SOVEREIGN IMMUNITY AND ENFORCEMENT OF AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION

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ABBREVIATIONS

BIT Bilateral Investment Treaty

FSIA Foreign Sovereign Immunities Act

ICC International Chamber of Commerce

ICSID International Centre for the Settlement of Investment Disputes

IIA International Investment Agreements

NYC New York Convention

UK United Kingdom

US United States

ABSTRACT

International commercial transactions often involve states and state agencies in contractual dealings with individuals and multinational corporations and owing to the reluctance of states to subject disputes arising from their transactions to the courts of another state, arbitration is often the forum of choice for resolution of disputes arising from such international commercial transactions involving state parties and their agencies. The ultimate goal of arbitration proceedings is the rendering of an enforceable award for settlement of the disputes between the parties. However, in the event of an unfavorable award against a state or state agency in international arbitrations, one veritable hurdle usually encountered by the successful party in enforcing the award is the plea of sovereign immunity by the state entity. Since the very essence of arbitration is the rendering of an enforceable award, this plea of sovereign immunity serves to frustrate and defeat the essence of entering into an international arbitration with a state entity. Nevertheless, in view of the nature of international business transactions, multinational companies and other international business agencies cannot avoid dealing with state entities and international arbitration remains the preferred dispute resolution forum for these international transactions. So how do these individuals and multinational corporations protect themselves, their investments and the sanctity of their arbitration proceedings from been frustrated by a plea of sovereign immunity by the state party in the event of a successful award?

This research aims at undertaking a critical analysis of the concept of sovereign immunity and its applicability to international commercial arbitration proceedings and to highlight recent trends and issues in the area of sovereign immunity that are frequently encountered in international commercial arbitration. Essentially, this research shall examine the problems

encountered by non-state parties in enforcing a successful award against state entities and scrutinize the various ingenious ways that have been devised by these non-state parties to side-track and subvert the plea of sovereign immunity by state entities.

A key component of this research shall also be an appraisal of judicial attitude towards the concept of sovereign immunity and its applicability to arbitral awards, as well as a case review of some crucial judicial decisions in this respect. A primary objective of this research is to highlight the development of sovereign immunity and the various theories which have defined its development over the years and discover the true extent to which the plea of sovereign immunity can protect a state entity from fulfilling its commitments under international commercial transactions.

1.0 INTRODUCTION

1.1 *Dispute Resolution Mechanisms in International Commerce*

There are two major ways to resolving conflicts under International Commerce namely Litigation and Alternative Dispute Resolution. Traditionally, parties turn to the court system (Litigation) when they cannot come to an amicable solution by themselves. However, when disputes arise between parties in international commerce, often neither party is comfortable using a foreign court system to resolve their dispute. This reluctance to submit to the courts of foreign jurisdictions is more pronounced where state parties and their agencies are involved in the commercial transaction.

In today's global marketplace, it is common for States to become involved in various commercial activities through State-owned enterprises. States are understandably unwilling to subject their sovereignty to the adjudicatory processes of the courts of an equal sovereign state in the event of a dispute arising from such international transaction and this extends to international transactions involving state agencies acting as a projection of the sovereign state in dealings with individuals and corporate entities.[1]

Consequently, the concept of Alternative Dispute Resolution (ADR) has proved a very attractive proposition for state parties as a neutral dispute resolution mechanism for resolving disputes that may arise in their international commercial transactions with

[1] Maniruzzaman, A.F., ***"State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends",*** August 1, 2005; Dispute Resolution Journal, pp. 1-8, 2005

individuals and corporate entities. There are different forms of ADR namely Arbitration, Mediation, Conciliation. Of these forms of ADR, arbitration (and by extension, international arbitration) is however the most prominent and widely used method for resolving disputes arising from international commercial agreements and other international relationships. Arbitration could be Ad-hoc, wherein the parties assume full control of the arbitration proceedings and decide the rules regulating the proceedings, or institutional arbitration conducted under the extant rules and proceedings of an established arbitration institution which governs the arbitration proceedings and regulates the enforcement of awards obtained thereunder.

Over the years, institutional arbitration has gained in prominence and has become the preferred arbitration procedure of choice especially in international commercial arbitration and there has been an upsurge in the number of institutional arbitral bodies providing arbitration service for international business transactions to both state entities and individual business enterprises.[2] These institutional arbitral bodies include those involved in general international arbitration proceedings such as the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), the International Centre for Dispute Resolution (ICDR), Permanent Court of Arbitration at the Hague (PCAH), Hong Kong International Arbitration Centre (HKIAC),

[2] Lew, J., Mistelis, L., and Kroll, S., ***Comparative International Commercial Arbitration*** (The Hague- London-New York : Kluwer Law International, 2003)Page 744

Australian Centre for International Commercial Arbitration (ACICA), the Association for International Arbitration (AIA), and the Singapore International Arbitration Centre (SIAC). On the other hand there are institutional arbitral bodies established specifically for specialized forms of arbitration disputes such as the International Centre for Settlement of Investment Disputes (ICSID) which handles purely investment disputes involving a contracting state and a national of another contracting state, and the World Intellectual Property Organization (WIPO) Arbitration Centre which handles purely intellectual property arbitration disputes.

Basically, these international arbitral institutions assist parties in the constitution of the arbitral tribunal, transcription and interpretation of hearings, translation of documents, administering accounts relating to fees and expenses as well as registering or filing the arbitral award, provide general secretarial services such as forwarding of written communication and notices of activities to concerned parties. Their supervisory roles involve reviewing the terms of reference of the arbitral tribunal and vetting draft awards before they are handed down by the arbitral tribunal. For instance, the International Chamber of Commerce (ICC) established its arbitral body known as the International Court of Arbitration in Paris in 1923[3]. The ICC 'Court'[4] developed resolution mechanisms specifically conceived for business disputes in an international

[3] see http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/

[4] The term 'Court' used here should not be confused with a regular court but refers to an Arbitral Tribunal constituted under an ICC Arbitration. The "international court of arbitration" is not a "court" in the sense of a court of law, but rather an administrative body of the ICC with representatives from many different countries.

context. Since its creation, the Court has administered more than 17,000 arbitration cases involving parties and arbitrators from some 180 countries and territories.[5]

1.2 *Arbitration as an Effective Tool in International Commercial Transactions*

International arbitration just like arbitration generally, is the creation of contract i.e., the parties' decision to submit disputes to binding resolution by one or more arbitrators elected by or on behalf of the parties and applying adjudicatory procedures, usually by including a provision for the arbitration of future disputes in their contract.[6] Arbitration has become more effective over the years in international commerce due to the fact that parties now prefer to have their international disputes resolved through arbitration for the reason that it is faster and more efficient, it avoids uncertainty of local practice which is associated with litigation in national courts, enforceability and the parties freedom to select and design the arbitral procedures, confidentiality and other benefits.

In this regard, it is essential to define the exact scope of an 'international arbitration' for the purposes of the discussions in this work and recourse will therefore be had to relevant international instruments. Arbitration is considered 'International' according to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral (New York Convention) 1968* when:

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[5] see http://www.international-chamber.co.uk/arbitration

[6] Gary B., "***International Commercial Arbitration"***, 187, 197, 217 (2009); Julian M. L., Loukas, A. Mistelis & Stefan M. Kröll, "***Comparative International Commercial Arbitration"*** 1-10 to 1-11, 6-1 to 6-6 (2003)

(3) a. the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

b. One of the following places is situated outside the State in which the parties have their places of business:

i. The place of arbitration if determined in, or pursuant to, the arbitration agreement;

ii. Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

c. The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

a. if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

b. if a party does not have a place of business, reference is to be made to his habitual residence[7]."

