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CONSENT TO ARBITRATE AS AN IMPLIED WAIVER OF IMMUNITY FROM EXECUTION IN THE CONTEXT OF THE ICSID CONVENTION

Abstract

The effectiveness of ICSID awards, were States to fail to comply with them, ultimately relies on the likelihood of their enforcement before domestic courts; an outcome that finds its main obstacle in the doctrine of immunity from execution, which shields foreign States' property from any kind of coercive attachment. Consequently, the theory of the implied waiver has been suggested as a solution to the problem in light of the *Creighton* case. After a preliminary framework of the ICSID enforcement system and a concise overview to contextualise the issue of immunity, the paper proposes an analysis of the mentioned theory throughout a breakdown of the leading objections raised against it. Accordingly, attention will be brought to the criticism maintaining that the proposed theory cannot find application within the context of the ICSID Convention, to the position holding that it was refuted by subsequent case-law, and, lastly, to the requirement that the waiver must be explicit, condition that appears to be incompatible with the theory of implied waiver.

Keywords: *investment arbitral awards, ICSID Convention, enforcement, immunity from execution, implied waiver.*

INTRODUCTION

With the Convention on the settlement of investment disputes between states and nationals of other state (ICSID, 1965) [hereinafter ICSID/the Convention] for the first time it was instituted a system under which non-State entities – investors – could sue States directly; under which international law could be applied directly to the relationship between the investor and the host State, excluding the operation of the local remedies rule; and, most notably, a system under which the tribunal's award would be directly enforceable within the territory of the States parties (Laterpacht, 2001, p. xi). It is frequently asserted that the parties voluntarily comply with arbitration awards in the majority of investment disputes. A survey conducted in 2024 shows a voluntary compliance rate of 58% with regard to ICSID awards (ICSID, 2024); nevertheless, the data considered for this statistic include both voluntary compliance and post-award settlement, while a study on corporate investors shows that post-award settlements result in only 35% of awardees securing more than 76% of the award value (Baltag & Mistelis, 2008; Mistelis, 2008, p.377). When States fail to voluntarily comply with awards, enforcement mechanisms come into play. According to the mentioned survey, in cases where enforcement was sought, the limited available data on outcomes of these proceedings show a success rate of 56% and a failure rate of 44% – a modest margin that makes it relevant to address the issue of non-execution of ICSID award.

The distinctive feature of ICSID lies in the fact that it insulates the arbitral proceedings and the resulting awards from the domain of domestic courts. Indeed, the Convention provides its own rules on recognition and enforcement of awards, whereas most other instruments governing international disputes settlement leave this issue to domestic laws or applicable treaties (Schill & Malintoppi, 2022, p. 1470, para. 3). According to ICSID enforcement mechanism, awards are binding, final and not subject to review but under the narrow conditions

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provided within the Convention itself by ICISD tribunals (Article 53); all Contracting States have an obligation to recognise awards as binding, whereas the pecuniary obligations imposed by awards are to be enforced as if they were final judgements of domestic courts of any Contracting State (Article 54(1)); the execution of awards is regulated by the law in force in the State where execution is sought (Article 54(3)), including the State's regulation on immunity from execution (Article 55). Thus, the Convention lays down a mechanism that is "quasi-automatic" as awards are directly enforceable in the territories of all States adhering to the Convention *without reservation*, since in recognising and enforce awards "[m]ember states' courts are […] not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award; under the Convention's terms, they may do no more than examine the judgment's authenticity" (U.S. District Court, S.D.N.Y., 2015, para. 102). Yet, Article 54(3) introduces an exception to the self-contained ICSID system by reserving the final stage of execution to domestic law, while Article 55 further clarifies that "[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of State or any foreign State from execution". Consequently, the retention of States' immunity from execution *ex* Article 55 represents the main obstacle to the enforcement process of awards' pecuniary obligations against States.

