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State Immunity from Execution under the “United Nations Convention on the Jurisdictional Immunities of States and their Property” (UN Convention) in the Process of Execution of Arbitral Awards against States*

The present article focuses on the examination of state immunity in the process of execution of arbitral awards under the UN Convention. It studies the effectiveness of the UN Convention in the light of domestic and international laws on State immunity. Within the scope of this area of research, the article discusses the approaches of Anglo-American, French and Swiss legal systems.

Keywords: Execution of arbitral awards against states, UN Convention, State immunity from execution.

1. Introduction

The ultimate purpose of international arbitration is the recognition and enforcement of an arbitral award.¹ However, one of the important barriers in the execution of the arbitral award made against the state is the state immunity.²

The growing participation of states in commercial activities in the last century has indicated the need to revise³ the principle of absolute immunity in a number of countries and triggered the development of the doctrine of restrictive state immunity, which was shared by the majority of states, and has been reflected in their domestic legislation and judicial practice.⁴ Unlike absolute, the doctrine of restrictive state immunity distinguishes between the state's non-governmental – *jure gestionis* and governmental – *jure imperii* acts and only in the case of the latter the state can plea the sovereign immunity.⁵ With the introduction of restrictive state immunity, the issue of state immunity from jurisdiction has been somehow resolved in the process of recognition and enforcement of arbitral

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¹ *Bishop D.R., Crawford J. R., Reisman W. M., et al, (eds), Foreign Investment Disputes: Cases, Materials and Commentary, 2nd ed., Kluwer Law International, 2014, 1177.*

² *Blackaby N., Partasides C., Redfern A., Hunter M., Redfern and Hunter on International Arbitration, 6th ed., Oxford, 2015, 654.*

³ *Shaw M. N., International Law, 5th ed., Cambridge, 625.*

⁴ See *Fox H., International Law, Evans M. D., (ed), 2nd ed., Oxford, 2006, 368; Shaw M. N., International Law, 5th ed., Cambridge, 630-63.*

⁵ *Brownlie I., Principles of International Public Law, Kukulava G., Meunargia S., Siradze E., Glurjidge E., (translators), Khidasheli T. (ed.), 7th ed., Vol., 2010, 358 (in Georgian).*

awards, however, the immunity from execution remains as “the last bastion.”⁶ The matter is complicated by the fact that according to both the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – the New York Convention)⁷ and the Convention on the International Center for Settlement of Investment Disputes (hereinafter – the ICSID Convention),⁸ the issue of immunity from execution shall be resolved according to national legislation.⁹

One way to address the existing divergent practice of the doctrine of state immunity is to develop and codify legally binding rules incorporated into the national legislation or directly applied by national courts as domestic legislation.¹⁰ “The 2004 UN Convention on Jurisdictional Immunities of States and Their Property”¹¹ (hereinafter – the UN Convention) is an example of such an attempt and an important step in the process of harmonization of international law on state immunity.¹²

The UN Convention, although it has not yet entered into force,¹³ is still of great importance, as it is the first universal international convention on state immunity.¹⁴ It is noteworthy that the restrictive state immunity doctrine and exceptions from state immunity set forth under the UN Convention are taken into account and accepted in the legislation and judicial practice of a number of states.¹⁵ But the regulatory mechanism of state immunity proposed by the UN Convention is also not flawless and raises questions regarding a number of issues.

The article is aimed at identifying the essence of the problem regarding the state immunity from execution in enforcement proceedings of international arbitral awards on the basis of a comparative analysis for the future regulation of state immunity. The mentioned issue is also relevant in relation to Georgia.

Although, Georgia is not a member of the UN Convention, but the country has not adopted legislation on state immunity either, and therefore it is important to determine the main issues that will contribute to the regulation of the plea of state immunity in Georgia in executing proceedings of arbitral awards against states.

⁶ *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.

⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“The New York Convention”), 330 UNTS, 1958, 38.

⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”), 575 UNTS, 1965, 159.

⁹ ICSID Convention, 575 UNTS, 1965, 194, Art. 54.3; The New York Convention, 330 UNTS, 1958, Art. 3.

¹⁰ *Fox H. QC., Webb Ph.*, *The Law of State Immunity*, Revised and Updated 3rd ed., Oxford, 2015, 287

¹¹ United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (UN Convention), UN General Assembly, A/59/508, 02/12/2004, https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf [17.06.2022].

¹² *Fox H. QC., Webb Ph.*, *The Law of State Immunity*, Revised and Updated 3rd ed., Oxford, 2015, 287

¹³ Convention has been ratified only by 22 states and signed by 28 states. At least 30 states must ratify the convention to enter into force. see UN Convention, 575 UNTS, 1965, Art. 30.