Arbitration has become the most important mechanism for resolving international commercial disputes in the last 50 years[8] because it is a contractual remedy and parties can in their agreement agree to forego multiple proceedings and forum shopping. They can also agree upon procedural rules and can choose the applicable substantive laws to be applied. Generally speaking, arbitral awards are more easily enforced internationally than are judgments in litigation. A study published in 2006 undertaken by Queen Mary University Law School in London established that, "73% of respondents prefer to use international arbitration, either alone (29%) or in combination with Alternative Dispute Resolution (ADR) mechanisms in a multi-tiered dispute resolution process (44%)", for the resolution of cross-border disputes. The study further revealed that "the top reasons

[7] See also UNCITRAL Model Law on International Commercial Arbitration, Art I which contains the same definition of international arbitration.

[8] Movsesian, J., "***International Commercial Arbitration and International Courts"***, 18 Duke J. Comp. & Int'l L 423, 423 (2008)

for choosing international arbitration are flexibility of procedure, the enforceability of awards, the privacy afforded by the process and the ability of parties to select the arbitrators".[9]

Despite these advantages of arbitration as a dispute resolution mechanism in international commercial transactions, it is however to be noted that international arbitration can sometimes be at least as expensive as transnational litigation, but it represents a better value for money and having a clear dispute resolution policy provides corporations with a strategic advantage in the negotiation of dispute resolution clauses for cross border contracts.

2.0 SOVEREIGN IMMUNITY AND INTERNATIONAL ARBITRATION

2.1 *Doctrine of Sovereign Immunity under International Law*

Sovereign Immunity is an established principle of international law which is based on the principle of equality of States. It is a legal doctrine by which a sovereign entity (a State) is immune from any suit be it civil or criminal before the courts of another sovereign entity[10]. It is further defined as a judicial doctrine that prevents a sovereign government or its political subdivisions, departments, and agencies from being sued in any judicial forum without its consent[11]. When the principle is applied, a legal action[12]

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9 Queen Mary, University of London, "Study shows corporations prefer arbitration to resolve disputes 2006" http://www.qmul.ac.uk/qmul/research/newsrelease.php?news_id=194 (date visited 2nd April 2013)

[10] Lew, J., Mistelis, L., and Kroll, S., "***Comparative International Commercial Arbitration*** "(The Hague- London-New York : Kluwer Law International, 2003)Page 744

[11] Hazel Fox, The Law of State Immunity (OUP 2004); Andrew Dickinson et al., State Immunity-Selected Materials and Commentary (OUP 2004); James R. Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions" [Crawford 2], 54 British Y.B. Int'l L. 75 (1983);

can only be brought against the State where its consent has been obtained. In essence, a sovereign State cannot be compelled to submit to the jurisdiction of another state and no enforcement proceedings can be brought against the properties of a sovereign in the courts of another sovereign[13].

The doctrine of Sovereign or State Immunity under International Law is established on the agreement of the international community of states that a sovereign state should not face prosecution in courts of another State. This principle is expressed by the Latin maxim- **"*par in parem no habet imperium***" – *an equal has no power over an equal rank*. In other words, sovereign states may not exercise prescriptive, executive or adjudicative powers over other sovereign states or over the properties of other sovereign states within its jurisdiction[14].

The main reasons for allowing States to plead sovereign immunity are the inability of national courts to enforce their judgments against a foreign State and the fact that there must be independence and equality of States.[15] In addition, the doctrine of sovereign immunity is necessary to promote the functioning of all governments by

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[12] Legal action in this sense refers to all forms of dispute resolution e.g. legal suits brought before a court of competent jurisdiction, as well as arbitration proceedings.

[13] Crawford, J R., ***"Execution of Judgments and Foreign Sovereign Immunity***", 75 Am J. Int'l L. 820 (1981);

[14] Georges R. D**., "*Foreign Sovereign Immunity: Impact on Arbitration",*** 38 Arb. J. 34,34-47(1983

[15]Sir Ian Sinclair., ***"The Law of Sovereign Immunity, Recent Developments***," 167 Hague Recueildes cours 113 (Hague Acad Int'l Law 1980-II); Delaume, D. R ***"Economic Development and Sovereign Immunity,"*** 79 *Amer. J. Int'l L.* 319 (1985), 2 Schreuer, *supra* n. 1, at 137-39; Hazel Fox, "***Sovereign Immunity and Arbitration",*** *in* Contemporary Problems in International Arbitration, *supra* note 6, at 323.

protecting them from the burden of defending litigation abroad.[16] The problem however, is that sovereign immunity rules may significantly impair the effectiveness of international commercial arbitration involving a State party[17] since the plea of State immunity could have a major impact at every stage of the arbitration.[18]

The doctrine of sovereign immunity applies not only to a State as a sovereign entity, but also to its enterprises, agencies and other appendages of the state representing its sovereign authority. State practice suggests that whether a State is seeking immunity from jurisdiction or from execution against State-owned property, the State and its wholly owned or controlled enterprises consider themselves to be functionally the same, so that the activities of State enterprises are considered to be carried out by the State in its exercise of sovereign authority.[19] In essence therefore, regardless of the status of the State agency or enterprise vis-à-vis the State, so long as the enterprise *"is entitled to perform and is performing acts in the exercise of sovereign authority of the State,"* it can invoke sovereign immunity as the State as it is viewed as an instrumentality of the sovereign state in the execution of its sovereign powers.[20]

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[19] Maniruzzaman, A.F., ***"State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends",*** August 1, 2005; Dispute Resolution Journal, pp. 1-8, 2005

[20] Hazel Fox, "***The Law of State Immunity",*** 45 (2002) at 29-30

Over the last two decades, the extension of the doctrine of sovereign immunity to state agencies has gradually become a universally acceptable principle of international law on State jurisdictional immunity.[21] Thus, the recent **Convention on Jurisdictional Immunities of States and their Property**, drawn on the ILC's final Draft Articles of 2003[22], defines the term **"State"** to include, *inter alia*, "Agencies or in instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State"[23] In accordance with this definition, a legal action or arbitration proceedings commenced against a State agency, enterprise, or instrumentality would be considered to be against the State itself for the purpose of invoking a plea of sovereign immunity.

2.2 *Theories of Sovereign Immunity under International Law*

There are two theories relating to the extent of Sovereign Immunity enjoyed by a State under international law, viz-

- The theory of Absolute Immunity, and

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[21]Brooke, J. B., ***"The International Law Association Draft Convention on Foreign Sovereign Immunity: A Comparative Approach***," 23 *Va. J. Int'l L.* 635 (1983); Badr, G.M ***"State Immunity: An Analytical and Prognostic View"*** (M. Nijhoff, The Hague 1984); Christoph H. S., ***State Immunity: Some Recent Developments*** **(Grotius 1988)**; Sucharitkul**,** S., ***"Immunities of Foreign States Before National Authorities***," 149 *Recueil des cours* 87 (Hague Acad. Int'l Law 1976-I);

[22] See Report of the Working Group of the U.N. International Law Commission (1999) VII (Annex) **"Jurisdictional Immunities of States and their Property"** (hereafter ILC Rep. 1999), available at http://untreaty.un.org/ilc/summaries/4_1.htm. (Last modified 30th June 2005, date visited 2nd April 2013)

[23] ILC Draft Articles on Jurisdictional Immunities of States and their Property [ILC Draft Articles], Art 2(1)(b)(iii), 27 Feb. 2003, A/AC.262/L.4/Add.l); see also ILC Rep. 1999, *supra* n. 3, at 6, art. 2, 1(b)**,** reformulated and suggested provision to the U.N General Assembly.

- The theory of Restrictive immunity.[24]

The absolute immunity, as the name implies, confers immunity on all actions of a State or State agency regardless of the purpose or nature of the transaction from which the dispute arose while the second, restrictive immunity, confers immunity only on sovereign acts of a State – *acta jure imperii,* while acts of a State in respect to commercial transactions- *acta jure gestionis*- are not covered by immunity but governed by private law in the same way as a private person would not enjoy immunity.

