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## **State Immunity in the Process of Recognition and Enforcement of ICSID Arbitral Awards**

*The present paper focuses on the determination of the role of state immunity in the process of recognition and enforcement of ICSID arbitral awards. It examines the effectiveness of the Convention on the Settlement of International Investment Disputes in the light of domestic and international laws on State immunity. The paper, mainly, discusses the approaches of Anglo-American and French legal systems along with the 2004 UN Convention. Within the scope of this area of research, the paper offers an analysis of the respective articles of Georgian legislation.*

**Key words:** *Recognition and enforcement of international arbitral awards; ICSID Convention, State immunity.*

### **1. Introduction**

In today's global economy there has been a noticeable growth in a number of private international transactions involving State parties and enterprises with state shareholding along with private parties. Such a remarkable increase in international transactions involving State parties has led to the growth of international arbitration disputes, which can be explained not only by economic factors but also by significant advantages of arbitration when compared to court litigation.<sup>1</sup>

The eventual goal of international arbitration is recognition and enforcement of an arbitral award. However, in the event of an unfavourable award against a State or State enterprise, the successful party usually faces the plea of sovereign immunity by the State party during enforcement proceedings. Multiple unsuccessful attempts of the former Yukos shareholders to execute the award rendered by the Permanent Arbitration Court in the Hague in July 2014 against the government of Russian Federation is sufficient to illustrate the complexity of the problem.<sup>2</sup>

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<sup>1</sup> *Brazil David R.*, International Commercial Arbitration Involving a State Party and the Defense of State Immunity, *American Review of International Arbitration*, Vol. 22, 2011, 241.

<sup>2</sup> *Hulley Enterprises Limited (Hulley) v. the Russian Federation, Yukos Universal Limited (YUL) v. the Russian Federation, Veteran Petroleum Limited (VPL) v. the Russian Federation*, (Final Awards) PCA Case Nos AA226, AA227, AA228, 18/07/2014, <<https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf>> [18.06.2020]; *Croissant G.*, Recent developments in the Yukos saga see assets in Belgium belonging to Russia unfrozen, 27/06/2017, <<https://www.arbitrationlinks.com/recent-developments-in-the-yukos-saga-see-assets-in-belgium-belonging-to-russia-unfrozen>> [18.06.2020]; *Knowls B., Moyeed K., Lamprou N.*, The USD 50 billion Yukos Award overturned – Enforcement becomes a game of Russian Roulette, 13/05/2016, <<http://arbitrationblog.kluwerarbitration.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/>> [20.06.2020]; *Bucki K., Poloni F.*, The Yukos Case: Former Shareholders Lose their Legal Battle in France but continue the War,

While States have been evading enforcement of international arbitral awards by raising State immunity before national courts, an effective international legal instrument ensuring, on the one hand, enforcement of an arbitral award rendered in favour of a private party, and on the other hand, protection of sovereign interests of a State acting as a subject of public international law, has become more and more important.

To improve an investment climate and promote private foreign investments the Convention on the Settlement of Investment Disputes Between States and Nationals of other States was adopted (hereinafter – the Convention)<sup>3</sup> by the Executive Director of the International Bank for Reconstruction and Development, establishing a special international arbitration forum - the International Centre for Settlement of Investment Disputes (hereinafter – the Centre), which provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of another Contracting States – private investors.<sup>4</sup> The Convention is a prominent international mechanism, as it creates a comprehensive and self-contained regime for recognition and enforcement of arbitral awards. This autonomous and delocalized enforcement scheme shelters the arbitral awards from the scrutiny of national courts in contrast to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – the New York Convention).<sup>5</sup>

The issue of State immunity from jurisdiction does not arise under the Convention as a Contracting State's consent to the jurisdiction of the Centre is considered as a consent to the jurisdiction of national courts over the recognition and enforcement of arbitral awards rendered under the Convention (hereinafter – the ICSID awards).<sup>6</sup> However, the question whether or not the Convention offers effective recognition and enforcement of ICSID arbitral awards still arises, as execution is still barred by State immunity from execution. The Convention entitles the courts of State parties to the Convention to enforce ICSID awards according to their law governing State immunity from execution of judgements and arbitral awards.<sup>7</sup> In its turn, the rules governing State immunity differ according to the States.<sup>8</sup>

The issue is relevant in Georgia, especially, in the light of an increasingly significant role that international arbitration plays in the resolution of cross-border investment disputes. As of today, Georgian legislation offers only “episodic” regulation of State immunity. Hence, considering the role of State immunity in the process of recognition and enforcement of international arbitral awards is of a central importance.

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04/12/2017, <<https://www.august-debouzy.com/en/blog/1092-the-yukos-case-former-shareholders-lose-their-legal-battle-in-france-but-continue-the-war>> [20.06.2020].

<sup>3</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”), 575 UNTS, 1965, 159.

<sup>4</sup> Preamble, Introduction, article 1 (1), ICSID Convention, 575 UNTS, 1965, 159.

<sup>5</sup> *Reed L., Paulsson J., Blackaby N.*, Guide to ICSID Arbitration, Kluwer Law International, 2010, 181.

<sup>6</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, The ICSID Convention: A Commentary, 2<sup>nd</sup> ed., Cambridge, 2009, 1129.

<sup>7</sup> Art. 54 (3), ICSID Convention, 575 UNTS, 1965, 159.

<sup>8</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, The ICSID Convention: A Commentary, 2<sup>nd</sup> ed., Cambridge, 2009, 1154.

The research is aimed at identifying the essence of the problem at issue on the basis of a comparative analysis for future regulation of State immunity in terms of recognition and enforcement of international arbitral awards under the ICSID Convention.