¹⁴ *Fox H.*, *International Law*, *Evans M. D.*, (ed), 2nd ed., Oxford, 2006, 367.

¹⁵ *Ibid*, 368.

2. State Immunity from Execution

The UN Convention sets forth different legal regimes on state immunity from jurisdiction and state immunity from execution, thereby directly underlining the fact that the state's waiver from immunity from jurisdiction does not imply its consent to pre-judgment or post-judgment measures of constraint.¹⁶

It should be noted that the concept of “measures of constraint” in the UN Convention is given as a general term and not specific coercive measures in use in the legislation of any country.¹⁷ Since measures of constraint vary widely in states’ practice, it would be difficult, if not impossible, to find a definition that would encompass measures of constraint in all legal systems. Accordingly, the authors of the Convention considered it sufficient to give examples of the most easily understood and notable measures of constraint such as: attachment, arrest and execution of court decisions, including arbitral awards.¹⁸

In respect of state immunity from execution, the UN Convention lays down the general rule that none of the aforementioned pre-judgment or post-judgment measures of constraint may be taken against a state in connection with a proceeding before a court of another state.¹⁹ Here, the UN Convention enumerates the exceptions to this general rule, which are related to a) state’s expressed consent to the taking of such measures as indicated,²⁰ b) allocation or earmarking of the property by the state for the satisfaction of the claim, which is the object of that proceeding,²¹ and c) when it has been determined that the property is specifically in use or intended for use by the state for purposes other than government non-commercial purposes, and the property is located in the territory of the forum state.²² The first two exceptions are common to pre-judgment and post-judgment measures of constraint, while the third exception applies only to post-judgment measures of constraint.²³

2.1. Waiver of Immunity

State immunity from execution, like state immunity from jurisdiction, is not absolute and can be waived by the state.²⁴ Under the UN Convention the member states are entitled to expressly consent to the taking of measures of constraint: a) by international agreement; b) by arbitration agreement or in a written contract; or c) by a declaration before the court or by a written communication after a dispute

¹⁶ UN Convention, 575 UNTS, 1965, Art. 20.

¹⁷ Draft Articles on Jurisdictional Immunities of States and their Property, with Commentaries by International Law Commission (ILC Commentary), Yearbook of the International Law Commission, Vol. 2, Part 2, 1991, 55.

¹⁸ ILC Commentary (1991), 55-56.

¹⁹ UN Convention, 575 UNTS, 1965, Arts. 18, 19.

²⁰ Ibid, Art. 19 (a).

²¹ Ibid, Art. 18 (b), Art. 19 (b).

²² Ibid, Art. 19 (c).

²³ Ibid, Arts. 18, 19.

²⁴ *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, № 1, 2015, 65.

between the parties has arisen.²⁵ This applies to both pre-judgement and post-judgement measures of constraint.²⁶

It should be noted that express consent can be declared by the state both in relation to measures of constraint and property, or both. In addition, the consent can be both of a general nature and made in relation to specific measures of constraint and/or property.²⁷

A state may withdraw its consent to immunity from execution only under the terms of international agreement, or of the arbitration agreement or the written contract.²⁸ As for declaration of consent or a written communication after the dispute has arisen, according to the Commentaries by International Law Commission (hereinafter – ILC Commentary), once the proceedings before a court have begun, consent to the state immunity cannot be withdrawn.²⁹

It is worth noting that the UN Convention on immunity from execution, as well as measures to secure a claim, is closer to the United Kingdom State Immunity Act³⁰ (hereinafter – UK SIA) and the European Convention on State Immunity (hereinafter – the European Convention)³¹ than to the Foreign Sovereign Immunities Act of the United States (hereinafter – US FSIA)³². In particular, similar to UK SIA, the UN Convention requires an express consent to the use of measures of constraint, although it can also be given verbally, unlike UK SIA and the European Convention, for which giving written consent is mandatory.³³ In addition, according to all three acts property not used for commercial purposes can be executed,³⁴ whereas under US FSIA in the case of an express or implied (except in the case of immunity from attachment, where consent must be made expressly)³⁵ waiver from immunity from execution, execution is permitted only against property used in commercial activities.³⁶

2.2. Allocation or Earmarking State Property for the Satisfaction of the Claim

The UN Convention also excludes the state's right to plea immunity from execution in the event that the state allocates or earmarks its property for the satisfaction of a claim in court proceedings.³⁷ Allocation or earmarking of property means that the state has identified the property for the purpose of

²⁵ UN Convention, 575 UNTS, 1965, Arts. 18 (a), 19 (a).

²⁶ Ibid.

²⁷ ILC Commentary (1991), 58.

²⁸ Ibid.

²⁹ Ibid.

³⁰ The United Kingdom State Immunity Act of 1978 (SIA), 17 ILM 1123 (1978).

