ISSN : 1875-4120
Issue : Vol. 7, issue 1
Published : April 2010

Transnational Dispute Management
www.transnational-dispute-management.com

State As A Private: The Participation of States in International Commercial Arbitration by V. Heiskanen

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STATE AS A PRIVATE:
THE PARTICIPATION OF STATES IN INTERNATIONAL COMMERCIAL ARBITRATION

Veijo Heiskanen*

"*Personne n'a jamais vu l'Etat. Qui pourrait nier, cependant, qu'il soit une réalité.*"[1]

I. Introduction

As Georges Burdeau famously observed, although nobody has ever seen the State, it is not something unheard of and in this sense is not a pure fiction. Similarly, a lawyer might point out that the reverse is also true: while the State may be considered a social reality, it is also a legal fiction – a legal entity vested with legal rights and obligations. Indeed, one might say that it is the challenge of translating the State's legal rights and obligations into a social reality what law – in particular international and constitutional law – is all about.[2]

As legal entities, States have been participating in international arbitration since the dawn of the modern era and continue to do so, both in their public and private capacity. While arbitration scholars and practitioners have traditionally distinguished between public international law arbitration between States and international commercial arbitration which may involve the State as a party but is generally conducted exclusively between private parties – the latter field therefore being considered primarily a matter of private international law – until recently this distinction appeared to be losing its practical relevance as the two fields became increasingly independent and separate from each other in both academic and professional terms.[3]

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* Partner, LALIVE, Geneva. Paper presented on 3 April 2009 in Ankara at an international arbitration seminar in organized by the Turkish National Committee of the International Chamber of Commerce ("ICC Turkey") and published in the ICC Turkey conference papers, MILLETLERARASI TAHKIM SEMINERI (2009). The paper is republished here in a slightly edited form with the kind permission of ICC Turkey.

[1] GEORGES BURDEAU, L'ETAT (Paris: Seuil, 1970), p. 13.

[2] And perhaps also *vice versa*: the process of translating social reality into law. But this is probably more a matter of regulation (and social theory) than professional practice.

[3] For a seminal study see David Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution," 84 AM. J. INT'L L. 104 (1990).

However, as a result of the recent emergence of investment treaty arbitration, the distinction between public and private international law arbitration has gained new currency. Indeed, while international arbitration practitioners tend to draw a distinction between investment treaty arbitration and international commercial arbitration and often consider these as two different fields of professional practice, the fact that one of the parties to investment treaty arbitration is a private party has forced arbitration scholars and practitioners to rethink the issues relating to the interface between public and private international law arbitration.[4]

Thus, when extending its consent to arbitrate disputes with private investors in a bilateral investment treaty, the State acts under public international law, or in its capacity as a sovereign (*jure imperii*).[5] That such consent is expressed in a source of public international law – a treaty – reflects this reality. However, when participating in international commercial arbitration, the State acts under private international law and thus in its private capacity (*jure gestionis*). It is generally accepted that when agreeing to an arbitration clause, the State waives its immunity from jurisdiction *vis-à-vis* both the arbitral tribunal and the local courts competent to exercise judicial review and supervision over the arbitral proceedings.[6] Consequently, when participating in international commercial arbitration the State is stripped of its sovereign rank and effectively acts as a private – perhaps in all senses of this term.

While the distinction between investment treaty arbitration and international commercial arbitration is conceptually complex and indeed straddles the distinction between public and private law arbitration, this does not reduce its legal relevance. In particular, it is important to note that public and private international law (or more specifically, the law determined to be applicable under the relevant rules of private international law) tend to define the concept of the State quite differently. Under public international law, the State is a broad concept and encompasses the three branches of the central government – the legislature, the executive and the judiciary – as well as its various territorial units (constituent states or provinces and

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[4] For discussion see, e.g., Veijo Heiskanen, "Forbidding *Dépeçage*: Law Governing Investment Treaty Arbitration," 32 SUFFOLK TRANSNAT'L L. REV. 367 (2009).

[5] *Id.* pp. 372-74.