The approach associated with absolute sovereign immunity is called **"structuralist**" while the approach associated with restrictive immunity is called "**functionalist**"[25] The former is concerned with the status of the party claiming sovereign immunity, while the latter is concerned with the subject matter (i.e. the nature of the transaction) forming the basis for the claim of sovereign immunity. A State is immune from all legal actions under the structuralist approach regardless of the nature of the transaction giving rise to the invocation of the plea, while under the functionalist approach to sovereign immunity, a State or a State enterprise can claim sovereign immunity only for ***acta jure imperii*** (government or sovereign acts) but not for ***acta jure gestionis*** (acts of a private or commercial character). However, there is as yet no consensus in judicial decisions and legislative instruments as to what constitutes *acta jure imperii* and *acta jure gestionis* as court decisions in different countries

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[24] Varges, G.S., ***"Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention,"*** 26 *Harv. J. Int'l L*. 103 (1985)

[25] Brownlie, I., **"*Principles of Public International Law*"***,*** 331 n. 31 (5th ed. OUP 1998)

are inconsistent, it is not always easy, especially in marginal or borderline cases to distinguish between the two. For example, courts in Europe and the United States apparently are divided on whether the exploration and exploitation of natural gas or other natural resources are sovereign or commercial acts.

The absolute immunity theory held sway in the early development of the doctrine of sovereign immunity but has gradually been replaced by the restrictive immunity doctrine in most jurisdictions. Espousing the theory of restrictive immunity, ***Lord Wilberforce*** of the United Kingdom House of Lords stated in *I Congresso Del Partido*[26] thus –

> The Relevant exception or limitation which has engrafted on the principle of immunity of states under the so called restrictive theory arises from the willingness of states to enter into commercial or other private law transactions with individuals. It appears to have two main functions - a) it is necessary in the interest of justice to individuals having transactions with states to allow them to bring on such transactions before the courts; b) to require a state to answer a claim based on such transactions does not involve a challenge or inquiry into any act of sovereignty or governmental act of that state.

In the development of the doctrine of restrictive immunity, the most remarkable decision espousing this theory is the well-known decision of the UK Court of Appeal in *Trendtex Trading Corporation V Central Bank of Nigeria*[27] where Lord denning MR stated thus–

> Many countries have now departed from the rule of absolute immunity. So many have departed it that it can no longer be considered a rule of

[26] (1983) 1AC 244

[27] (1977) QB 529

> international law and it has been replaced by the doctrine of restrictive immunity. The doctrine gives immunity to acts of a government nature, described in Latin as *jure imperii* but no immunity to acts of a commercial nature *jure gestionis.*[28]

However, it is imperative to note that although the restrictive immunity theory has gained ground globally over the last few decades, it is not entirely correct to say, as Lord Denning stated above, that the absolute immunity doctrine has been replaced by the restrictive immunity doctrine. State practice reveals that the absolute immunity doctrine is still applicable in many countries of the world.[29] Nevertheless, with increased State participation in international business transactions, absolute sovereign immunity has been gradually limited and in its place, a doctrine of restrictive immunity has been created. The theory of restrictive immunity has gained legislative recognition at national, regional and international forum. Various national laws have adopted this restrictive immunity and approach, which is also reflected in the *European Convention on State Immunity of 1972*.[30] Generally, countries that have adopted the restrictive immunity theory have legislation expressly providing for same, e.g. in the UK, there is the **State Immunity Act of 1978** while the United States have the **Foreign Sovereign Immunities Act of 1976 (as amended in 1988)**. Attempt have also been made to codify this restrictive theory at the

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[28] (1977) QB 529 at page 555

[29] Professor Brownlie I, supra, notes that several States, such as Brazil, Bulgaria, China, Czechoslovakia, Ecuador, Hungary, Japan, Nigeria, Poland, Portugal, Sudan, Syria, Thailand and Tobago, the former USSR and Venezuela still accept and apply the principle of absolute immunity.

[30] For examples of national laws endorsing the restrictive immunity theory, see the UK State Immunity Act of 1978, available at http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1978/cukpga_19780033_en_1, and the US Foreign Sovereign Immunities Act of 1976 (as amended in 1988), available at http://uscode.house.gov/download/pls/28C97.txt. (Date assessed 05/02/2013)

international level with the adoption of the **UN Convention on Jurisdictional Immunities of States and their Property 2003,** the first attempt at formulating an international instrument on the subject of sovereign immunity. However, the convention is yet to come into force and is not yet applicable.

The distinction between the absolute and restrictive immunity theories is also reflected in the protection extended to State agencies as an extension of a State's sovereignty. According to the absolute immunity (structuralist) approach, a State enterprise is entitled to immunity from jurisdiction as an extension of the sovereign will of the State and the courts in structuralist States investigate such factors as: (1) whether the enterprise is a public entity or a company formed under private law; the enterprise's capacity to sue or be sued; the extent of government control over the enterprise; and the enterprise's ability to incorporate and hold property. A strict structuralist approach will lead to absolute immunity if the entity is established as a public entity that is inseparable from the State. Then, everything the entity does will be entitled to immunity.[31]

Under the restrictive immunity (functionalist) approach, when a State enterprise has a distinct legal personality (i.e., one detached from the State itself) and it performs acts of a private or commercial nature, it cannot claim sovereign immunity. To functionalists, the status of the State enterprise is irrelevant; only the nature of its acts

[31] See for example, A.F.M. Maniruzzaman, "State Enterprise Arbitration and Sovereign Immunity Issues": A look at recent trends, Electronic copy available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1338030 (last modified January 2012; date visited: 5th April 2013)

really matters for purposes of jurisdictional immunity. In C. Czarinkow v. Rolimpex,[32] Lord Wilberforce of the UK House of Lords said-

> State-controlled enterprises, with legal personality, ability to trade and to enter into contract of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. This distinction between them, and their governing State, may appear artificial: but it is an accepted distinction in the law of England and other states.

Some national courts have taken a mixed approach in which structuralist considerations were initially taken into account, but the nature of the act usually was decisive for the purpose of deciding the immunity issue. This suggests that mixed approaches would likely tilt in favor of the functionalist way. Recent legislation follows this pattern, seeming to do away with the structuralist approach and shifting markedly to purely functional considerations.[33]

2.3 *Application of the doctrine of sovereign immunity to International Arbitration*

There are two stages where the doctrine of Sovereign Immunity can be invoked in relation to International arbitration - Sovereign immunity from jurisdiction and sovereign immunity from execution and they are considered to be completely distinct. Nevertheless, there also seems to be a trend toward treating both types of immunity in a similar manner. Sovereign Immunity can be raised to challenge the jurisdiction of the arbitral tribunal or it can be invoked as a defence in enforcement proceedings based on an arbitral award although the former is considered rather weak due to the fact that arbitration in the first

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[32] [1979] App. Cas. 351, 364,

[33] M.M. Boguslavsky, ***"Foreign State Immunity: Soviet Doctrine and Practice***," 10 *Netherlands Y.B. Int'l L.*167 (1979);

instant is only possible because parties have agreed to arbitrate.[34] Once a valid agreement to arbitrate has been concluded, it is settled that it constitutes a waiver of jurisdictional immunity.

2.3.1 Waiver of Sovereign Immunity to Arbitration Proceedings

Since the purpose of sovereign immunity is to prevent one State from being subjected to the jurisdiction of another state before the latter's courts, it would come as something of an aberration for a State that is party to an arbitration agreement to invoke an immunity plea. Arbitral tribunals being independent are not creatures of any state but entities deriving legitimacy and jurisdiction from the parties themselves. In essence, the jurisdiction of an arbitration tribunal derives from the agreement of the parties. However, this would be an over-simplification of the issue as States are reluctant to submit their sovereignty to any prescriptive or adjudicatory process outside their control.