³¹ 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, European Journal of International Law, Vol. 17, 2006, 805.

³² The Foreign Sovereign Immunities Act of the United States of 1976 (28 USC), 15 ILM 1388 (1976).

³³ UN Convention, 575 UNTS, 1965, Arts. 18 (a), 19 (a); SIA, 17 ILM 1123 (1978), Sec. 13 (3); European Convention, ETS 74, 11 ILM 470 (972), Art. 23.

³⁴ Ibid.

³⁵ 28 USC, 15 ILM 1388 (1976), §1610 (d) (1).

³⁶ Ibid, §1610 (a)(1).

³⁷ UN Convention, 575 UNTS, 1965, Art. 19 (b).

paying debts.³⁸ This may be considered a form of a waiver of state immunity from execution against state assets, expressed by action rather than statement.³⁹

Neither US FSIA nor UK SIA and the European Convention contain such a norm. However, an implied waiver of immunity from execution on specific property under USC § 1610(a)(1) may be considered earmarking of property, provided that the property is used for commercial purposes.⁴⁰ In the case of UK SIA, the reasoning of the House of Lords in the *Alcom*⁴¹ case is interesting, according to which the allocation of assets to satisfy obligations arising from a commercial transaction may indicate that the property is "in use or intended for use for commercial purposes" under the commercial exception under section 13(4) of UK SIA.⁴² A similar approach to the exceptions related to commercial assets and separate property blurs the distinction between the two exceptions and raises the question of whether they should exist independently.⁴³

2.3. Commercial Exemption and Territorial Nexus

The UN Convention codifies restrictive state immunity, establishing a commercial exception to state immunity for post-judgment measures of constraint. In particular, according to Article 19(c) of the UN Convention, no post-judgment measures of constraint, such as attachment, arrest and execution, may be taken against the property of a state in connection with a proceeding before a court of another State unless “the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.”⁴⁴

The commercial exception establishes a “purpose test” as it considers property that is “directly in use, or intended for use by the State for other than government non-commercial purposes.”⁴⁵ In this regard, the UN Convention does not differ from US FSIA and UK SIA, which in the case of commercial exceptions to execution also emphasize the purpose of the use of the property and

³⁸ *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, № 1, 2015, 70.

³⁹ *Fox H. QC., Webb Ph.*, *The Law of State Immunity*, Revised and Updated 3rd ed., Oxford, 2015, 631.

⁴⁰ *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, № 1, 2015, 70.

⁴¹ *Alcom Limited v Colombia*, [1984] 74 ILR 170, 185 (HL).

⁴² *Ibid.*, see also, *Fox H. QC., Webb Ph.*, *The Law of State Immunity*, Revised and Updated 3rd ed., Oxford, 2015, 631-632.

⁴³ *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, № 1, 2015, 70.

⁴⁴ UN Convention, 575 UNTS, 1965, Art. 19 (c).

⁴⁵ *Ibid.*

establishes that enforcement is permissible against property that is “used for a commercial activity”⁴⁶ in one case, and in the other case – is “in use or intended for use for commercial purposes.”⁴⁷

In the case of commercial exceptions the UN Convention also establishes a requirement of territorial nexus with the state in which the property is located.⁴⁸ It should be noted that the requirement of territorial connection under the UN Convention does not apply in cases of waiver of immunity and exceptions to the allocation or earmarking of property by the state, and measures of constraint can be taken regardless of whether the said state property is located in the territory of the forum state or not.⁴⁹ The requirement of territorial connection with the state in which the property is located is not provided for by any of the exceptions to immunity from execution under UK SIA,⁵⁰ unlike US FSIA, which directly requires that property used for commercial purposes be located in the US territory for all exceptions to immunity from execution.⁵¹

2.4. State Property Protected by State Immunity

Whether commercial or public in nature, certain categories of property will always be considered property for sovereign purposes and will therefore always be subject to state immunity.⁵² Article 21 of the UN Convention establishes a non-exhaustive list of state property that shall not be considered as “property specifically in use or intended for use by the State for other than government non-commercial purposes” according to the commercial exception provided for in Article 19(c) of the UN Convention. This list contains the following categories of property:

- a) Property, including any bank account, used or intended for use in the performance of the functions of diplomatic missions of the State or its consular institutions, special missions, missions to international organizations or delegations to international organizations or international conferences;
- b) Property of a military nature, or property used or intended for use in the performance of military functions;
- c) Property of the central bank or other monetary authority of the state;
- d) Property, which is part of the cultural heritage of the state, or part of its archive, which is not placed on sale, or is not intended to be placed on sale;
- e) Property that is part of the exposition of objects that have scientific, cultural or historical interest and that is not placed on sale, or is not intended to be placed on sale.⁵³

It is noteworthy that state immunity applies to the above-mentioned property only in the case of the commercial exception provided for in Article 19(c) of the UN Convention, which means that any

⁴⁶ 28 USC §1610 (a), §1610 (a) (2), 15 ILM 1391 (1976).