The dominant view on State immunity is the so-called "restrictive theory" of immunity, which acknowledges a disparity between State's acts in exercise of sovereign authority (*iure imperii*) protected by immunity, and State's acts of non-governmental nature (*iure gestionis*) which no longer enjoy immunity (International Court of Justice [ICJ], 2012, *Jurisdictional immunities of the state*, para. 117). In other words, immunity is no longer intended as unlimited, on the contrary, it is subject to exceptions that restrict its scope of application. However, the tentative approach of the international community to provide for clear boundaries to State immunity resulted in the failure to deliver a clear definition of either *acta iure imperi* and *acta iure gestionis*, leading to ambiguities on the rules concerning the application of this principle. In particular, the difficulty in characterizing the property as belonging to one category or the other entails questions of burden of proof, which are addressed in some national laws but not in others. (Schill & Malintoppi, 2022, p. 1516, para. 29). An overview of international and national legal instruments denotes that the general trend is to rely on the "use or intended use for the *purposes* of commercial non-governmental activity" (emphasis added) to determine whether property is covered by immunity or not. The chosen criterion leads to the exemption from execution of a broad spectrum of assets since the purpose test proves to be particularly challenging with regards to intangible property, in as much as the use of it is virtually impossible to determine without a specific declaration of the State (Fox & Webb, 2015, p. 513). Furthermore, constraints on execution become even more severe with regard to the category of property granted special protections, which often coincide with the assets that are more frequently targeted for enforcement, as they are typically the most accessible assets located in foreign jurisdictions – namely, central bank accounts and diplomatic property (Reinish, 2006, p. 827). To sum up, the high likelihood of a successful invocation of immunity from execution in proceedings for ICSID awards enforcement creates a situation whereby when creditors try to pursue assets of the State, they either get told that those property are allocated to *iure imperii* activities, therefore protected by immunity from execution; or that the assets, albeit allocated to activities *iure gestionis*, belong to a separate legal entity from the State, hence cannot be attached as they are not own by their debtor. In such a way as to "restore, for all practical purposes and for the benefit of foreign States, the absolute doctrine of immunity that modern immunity rules are intended to supersede" (Delaume, 1990, p. 253).

This background, that leads to "dread the lack of effectiveness of which the awards may as a result suffer" (Oppetit, 1981, p.847), prompted some authors to propose a solution that would align the position of investors and States also in the post-arbitration phase without disregarding the regulation on immunity, reflecting the intent that the "Contracting State and the investor would be on the same footing" (ICSID, 1968, p. 890) underlying the previsions dealing with the compliance with the awards. The suggested solution to the problem of immunity from execution consists in an implied waiver. The concept stems from the same construct that see States' consent to arbitrate as consent to jurisdiction (i.e. an implied waiver

of immunity from jurisdiction) under the wording of Article 54 of the ICSID Convention, endorsed by both literature and domestic jurisdiction (*Yugoslavia v. SEEE*, 1986, Bulletin Civile No. 226; *Soabi v. l'État Sénégalais*, 1991, Bulletin civile No. 193). The proposed theory tries to push forward and extend such consent to arbitration as to also be interpreted like a waiver of immunity in proceedings to execute the resulting award (Brenninkmeijer & Gélinas 2021), on the premises that the obligation undertaken by State to comply and abide with the awards cannot be relegated to the arbitration phase ignoring the post-award commitment. This interpretation, not unknown to the doctrine on immunity, albeit always rejected, has gained renewed attention following the *Creighton v. Qatar Case* before the French Court of Cassation.

Creighton, an American company, was entrusted by Qatar with the construction of a hospital and then expelled from the site following the termination of the contract by the State. Consequently, pursuant to the arbitration clause in the construction contract, Creighton referred to the ICC for arbitration and in 1993 was awarded compensation totalling several million dollars through two awards against Qatar. When Creighton moved to levy a distress and arrest on Qatar's assets held by French banks, Qatar successfully invoked immunity from execution before the courts of first and second instance, which prompted the awardee to lodge and appeal to the *Cour de Cassation* (Oxford Report, 2000). The First Civil Chamber of the Court of Cassation ruled that, considering together the principle of international law and Article 24 of the ICC Rules on Arbitration (International Chamber of Commerce [ICC], 2021), "l'engagement pris par l'État signataire de la clause d'arbitrage d'exécuter la sentence dans les termes de l'article 24 du règlement d'arbitrage de la Chambre de commerce international impliquait renonciation de cet État à l'immunité d'exécution" (*Creighton Limited v. Minister of Finance of Qatar*, 2000, para. 1(4)). Where Article 24 ICC stated that "[e]very arbitral award shall be binding upon the parties. By submitting their dispute to the Rules, the parties undertake to carry out the award without delay, and are deemed to have waived any remedies to which they may validly renounce" (ICC, 2021, Art. 24(2)).