In spite of this, it is generally accepted that sovereign immunity of a state can be waived either expressly or by implication, although the latter poses more difficulty in ascertainment. A State or a State enterprise that is legally part of the State itself can waive immunity either expressly or implicitly by a contractual provision or an arbitration clause in a contract with another party. Express waiver can consist of an instrument executed by the State submitting itself to arbitration or an express clause in an arbitration agreement to that effect. On the other hand, It is generally recognized that a state's

[34] Domenico Di Pietro & Martin Platte, "***Enforcement of International Arbitration Awards"***, the New York Convention of 1958, London SW8 1SQ, Cameron May Ltd, 2001. at 191

consent to arbitrate can be construed as a deemed waiver of jurisdictional immunity, requiring a state to participate in the arbitration proceedings although such a waiver is generally not extended to immunity from execution of the state's assets should the investor prevail against the state in an arbitration proceeding and obtain judgment against her. In the words of Lord Esher in Kahan V Pakistan Federation[35] -

> We had not then to deal with the question of a sovereign submitting to the jurisdiction, everybody knows and understands that a foreign sovereign may do that…..the question is how? What is the time at which he can be said to elect whether he will submit to the jurisdiction? Obviously it appears to me that it is when the court is about or is asked to exercise jurisdiction over him and not at any previous time

A submission by a State or State enterprise to arbitration under the guidance of the International Centre for the Settlement of Investment Disputes (ICSID) constitutes, on its part or that of the State involved, an irrevocable waiver of immunity from the ensuing arbitration proceeding[36]. This principle is also enshrined in several legislations governing sovereign immunity. The *European Convention of 1972* provides that a contracting state cannot claim immunity from the jurisdiction of a court of another contracting state if it has undertaken to submit to the jurisdiction of that court either:

a) By international agreement
b) By an expressed term contained in writing; or
c) By an express consent given after a dispute between the parties have arisen.[37]

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[35] (1951) 2KB 1003
[36] Article 54(3) of ICSID Convention
[37] Article 27 (1) and Article 14 (1) & (2)

Also, Section 9 of the UK State Immunity Act 1978 provides that "Where a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to arbitration."[38] A similar provision is contained in the US Foreign Sovereign Immunities Act (FSIA) which made it clear that a foreign State's agreement to arbitrate could be regarded as a waiver of immunity from the jurisdiction of a US court. This was the position in *Libyan American Oil Company (LIAMCO) V Socialist People's Libyan Arab Jamahiriya*[39] where the court, by relying on *section 1605(a) (6) of the FSIA*, rejected Libya's jurisdictional argument and held that Libya had waived its defence of sovereign immunity by expressly agreeing to the specific amendments to the arbitration and choice of law clauses in the deeds of concession. The above decision followed the precedent laid down in the case of *Ipitrade International, S.A v Federal Republic of Nigeria*[40] where the court upheld the view that the arbitration clause in a contract for sale of cement providing for dispute settlement by the International Chamber of Commerce (ICC) in Paris constituted a waiver from immunity. Even though Nigeria refused to participate in the arbitration on the grounds of sovereign immunity, the Swiss arbitral award was made unilaterally against the government of Nigeria.

2.3.2 Sovereign Immunity from Execution

When a party loses arbitration on the other hand, such party can raise immunity to enforce the award against its assets abroad. In international commercial arbitration

[38] The same provision is contained in Article 17 of the UN Convention on sovereign immunity.
[39] 923 F.2d 380, 385 (5th Cir. 1991)
[40] 482 F. Supp. 1175, 1178 (DDC 1980)

generally, an undertaking by a State or a State enterprise to arbitrate is not itself a consent to court enforcement of the resultant award and it has been stated that "Certainly, international law does not at present support the principle sometimes advanced, that the agreement of a State to submit to arbitration entails a waiver of its immunity in respect of all subsequent proceedings arising out of the arbitration, including enforcement proceedings."[41] This position is also given statutory recognition by *Section 13 (2) (b) of the UK State Immunity Act* which provides that " The property of a state shall not be subject to any process for the enforcement of a judgment or arbitration award or in an action in rem for its arrest detention or sale". The US Supreme Court has held that signing an arbitration agreement cannot amount to an implied waiver of immunity over execution of awards and judgments in *Argentine Republic V Amerada Shipping Corp*[42].

Furthermore, the provisions of the ICSID Convention and New York Convention also recognize the fact that submission to arbitration by a sovereign is not a waiver of immunity to enforcement and execution of awards against the sovereign.[43] Notwithstanding this trend, it should be remembered that national laws and practice on sovereign immunity of a State or State enterprise from measures of execution may differ.

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[41] Rosalyn Higgins, ***"State Contracts and Transnational Arbitration***," 75 *Amer. J. Int'l L*. 784 (1981); G. Bernini & A.J. Van den Berg, **"**The Enforcement of Arbitral Awards against a State: The Problem of Immunity from Execution**,"** in *id*., at 33. See also in the recent works of the ILC in Y.B. Int'l L. Comm'n (1988), vol. II

[42] 1989 488 U.S at 442-443

[43] *Article 54(3) of ICSID convention* provides thus – "Execution of the award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought" while Article 55 went further to state that– "Nothing in Article 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."

Some jurisdictions do not grant sovereign immunity from execution against the properties of sovereign entities in all circumstances. In this regard, a distinction is created between properties of the State used for sovereign purposes and properties used for commercial purposes. Properties owned by a State-owned enterprise that is destined specifically for the fulfillment of sovereign functions or used for sovereign purposes[44] is immune from attachment or execution while those used for commercial purposes are not immune from attachment or execution.[45] In essence therefore, where the law of sovereign immunity is not the same for jurisdiction and enforcement purposes, and the restrictive approach to sovereign immunity applies to actions to enforce an award, the "purpose" test will be applied to determine whether immunity can be invoked for State- or State-enterprise-owned property. The answer will be no if the property against which enforcement is sought is held for commercial purposes rather than for sovereign or public purposes.

State practice also endorses the concept of distinguishing between sovereign property and commercial property for the purpose of determining the immunity of a State to execution of awards and judgments. The *US FSIA*[46] does not allow a property of a foreign State used for commercial activity to be immune from execution. It further identifies types of foreign property which are immune from execution[47]. They include property of "a foreign central bank or monetary authority held for its own account… and

[44] *E.g*., the purchase of military equipment, the operation of State railways, the promotional activities of State tourist offices

[45] L. Marasinghe, ***"The Modern Law of Sovereign Immunity,"*** 54 (5) *Modern L. Rev.* 664 (Sept. 1991). 18. Cohn, *Waiver **of** Immunity*, 34 BRIT. ***YB.*** **INT'L** L. ***26o*** (1958); Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade,* 7 **INT'L** & **COMP. L.Q.** 452, **462** (1958) **5** Note, 36 HARv. L. **REv. 623** (1923) **5** Note, **41 L.Q.** REV. **x (1925**

[46] **Section 1610** which is an exception to the immunity from attachment and execution

[47] Section 1611

property held in connection with military activity…" Likewise, the *UK State Immunity Act* allows execution right for the property of a member state used for commercial purposes[48]. Pursuant to Section 13(5), the use or intended use of the property subject to execution may be proved by a certificate issued by the foreign State's representative. However, property of a State's central bank and other monetary authority do not come within the scope of properties used for commercial purposes.[49] Thus, the general approach is that states are immune from execution of judgment against its properties only if such properties serve "sovereign purposes"[50]

2.4 *Judicial Attitude towards invocation of the doctrine*

Generally, judicial attitude to the invocation of the doctrine of sovereign immunity varies according to national jurisdiction and further depends on which of the two theories of immunity is applicable in such jurisdiction. In countries adopting the absolute immunity theory, the attitude of the courts have been to uphold the plea of sovereign immunity whenever raised by a State or State entity, unless there has been an express or implied waiver of immunity. Thus, in Nigeria for instance, the Supreme Court has held in two separate decisions[51] that, the plea of sovereign immunity will operate to bar any suit against a sovereign entity regardless of the nature of the transaction giving rise to the dispute. Similarly, in Spain, the Spanish Constitutional Court has held that