## **2. Finality and the Binding Nature of the Award**

According to the Convention, the obligation to comply with the ICSID award is automatic and begins immediately upon its rendering.<sup>9</sup> The ICSID award is self-executing and the prevailing party does not need to take any steps of any kind for that purpose.<sup>10</sup> That is wholly contained in Article 53, which states that the award shall be binding on the parties and each party shall abide by and comply with the terms of the award.<sup>11</sup>

The ICSID award is independent of judicial control of the arbitration forum<sup>12</sup> and it shall not be subject to any other remedy except those provided for in the Convention.<sup>13</sup> This highlights the finality of the award and a delocalized nature of ICSID arbitration, as well as an exhaustive and autonomous character of the Convention, making it distinctive and a truly international mechanism in international arbitration.<sup>14</sup>

The obligation of the parties to the dispute to comply with the award is independent of any enforcement proceedings. Moreover, the need to resort to enforcement under Article 54 (1) arises only when an award debtor does not comply with the award voluntarily.<sup>15</sup>

Non-compliance with the award by the party, even as a result of procedural obstacles that may arise in the course of enforcement, would be a breach of the Treaty obligation.<sup>16</sup> Therefore, the obligation to comply exists even where a State party finds that it can rely on State immunity in accordance with Article 55 of the Convention. Hence, failure of a State party to the Convention to comply with the award constitutes a violation of the Convention by that State.<sup>17</sup>

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<sup>9</sup> Ibid, 1111.

<sup>10</sup> *Alexandrov S. A.*, Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention, International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer, *Binder Ch., Kriebaum U., Wittich St.*, (ed.), Oxford, 2009, 325.

<sup>11</sup> Art. 53 (1), ICSID Convention, 575 UNTS, 1965, 159.

<sup>12</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, The ICSID Convention: A Commentary, 2<sup>nd</sup> ed., Cambridge, 2009, 1103.

<sup>13</sup> Art. 53 (1), ICSID Convention, 575 UNTS, 1965, 159; The post-award procedures provided for in the Convention entail addition to, and correction of, interpretation, revision, and annulment of the award under articles 49 (2), 50, and 51 respectively.

<sup>14</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, The ICSID Convention: A Commentary, 2<sup>nd</sup> ed., Cambridge, 2009, 1103.

<sup>15</sup> Ibid, 1106.

<sup>16</sup> Ibid.

<sup>17</sup> See *MINE v. Guinea*, ICSID Case No. ARB/84/4, Interim Order No. 1 of 12 August 1988, para. 25, <<https://jusmundi.com/en/document/other/en-maritime-international-nominees-establishment-v-republic-of-guinea-interim-order-1-friday-12th-august-1988>> [07.02.2020]; *Mitchell v. DR Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award of 30 November 2004, 20 ICSID Review – Foreign Investment Law Journal, 2005, 598.

There are two types of legal actions available under the Convention to secure compliance with an award.<sup>18</sup> One is taking an action of recognition and enforcement in accordance with Article 54 of the Convention against either the investor or the host State.<sup>19</sup> The other is a legal action by the investor's home State against the host State in accordance with Articles 27 and 64 providing for the right of exercising diplomatic protection by an investor's home State or instituting proceedings against host State in the International Court of Justice.<sup>20</sup> However, apart from the above-mentioned results, non-compliance with the ICSID award may have a negative effect on the host State's position in the international community with respect to the continuance of international financing or the inflow of other investments.<sup>21</sup>

### **3. Recognition and Enforcement<sup>22</sup> in Accordance with Article 54**

Article 54 (1) is the center of the Convention's automatic recognition and enforcement regime.<sup>23</sup> While Article 53 (1) concerns only the parties to a dispute, the obligation to recognize and enforce awards under Article 54 applies to all Contracting States of the Convention.<sup>24</sup> In particular, each Contracting State is obliged to recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories "as if it were a final judgement of the court in that State."<sup>25</sup>

Hence, Contracting States have two obligations: to recognize an award as binding and enforce the pecuniary obligations imposed by it. The arbitral award is equated to a final decision of the national court for both purposes, expressing the essence of the Convention, i.e. if the final judgement of the national court in question is enforceable, the ICSID arbitral award shall be also enforceable in that State.<sup>26</sup>

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<sup>18</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, The ICSID Convention: A Commentary, 2<sup>nd</sup> ed., Cambridge, 2009, 1108.

<sup>19</sup> *Broches A.*, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal, Vol. 2, Issue 2, 1987, 294.

<sup>20</sup> *Ibid.*, 1108.

<sup>21</sup> *Mitchell v DR Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award of 30 November 2004, 20 ICSID Review – Foreign Investment Law Journal, 2005, 598.

<sup>22</sup> Articles 54 (1) and 54 (2) both refer to "enforcement", whereas Article 54 (3) refers to "execution", in the official English version of the text. By contrast, equally authentic Spanish and French texts do not. Professor Schreuer suggests that the interpretation that best reconciles these differences under Article 33(4) of the 1969 Vienna Convention on the Law of Treaties is to conclude that the terms "enforcement" and "execution" are identical in meaning. See *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, The ICSID Convention: A Commentary, 2<sup>nd</sup> ed., Cambridge, 2009, 1136; In Georgian "enforce", "enforcement", and "execution" have the same meaning, therefore, to differentiate "enforcement" and "execution", the last one shall be translated as "forcible execution" for the purposes of this paper.

<sup>23</sup> *Reed L., Paulsson J., Blackaby N.*, Guide to ICSID Arbitration, Kluwer Law International, 2010, 182.

<sup>24</sup> *Ibid.*

<sup>25</sup> Art. 54 (1), ICSID Convention, 575 UNTS, 1965, 159.