CRITICISM INFORMED BY A MISREADING OF ARTICLE 55 ICSID

The main oppositions to import the French court's results in the ICSID system rest on the judgment sole reliance on the ICC Rules of Arbitration, and on the absence therein of a corresponding provision to Article 55 ICSID (Oxford Report, 2000, para. 6), whereby the latter is interpreted as explicitly preserving immunity from execution in proceeding to enforce ICSID awards (Shill & Malintoppi, 2022); lastly, the criticism focuses on the different stance of the *Cour d'Appel* in the successive controversy involving enforcement of an international investment award (Mayer Fabre, 2024, p.49).

To address the first issue, it should be noted that the commitment under the ICC Rules from which the Court infers the existence of the implied waiver is the one provided for by Article 24(2), which simply affirms that the "award shall be binding", using exactly the same wording of Article 53 ICSID. Furthermore, the ICC Article states that by submitting the dispute to the Rules "the parties undertake to carry out the award". In the context of the ICSID Convention, the same obligation is set out, in general, in Article 53 (1), where it requires the party to "abide and comply with the award"; and, in particular, by Article 54 when it compels the Contracting States to "recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations […] as if it were a final judgment of a Court in that State" – imposing an even stricter obligation beyond the general one to carry out the award. Thus, if a commitment to enforce the award can be deduced by Article 24(1) ICC, there is no reason to deny the same conclusion to Articles 53 and 54 ICSID, considering that the latter establishes a more specific duty to enforce the award; in any case, at the very least, it is clear that the norms mirror each other to the point to convene that they impose the same obligation. Consequently, if it is admitted that the same obligation from which the Court of Cassation deduced the implied waiver exists also within the ICSID Convention, there appears to be no obstacle to transpose such inference with regard to the ICSID Convention as well.

Along the same lines, another French judgment, adjudicating on a reference to *Creighton*, ruled that "acceptance of the binding nature of the award *resulting from that of the*

arbitration agreement operates, in the absence of a clause to the contrary, as a waiver of immunity from enforcement (emphasis added)" (*Société Creighton v. Qatar*, 2001). With this decision, the Court "a esquissè un fondement à la nouvelle règle" (Meyer Fabre, 2024, p. 49.) in light of the principle of good faith – unsurprising considering the relevance and inspiration to this principle in the drafting of the ICSID Convention (Broches, 1987, p.289; ICSID, 1968, pp. 19,46) – not just referring to the ICC Rules and Regulation, but to all arbitration agreements.

Once it has been established that the obligation under the ICSID Convention and the ICC Rules is the same, attention can be given to the second criticism, namely Article 55 ICSID and its meaning as preserving immunity from execution would militate against an implied waiver (Oppetit, 1981, p. 874). These critics overlook the actual role of Article 55 within the Convention, for a better understanding of which is useful to refer to the documents concerning the origin and the formulation of the Convention and the explanatory papers authored by Mr. Broches, chairman of the Regional Consultative Meetings and of the Legal Committee, and in charge of the World Bank staff working on the Convention.

The first thing to clarify is that "Article 55 d[oes] not constitute a reservation" (Broches, 1987, p. 332) of immunity from execution; it does neither grant nor prevent it (Brenninkmeijer & Gélinas, 2021, p. 447). Rather, this provision was included with the sole purpose of clarifying that the Convention "did not seek to change the law of the Contracting States with respect to immunity" (ICSID, 1968, pp. 905, 1083), as a mere clarification. The Convention did not intend to impose immunity from execution with respect to the implementation of awards; actually, the ICSID did not attempt to regulate execution at all. The drafter had "no thought of dealing with the question of sovereign immunity" (ICSID, 1968, p. 11) in the Convention, since the only difficulty that had emerged in the past "concerned the implementation of agreements to arbitrate rather than refusal to comply with an award once rendered" (Broches, 1987, p. 300); thus, the issue of execution was to not be "exaggerated" (ICSID, 1968, p. 11). On the contrary, it was deemed to be a "question […] somewhat academic" (ICSID, 1968, p. 304), on the ground that "the basic presumption of the Convention [was] that State would live up the obligations they assumed" (ICSID, 1968, p. 345) and, accordingly, there was no reason to believe that State would not abide with awards (ICSID, 1968, pp. 11, 344). It is also worth considering, as some authors noticed, that any attempt to lay down a uniform rule which would allow a waiver of immunity from execution would have encountered objections from all sides (Moore, 1966, p. 1378), in particular developing countries, jeopardising the wide ratification of the Convention (Schill & Malintoppi, 2022). Any solutions proposed – from restrictive immunity on execution (today widely accepted) to a waiver from immunity on execution (Oppetit, 1981, p. 848) – were impossible to put forward in any significant way through a multilateral treaty in the early sixties (Broches, 1987, p. 333).