[48] Section13(4) of the State Immunity Act
[49] Section14(4)

[50] Alcom Limited V Republic of Colombia (1984) 2 All ER 14
[51] John Grisby V MS Jubwe and 2 others and African Re-Insurance Corporation V Fantaye (1986) 1 NWLR Pt 14 Page 113

foreign bank accounts within jurisdiction were immune from attachment even if and where they were maintained for commercial purposes.[52]

Even among countries with the restrictive immunity approach, there still exists some significant difference between the attitude of the U.S. and the English courts towards the issue of "commercial purposes" as an exception to the plea of sovereign immunity.[53] In the case of the UK State Immunity Act, it does not refer to the "purpose of the transaction" as a relevant criterion for determining its commercial nature unlike the US courts that resort to the purpose test when there the need to define the nature of the act arises.[54] However, the English courts have formulated different tests, relying on both the purpose and the nature of the transaction. For instance, the English courts have adopted a broad contextual approach in deciding the most complex cases.[55]

Notwithstanding this difference in judicial approach by the US and UK courts, there is a uniformity in both jurisdictions, as in other restrictive immunity jurisdictions, as to the inapplicability of the plea of sovereign immunity to commercial transactions entered into by the State or State entity. Thus in a case[56] involving a French naval vessel in the USA for repairs and other mercantile works, the plea of immunity was held not to

[52] Abbot Vs. Republic of South Africa (Decision No 107/92) 113 ILR 411

[53] State Enterprise Arbitration and Sovereign Immunity Issues: A look at recent trends, By A.F.M. Maniruzzaman Electronic copy available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1338030

[54] G.M. Badar, "***State Immunity: An Analytical and Prognostic View*"**, ch. 4, 63 *et seq*. (M. Nijhoff 1984); See *Maritime International Nominees Establishment v. Republic of Guinea*, 603 F.2d 1094," 24 *Harv. Int'l L.J.* 236 (1983);

[55] Kahan V Pakistan Federation.,(1951) 2KB 1003 at 1013

[56] Schooner Exchange Vs MCFaddon., 7 Cranch 116 (1812)

avail the State. Similarly the English Court of Appeal held [57] that immunity does not apply to commercial transactions with an individual or corporate entity giving rise to a dispute which is properly within the jurisdiction of the courts.

In relation to the issue of sovereign immunity to execution or attachment of the properties of States, judicial approach amongst jurisdictions adopting the restrictive immunity theory are also similar, with an emphasis on the nature of the property sought to be attached and whether it is held for commercial or sovereign purposes. In the case of *AIG Capital Partners Inc V Kazakhstan*,[58] a foreign institutional investor's property was seized and expropriated by a foreign State, Kazakhstan. The investor obtained an ICSID arbitration award against the State of Kazakhstan. It thereby sought the enforcement of the award by obtaining final third party debt orders and charging orders against cash and securities held in the UK, as part of the national fund of the foreign State held with a financial institution, pursuant to a custody agreement between the financial institution and the national bank of Kazakhstan. The State of Kazakhstan intervened and applied that both orders be dismissed. It further argued that the assets held by the financial institution were the property of the central bank and not the state itself or alternatively the property was not used for commercial purposes and is thereby subject to state immunity from enforcement under section 14(4) and 13(2) of the State Immunity Act 1978(UK). The court in interpreting section14(4) and 13(2) of the State Immunity Act held that the assets

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[57] Thai-Europe and Trendtex Trading Corp v Central Bank of Nigeria (1977) Q.B 529

[58] [2006] WLR 1420, [2006] 1 WLR 1420, [2005] EWHC 2239 (Comm), available at http://www.bailii.org/ew/cases/EWHC/Comm/2005/2239.html

held by the financial institution on behalf of the national bank of Kazakhstan were property of a central bank within the meaning of section 14(4) since National bank had an interest in the property within the definition. Thus, the assets were immune from the enforcement of jurisdiction of the UK courts.

The court further held that even if their conclusion was wrong, the 'property' constituted the property of a state within the meaning of section 13 (2)(b) and was not at any time in use or intended for use within the meaning of section 13(4)- commercial purposes. The property is thereby immune from the enforcement of the UK courts by virtue of Section13 (2)(b). In the US case of Maritime International Nominees Establishment V Republic of Guinea[59] the US court upheld a plea of sovereign immunity by Guinea to the execution of an award against its property on the ground that such property was held for sovereign purposes.

In the determination of whether a sovereign property is held for sovereign or commercial purposes, the UK House of Lords[60] accepted a declaration made by the ambassador of a foreign State that its account with a London bank was not held for commercial purposes as sufficient evidence of this fact in the absence of a contrary proof. This decision gives States the leeway to prevent execution against any of its properties by declaring the property to be held for sovereign purposes, regardless of the true state of facts.

[59] 1981 693 F2D 1094; 75 AJIL 963,
[60] Alcom Ltd v Republic of Columbia [1984] AC 580, [1984] 2 WLR 750, [1984] 2 Lloyds Rep 24, [1984] 2 All ER 6

2.5 *Limits and Exceptions to the doctrine*

A major exception to the invocation of the doctrine of sovereign immunity is the nature of the transaction giving rise to the dispute. This exception however only applies in jurisdiction where the restrictive immunity theory is adopted by the courts or enshrined in legislative instruments. It is generally recognized by international law that a plea of sovereign immunity would not apply to commercial transactions entered into by a State. The classical exposition of this principle was stated by Lord Denning in *Trendtex's Case*[61] when he stated that-

> If a government goes into the market places of the world and buys boots or cements- as a commercial transaction- that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods.[62]

While this principle appears to have become settled and generally recognized, what remains relatively unclear is the exact scope and definition of what amounts to a 'commercial transaction'. Thus, one of the most important decisions a court faces with the issues of sovereign immunity is a determination of what constitutes 'commercial activity' since there is no clear definition of 'commercial activity' in most legislations and it is for the courts to determining whether a particular activity should be considered "commercial".[63] Thus, although the restrictive doctrine of sovereign immunity is widely

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[61] *Ibid*

[62] (1977) Q.B 529 at 558

[63] *See, e.g.*, Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 310 (2d Cir. 1981) (emphasizing the importance and the difficulty of determining what amounts to a "commercial" activity).

accepted, there is a lack of certainty when it comes to deciding whether an act performed by a State should be regarded as a commercial act.

In the United State under the FSIA, a foreign sovereign that engages in the same type of commercial activity in which a private person could engage, then that sovereign loses its immunity from suit.[64]A foreign State is not immune but, rather, is subject to the jurisdiction of federal and State courts in the United States when the action is based upon:

i. A commercial activity carried on in the United States by the foreign State;
ii. An act performed in the United States in connection with a commercial activity of the foreign State elsewhere; and
iii. An act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act causes a direct effect in the United States.[65]

Section 3 (1) of the State Immunity Act 1978 of the United Kingdom also attempt to define the scope of exemption from a plea of sovereign immunity by a state and it defines 'commercial transaction' to mean-

i. any contract for the supply of goods or services
ii. Any loan or other transactions for the provision of finance and any guarantee or indemnity in respect of any such transaction or any other financial obligation.
iii. Any other transaction or activity (whether of a commercial, industrial, financial, professional or similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority.

[64] Texas Trading & Mill. Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 1981 A.M.C. 1605, 59 A.L.R. Fed. 73 (2d Cir. 1981) (overruled on other grounds by, Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic, 582 F.3d 393 (2d Cir. 2009)).

[65] 28 U.S.C.A. § 1605(a)(2).

