

Enforcement and State Entities:
What are the Chances?
Is it a Catch 22?

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Situations

- Judgment/ Award against the State Entity itself
- Judgment/ Award against another State Entity
- Judgment/ Award against the State
- Nature of Title
 - Judgment
 - Award
 - Contract
 - Treaty

The Claimant's Conundrum

A Claimant has obtained a favourable award / judgment but the State or State entity does not pay.

- Enforcement Proceedings in the Respondent State
- Enforcement Proceedings in a Third State
- European Court of Human Rights and similar proceedings
- Treaty Arbitration against the Respondent State
- Home State Intervention

continued →

The Claimant's Conundrum - Continued

A Claimant has obtained a favourable award / judgment and subsequently a favourable award in a Treaty arbitration, but the State or State entity still does not pay.

- Enforcement Proceedings in the Respondent State
- Enforcement Proceedings in a Third State
- European Court of Human Rights
- Home State Intervention, including State-State arbitration
- Institutional Response?

Enforcement against the State and its Entities against assets abroad

- Enforcement against the State
 - ⇒ **Legal: Problem of State Immunity**
 - ⇒ **Factual: Does the State have attachable assets abroad?**

- Enforcement against a State Entity
 - ⇒ **Legal: Problem of State Immunity?**
 - ⇒ **Legal: Identity of the Debtor**

Customary Law on State Immunity from Enforcement

- Historically most enforcement cases arose from commercial disputes
- Case-law and statute law relied on for *opinio iuris* must be seen before this background:
 - Liability for commercial acts
 - Limited to ‘commercial’ assets

Hallmarks of Treaty Arbitration

- Responsibility of the State as sovereign
- Duty to comply with an award is a public international law obligation

⇒ **Do we need separate rules for Treaty Awards?**

The Court's Conundrum

Claimant seeks to enforce a treaty award. Respondent State has organised all its commercial assets in separate legal entities. Otherwise, it uses embassy accounts.

The Court has the following options:

- Frustrate the Investor's claims
- Restrict the State's immunity
- Pierce the corporate veil

Recent Cases

- German Courts in Sedelmayer case
 - Treatment as in ordinary commercial case

Danger:

- Frustration of claims
- Abuse
- Re-Politicization of enforcement

- New Trends in state immunity law?

- Greek and Italian decisions
- US Terrorism Exception

Danger:

- Abuse
- Imbalance of Power

Considerations for Piercing the Veil

- State's domaine réservé to organise its activities
- State may not rely on internal law to evade its international obligations
- The notion of separate corporate entities is a concept of private law. - The duty to fulfil the award is public international law.

Advantages:

- Solution without impairment of the rules of sovereign immunity
- No need for a new international convention
- Implementation through case-law or national legislation

Do we need new rules for Enforcement?