

## ***Euro-Arab Conference on Investor-State Dispute Settlement, 10-11 October 2012***

**Hans Danelius, former Justice of the Supreme Court of Sweden:**

### **Enforcement of Awards in Investment Arbitrations**

#### ***A. Introduction***

1. When arbitrators issue their final arbitral award, their work has come to an end. They are not involved in the enforcement of the award and will not, as a rule, be aware of any problems that may arise in that connection. I have myself been an arbitrator in a number of investment disputes but have rarely been informed of what happened in those cases at the enforcement stage. My intervention will therefore mainly deal with the legal framework governing enforcement of arbitral awards in investment cases but with some illustrations from court cases.

#### ***B. Enforcement of arbitral awards in investment cases***

2. Enforcement in investment arbitrations has one characteristic feature which distinguishes it from enforcement in ordinary commercial arbitrations, *i.e.* that the Respondent is a sovereign State. In many awards the Respondent State has been ordered to pay damages and to compensate the investor for costs. It is true that a State could be a party in other arbitrations as well, but this would be an exception in ordinary commercial arbitrations. This State participation may also affect the enforcement of the award, especially when the State which has been ordered to compensate the investor invokes State immunity as a defence against enforcement.

3. Another characteristic feature of investment arbitrations is the fact that the arbitration is normally not based on a private-law contract but on an international – bilateral or multilateral – treaty. In most such treaties, each Contracting State has accepted arbitration as a means of

resolving disputes regarding investments in its territory made by nationals of the other Contracting State or one of the other Contracting States, as the case may be. The investor is not a party to the treaty, but the treaty is an offer to him and to all other investors satisfying the conditions in the treaty to resort to arbitration if a dispute arises in respect of an investment.

4. This means that a State's failure to comply in good faith with the arbitral award is to be regarded not only as a breach of obligations vis-à-vis the investor but also as a breach of treaty obligations vis-à-vis another Contracting State. It could therefore be expected that a State, in order to avoid tension in its relations with the other State and perhaps a diplomatic dispute with that State, would be anxious to act in good faith to comply with an award issued in the treaty-based arbitral proceedings.

5. Ideally, therefore, it would not be necessary to proceed to measures of constraint in order to enforce an investment award against a State. But in reality, it is not unusual that a State fails to comply with its obligations under an award in an investment case, and in the absence of voluntary compliance, the investor will have to rely on the possibilities which may exist to enforce the award against the State.

6. Enforcement within the territory of the State which was ordered in the award to make a payment to the investor will be subject to the laws and regulations of that State and is often unlikely to be a realistic option.

7. It then remains for the investor to seek enforcement in the obligated State's property abroad. Such enforcement will normally be conducted in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958 which is the main treaty for enforcement of foreign awards. This Convention is widely accepted and creates an obligation to enforce foreign awards except where one of the exceptions specified in Article V of the Convention applies.

### ***C. Institutional rules***

8. Some arbitration institutions have provisions about enforcement in their respective institutional rules.

9. The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “*SCC Rules*”) provide:

#### ***Article 47 Enforcement***

*In all matters not expressly provided for in these Rules, the SCC, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that all awards are legally enforceable.*

10. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “*ICSID Convention*”) contains more detailed provisions about enforcement in Articles 53 and 54 which apply to investment arbitrations conducted under that Convention. These provisions are in relevant parts as follows:

#### **Article 53**

*(1) - - - Each Party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. - - -*

#### **Article 54**

*(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. - - -*

11. The obligation in Article 54 to recognize and enforce the award applies to each Contracting State and not only to the State which was a party to the dispute. Moreover, each State has undertaken to enforce the pecuniary obligations in an ICSID award in a simple way, *i.e.* in the same way as a judgment of a court of that State.

12. Consequently, no examination of whether any of the exceptions in Article V of the New York Convention might be applicable is necessary for the enforcement of an ICSID award. This easy way of enforcing an award has been considered acceptable, because there is a right under the ICSID Convention to claim annulment of an award on a number of procedural grounds corresponding to some extent to those which could be an obstacle to enforcement under the New York Convention. When annulment has been requested, a party may also ask for the enforcement of the award to be stayed.