⁴⁷ SIA, Sec 13(4), 17 ILM 1126 (1978).

⁴⁸ UN Convention, 575 UNTS, 1965, Art. 19 (c).

⁴⁹ UN Convention, 575 UNTS, 1965, Art. 19; ILC Commentary (1991), 57.

⁵⁰ SIA, Sec 13(3), Sec 13(4), 17 ILM 1126 (1978).

⁵¹ 28 USC §1610 (a), §1610 (b), 15 ILM 1391 (1976).

⁵² *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, № 1, 2015, 73.

⁵³ UN Convention, 575 UNTS, 1965, Art. 21.

of the above-mentioned categories of property or part of them may be subject to pre-judgment or post-judgment measures of constraint on the basis of the state’s consent to the above or the allocation of state property in accordance with Article 18 (a)(b) and Article 19(a)(b) of the UN Convention.⁵⁴

It is worth noting that, in addition to the property of diplomatic missions and military property, which were already protected by the national legislation on state immunity,⁵⁵ the UN Convention introduced such categories of property under the protection of state immunity from execution, such as property that forms part of the state's cultural heritage and archives and is not intended for sale, which represents novelty.⁵⁶ It should also be noted that recently, the protection of the state property with immunity, which is part of the exposition of the state with cultural, scientific or historical interest, is gaining more importance.⁵⁷ By protecting such a category of property, the UN Convention echoes the recent practice of national courts, which, when justifying the issue of protecting state property with state immunity, increasingly emphasize the public use and purpose served by state property, rather than the fact of state ownership of this property.⁵⁸ In this regard, the example of Switzerland in the high-profile case of *Noga* is interesting.⁵⁹ In 2005, the Swiss company *NOGA*, in order to enforce the arbitral award against Russia, requested the seizure of 54 samples of paintings from the Pushkin Museum in Moscow sent for exhibition to Switzerland, which was approved by the Swiss District Court. However, this decision was not taken into account by the Swiss Federal Council, by whose decree the seizure of the painting samples was lifted and the samples were returned to Russia.⁶⁰ In justifying its decision, the Swiss Federal Council relied on the norms of international law, according to which national cultural treasures are public property and are not subject to confiscation.⁶¹

It is worth noting that precisely after the *NOGA* case, and in light of the difficulties faced by British museums due to the lack of appropriate legislation to protect foreign cultural objects sent for exhibition in the UK, in 2007 the United Kingdom introduced into enforcement legislation a clause providing immunity from attachment for foreign cultural objects that would be sent for temporary public exhibition to any museum or gallery in the United Kingdom.⁶² It is obvious that the mentioned issue is becoming more and more urgent and requires appropriate legal regulation. Immunity protection of the mentioned category of property under the UN Convention is a confirmation of the recognized principle of international law that cultural objects of a foreign country are for public purpose and are not subject to confiscation.⁶³ Although the UN Convention has not entered into force

⁵⁴ Ibid, Art. 21 (2).

⁵⁵ *Fox H. QC., Webb Ph.*, *The Law of State Immunity*, Revised and Updated 3rd ed., Oxford, 2015, 519.

⁵⁶ Ibid, 532-533.

⁵⁷ Ibid, 533-534.

⁵⁸ Ibid, 519.

⁵⁹ Ibid, 519, see also, *Woudenberg N.*, *State Immunity and Cultural Objects on Loan*, Leiden – Boston, 2012, 310-314.

⁶⁰ See, *Woudenberg N.*, *State Immunity and Cultural Objects on Loan*, Leiden – Boston, 2012, 310-314.

⁶¹ Ibid, 314.

⁶² *Fox H. QC., Webb Ph.*, *The Law of State Immunity*, Revised and Updated 3rd ed., Oxford, 2015, 534-535.

⁶³ *Woudenberg N.*, *State Immunity and Cultural Objects on Loan*, Leiden – Boston, 2012, 314.

yet, under its influence, several states have adopted relevant legislation protecting foreign cultural objects sent for exhibition with immunity from attachment.⁶⁴

2.4.1. Property of Diplomatic Missions

Property of diplomatic missions and central banks is a popular target for creditors in the process of enforcement of arbitral awards.⁶⁵

The general principle of state immunity protecting premises of diplomatic mission and other property with immunity is widely recognized and upheld by states at the legislative and judicial level.⁶⁶ The UN Convention emphasizes the fact that diplomatic property should serve the exercise of diplomatic authority of the state. Otherwise, it is not subject to immunity protection.⁶⁷