Therefore, in understanding acts of state that can be considered *acta jure imperi* or *gestions*, there are three different approaches to categorize legal transactions in the context of state immunity, the court looks at;

1. Contractual parties
2. Purpose of the transaction
3. Nature of the transaction

There however seems to be a general preference to use the nature of transaction test.[66] For instance, the U.N. Convention on Sovereign Immunity shows a preference for the nature test as state in Article 2(2) as follows:

> "In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction."[67]

In addition, judicial attitude in the United States (U.S) appear to follow this nature of transaction test as well.[68]

[66] Muthucumaraswamy S., "*The Settlement of Foreign Investment Disputes and Law*", ***(2000)*** *ICSID Arbitration,at 293*.

[67] Resolution A/RES/59/38 adopted by the United Nations General Assembly, Fifty-ninth session (Dec. 2, 2004), [hereinafter U.N. Convention], *available at* General Assembly resolution 59/38 **of** 2 December 2004, Part 1, Art. 2(2).

[68] *Section 1603(d)* FSIA which states that -"The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

3.0 ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

3.1 *Applicable Instruments in Enforcement of International Arbitration Awards*

A successful party in an arbitration proceeding is availed with several options of enforcing compliance with the terms of the award where the losing party does not voluntarily comply with the arbitration award. The enforcement proceedings to be adopted by the successful party would essentially depend on the applicable international legal instrument governing the arbitration proceeding. In this regard, the arbitral rules of most institutional arbitral bodies make provisions for enforcement of arbitral awards by a successful party.[69]

The *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958* which is a general legal instrument applicable to the enforcement of awards obtained within the jurisdiction of a contracting state regardless of whether the arbitration was ad-hoc arbitration or conducted under the auspices of an institutional arbitral body[70]. The requirements for enforcement of arbitral awards under the New York Convention are that the State where the award was obtained must be a contracting state to the convention and must accord reciprocal treatment to awards obtained from the country where the award is sought to be enforced.[71]

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[69] *Article 24 of ICC Arbitration Rules and Articles 50-55 of the ICSID Rules* for instance govern enforcement of awards obtained from arbitral proceedings conducted under the Rules.

[70] U.S.T. 2517, 330 U.N.T.S 38 (1958)

[71] Article VII of the NYC 1958

There are also national legislations in most jurisdictions for enforcement of foreign judgments and awards and these would also be applicable to enforcement proceedings within such national jurisdiction. For instance, in Nigeria, there is the *Foreign Judgments (Recognition and Enforcement) Act of 1958* which provide for the recognition and enforcement of foreign judgments, including arbitral awards, obtained from jurisdictions which accord reciprocal treatment to judgments and awards obtained from Nigeria.[72]

3.2 *Procedure for Enforcement of International Arbitral Awards*

As stated earlier, the procedure for enforcement of arbitral awards depend largely on the applicable legal instrument to the arbitration. Generally, there is an obligation on States within whose jurisdiction arbitral proceedings are conducted to recognize and enforce awards rendered by arbitral tribunals. Article III of the New York Convention (NYC) (the Convention) requires countries to recognize arbitral awards as binding and to enforce them in accordance with national laws, consistent with the provision of the convention. It provides that-

> "Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…"

The NYC 1958 further allows parties to take cover under relevant Multilateral and Bilateral Treaties (BITS) so as to enforce an arbitral award. This could be another

[72]Shasore, O., ***"Jurisdiction and Sovereign Immunity in Nigerian Commercial Law"***, 2007, published by the Nigerian Institute of International Affairs

alternative for enforcing arbitral award as most BITS have a more enforceable procedure which may be beneficial to the private party. Thus BITS being international agreements between States may be more respected by the contracting State because they want to maintain good relationship with other countries and thereby create conducive environment for the promotion and protection of foreign investment.[73]

Similarly, under the ICSID Rules[74], it makes it mandatory for states to recognize an award made pursuant to the convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state. *Article 55* however, creates an important limitation by recognizing the applicability of a plea of sovereign immunity to enforcement proceedings of an award. Under the ICSID Convention (1965), the enforcement of an award is not automatic. *Article 55* of the Convention clearly states that the provisions relating to the recognition and enforcement of an arbitral award in *Article 54* shall not "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." Thus, participation by a State or a State enterprise in an ICSID arbitration should not be interpreted as an implicit waiver of immunity from execution (i.e., from enforcement of the award), since Article 55 preserves such immunity in no uncertain term. In any event, Article 55 prevails over Article 54 at least on the enforcement matter.

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[73] Article VII of the NYC 1958

[74] Article 54(1)

State parties to the ICSID Convention are obliged to take steps to ensure enforcement of Convention awards in their respective jurisdictions. This would therefore imply that it is obligatory on contracting States to ensure that "their law on state immunity relating to enforcement of arbitral awards conforms to the minimum international standard." In confirming to the standards, States are expected to take legislative action to ensure adequate enforcement of awards within their jurisdiction. Thus, the UK and US governments have enacted the State Immunity Act and FSIA respectively which ensure that awards are adequately enforced. Both enactments tackle the issue of sovereign immunity by deeming an agreement to arbitrate by a State or its agency as a waiver of immunity to arbitration proceedings, thus a State's agreement to arbitrate in the United States or UK is considered to be an implied waiver of immunity to suit in a U.S. court.[75] The US FSIA further provides that "an agreement to arbitrate constitutes a waiver of immunity in an action to enforce that agreement or the resultant award."

The Arbitration Rules of the ICC confers better advantage on successful parties over the ICSID and New York Convention.[76] In *Creighton Ltd V Minister of Finance of Qatar & Ors*[77] the Supreme Court in France held that Qatar's signature of an agreement containing an ICC Arbitration clause resulted in an implied waiver of its immunity from

[75] Supra, *notes 45 & 46.* See Section13(4) of the State Immunity Act

[76] **Article 26 (6)** provides that "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".

[77] International Law Reports, Volume 127 page 154.

execution. However, in a similar enforcement suit brought by the successful party at the US Court of Appeals of the District of Columbia circuit in the same case seeking to execute the judgment against sovereign properties of Qatar situated in the US, the court refused to apply the same reasoning in this same set of facts. Thus, there is no judicial consensus on the exact import of Article 26 of the ICC Rules, although the decision of the Supreme Court of France is an indication that courts may be willing to give the provision of Article 26 of the ICC Rules a liberal interpretation as connoting a waiver of immunity from execution by a State.[78]

The procedure for enforcing an award is not unified in all legal systems and varies by jurisdiction. Each national system provides a different competent authority to deal with foreign arbitral awards and the enforcing authority usually fall within one of the following categories:[79]

i. Judicial authority: the winning party applies to the competent courts which are indicated by the rules about the enforcement of foreign awards,
ii. Public officer: the winning party applies to a certain public officer for enforcement of the award,
iii. Arbitrators: in some legal systems arbitrators are empowered to declare any award they have made as enforceable as soon as it is deposited with a court registry if there has been no action to set this award aside within the indicated time limit.[80]

Majority of the States however confers on a judicial authority the jurisdiction to recognize and enforce a foreign award by issuing an enforcement order on the basis of a

[78] Jerome F. Birn, ***"Sovereign Immunity: Enforcement of Arbitral Award Against Foreign State***", Hague Acad. Int'l Law 1986, Vol. 3
[79] R David, "***Arbitration in International Trade",*** (Kluwer Law and Taxation Publishers Deventer 1985) 356
[80] Y. Osinbajo, ***"Sovereign Immunity in International Commercial Arbitration: The Nigerian Experience and Emerging State Practice,"*** 4 *RADIC* [*African J. of Int'l & Compar. L.]*

request made by the winning party. However, the competent courts for such enforcement differ according to the jurisdiction.[81] Article IV of the NYC convention provides that the enforcing party is to supply the original award and original arbitration agreement or a duly authenticated copy and, if applicable, a translation of the award in the official language where enforcement is sought. These documents provide prima facie evidence entitling the successful party to enforcement of the award.