<sup>26</sup> *Broches A.*, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal, Vol. 2, Issue 2, 1987, 316-317; See also, The History of the ICSID Convention, Documents Concerning the Origin and the Formulation of

The restriction of the obligation to enforce only pecuniary obligations is the result of the difficulty that might have arisen if the award provides for forms unknown to the law of the Contracting State where the enforcement is sought, whereas, the pecuniary obligations is likely available under every legal system.<sup>27</sup>

The above-mentioned does not refrain the tribunal from the right to impose non-pecuniary obligations under the award, however, while imposing non-pecuniary obligations, the tribunal shall keep the impossibility to enforce them in mind in a particular case, and ensure that a pecuniary alternative is provided in case of non-performance.<sup>28</sup>

### 3.1. Nonreviewability of the Arbitral Award

In order to obtain recognition or enforcement of the arbitral award in the territories of a Contracting State, a party shall furnish to a competent court or other authority, which such State shall have designated for this purpose a copy of the award, certified by the Secretary-General.<sup>29</sup>

The power of a competent court or authority is restricted to ascertaining the authenticity of the award, which excludes exercise of judicial control of national courts on the recognition and enforcement proceedings. Hence, national courts are not entitled to re-examine the arbitral award on merits, or the jurisdiction of the tribunal or examine the fairness and propriety of the proceedings before the ICSID tribunal.<sup>30</sup> This is in contrast to non-ICSID arbitral awards, which may be reviewed under domestic laws and applicable treaties, i.e. the New York Convention, setting forth a detailed list of grounds for refusing recognition and enforcement.<sup>31</sup>

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the Convention, Vol. 2, Part 2, 1968, 889, <<https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-2.pdf>> [15.03.2020].

<sup>27</sup> *Cane G.*, The enforcement of ICSID Awards: Revolutionary or Ineffective, *The American Review of International Arbitration*, Vol. 15, 2004, 456; See also, *Carias-Borjas S.*, Recognition and Enforcement of ICSID Awards: The Decision of the French *Cour de Cassacion* in *SOABI v. Senegal*, *The American Review of International Arbitration*, Vol. 2, 1991, 359; See also, *Broches A.*, Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application, 18 *Yearbook of Commercial Arbitration*, 1993, 703-704.

<sup>28</sup> *Schreuer C. H.*, Non-Pecuniary Remedies in ICSID Arbitration, 20 *Arbitration International*, 2004, 332.

<sup>29</sup> Art. 54 (2), ICSID Convention, 575 UNTS, 1965, 159.

<sup>30</sup> See *MTD Equity Sdn Bhd & MTD Chile SA v. Republic of Chile*, ICSID Case No ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution of 1 June 2005, para 31, <<https://www.italaw.com/sites/default/files/case-documents/ita0545.pdf>> [07.04.2020]; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of 1 September 2006, para 40, <[http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4/DC505\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4/DC505_En.pdf)> [07.04.2020]; See also, *Parra A.*, The Enforcement of ICSID Arbitral Awards, 24th Colloquium on International Arbitration, Paris, November 2007, <[https://www.arbitration-icca.org/media/4/39889320043113/media012144885278400enforcement\\_of\\_icsid\\_awards.pdf](https://www.arbitration-icca.org/media/4/39889320043113/media012144885278400enforcement_of_icsid_awards.pdf)> [19.03.2020].

<sup>31</sup> Art. 5, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 330 UNTS, 1958, 38; See also, *Sempra Energy International v. Argentine Republic*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of 5 March 2009, 7, <<http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/>

Nonreviewability of ICSID arbitral awards is a distinctive feature of the Convention. However, according to the court practice, national courts do not seem to have fully aware of their lack of power to review ICSID awards.<sup>32</sup> For example, in *Benvenuti & Bonfant v Congo*<sup>33</sup> the *Tribunal de Grande Instance* of Paris its decision to grant an *exequatur*<sup>34</sup> based on the fact that the award contained nothing that was contrary to French law and public order.<sup>35</sup> In *SOABI v. Senegal*<sup>36</sup> the *Cour de cassation* of France also found it necessary to remind the *Cour d'appel* that the regime established by Articles 53 and 54 of the Convention excluded the remedies of the French Code of Civil Procedure in recognition and enforcement proceedings of ICSID awards.

In Argentina, Argentine officials have suggested that its national courts might review ICSID awards in the event recognition and enforcement was sought in Argentina.<sup>37</sup>

### 3.2. Recognition

Recognition of an arbitral award is a confirmation that the award is authentic and that it has the legal consequences by the law.<sup>38</sup> Specific procedures that the awards may be subject to vary depending on the law of the country where recognition is sought, however, as already mentioned above, in the event of recognition of ICSID awards, the power of national courts or other competent authority, designated for that purpose, is limited to verifying the authenticity of the ICSID award and refusal of recognition on the basis of domestic legislation is not allowed.<sup>39</sup>

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OnlineAwards/C8/DC991\_En.pdf> [09.04.2020]; Comp., *Sicard-Mirabal J., Derains Y.*, Introduction to Investor-State Arbitration, Kluwer Law International, 2018, 243-245; Article 52 of the Convention lists the grounds on which the ICSID arbitral awards may be annulled by the *ad hoc* committee of the Centre. It is of note that several of the reasons in Article 52 are covered by the reasons for non-enforcement under Article V of the New York Convention.

<sup>32</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, The ICSID Convention: A Commentary, 2<sup>nd</sup> ed., Cambridge, 2009, 1141.

<sup>33</sup> *Benvenuti & Bonfant v Congo*, ICSID Case No. ARB/77/2, Decisions of Tribunal de Grande Instance, Paris of 23/12/1980, 13/01/1981, 1 ICSID Reports, 1993, 368.

<sup>34</sup> *exequatur* – (lat); French term referring to the court decision or order on the enforcement of foreign court decision/arbitral award in France. Under French law arbitral awards becomes title for forcible execution only through *exequatur* (leave for enforcement) of the respective court of the place of arbitration. See *Broches A.*, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal, Vol. 2, Issue 2, 1987, 316-318.

<sup>35</sup> See *Delaume G. R.*, France: Court of Appeals of Paris Judgement Concerning Recognition and Enforcement of Award in Context of ICSID Convention, ILM Vol. 20, No 4, 1981, 877-882.