In practice, difficulties arise in relation to the so-called “mixed accounts”, when expenses with both public and commercial purposes are financed from the common account of the diplomatic mission.⁶⁸ Recent case law supports the presumption that government property is used for official purposes until proven otherwise.⁶⁹ As a result, embassies' bank accounts are treated as a single indivisible sovereign asset that is immune from execution.⁷⁰ In the *Philippine Embassy* case, the Federal Constitutional Court of Germany ruled that, upon claim, a general account of a foreign embassy, “which is opened in the forum state and whose purpose is to cover the costs of the embassy, is not subject to execution by the forum state.”⁷¹ The mentioned decision of the Federal Constitutional Court of Germany became a precedent for the courts of other countries in the cases related to the so-called “mixed accounts”.⁷² However, the US is an exception in this regard, where in its decision of 1980, the District Court found that it was possible to separate the purposes for which a bank account was opened on behalf of a diplomatic mission.⁷³ Otherwise, in the court's view, any property would be

⁶⁴ France (1994), Germany (1999), Austria (2003), Belgium (2004), Switzerland (2005), certain US states (New York, Texas). See *Fox H. QC., Webb Ph., The Law of State Immunity*, Revised and Updated 3rd ed., Oxford, 2015, 535. See also, ⁶⁴ *Woudenberg N., State Immunity and Cultural Objects on Loan*, Leiden – Boston, 2012.

⁶⁵ *Liber E Timber Corp v. Liberia*, (1987), 659 F Supp 606; *Sedelmayer v. Russian Federation*, VII ZB 9/05, (2005), NJW-RR 2006, 198.

⁶⁶ Vienna Convention on the Law of Treaties, 23/05/1969, Article 22, Section 3; SIA, Sec 16(1), 17 ILM 1126 (1978).

⁶⁷ ILC Commentary (1991), 59.

⁶⁸ *Fox H. QC., Webb Ph., The Law of State Immunity*, Revised and Updated 3rd ed., Oxford, 2015, 524.

⁶⁹ *Ibid*, 526.

⁷⁰ *Yang X., State Immunity in International Law*, Cambridge, 2012, 84.

⁷¹ *The Philippine Embassy case*, (1997) UN Legal Materials, 297.

⁷² Based on this case, the Austrian Supreme Court changed its practice, according to which, it separated the embassy's bank account for commercial and diplomatic use, and declared the embassy's general account immune from execution. See. *Republic of 'A' Embassy Account case*, (1986), 77 ILR 489; *Leasing West Gulf V People's Demomcratic Republic of Algeria*, (1986), 116, ILR 527; The opinion of the German Constitutional Court was shared by the United Kingdom Court in *Alcom v Republic of Colombia*, [1984] AC 580, 74 ILR 170; The Netherlands, France and Belgium also supported the same opinion. See. *Netherlands v Azeta BV*, (1998), 128 ILR 688; *Dumez v Iraq*, (1999), 27 ILR 144.

⁷³ *Birch Shipping Corpn v. Embassy of the United Arab Republic of Tanzania*, (1980), 63 ILR 527.

protected by immunity for some period based on its use for a minor public purpose.⁷⁴ Therefore, if the embassy wanted its general bank account to be immune from execution, the embassy had to ensure that funds for public purpose were separated from funds for commercial purposes.⁷⁵ However, a US District Court later declined to attach a diplomatic mission's bank account to enforce an ICSID arbitral award against a foreign state, on the grounds that the attachment was contrary to the obligation of the United States under Article 25 of the Vienna Convention, according to which the forum State must provide all necessary conditions for diplomatic missions to perform their functions, although no provision of the Vienna Convention establishes the right to enjoy diplomatic immunity from attachment of official bank accounts used or intended to be used by a diplomatic mission.⁷⁶ A similar decision was made by the German court in the high-profile *Sedelmayer* case,⁷⁷ when Franz Sedelmayer requested execution against VAT refundable amount for the Russian Embassy in Germany in enforcement proceedings of the arbitral award rendered by the Arbitration Institute of the Stockholm Chamber of Commerce against the Russian Federation.⁷⁸ As expected, the court recognized the mentioned assets as protected by immunity from execution.⁷⁹

However, it is remarkable that despite many years of unsuccessful enforcement proceedings of the arbitral award rendered in the *Sedelmayer* case, in 2011 the Swedish Supreme Court upheld the decision of the Court of Appeal regarding the attachment of property belonging to the Russian Federation and the income from its leasing, on the grounds that the court did not find convincing the evidence presented by the Russian side regarding the use of the mentioned property for “public purposes.”⁸⁰ It should be noted that the alleged property was owned by the trade delegation of the Russian Federation until 1976, and then, as the court found, it was leased for private commercial purposes and was not used by Russian diplomats or high-ranking officials to exercise sovereign functions, as the Russian side claimed.⁸¹

The above-mentioned decision of the Swedish Supreme Court is significant in relation to the UN Convention in several respects. In particular, the *Sedelmayer* decision was the first decision in which restrictive state immunity was recognized by the Supreme Court in enforcement proceedings in

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ *Liber E Timber Corp v. Liberia*, (1987), 89 ILR 360; *Foxworth v. Permanent Mission of the Republic of Uganda to the UN*, (1992), 99 ILR 139.