The formalities basically under the Convention are simple. No higher fees than the enforcement of domestic awards may be levied and no more onerous requirement regarding the formal enforcement procedure may be imposed according to Article III of the NYC Convention.

3.3 *Setting Aside of an Award*

Proceedings for setting aside of an award are commenced by the unsuccessful party to forestall the enforcement of the award. All applicable legal instruments governing arbitral proceedings provide grounds for setting aside of an award. The NYC Convention provide that recognition and enforcement of an award may be refused by the enforcing Court if any of the grounds mention in **Article V** of the convention is alleged or proven by the resisting party. There are in total seven grounds for the setting aside of an award under the Convention, five in Article V (1) and two in Article V (2). It is

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[81] P.M. McGowan, ***"Arbitration Clauses as Waivers of Immunity from Jurisdiction and Execution under Foreign Sovereign Immunities Act of 1976,"*** 5 N.Y.L. Sch. J. Int'l & Comp. L. 409 (1984).

imperative to note that the Court on its own volition cannot make enquires as to whether the grounds in Article V (1) are fulfilled, it can only accept and evaluate evidence as to these facts. These grounds are-

a. the parties to the arbitration agreement were under some legal incapacity or the agreement was not valid under applicable law;
b. the losing party had not been given proper notice of the arbitration or the appointment of the arbitrator, or was not allowed to present his case;
c. the award is outside the scope of the arbitral submission or fails to address the issues submitted (that is, the decision must be neither less, nor more, than what the parties asked to be decided by the arbitrator);
d. the composition of the arbitral authority (arbitral panel or institute) or the procedures followed by the arbitral authority were not what the parties had agreed;
e. the award is not final or has been set aside by the proper International Commercial Arbitration:
f. the subject matter of the dispute is not one capable of settlement by arbitration under the law of the country where enforcement is sought; and,
g. Recognition and enforcement of the award would be contrary to the public policy of the country where enforcement is sought.

Despite the numerous grounds for setting aside enumerated above, as a matter of fact, most successful challenges to validity of awards relate to grounds "(b)" or "(c)" above (arbitrators failing to allow full presentation of the case, including reasonable

postponements to prepare or preserve the case, or the award being more or less than agreed by the parties).[82]

3.4 *Sovereign Immunity and Enforcement of International Arbitral Awards*

A cursory analysis of the foregoing discussions in this work reveals that the plea of sovereign immunity is a veritable hurdle encountered by successful parties in enforcement of arbitral awards against State parties, as a successful invocation of the plea will frustrate any enforcement proceedings by the successful party. Although it is presently a generally acceptable principle that an agreement to arbitrate entered into by a State party constitutes a waiver of immunity to jurisdiction, this waiver does not extend to enforcement or execution of an award obtained from the arbitral process against the State party. The ultimate goal of every arbitration proceeding is the rendering of an enforceable award, thus a successful plea of sovereign immunity to enforcement of an award leaves the successful party with an unenforceable award, a sort of a pyrrhic victory.

The hurdle posed by sovereign immunity to enforcement of arbitral awards can be analyzed in two aspects-

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[82] A.J. Van den Berg., ***"Recent Enforcement Problems under the New York and ICSID Conventions",*** 5 *Arb Int'l* 2, 13 (1989). See also Article 52 of ICSID which provides similar grounds for annulment of awards though which slight variations

3.4.1 Absolute or Restrictive Immunity?

There is no universally accepted theory of sovereign immunity, as there is a clear split in state practice between the absolute and restrictive theories of sovereign immunity. Therefore, where the award is sought to be enforced in a jurisdiction adopting the absolute immunity, a plea of sovereign immunity will sound the death knell on such enforcement proceeding, as the court will look no further than the fact that the party against whom the award is sought to be enforced is a State party or an agency of a State party.

On the other hand, even in jurisdictions with the restrictive approach to sovereign immunity, there is still the issue of determining whether the State property sought to be attached constitutes a sovereign or commercial property. Judicial decisions on this point are not consistent and vary from case to case[83]. Further dent on the enforceability of awards against the property of State entities can be seen in the decision of the UK House of Lords in *Alcom Ltd v Republic of Columbia*[84] where it accepted a declaration made by the ambassador of a foreign State that its account with a London bank was not held for commercial purposes as sufficient evidence of this fact in the absence of a contrary proof. This makes it easy for a State to avert execution against its property by declaring a property to be held for sovereign purposes.

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[83] See ***American Oil Co. v. Socialist People's Libyan Arab Jamahirya,*** 482 F. Supp. 1175 (1980), *vacated*, 684 F.2d1032 (D.D.C. 1981), 62 I.L.R. 220: compare with *Libya v Libyan Amer. Oil Co.* (Swiss Fed'l Trib. June 19, 1980), 62 I.L.R. 229 (1981).

[84] (1984) A.C. 580

3.4.2 Withdrawal of Waiver

While there is little doubt that a State can waive its right to a plea of sovereign immunity and it has generally become accepted that an agreement to arbitrate entered into by a state constitutes a waiver to sovereign immunity in respect of the arbitral proceedings, three major hurdles are still present in respect of waivers of sovereign immunity by State parties-

a. Such waivers do not amount to a waiver of immunity for enforcement of an award gotten pursuant to such arbitral proceedings. However, courts in some jurisdiction have upheld the view that where a state expressly agrees to arbitration, the state does not only waive its immunity from jurisdiction but also its immunity from execution as held in the case of *Creighton v Qatar*[85]40 where the French *Cour de Cassation* overturned the Paris *Cour d'Appel's* decision and based its argument on Article 24 of ICC Arbitration Rules in which parties are "deemed to have undertaken to carry out the resulting award "*without delay and to have waived their right to any form of appeal in so far as such waiver can validly be made."* Nevertheless this decision appears to be an isolated decision and at any rate is applicable only to France. In other jurisdictions therefore, such waiver of immunity to jurisdiction does not operate as a waiver to enforcement of a resulting award.[86]

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[85] 38 (2006) 1 W.L.R. 1420

[86] See the US Court of Appeal of the District of Columbia's decision on the same case in respect of the State's property within the US. Further, in ***Maritime International Nominees Establishment V Republic of Guinea*** 1981 693 F2D 1094; 75 AJIL 963, the same US court upheld a plea of sovereign immunity by Guinea based on the New York Convention.

b. It has been held that the relevant time for determining waiver of immunity by a State to enforcement of an award against its property is at the time the award is sought to be enforced, and not earlier. In *Kahan V Pakistan Federation*[87]**,** it was held that –

> "……Everybody knows and understands that a foreign sovereign may do that…..the question is how? *What is the time at which he can be said to elect whether he will submit to the jurisdiction? Obviously it appears to me that it is when the court is about or is asked to exercise jurisdiction over him and not at any previous time*. … An arbitrator is not a court and therefore by appearing before an arbitrator he did not submit himself to the jurisdiction of the courts….."