<sup>36</sup> *SOABI v. Senegal*, ICSID Case No. ARB/82/1, Decision of Cour de Cassation, Paris, 11 June 1991, 2 ICSID Reports, 1994, 341.

<sup>37</sup> *Uchkanova I., Temnikov O.*, Enforcement of Awards Under the ICSID Convention – What Solutions to the Problem of State Immunity?, ICSID Review, Vol. 29, No. 1, 2014, 191-192; See also, *Marzorati O. J.*, Enforcement of Treaty Awards and National Constitutions (The Argentinian Cases), Business Law International, Vol. 7, 2006, 239.

<sup>38</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, The ICSID Convention: A Commentary, 2<sup>nd</sup> ed., Cambridge, 2009, 1128.

<sup>39</sup> *Ibid*; See also, *Cane G.*, The enforcement of ICSID Awards: Revolutionary or Ineffective, The American Review of International Arbitration, Vol. 15, 2004, 445-446.

As a consequence of recognition, the award enjoys the effect of *res judicata*<sup>40</sup> and becomes a valid title, forming the basis for execution.<sup>41</sup>

It is of note that the obligation to recognize extends to the entire ICSID award; by contrast, the obligation to enforce extends only to the pecuniary obligations imposed by the award.<sup>42</sup>

A clear distinction should be drawn between the recognition of an award and its execution. This excludes the application of the provision of sovereign immunity from execution in Article 55 of the Convention at the stage of recognition. Therefore, recognition may not be refused for reasons of immunity from execution of domestic law, and the effect of the award as *res judicata* will apply irrespective of the immunity from execution.<sup>43</sup> This was confirmed in the decision of the *ad hoc* committee on the stay of enforcement of the ICSID award in *Ioannis Kardassopoulos and Ron Fuchs v Georgia*,<sup>44</sup> according to which a simplified and autonomous regime created by Article 54(1) of the Convention is independent from the enforcement measures imposed by the enforcement order rendered by the courts in accordance with Article 54(2) for the purpose of execution of the award. However, national courts have interpreted Article 54 (1) variously and the violation of the autonomous enforcement regime by the courts has been also observed.<sup>45</sup> In this respect, it is also important that Cour de cassation and Cour d'appel of France have also confirmed distinction between the stages of recognition of the award and its execution, and that there is no sovereign immunity with respect to the recognition of an award, and the recognition of the ICSID award is not subject to the provisions of domestic law dealing with the recognition and enforcement of other arbitral awards.<sup>46</sup>

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<sup>40</sup> Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A., *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1128.

<sup>41</sup> Delaume, G. R., *ICSID Arbitration in Practice*, 2 *International Tax and Business Law*, 1984, 74.

<sup>42</sup> Broches A., *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, *ICSID Review – Foreign Investment Law Journal*, Vol. 2, Issue 2, 1987, 316.

<sup>43</sup> Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A., *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1129.

<sup>44</sup> *Ioannis Kardassopoulos and Ron Fuchs v Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award of 12 November 2010, para 30, <[http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C63/DC3354\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C63/DC3354_En.pdf)> [16.06.2020].

<sup>45</sup> See Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A., *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1130; Davin S., *Enforcement of ICSID Awards in the United States: Should the ICSID Convention be Read As Allowing a ‘Second Bite at the Apple’?* 44 *New York University Journal of International Law and Politics*, 2016, 1274-1275; *Benvenuti & Bonfant v. Congo*, ICSID Case No. ARB/77/2, Tribunal de Grande Instance, Paris 13/01/1981, 1 *ICSID Reports*, 1993, 369; *Benvenuti & Bonfant v. Congo*, Cour d'appel, Paris, 26/06/1981, 1 *ICSID Reports*, 369.

<sup>46</sup> *SOABI v. Senegal*, Cour d'appel, Paris, 05/12/1989, 2 *ICSID Reports*, 1994, 337; *SOABI v. Senegal*, Cour de cassation, 11/06/1991, 2 *ICSID Reports*, 1994, 341; *Benvenuti & Bonfant v. Congo*, Cour d'appel, Paris, 26/06/1981, 1 *ICSID Reports*, 369; See also, Ziade N. G., *Some Recent Decisions in ICSID Cases*, *ICSID Review – Foreign Investment Law Journal*, Vol. 6, Issue 2, 1991, 521-524.

## 4. State Immunity from Execution

### 4.1. State Immunity from Execution and ICSID Convention

Article 54(3) of the Convention states that execution of ICSID awards “are governed by the laws concerning the execution of judgements in force in the State” in which execution is sought. Furthermore, according to Article 55, “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.”

As Professor Schreuer points out, Article 55 may be seen as the Achilles’ heel of the Convention.<sup>47</sup> A weak point of otherwise effective mechanism of arbitration shows up, when it comes to the actual execution of pecuniary obligations imposed by the award. The Convention does not entitle the courts of Contracting States to enforce arbitral awards if this would contradict to the domestic laws governing state immunity from execution of judgements and arbitral awards.<sup>48</sup>

While the laws on State immunity, as well as respective judicial practice of States varies, still some main principles governing State immunity from execution can be observed.<sup>49</sup>

The statutes dealing with State immunity from execution, as well as court practice in some countries without comprehensive legislation on State immunity, apply exceptions from immunity from execution, in principle, only to commercial property.<sup>50</sup> Furthermore, some countries require a special link between the underlying claim and the property that is subject to execution,<sup>51</sup> which is another serious limitation to the execution of ICSID awards, as it is unlikely that a host State will keep commercial assets in another country that might have a direct connection to the investment in its territory.<sup>52</sup>

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<sup>47</sup> Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A., *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1153; See also, Gerlich O., *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille’s Heel of the Investor-State Arbitration System?*, *The American Review of International Arbitration*, Vol. 26, No. 1, 2015, 47-99; Bjorklund A. K., *Symposium: Arbitration and National Courts: Conflict and Cooperation: Sovereign Immunity as a Barrier to the Inforcement of Investor-State Arbitral Awards: the Re-Politicization of International Investment Disputes*, *21 American Review of International Arbitration*, 2010, 236.