#### *D. Swedish law on enforcement of awards*

13. In Swedish law on enforcement of arbitral awards, a distinction is to be made between Swedish and foreign awards.

14. A Swedish arbitral award is an award rendered in proceedings where the seat of arbitration was in Sweden. It is not significant whether or not the parties are Swedish. There are in fact many arbitral proceedings between non-Swedish parties which take place in Sweden. This is essentially due to the fact that the Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC”) is the agreed arbitration institution in many international contracts and also in a number of investment protection treaties. Stockholm will then often be the agreed place of arbitration. The award issued in such proceedings will be considered a Swedish award which has a number of legal consequences, one of them being that the award may be challenged on procedural grounds before a Swedish court.

15. A foreign arbitral award, according to the Swedish definition, is an award issued in proceedings where the seat of arbitration was in a country other than Sweden.

16. If an arbitral award is to be enforced in Sweden, the procedure will differ depending on whether it is a Swedish or a foreign award.

17. A Swedish arbitral award is enforced in Sweden in the same manner as a Swedish court judgment. This means that a request for

enforcement is made to the Swedish Enforcement Authority (“*Kronofogdemyndigheten*”), which is not a court but an administrative authority but which nevertheless acts independently under the law in all enforcement cases. Moreover, its decisions in these matters can be appealed to a court.

18. If a foreign arbitral award is to be enforced in Sweden, the procedure is lengthier, since it is necessary first to obtain the approval (*exequatur*) of the Svea Court of Appeal (“*Svea hovrätt*”) in Stockholm. The exceptions from enforcement in Article V of the New York Convention have been incorporated in the Swedish Arbitration Act, and it is the task of the Svea Court of Appeal to examine, in an adversarial procedure, whether any of these exceptions applies and, if that is not the case, to grant enforcement. When the Court of Appeal has granted enforcement, the party seeking enforcement shall turn to the Enforcement Authority which will handle the matter in the same way as any other case of enforcement.

19. It may be added that this procedure does not apply to ICSID awards which can be enforced without any *exequatur* procedure. This follows from Article 54 of the ICSID Convention which requires that an ICSID award shall be enforced in each Contracting State in the same way as a judgment issued by a national court.

### ***E. The issue of State immunity***

20. These various rules about enforcement of awards do not deal specifically with issues of State immunity which is based on public international law. However, such issues may arise when enforcement is sought against a State, as is often the case in investment disputes.

21. It is true that a State, by becoming a party to a bilateral or multilateral treaty which provides for arbitration, should be considered to have waived its right to rely on State immunity as a ground for opposing arbitral proceedings when a dispute has arisen. However, such waiver does not normally extend to enforcement of the award. A clear distinction is made in international law between immunity in proceedings and immunity in respect of enforcement, and it is rare that

an investment protection treaty is so worded that the Contracting States can be deemed to have waived State immunity also in respect of enforcement. However, it would hardly be consistent with the spirit of an investment protection treaty to allow a State entirely to prevent enforcement against it. State immunity is intended to protect a State from interference with the exercise of functions connected with its sovereignty, and a State has many assets which have no such connection.

22. There has indeed been a trend in public international law during the last decades to restrict State immunity in regard to enforcement by limiting it to enforcement in property connected with the exercise of State functions.

### ***F. The U.N. Convention***

23. In 2004, the United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted by the General Assembly of the United Nations. Soon thereafter, it was opened for signature and ratification.

24. This Convention deals not only with State immunity in court proceedings but also, in Article 19, with “*State immunity from post-judgment measures of constraint*”. Article 19 provides that “[n]o *post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that - - -*”, and then follows an enumeration of exceptions. The most important exception would seem to be the last one, which specifies that measures of constraint may be taken when “*it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes*”.

25. In Article 21 of the Convention, there is a list of categories of property that should not be considered to fall under this exception and in respect of which State immunity is therefore justified. Examples are property, including any bank account, used or intended for use in the performance of the functions of the State’s diplomatic mission or its

consular posts, property of a military character, property of the central bank and property forming part of the cultural heritage of the State.

26. There remain various categories of State property not tied to official State functions, for example property connected with commercial activities. In respect of such assets, the State should not be entitled under the U.N. Convention to claim immunity.

27. The U.N. Convention has not yet entered into force. It requires 30 ratifications or accessions but has only got about half that number so far. This may show that some States are hesitant to accept the principles laid down in the Convention, and there are presumably diverging views on whether or to what extent these principles reflect customary international law. But at the very least, they appear to reflect a general trend in international law towards a more restrictive view on State immunity.

28. Sweden is one of the countries which have ratified the U.N. Convention. It has been incorporated in a Swedish Act which will enter into force at the same time as the entry into force of the Convention itself.