This decision implies that even a waiver by a State party to enforcement in an arbitration agreement would not suffice when the court is faced with an enforcement proceeding against the State, as the relevant time for waiver by a State is at the time the award is sought to be enforced by the successful party.

c. There is also the issue of withdrawal of waiver by a State party. In some cases, the courts have been inclined to uphold a withdrawal of waiver by a State party at the stage of enforcement of an award. This was the situation in Kahan's case where **Lord Esher** classically stated that – "true it is that the sultan contracted to allow jurisdiction against him… he has now changed his mind". Also, in *Rich v. Naviera Vacuba*[88] that a sovereign may repudiate such a waiver at any time prior to submission to suit or

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[87] Supra, *note 34*

[88] 197 F. Supp. 710 (EM) 295 F.2d 24 (4 th Cir. 1961).

execution. In the leading British case, *Duff Development Co. v. Government of Kelantan*,[89] a contract between plaintiff and the sovereign defendant provided for arbitration of any dispute arising under the contract. Both parties further consented to judicial enforcement of the arbitral award. A dispute later submitted to arbitration resulted in an award in favor of the plaintiff. When the plaintiff sought enforcement of the award, the sovereign pleaded its immunity as a defense to the court's purported authority. The House of Lords held that since there had been no submission to the court, the repudiation of the agreement to submit, while a breach of the contract with the plaintiff, nevertheless precluded the court from taking jurisdiction

4.0 OVERCOMING PLEA OF SOVEREIGN IMMUNITY IN ENFORCEMENT OF AWARD PROCEEDINGS

4.1 *Sidetracking a Plea of Sovereign Immunity: Any prospects?*

In the recent global market**,** States have become more involved in international business transactions. Hence, various international investment contracts have been concluded between States and foreign investors either directly or through their State entities. The extent of the State's or State entity's commitment to arbitration clauses drafted within these investment contracts and the fact that States seek immunity from jurisdiction and execution of arbitral award has been a major issue before arbitral

[89] [1924] A.C**797**

tribunals and courts.[90] Investors are therefore wary of entering into arbitration agreements with States which may prove a costly exercise in the event of a dispute arising from the transaction owing to unenforceability of an award obtained thereunder. This would constitute a threat to international investments if not checked.

Over the years however, various ways have been devised by investors and transactional entities dealing with States or State entities to avert a plea of sovereign immunity by the State parties to the arbitration proceedings or awards obtained from the arbitration. While the efficacy of these mechanisms have remained doubtful, and in many cases have failed to achieve the desired result, they however go a long way in reducing the potency of a plea of sovereign immunity by the State parties and increase the prospects of a successful enforcement of arbitral awards against the State.[91] The most prominent of the ways developed over the years to sidestep a plea of sovereign immunity by the State is the inclusion of express waiver clauses in the arbitration agreements indicating the submission of the State party to the jurisdiction of an arbitral tribunal.

This has become the widespread practice to include express waiver of sovereign immunity clauses in international contracts containing an arbitration agreement whereby the State party undertakes to submit to the jurisdiction of the arbitral tribunal in the event of a dispute. This is not novel however and in the light of judicial decisions imputing

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[90] Iyabo Adebiyi., *"**Is the Doctrine of Sovereign Immunity a threat to Investment Arbitration?",*** University of Dundee**,** CAR-12_14_388100746.pdf, available at http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=CAR-12_14_388100746.pdf

[91] John Collier & Vaughan Lowe, ***"The Settlement of Disputes in International Law: Institutions and Procedures"*** 272 (OUP 1999).

waiver against the State from the very act of entering into an arbitration agreement, such clauses may be regarded as moot at least in jurisdictions adopting the restrictive immunity. However, the relevance of such clauses come to the fore in relation to jurisdictions adopting the absolute immunity theory where such clauses assume remarkable significance in ensuring the State party submits to the jurisdiction of the arbitral tribunal.

Another method employed in sidestepping a plea of sovereign immunity applies to the specific issue of immunity from execution. The State party is made to execute an instrument of waiver of sovereign immunity from execution of arbitral awards prior to or at the time of execution of the contract and arbitration agreement. This comes in handy when a successful award is sought to be enforced by the individual party. However, in the light of recent decisions indicating that a State may revoke or withdraw a waiver of immunity, the efficacy of this method also comes into doubt, which is not good news for the individual party. In adopting this method, it is necessary to provide an express waiver of immunity that the state waives "any" immunity from execution in connection with the enforcement of an award and to widen the scope of the waiver so as to make it applicable to "any property" or to "all properties" of the state, in the hope that the waiver may be construed as encompassing both sovereign and diplomatic immunity and cover both properties held for sovereign and commercial purposes. A general waiver clause suggested by ICSID's Model Clauses of 1993 sounds instructive and is recommended for individual parties entering into arbitration agreements with State parties. It states as follows:

> **Clause 15**: 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.

Legislations in most jurisdictions allow for the State to make such waivers in executed agreements. For instance, the *Russian Federal Law on Production Sharing Agreements,*[92] *Article 23* (Immunity of the State) provides:

> The agreements to be concluded with foreign citizens and foreign legal entities under the legislation of the Russian Federation as in effect may provide for the waiver of the state's judicial immunity, immunity with regard to interim measures for the protection of the claim, and execution of the court and (or) arbitration ruling.

Finally, the State party may be made to execute a sovereign guarantee for the performance of its obligations under the contract and same will be deposited with a foreign bank in which the State party has funds. This guarantee unlike others operates like a Letter of Credit and entitles the individual party to claim a specific sum from the foreign bank in the event of a default by the State party in fulfilling its obligations under the contract, including the satisfaction of an arbitral award rendered against it. In truth, this method is a bare suggestion and the exact modalities for its application is unclear, even as it is doubtful if a sovereign guarantee would appropriately fit into the concept of enforcement of arbitral awards against a state party.[93]

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[92] (Dec. 30, 1995), 35 I.L.M. 1251, 1272 (1996), which came into force on Jan. 11, 1996:

[93] G.R. Delaume, ***"Recognition and Enforcement of State Contract Awards in the United States: A Restatement,"*** 91 *Amer. J. Int'l L.* 476, 487 (1997):

4.2 *Alternative Approaches available to Non-State Parties*

Aside from the above methods, non-State parties to arbitration agreements have alternative approaches which can be adopted to minimize their exposure to a plea of sovereign immunity by the State parties. One obvious way is by incorporating Multilateral and Bilateral Treaties (BITS) in the arbitration agreements so as to enforce an arbitral award. This could be another alternative for enforcing arbitral award as most BITS have a more enforceable procedure which may be beneficial to the private party. Furthermore, BITS being international agreements between States may be more respected by the contracting State because they want to maintain good relationship with other countries and thereby create conducive environment for the promotion and protection of foreign investment.[94]

Another, perhaps less salutary approach, could be the embarking on forum shopping by the non-State party in a bid to benefit from jurisdictions with favourable judicial approach to the issue of sovereign immunity by a State party. In this respect, US, UK, France and Switzerland will prove attractive adjudicatory forums based on the liberal approach of the courts in these jurisdictions to the issue of sovereign immunity and the existence of extant laws regulating the issue and providing more avenues for non-State parties to enforce arbitral awards against State parties. France particularly will prove a particularly lucrative adjudicatory forum based on the decision of the Supreme

[94] Article VII of the NYC 1958

Court interpreting an agreement to arbitrate as not only a waiver to jurisdiction, but also a waiver to execution of awards gotten from the ensuing arbitration.

However, it goes without saying that to take advantage of such situation and permit for forum shopping by the non-State party, the laws of such jurisdictions must be indicated in the relevant contract and arbitration document as the applicable law for the resolution of disputes arising from the transaction or arbitration agreement.

5.0 CONCLUSION

This research has examined the issue of sovereign immunity of a State enterprise and its applicability to enforcement of international arbitration awards in light of recent developments. Generally, the plea of sovereign immunity constitutes a veritable hurdle to arbitration proceedings and the enforcement of arbitration awards. However, over the years, legislative and judicial intervention has helped to water down and streamline the extent of applicability of the plea of immunity by State parties to arbitration proceedings and enforcement of awards. In the light of the dichotomy in state practice between the absolute and restrictive immunity approaches, what is needed is a unified international legal instrument which will harmonize state practice in this regard and provide for unified approach amongst states.

The anticipated coming into force of the UN Convention on Jurisdictional Immunities of States and Their Property will go a long way to achieve this objective and the many problems involving sovereign immunity arising from the vagaries of national legislation will slowly disappear. However, there could still be problems ahead involving

interpretations of the Convention by national courts and even by arbitral tribunals. In essence therefore "the extent to which immunity should be enjoyed by agencies, connected to the State but not so closely as to constitute central organs of government, remains a perennial problem in the law of State immunity."[95]

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