<sup>48</sup> Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A., *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1154.

<sup>49</sup> *Ibid*, 1156; See also, Broches A., *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, *ICSID Review – Foreign Investment Law Journal*, Vol. 2, Issue 2, 1987, 333-34.

<sup>50</sup> Cane G., *The enforcement of ICSID Awards: Revolutionary or Ineffective*, *The American Review of International Arbitration*, Vol. 15, 2004, 453; See also, Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A., *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1159-1168.

<sup>51</sup> Bernini G., Van den Berg A., *The Enforcement of Arbitral Awards Against States: The Problem of Immunity from Execution*, *Contemporary Problems in International Arbitration*, Lew J. ed., 1987, 364; Van Blankenstein A., *Enforcement of an Arbitral Award against a State: With Whom Are We Dealing?*, *The Flame Rekindled – New Hopes for International Arbitration*, Muller S., Mijs W., eds., 1993, 159; Schreuer C. H., *State Immunity: Some Recent Developments*, VIII Hersh Lauterpacht Memorial Lecture Series, Cambridge, 1988, 134.

<sup>52</sup> Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A., *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1166.

The exception added to the Foreign Sovereign Immunities Act of the United States (hereinafter – the FSIA) through a 1988 amendment is an important step towards facilitating the execution of ICSID awards.<sup>53</sup> Pursuant to the amendment the presence of property used for a commercial activity in the United States is still required, by contrast, a special nexus between the property and the claim underlying the award is not compulsory. In this respect, the FSIA is more generous to arbitral awards than to court decisions.<sup>54</sup>

The execution of ICSID awards reaches its deadend when it comes to the specially protected property, such as assets held by central banks, military and diplomatic property.<sup>55</sup> As a general rule, those types of assets are protected by State immunity from execution and exceptions from immunity do not apply to them.<sup>56</sup>

#### 4.2. Waiver of Immunity

The problem of State immunity from execution that an investor faces when attempting to execute the ICSID award can be resolved through an arbitration agreement on the waiver of immunity from execution.<sup>57</sup> It is of note that participation in the Convention cannot be construed as an implied waiver from immunity from execution.<sup>58</sup>

Laws on State immunity contain various provisions regarding the waiver of immunity from execution. The waiver of immunity is one of the exceptions from immunity from execution listed in

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<sup>53</sup> The Foreign Sovereign Immunities Act of the United States of 1976 (FSIA), 15 ILM 1388 (1976); a 1988 amendment, 28 ILM 396 (1989).

<sup>54</sup> 28 USC §1610(a)(6), ILM 398 (1989); *Delaume G. R.*, Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies, ICSID Review – Foreign Investment Law Journal, Vol. 8, Issue 1, 1993, 42.

<sup>55</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, The ICSID Convention: A Commentary, 2<sup>nd</sup> ed., Cambridge, 2009, 1168.

<sup>56</sup> See 28 USC §1611, 15 ILM 1391 (1976); The United Kingdom State Immunity Act of 1978 (SIA), 17 ILM 1123 (1978), Sec. 16 (1)(2); *ob. Also, AIG Capital Partners Inc. and another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening)*, High Court, Queen’s Bench Division (Commercial Court), 20 October 2005, [2005] EWHC 2239 (Comm), 11 ICSID Reports 118; *LETCO v. Liberia*, United States District Court, District of Columbia, 16 April 1987, 2 ICSID Reports 390. For further discussions on those cases see *Van den Berg A. J.*, Recent Enforcement Problems under the New York and ICSID Conventions, *Arbitration International*, Vol. 5, Issue 1, 1989, 12-13; *Broches A., Broches A.*, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal, Vol. 2, Issue 2, 1987, 324-334; *Choi S.*, Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions, 28 N.Y.O. Journal of International Law & Politics, 1995-1996, 184-186; *Franzoni, D. B.*, Enforcement of ICSID Awards in the United States, 18 Georgia Journal of International and Comparative Law, 1988, 101; *Kahale G. III.*, Enforcing an ICSID Arbitral Award, 6 International Financial Law Review, 1987, 40.

<sup>57</sup> *Barbosa F. S.*, The Enforcement of International Investment Arbitral Awards: Is there a better way?, *Revista Brasileira de Arbitragem*, Vol. 6, Issue 21, 32-34.

<sup>58</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, The ICSID Convention: A Commentary, 2<sup>nd</sup> ed., Cambridge, 2009, 1173; *Comp., Turck N. B.*, French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards, *Arbitration International*, Vol. 17, Issue 3, 2001, 327-343.

the FSIA and the United Kingdom law on State immunity.<sup>59</sup> However, after adding an arbitration exception to the FSIA, the role of waiver exception from immunity is not quite clear for purposes of enforcement of ICSID awards.<sup>60</sup> The FSIA is also unique in that it extends waiver of immunity from execution only in respect of State property used in commercial activity in the United States.<sup>61</sup> Conversely, waiver of immunity is available in respect of any property in the United States of an agency or instrumentality of a foreign State engaged in commercial activity in the United States.<sup>62</sup> However, still the requirement of a commercial activity of the agency or instrumentality in the United States largely devalues the provision for the purposes of enforcement of ICSID awards.<sup>63</sup>

By contrast, the United Kingdom State Immunity Act ((hereinafter – the SIA) does not require a commercial purpose of the property and provides for the waiver of immunity from execution on the State property expressed with the written consent of the State.<sup>64</sup> The European Convention on State Immunity (hereinafter – the European Convention)<sup>65</sup> and the United Nations Convention on the Jurisdictional Immunities of States and Their Property (hereinafter – the UN Convention)<sup>66</sup> also contain a provision on express waiver of immunity from execution. In both cases, the waiver of immunity is independent of the commercial or non-commercial nature of the State property subject to execution, concluding that general waivers of immunity from execution should be interpreted as extended to non-commercial State property.<sup>67</sup>

The effect of the waiver of immunity from execution in respect of the property that is granted special protection is even more doubtful.<sup>68</sup> For example, under the FSIA the waiver of immunity does not extend to the military and diplomatic property.<sup>69</sup> Furthermore, special protection is granted to the assets of central banks, however, a foreign state is entitled to explicitly waive immunity from execution in respect of those assets.<sup>70</sup>

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<sup>59</sup> 28 USC §1610 (a)(1); SIA, Sec 13 (4).