29. The Convention has also been ratified or acceded to by a number of other European States, such as Austria, France, Norway, Portugal, Spain and Switzerland. Among the Arab States, Lebanon and Saudi Arabia are to be found among the countries that have acceded to the Convention.

### ***G. Swedish case-law***

30. The issue of State immunity in connection with enforcement was examined by the Swedish Supreme Court ("*Högsta domstolen*") in a recent and much publicized case (*Nytt Juridiskt Arkiv 2011 p. 475*). The case was about a German citizen, Franz Sedelmayer, who had made an investment in the Soviet Union and whose investment had subsequently been expropriated without compensation. This gave rise to arbitration between Mr. Sedelmayer and the Russian Federation, as successor of the Soviet Union, on the basis of the bilateral investment

protection treaty between the Federal Republic of Germany and the Soviet Union. The arbitration was conducted under the Rules of the SCC, and the place of arbitration was Stockholm.

31. In the award, the Russian Federation was ordered to pay a large sum of money to Mr. Sedelmayer. Since the proceedings were conducted in Sweden, the award was to be considered a Swedish award. It was challenged by the Russian Federation before a Swedish court. The challenge was rejected and the Russian Federation was ordered by the court to compensate Mr. Sedelmayer for his costs in the challenge proceedings.

32. The Russian Federation did not comply and Mr. Sedelmayer turned to the Swedish Enforcement Authority and obtained an attachment order in respect of certain real property in the Stockholm area, owned by the Trade Delegation of the Russian Federation in Sweden. The property was not used – or was only to a minor extent used – for diplomatic or other official purposes. In the house built on the property there were flats which were rented out to various persons or used to accommodate visitors. The Russian Federation claimed State immunity, and the case was examined by the Swedish courts at three levels of jurisdiction, in the last resort by the Supreme Court (“*Högsta domstolen*”).

33. In its judgment, the Supreme Court referred to the trend in international law to restrict State immunity to property used or intended for use by the State in the exercise of its official functions. The Court also referred to the 2004 U.N. Convention which it considered, not in its entirety but to a large extent, to be a codification of unwritten customary law. The Supreme Court referred, in particular, to Article 19 according to which enforcement is permissible in “*property specifically in use or intended for use by the State for other than governmental non-commercial purposes*”.

34. The conclusion was that there was no legal obstacle to enforcement in this property.



35. This Supreme Court judgment is an important Swedish precedent which illustrates how State immunity is to be understood in present Swedish law.

### ***H. Enforcement in Germany***

36. It is well known that Mr. Sedelmayer also sought enforcement of the arbitral award in Germany.

37. He first sought enforcement in the Russian Federation's claims in Germany for reimbursement of Value Added Tax ("VAT"). In the end, this was not granted by the German courts. The VAT owed by Germany stemmed from the Russian Embassy's acquisitions of goods and services, and during the proceedings the Russian Federation issued a declaration in which it certified that the reimbursed VAT solely served to maintain the functioning of the Russian diplomatic and consular missions. Having regard to this declaration, the Federal Court of Justice ("*Bundesgerichtshof*"), *i.e.* the German Supreme Court, found that the enforcement of the Russian Federation was entitled to rely on immunity in regard to these claims, since they served the maintenance of the diplomatic mission's sovereign functions.

38. Mr. Sedelmayer also sought enforcement of the award in the Russian Federation's claims for "air traffic fees". These were claims against the German airline Lufthansa, and the basis of the claims was the granting by the Russian authorities of overflight, transit and landing permits. The Federal Court of Justice considered that the Russian Federation enjoyed immunity in regard to these claims, since they related to air traffic administration which is a sovereign State task. Consequently, enforcement in these claims could not be permitted.

39. Mr. Sedelmayer was more successful when he requested execution on a plot of land in Germany, which was owned by the Russian Federation. The German courts found that this land did not serve a sovereign purpose and was therefore not exempt from execution under the principle of State immunity.

## *I. Final remarks*

40. In the area of investment protection, some significant developments are going on within the European Union, and these developments may in the end also affect the enforcement of arbitral awards. The background is the Lisbon Treaty which amended the previous core Treaties of the European Union and created a basis for new closer co-operation between the States of the Union. The Lisbon Treaty entered into force on 1 December 2009. It broadened the European Union's Common Commercial Policy so as to include foreign direct investment. As a consequence, the European Union will also be responsible for agreements with other States about investment protection and will be given responsibility for the performance of such treaties. This will presumably have implications for the enforcement of arbitral awards in investment cases, but these matters are still being debated and negotiated and the scope and character of the implications remain to be defined.