⁷⁷ *Sedelmayer v. Russian Federation*, VII ZB 9/05, (2005), NJW-RR 2006, 198; ob. *Blane A.*, Sovereign Immunity as a Bar to the Execution of International Arbitral Awards, *International Law and Politics*, Vol. 41, 2009, 469.

⁷⁸ Kammergericht Berlin, (2003) SchiedsVZ, 2004 99; See also *Franz Sedelmayer v Russian Federation*, Award, SCC, (1998) <<https://www.italaw.com/sites/default/files/case-documents/ita0757.pdf>> [04.05.2022].

⁷⁹ Ibid.

⁸⁰ *Sedelmayer v Russian Federation*, SSC, (2011), <https://jusmundi.com/en/document/decision/en-mr-franz-sedelmayer-v-the-russian-federation-decision-of-the-swedish-supreme-court-friday-1st-july-2011#decision_1343> [21.07.2022].

⁸¹ Ibid.

Sweden,⁸² and in making this decision the Supreme Court relied on the UN Convention, even though the UN Convention is not yet in force. Namely, the Swedish Supreme Court established a commercial exception based on the relevant provision of the UN Convention,⁸³ at which point it highlighted two important issues: 1) the alleged property was not “in use or intended for use by the state for other than government non-commercial purposes” and 2) the property was being used for commercial purposes during the litigation period.⁸⁴ The court also determined that the alleged property was not used by the Russian Federation for a diplomatic mission or other state purposes, also emphasizing the periodicity of the property's use, nor did it support the opinion that the premises would house persons with diplomatic immunity in future, as it is important for the UN Convention that the property be used for non-commercial purposes during the period of the enforcement proceedings.⁸⁵

2.4.2. Property of the Central Bank

It is remarkable that the UN Convention grants central bank property greater protection with state immunity from execution than other institutions, agencies or independent entities.⁸⁶ In particular, the wording of Article 21(c) of the UN Convention shows that the property of the Central Bank, regardless of whether it is used for commercial or non-commercial purposes, is considered as property in use or intended for use by the state only for government non-commercial purposes.⁸⁷ The application of undoubted presumption of immunity to central bank property, which is reflected by both UK SIA and US FSIA, dates back to the 1970s, when the US and the UK, as investment centers for foreign reserves, recognized the necessity for central bank property to be protected by state immunity.⁸⁸ This recognized necessity was reflected in the relevant legislation in the form of special provisions on immunity for central bank property, which was also shared by the UN Convention.⁸⁹

Adoption of a diverse legal regime in terms of the immunity protecting central bank assets is largely seen as a political decision rather than a fulfillment of obligations under international law, which meant encouraging foreign countries to place their foreign reserves in foreign countries.⁹⁰ In this regard, it is interesting to what extent immunity from execution should be extended to the use of

⁸² However, this was not the first court ruling on restrictive state immunity. In 1999, in *Vasteras Municipality v Iceland* case, the Court discussed state immunity from jurisdiction and applied this reasoning to the *Sedelmayer* case; *Belohlavek A. J., Rozehnalova N., (eds), Czech and Central European Yearbook of Arbitration – 2012: Party Autonomy versus Autonomy of Arbitrators, Vol. II, 2012, 69-70, 61-81, See Quote: Ergnstrom, Marian, Restrictive Absolutes: Using Party Autonomy to Reconcile Absolute Immunity with the Liberal Standard for Restrictive Immunity Adopted by the Swedish Supreme Court in the Sedelmayer Decision.*

⁸³ *Ibid*, 69-73, 61-81.

⁸⁴ *Ibid*, 69, 61-81.

⁸⁵ *Ibid*, 72-73, 61-81.

⁸⁶ *Fox H. QC., Webb Ph., The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 528.*

⁸⁷ *Ibid*.

⁸⁸ *Ibid*, 529.

⁸⁹ *Ibid*.