<sup>60</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1174.

<sup>61</sup> *Ibid*; See also, *Af-Cap, Inc v. Chevron Overseas (Congo) Ltd*, 475 F3d 1080, 1087 (9<sup>th</sup> Cir. 2007); The Court of Appeal of the 9<sup>th</sup> Circuit of the United States ascertained that the State's waiver of immunity over its entire assets is not valid.

<sup>62</sup> 28 USC §1610 (b)(1), 15 ILM 1391 (1976).

<sup>63</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1184.

<sup>64</sup> SIA, Sec 13(4), 17 ILM 1126 (1978).

<sup>65</sup> European Convention on State Immunity of 1972 (European Convention), ETS 74, 11 ILM 470 (972); See also, *Reinisch A.*, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 *European Journal of International Law*, 2006, 805

<sup>66</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (UN Convention), UN General Assembly, A/59/508, 02/12/2004, Is not in force yet, <[https://treaties.un.org/doc/source/RecentTexts/English\\_3\\_13.pdf](https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf)> [17.09.2020].

<sup>67</sup> Art. 23, European Convention, 11 ILM 478 (1972); Art. 19 (a), UN Convention, UN General Assembly, A/59/508.

<sup>68</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1174.

<sup>69</sup> 28 USC §1611 (b)(2), 15 ILM 1391 (1976).

<sup>70</sup> 28 USC §1611 (b)(1), 15 ILM 1391 (1976).

The SIA has a similar approach regarding the assets of central banks.<sup>71</sup> As for diplomatic and military property, it is doubtful, whether or not it is possible to waive immunity from execution with respect to that property.<sup>72</sup> Only the Australian Act states that an express waiver of immunity can be extended to military and diplomatic property.<sup>73</sup> It is remarkable that the UN Convention provides for the waiver of immunity from execution with respect to the military and diplomatic property, as well as the assets belonging to central banks, notwithstanding the fact that they are not considered as commercial property and are not given special protection under the UN Convention.<sup>74</sup>

As a general rule, courts do not interpret either waiver of immunity from jurisdiction, or conclusion of arbitration agreement, as implicit waiver of immunity from execution.<sup>75</sup>

Express waiver of immunity from execution would promote enforcement of arbitral awards voluntarily.<sup>76</sup> At the same time, it is important that the waiver clause is broad and not aimed specifically at execution in one particular State.<sup>77</sup> To avoid narrow interpretation of a waiver clause, it should cover all types of property, including bank accounts belonging to the State, whether held in the name of diplomatic missions or otherwise. Furthermore, a waiver clause should contain provision regarding the assets of central banks.<sup>78</sup>

Obviously, the terms and conditions of the waiver clause would be subject to negotiations of the parties concerned, however, it is doubtful, that a State would agree on such a waiver clause.<sup>79</sup>

## 5. The Convention and Georgia

In Georgia the Convention went into force on 6 September 1992, but the Parliament of Georgia has not still adopted an implementing legislation of the Convention. Accordingly, the Law of Georgia on Arbitration is applied to the recognition and enforcement of ICSID awards.<sup>80</sup> The Law on Arbitration lists the grounds for refusal of the recognition and enforcement of arbitral awards<sup>81</sup> that are identical to the grounds for refusal listed in the New York Convention,<sup>82</sup> whereas, the Convention provides for the automatic regime for the recognition and enforcement excluding verification of the

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<sup>71</sup> SIA, Sec 14(3), 17 ILM 1126 (1978).

<sup>72</sup> Ibid, Sec. 16 (1)(2), 17 ILM 1127 (1878).

<sup>73</sup> Art. 31(4), The Australian Foreign States Immunity Act of 1985, 25 ILM 722 (1986).

<sup>74</sup> Art. 21, UN Convention, 44 ILM 803 (2005).

<sup>75</sup> See *Sornarajah M.*, *The Settlement of Foreign Investment Disputes*, Kluwer Law International, 2000, 298-299; *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1175; *Bernini G., Van den Berg A.*, *The Enforcement of Arbitral Awards Against States: The Problem of Immunity from Execution*, *Contemporary Problems in International Arbitration*, Lew J. ed., 1987, 364.

<sup>76</sup> *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.*, *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, 2009, 1179.

<sup>77</sup> Ibid, 1179-80.

<sup>78</sup> Ibid, 1180-81.

<sup>79</sup> Ibid, 1180.

<sup>80</sup> Art., 73<sup>1</sup> of the Law of Georgia on Private International Law, Parliamentary Gazette, 19-20, 29/04/1998.

<sup>81</sup> Art. 45 of the Law of Georgia on Arbitration, LHG, 13, 02/07/2009.