Therefore, as evidenced by the analysis of the *travaux préparatoires* of the ICSID and clearly recognized by the Chairman "Article 55 does nothing more than acknowledge State practice as regards immunity from execution. Accordingly, the scope of Article 54 *will evolve along with State practice* (emphasis added)" (Broches, 1972, p. 404). This leaves no doubt that the regulation of State immunity from execution must be found not within the ICSID Convention, but within "the law in force in any Contracting State regulating immunity" (ICSID, 1965, Art. 55); thus, any development on the topic of immunity from execution, such as the implied waiver, is allowed in the framework of the Convention inasmuch as it represents that State's regulation on immunity.

To recapitulate, the commitment to comply with a binding award undertaken by consent to the arbitration, from which the French Court of Cassation derives the implied waiver to immunity, can be found within the ICSID Convention. Moreover, no provision of the ICSID can be interpreted as "a clause to the contrary" referred to by the *Cour de Appel*; hence, an implied waiver would be consistent with the Convention notwithstanding the provision of Article 55.

CRITICISM INFORMED BY CONFLICTING CASE-LAW

Moving onto the last point of criticism, it has been brought to attention the fact that, in the month following the first *Creighton* judgment, the French Court of Appeal inverted its

position in the *Noga* case (*Ambassade de la Fédération de Russie en France v. Société Noga*, 2000). In that case, Noga tried to execute awards under the Stockholm Chamber of Commerce against Russian embassy's account relying on an express waiver of immunity from execution by the Russian Federation, but the Court rejected Noga impound on those assets on the grounds of diplomatic immunity from execution granted by the Vienna Convention on Diplomatic Relations (United Nations, 1961).

Although at first reading this judgment may appear to be in contrast with the previous one, there is no actual inconsistency between them. In the case at hand, what determined the outcome of the award was not the rebuttal of the "implied waived rule" established in *Creighton*, but the application of the Vienna Convention on Diplomatic Protection. In this regard, it must be borne in mind that in *Creighton* the Court acknowledges an implied waiver considering Article 24 ICC *together with* "les principes du droit international régissant les immunités des Etates étrangers", which necessarily encompassed the customary rules regarding diplomatic immunity of premises and property of the embassy (UN, 1961, Aritcle 22(3)); at no point of that judgment the Court appears to suggest such departure from the discipline on immunity: the reasoning for the implied waiver roots elsewhere, i.e. in a different interpretation of the consent to arbitrate.

Under the proposed theory, the key point that allows for balancing the broader enforceability of awards and the protection of States' interest (Lauterpacht, 1951, p. 235) lies exactly in the property granted reinforced immunity. The special regime provided for property protected *ex* Article 21 UNCJI, reproduced *mutatis mutandis* in most national legislations on the topic, "would be a proportionate limitation to the scope of the solution proposed" (Brenninkmeijer & Gélinas, 2021, p. 449); given that it would ensure that certain categories of State property remain, in practical terms, non-executables. According to this argumentative approach, the same objection to the *Creighton* approach grounded on the refusal to grant execution in the later *Noga* (*Noga v. Banque centrale de la Fédération de Russie*, 2009/2010) judgments is equally untenable, since the property sought therein were assets belonging to Russian Central Bank, another type of property granted special protection.

CRITICISM INFORMED BY THE EXPRESS CONSENT REQUIREMENT

The real, nodal, problem to derive an implied waiver of immunity from execution from the States' consent to arbitration is that the prevailing view in current practice demands that renunciation by a foreign State to its immunity from execution arises out of a specific and unequivocal consent, separated from the consent to jurisdiction (Fox & Webb, 2015, p. 390).

The explicit requirement appears manifestly in Article 20 UNCJI, which states that "consent to the exercise of jurisdiction […] shall not imply consent to the taking of measures of constrain" (UN, 2004, Art. 20). This, admittedly, could pose a serious threat to the proposed theory when the UN Convention enters into force; but, until then "the rules of State immunity as they have been developed in national courts and statutory provisions will continue to prevail" (Brenninkmeijer & Gélinas, 2021, p. 444). And, notably, one persistent undercurrent weakening of the general rule can be found both in domestic jurisdiction and legislative or institutional rules concerning arbitration that consider a State's consent to arbitration as a sufficient waiver to both immunity from jurisdiction and execution (Fox & Webb, 2015, p. 398). Starting from legislation, one can quote, by way of example, the US FSIA and the Canadian FSIA that do not contain any norm specular to Article 20 UNCJI and, furthermore, expressly provide for the consent to execution to be either explicitly or *by implication* (U.S. Foreign Sovereign Immunities Act, 1976, § 1610(a)(1); State Immunity Act, R.S.C. 1985, c. S-18, art. 12(1)(a)). Moreover, it has been noted that when States have also committed to institutional rules that "impose obligations on the party to honour any arbitral award rendered, an even stronger case of implied waiver of immunity from execution of the award can be argued" (Fox & Webb, 2015, p. 392).