⁹⁰ *Blair W., The Legal Status of Central Bank Investments under English Law, Cambridge Law Journal, Vol. 57, Issue 2, 1998, 378.*

state reserves in the Central Bank through investment or other commercial means. Although such funds are not “used” for sovereign purposes, in enforcement proceedings of the ICSID arbitral award against Kazakhstan,⁹¹ the English court found that such use of central bank assets ultimately served to the performance of sovereign purposes for future generations, therefore, such transactions were immune from execution.⁹²

However, there is also a different approach of states that do not recognize the presumption of immunity of central bank property.⁹³ For example, French courts apply the same legal regime to central banks as to other state entities.⁹⁴ Therefore, if the central bank is an independent legal entity its assets are subject to execution, provided that merely the bank's own creditors, not the state's creditors, have access to them.⁹⁵ The issue of presumption of immunity also does not arise in Switzerland, where in one case the Swiss Supreme Court rejected the presumption that all funds of the Libyan Central Bank were intended for sovereign purposes.⁹⁶ The Supreme Court ruled that merely those assets at issue that are designated solely for the performance of sovereign functions can benefit from immunity, and issued an enforcement order on the disputed assets.⁹⁷

3. Conclusion

In conclusion, it can be said that the UN Convention provides an opportunity to create a certain kind of unified legal space, which should contribute to the harmonization of national judicial practice. The UN Convention covers all the main principles of state immunity recognized today, which are in consistence with the existing legislation on state immunity.⁹⁸ In particular, these principles are the following:

- a. the state is protected by state immunity according to the principle of customary international law;⁹⁹
- b. In general, states are immune from the jurisdiction of the courts of another state,¹⁰⁰ and their assets are protected from execution, except for exceptional cases defined by the UN Convention;¹⁰¹

⁹¹ *AIG Capital Partners Inc and Anr v. Republic of Kazakhstan*, [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420, 129 ILR 589, § 92.

⁹² *Ibid.*

⁹³ *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, № 1, 2015, 73.

⁹⁴ *Foster G. K.*, Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgements against States and their Instrumentalities, and Some Proposals for its Reform, *Arizona Journal of International and Comparative Law*, Vol. 25, Issue 3, 2008, 686.

⁹⁵ *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, № 1, 2015, 74.

⁹⁶ *Libyan Arab Socialist People's Jamahiriya v. Actimon SA*, (1985), 82 ILR 30, 31.

⁹⁷ *Ibid.*

⁹⁸ *Yang X.*, *State Immunity in International Law*, Cambridge, 2012, 455.

⁹⁹ UN Convention, 575 UNTS, 1965, Preamble, §1.

c. The UN Convention distinguishes between immunity from jurisdiction and immunity from execution and establishes that the state's waiver of immunity from jurisdiction does not imply a waiver of immunity from execution, and a separate consent is required for the latter.¹⁰² Accordingly, the UN Convention regulates state immunity from execution independently from state immunity from jurisdiction.¹⁰³

d. Article 19 of the UN Convention contains the requirement of territorial connection, namely, in the case of a commercial exception to immunity from execution, the property subject to execution must be located "in the territory of the State of the forum."¹⁰⁴

The goal of the UN Convention was the substantial harmonization of judicial practice of states related to state immunity.¹⁰⁵ Due to the fact that the UN Convention has not yet entered into force, the signatory countries are not obliged to fully comply with its requirements, although they are under an obligation not to undermine the object and purpose of the Convention before its entry into force.¹⁰⁶ The preamble of the convention expresses the belief of the authors of the convention that the convention will contribute to the codification and development of international law.¹⁰⁷ Although the UN Convention is not a flawless mechanism for overcoming state immunity in the recognition and enforcement of arbitral awards against a state, the best measure of its authority is the application of its provisions by both domestic¹⁰⁸ and international¹⁰⁹ courts.¹¹⁰

Bibliography:

1. Vienna Convention on the Law of Treaties, 23/05/1969.
2. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), 575 UNTS, 1965, 159.
3. European Convention on State Immunity of 1972 (European Convention), ETS 74, 11 ILM 470 (1972).
4. The Foreign Sovereign Immunities Act of the United States of 1976 (28 USC), 15 ILM 1388 (1976).
5. The United Kingdom State Immunity Act of 1978 (SIA), 17 ILM 1123 (1978).

¹⁰⁰ Ibid, Art. 5.

¹⁰¹ Ibid, Arts. 7-21.

¹⁰² Ibid, Art. 20.

¹⁰³ Yang X., *State Immunity in International Law*, Cambridge, 2012, 455.

¹⁰⁴ UN Convention, 575 UNTS, 1965, Art. 19 (c).

¹⁰⁵ UN Convention, 575 UNTS, 1965, Preamble; The law adopted by the People's Republic of China in 2005, which also grants the property of the central bank immunity from execution and prohibits the use of pre-judgement and post-judgement measures of constraint against it, can be considered as a confirmation of this opinion. see Fox H. QC., Webb Ph., *The Law of State Immunity*, Revised and Updated 3rd ed., Oxford, 2015, 529-530.

¹⁰⁶ Vienna Convention on the Law of Treaties, 23/05/1969.

¹⁰⁷ UN Convention, 575 UNTS, 1965, Preamble.