<sup>82</sup> See Art. 5, New York Convention, 330 UNTS, 1958, 38.

award on the basis of a domestic legislation.<sup>83</sup> Therefore, the Supreme Court of Georgia should abide by the requirements of the Convention and limit itself with verifying the authenticity of the award during the recognition and enforcement proceedings of ICSID awards. However, the Supreme Court of Georgia, the practice of which includes only one case concerning the recognition and enforcement of ICSID awards, violated the above-mentioned basic requirement of the Convention.<sup>84</sup>

In particular, on 8 October 2009 the Supreme Court of Georgia issued an Order<sup>85</sup> granting recognition and enforcement of the arbitral award of 28 February 2008 rendered by the ICSID tribunal in *Ares Internationales S.r.l. and MetalGeo S.r.l. v. Georgia*, imposing on Georgia pecuniary obligation in favour of *Ares Internationales S.r.l. and MetalGeo S.r.l.*<sup>86</sup> It is of note that for that period the Law of Georgia on Private Arbitration was still in force, which did not govern recognition and enforcement of arbitral awards rendered outside Georgia at all.<sup>87</sup> Accordingly, the Court based its Order on Articles 68 and 69 of the law of Georgia on Private International Law, Article 68 of which refers to the recognition of foreign judgements and lists the grounds for refusal of them.<sup>88</sup> Consequently, in contrast to Article 54 of the Convention, the Supreme Court of Georgia examined the compliance of the award with the grounds for the recognition of foreign judgements under the domestic legislation, and exceeded its power granted under the Convention.

Eventually, the Court confirmed that the arbitral award “shall be recognized in the territory of Georgia and shall be subject to enforcement.”<sup>89</sup> It is remarkable that the Court does not consider either the issue of forcible execution under the Order, or State immunity from execution, which is in compliance with Article 54 of the Convention.<sup>90</sup> Accordingly, the Court drew a distinction between the stages of recognition and enforcement under Articles 54(1) and (2), and measures of execution under Article 54(3) of the Convention.

As may be seen from the above-mentioned, the court practice on recognition and enforcement of ICSID awards is very scant and it does not refer to the issue of State immunity at all. To date there are only two pending arbitration cases against Georgia registered in the Centre.<sup>91</sup> Eight cases are

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<sup>83</sup> Art. 54(2), ICSID Convention, 575 UNTS, 1965, 159.

<sup>84</sup> See Order N A-1858-S-53-09 of 8 October 2009 of the Supreme Court of Georgia.

<sup>85</sup> Ibid.

<sup>86</sup> *Ares Internationales S.r.l. and MetalGeo S.r.l. v. Georgia*, ICSID case ARB/05/23, Award of 28 February 2008. The award is not publicly available upon request of the Parties concerned. For case excerpts from the Tribunal’s legal justification See *Yannaca-Small K.*, Case Excerpts, *Ares Internationales S.r.l. and MetalGeo S.r.l. v. Georgia*, (ICSID case ARB/05/23): Introductory Note, ICSID Review – Foreign Investment Law Journal, Vol. 23, Issue 1, 2008, 186-188.

<sup>87</sup> *Tsertsvadze G.*, International Arbitration, Tbilisi, 2008, 42; See also, the Law of Georgia on Private Arbitration, Parliamentary Gazette, abolished 19/06/2009.

<sup>88</sup> Art., 73<sup>1</sup> of the Law of Georgia on Private International Law, Parliamentary Gazette, 19-20, 29/04/1998; Order N A-1858-S-53-09 of 8 October 2009 of the Supreme Court of Georgia.

<sup>89</sup> Order N A-1858-S-53-09 of 8 October 2009 of the Supreme Court of Georgia.

<sup>90</sup> Ibid.

<sup>91</sup> *Gardabani Holdings B.V., Inter RAO UES PJSC, Telasi JSC v. Government of Georgia, Ministry of Economy and Sustainable Development of Georgia, State Service Bureau Ltd* (ICSID Case No. ADM/18/1 and SCC Case No. V2018/039); *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia* (ICSID Case No. ARB/17/29).

completed.<sup>92</sup> In most ICSID cases against Georgia the decision on discontinuance of arbitration proceedings have been made by the Centre and the dispute have been settled through negotiations between the parties concerned, or the enforcement of ICSID awards have been also settled through negotiations between the parties thereof.<sup>93</sup>

Georgian court practice does not include any case concerning ICSID awards rendered against foreign States sought to be recognized and enforced in the territory of Georgia.

In its turn, Georgian legislation does not provide for a comprehensive law on State immunity contrary to i.e, the United States and the United Kingdom. Furthermore, Georgia is not a party to either the European Convention or the UN Convention. However, Civil Code of Georgia (hereinafter – the Civil Code) sets forth that “State and local self-governing units participate in civil law relations in the same manner as legal entities under private law. In this respect, the powers of the State or of a local self-government shall be exercised by its organs without being legal persons.”<sup>94</sup> In civil law relations a State may be also represented by legal entities.<sup>95</sup> In this respect, the status of the legal entity is irrelevant, whether it is a legal entity under private or public law, as pursuant to the Civil Code, a legal entity under public law participates in civil law relations in the same manner as legal entities under private law.<sup>96</sup> Hence, it can be said that Georgian legislation acknowledges the doctrine of restrictive State immunity, which extends State immunity only on the acts performed by the State in the exercise of its public authority.<sup>97</sup> However, there is no State immunity from jurisdiction with respect to the Convention, since a State waives its immunity from jurisdiction by signing the Convention and expressing its consent to the ICSID arbitration.<sup>98</sup>

As for the immunity from execution, the law on Arbitration states that enforcement of arbitral awards are carried out in accordance with the law of Georgia on Enforcement Proceedings (hereinafter – the law on Enforcement Proceedings) on the basis of a court Order.<sup>99</sup> In its turn, the Law on

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<sup>92</sup> *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18); *Ares International S.r.l. and MetalGeo S.r.l. v. Georgia* (ICSID Case No. ARB/05/23); *Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15); *Zhinvali Development Ltd. v. Republic of Georgia* (ICSID Case No. ARB/00/1); *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/08/7); *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v. Georgia* (ICSID Case No. ARB/08/19); *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/09/22); *Bidzina Ivanishvili v. Georgia* (ICSID Case No. ARB/12/27).