Turning to the case law, although *Creighton* does not reflect the general common understanding of domestic courts, it has not been a standalone case. The same conclusion of an implied waiver was reached by Swiss Courts (*Liamco v. Socialist People's Republic of Libya*, 1980), American Courts (*Liamco v. Socialist People's Libyan Arab Jamahiriya*, 1980; *Walker*

International Holdings Ltd v. Republic of Congo, 2004; *TMR Energy Ltd v. State Property Fund of Ukraine*, 2005) and again by the French Courts of Appeal in 2013 (*Orion c. RSCC, 2013*). The steadiest have been Canadian Courts: the Federal Court first ruled that the respondent State had waived immunity from execution of awards by agreeing to international commercial arbitration in 2003 (*TMR Energy Ltd v. State Property Fund of Ukraine*, 2003); then, in 2007 (*Collavino Inc v. Tihama Development Authority*, 2007), the Queen's Bench of Alberta recognised that State "waived any immunity it would otherwise have had" (*Collavino*, 2007, para 140(e)), noting that there was "no doubt that the TDA waived immunity for enforcement purposes […] by agreeing to international commercial arbitration. Otherwise, the effect of an award could be thwarted by successfully claiming State immunity in jurisdictions where the TDA has eligible assets" (*Collavino*, 2007, para 139); lastly, the Ontario Superior Court of Justice stated that Libya was deemed to have waived its immunity from execution by agreeing to ICC arbitration in 2015 (*Canadian Planning and Design Consultants Inc v. Libya*, 2015).

CONCLUSIONS

The theory of the implied waiver of immunity from execution maintains that consent to arbitrate under any arbitration agreement, whose parties undertake to honour the award, consists of an implied waiver of immunity from both jurisdiction and execution, on the ground that "consenting to a commercial arbitration necessarily implies consent to all the natural and logical consequences of the commercial arbitration" (UN, 1991, Art. 17, para. 6), therein including the obligation to carry out the unfavourable award (Van der Berg, 1989, p. 13). This stands true within the framework of the ICSID Convention as well, because Article 55 of the ICSID Convention cannot be interpreted as granting immunity from execution to its Contracting States, but rather it establishes that execution of awards has to be governed by the regulation of immunity from execution in force in the Contracting State, whatever it may be.

The proposed theory, by redefining State immunity from execution's borders in a similar way to those of immunity from jurisdiction, would be a valid pathway to guarantee the enforceability of ICSID award and avoid that investors are in "the doubly frustrating position of having been lured into expensive and seemingly successful lawsuits only to be left with an unenforceable judgment plus legal costs" (Bjorklund, 2009, p. 304). On one hand, this theory would protect States ' legitimate interest as it does not allow an indiscriminate attack on States' assets, because the property that is inherently characterised by a sovereign purpose would continue to be granted a higher level of protection that would almost always exempt it from execution. On the other hand, it would be able to uphold the investors' rights asserted by the award, rendering enforcement under the ICSID from quasi-automatic to certain, as a logical consequence of States' consent to partake in a dispute resolution procedure.

However, the theory of the implied waiver still represents a "doctrine isolée" (*Commisimpex c. République du Congo*, 2018) without consistent case-law to back it up: the very *Creighton* judgment, variously appreciated by doctrine, has been recently departed from by the French Court of Appeal, when in 2019 it held that "l'engagement pris par un État d'exécuter immédiatement une sentence arbitrale ne peut s'analyser comme une renonciation expresse de cet État à son immunité générale d'exécution" (*Al Kharafi c. Libyan Investment Authority*, 2019), adding that "la notion de bonne fois dans l'exécution des convention ou l'absence de recours possible sont indifférentes" in regards to the terms of the arbitration agreement. Therefore, the current lack of support and inconclusive practice on the matter, suggest that "it would be imprudent to rely on it" (Schill & Malintoppi, 2022, para 82)

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