¹⁰⁸ 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, № 1, 2015, 64.

¹⁰⁹ Ibid, see also, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, [2012] ICJ, 99, 123, < <https://www.icj-cij.org/en/case/143> > [15.03.2022].

¹¹⁰ Ibid.

6. United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (UN Convention), UN General Assembly, A/59/508, 02/12/2004, [https://treaties.un.org/doc/source/Recent Texts/English_3_13.pdf](https://treaties.un.org/doc/source/Recent_Texts/English_3_13.pdf) [17.06.2022].
7. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), 330 UNTS, 1958, 38.
8. Draft Articles on Jurisdictional Immunities of States and their Property, with Commentaries by International Law Commission (ILC Commentary), Yearbook of the International Law Commission, Vol. 2, Part 2, 1991, 55.
9. *Belohlavek A. J., Rozehnalova N., (eds)*, Czech and Central European Yearbook of Arbitration – 2012: Party Autonomy versus Autonomy of Arbitrators, Vol. II, 2012, 69-73, 61-81.
10. *Bishop D.R., Crawford J. R., Reisman W. M., et al, (eds)*, Foreign Investment Disputes: Cases, Materials and Commentary, 2nd ed., Kluwer Law International, 2014, 1177.
11. *Blackaby N., Partasides C., Redfern A., Hunter M.*, Redfern and Hunter on International Arbitration, 6th ed., Oxford, 2015, 654.
12. *Blair W.*, The Legal Status of Central Bank Investments under English Law, Cambridge Law Journal, Vol. 57, Issue 2, 1998, 378.
13. *Blane A.*, Sovereign Immunity as a Bar to the Execution of International Arbitral Awards, International Law and Politics, Vol. 41, 2009, 469.
14. *Brownlie I.*, Principles of International Public Law, *Kukulava G., Meunargia S., Siradze E., beGlurjidge E., (translators), Khidasheli T., (ed.)*, 7th ed., Tbilisi, 2010, 358 (in Georgian).
15. *Foster G. K.*, Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgements against States and their Instrumentalities, and Some Proposals for its Reform, Arizona Journal of International and Comparative Law, Vol. 25, Issue 3, 2008, 686.
16. *Fox H.*, International Law, *Evans M. D., (ed)*, 2nd ed., Oxford, 2006, 368.
17. *Fox H. QC., Webb Ph.*, The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 287, 367-68, 519, 524, 528-35, 631-32.
18. *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, № 1, 2015, 64-65,70, 73-74.
19. *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.
20. *Reinisch A.*, European Court Practice Concerning State Immunity from Enforcement Measures, European Journal of International Law, Vol. 17, 2006, 805.
21. *Shaw M. N.*, International Law, 5th ed., Cambridge, 625, 630-63.
22. *Woudenberg N.*, State Immunity and Cultural Objects on Loan, Leiden – Boston, 2012, 310-14.
23. *Yang X.*, State Immunity in International Law, Cambridge, 2012, 84.
24. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), [2012] ICJ, 99, 123, < <https://www.icj-cij.org/en/case/143> > [15.03.2022].
25. Sedelmayer v Russian Federation, SSC, (2011), < https://jusmundi.com/en/document/decision/en-mr-franz-sedelmayer-v-the-russian-federation-decision-of-the-swedish-supreme-court-friday-1st-july-2011#decision_1343 > [21.07.2022].
26. AIG Capital Partners Inc and Anr v. Republic of Kazakhstan, [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420, 129 ILR 589, § 92.

27. Sedelmayer v Russian Federation, VII ZB 9/05, (2005), NJW-RR 2006, 198.
28. Kammergericht Berlin, (2003) SchiedsVZ, 2004, 99.
29. Netherlands v Azeta BV, (1998), 128 ILR 688; Dumez v Iraq, (1999), 27 ILR 144.
30. Sedelmayer v Russian Federation, Awards, SCC, (1998) <<https://www.italaw.com/sites/default/files/case-documents/ita0757.pdf>> [04.05.2022].
31. The Philippine Embassy case, (1997) UN Legal Materials, 297.
32. Foxworth v Permanent Mission of the Republic of Uganda to the UN, (1992), 99 ILR 139.
33. Liber E Timber Corp v Liberia, (1987), 659 F Supp 606;
34. Republic of 'A' Embassy Account case, (1986), 77 ILR 489;
35. Leasing West Gulf V People's Demomcratic Republic of Algeria, (1986), 116, ILR 527;
36. Libyan Arab Socialist People's Jamahiriya v. Actimon SA, (1985), 82 ILR 30, 31.
37. Alcom v Republic of Colombia, [1984] 74 ILR 170, 185 (HL).
38. Birch Shipping Corpn v Embassy of the United Arab Republic of Tanzania, (1980), 63 ILR 527.