<sup>93</sup> See *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18); *Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15); *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/08/7); *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v. Georgia* (ICSID Case No. ARB/08/19); *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/09/22); *Bidzina Ivanishvili v. Georgia* (ICSID Case No. ARB/12/27).

<sup>94</sup> Art. 24(4) of the Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997.

<sup>95</sup> *Liluashvili B.*, Recognition and Enforcement of foreign Judgements in Georgia, dissertation, Tbilisi University Press, 2009, 71.

<sup>96</sup> Art. 24(3) of the Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997.

<sup>97</sup> *Liluashvili B.*, Recognition and Enforcement of foreign Judgements in Georgia, dissertation, Tbilisi University Press, 2009, 71.

<sup>98</sup> *Delaume G. R.*, Foreign Sovereign Immunity: Impact on Arbitration, Arbitration Journal, Vol. 38, 1983, 35.

<sup>99</sup> Art. 44(4) of the Law of Georgia on Arbitration, LHG, 13, 02/07/2009.

Enforcement Proceedings defines a list of assets that may not be subject to the execution measures,<sup>100</sup> most of which is the property of Georgia that may not be privatized pursuant to the law of Georgia on State Property.<sup>101</sup> State immunity from execution also applies to the property of diplomatic and consular missions in Georgia in accordance with Vienna Conventions.<sup>102</sup>

It should be noted that Georgia has concluded Bilateral Investment Agreements (hereinafter – BIT), which define that the Centre shall consider the disputes between the parties concerned. However, those BITs state that the issue of State immunity from execution shall be governed on the basis of the law of a State where enforcement is sought.<sup>103</sup>

## **6. Conclusion**

The Convention is a considerable mechanism for the recognition and enforcement of arbitral awards rendered against States,<sup>104</sup> which provides for a delocalized, automatic, self-sufficient and self-executing regime for the recognition and enforcement of arbitral awards involving States and private investors, which excludes exercise of a local judicial control over recognition and enforcement of an award.<sup>105</sup>

The Convention is an important step forward in the process of recognition and enforcement of international arbitral awards involving State party, as, contrary to the New York Convention, it offers more favourable scheme to the parties to the dispute. However, the Convention has its Achilles' heel in the form of State immunity from execution. Accordingly, the finality of the enforcement proceedings of ICSID awards depends on the law governing State immunity in the country where enforcement of ICSID awards is sought.<sup>106</sup>

On the basis of the laws governing State immunity and relevant court practice discussed above, it may be said that State immunity from execution is a barrier, which would be quite difficult to overcome if not impossible at all, in particular cases.

Creation of a complex, unified regime in respect of State immunity from execution is problematic taking into account the approaches that various States have regarding the issue, and the solutions are also less politically feasible.<sup>107</sup>

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<sup>100</sup> Art. 2<sup>1</sup> of the Law of Georgia on Enforcement Proceedings, LHG, 13(20), 01/05/1999.

<sup>101</sup> Art. 4 of the Law of Georgia on State Property, LHG, 48, 09/08/2010.

<sup>102</sup> Art. 22(3) of the 1961 Vienna Convention on Diplomatic Relations, 18/04/1961; Art. 31(4) of 1963 Vienna Convention on Consular Relations, 24/04/1963.

<sup>103</sup> See for example, Agreement between the Government of Georgia and the Government of the Republic of Finland on the Promotion and Protection of Investments, 24/11/2006; Agreement between Georgia and the Republic of Austria on the Promotion and Protection of Investments, 18/10/2001; For a full list of BITs see, <<http://www.justice.gov.ge/Ministry/Index/101>> [20.10.2020].

<sup>104</sup> *Bjorklund A.K.*, State Immunity and the Enforcement of Investor-State Arbitral Awards, *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer*, edited by *Binder Ch., Kriebaum U., Wittich St.*, Oxford, 2009, 321.

<sup>105</sup> *Delaume G. R.*, Foreign Sovereign Immunity: Impact on Arbitration, *Arbitration Journal*, Vol. 38, 1983, 35.

<sup>106</sup> *Bjorklund A.K.*, State Immunity and the Enforcement of Investor-State Arbitral Awards, *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer*, edited by *Binder Ch., Kriebaum U., Wittich St.*, Oxford, 2009, 321.

<sup>107</sup> *Ibid.*

Although, States rarely refuse to enforce ICSID awards, the number of such instances may increase due to the absent of effective sanctions against States who deny to perform their international obligations.<sup>108</sup>

There is a significant danger, that States who willingly pay pecuniary obligations imposed on them by the ICSID award, may re-think their approach.<sup>109</sup> Furthermore, by examining the right of diplomatic protection envisaged under the Convention, there is a risk of re-politization of arbitration, since an investor from powerful State would more likely achieve success through diplomatic protection, than the investor from less powerful States.<sup>110</sup>

As a result, State immunity from execution still remains a “last bastion” in the process of execution of international arbitral awards even under the ICSID Convention.<sup>111</sup>

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<sup>108</sup> *Bjorklund A. K.*, Symposium: Arbitration and National Courts: Conflict and Cooperation: Sovereign Immunity as a Barrier to the Inforcement of Investor-State Arbitral Awards: the Re-Politization of International Investment Disputes, *American Review of International Arbitration*, Vol. 21, 2010, 241.

<sup>109</sup> *Ibid*; See also, *Luke Eric Peterson L. E.*, How many states are not paying awards under investment treaties? *Investment Arbitration Reporter*, 7/05/2010.

<sup>110</sup> *Bjorklund A. K.*, Symposium: Arbitration and National Courts: Conflict and Cooperation: Sovereign Immunity as a Barrier to the Inforcement of Investor-State Arbitral Awards: the Re-Politization of International Investment Disputes, *American Review of International Arbitration*, Vol. 21, 2010, 241.

<sup>111</sup> *Ibid*; See also, *Ostrander J.*, The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgement, *Berkley Journal of International Law*, Vol. 22, 2004, 541-582.

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