Award:

= 90 Mistral-class warships



= 1/5 of Russia's budget



= Budget of Olympic Games in Sochi 2014



= Capitalization of Gazprom





Discussion

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