[6] There is extensive commentary on the issue. *See, e.g.*, Jan Paulsson, "May a State Invoke Its Internal Law to Repudiate Consent to International Commercial Arbitration," 2 ARB. INT'L 90, 98 (1986). *See also* Art. 17 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 Dec. 2004, opened for signature on 17 Jan. 2005 (providing that a State cannot invoke immunity from jurisdiction before a court of another State in a proceeding relating to an arbitration agreement, arbitration proceedings or setting aside proceedings in relation to an arbitral award if it has agreed to an arbitration clause in a commercial transaction). The Convention is not yet in force.

municipalities),[7] and any State instrumentalities and even private legal entities and individuals whose acts and omissions may be considered attributable to it. Under public international the concept of the State effectively coincides with that of public power (*puissance publique*); in other words, under public international law the State is, in substance, not only a formal legal entity but a concept that covers any legal subject, whether public or private, that is vested with the authority to use public power on behalf of the State. This understanding is reflected, for instance, in Article 5 of the International Law Commission's Articles on State Responsibility, which provides:

> "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority of shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in that particular instance."[8]

Under private international law, on the other hand, the definition of the State may vary substantially, depending on the applicable law. Thus, in many jurisdictions State agencies and instrumentalities have distinct legal personalities, and they may enter into contracts, and have the capacity to sue and be sued, in their own name. In some jurisdictions even the core elements of the central government such as ministries may have a separate legal personality.[9] In other words, depending on the applicable local law, the "core" State – *i.e.*, the part of the State that is considered the State "itself" – may be broader or narrower, if not disappear altogether.

The fact that public and private international law adopt different definitions of the concept of the State tends to have important strategic implications for the practice of international arbitration, including both investment treaty arbitration and international commercial arbitration. This brief paper will highlight some of these issues as they have arisen in the context of international commercial arbitration, and in particular ICC arbitration, however without any attempt at being exhaustive.

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[7] See Art. 4(1) of Articles on State Responsibility, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.")

[8] Art. 5, Articles on State Responsibility, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. (Emphasis added.)

[9] It is understood that this is the case, for instance, in the Russian Federation; s*ee* Art. 120 of the Russian Civil Code.

II. Participation of States in International Commercial Arbitration: Some Strategic Considerations

The participation of the State as a party in international commercial arbitration tends to raise a range of issues, strategic and otherwise, across the whole field, including in the jurisdictional, procedural and substantive context.

A. Jurisdiction: Consent to arbitrate

When a State enters into an arbitration agreement incorporated into a commercial contract, one of the issues that arises is the determination of the identity of this particular party. Who is the party to the contract when the State is the party? Or, in other words, when a private party concludes a contract with the State, who does it in fact conclude the contract with? Is such other party part of the "core" State, *i.e.*, the central government, or is it a State agency or a State instrumentality with separate legal personality (but not necessarily with its own assets), or a State corporation owned and controlled by the State but established and operating under the private law of the jurisdiction in question, or a purely private entity but one authorized to exercise public powers for certain specific purposes?

These issues have obviously different strategic implications for the two parties to the contract. For the State party, the fact that the applicable law may vest certain State agencies or instrumentalities with separate legal personality tends to create opportunities for hedging the legal risks it assumes when entering into commercial contracts. It may also create opportunities for avoiding such liabilities, in particular when the State agency in question, even when it possesses a separate legal personality (thus allowing it to conclude contracts in its own name), is not vested with the legal right to own and dispose of assets (thus potentially allowing it to avoid legal liability in the context of enforcement and execution of an adverse arbitral award). While in practice legal standards such as the principle of good faith tend to constrain the State's ability to maneuver around these issues, it is not excluded that in practice certain State parties may seek to benefit from the flexibilities provided by the applicable law.

However, while in certain circumstances the State party's attempt to avoid the legal consequences of its own actions may be considered questionable, this does not mean that

every attempt made by the State to benefit from the applicable law should be considered improper. From the perspective of the State, it is a perfectly legitimate question whether the party to the contract should be a State organ or a State agency with a separate legal personality, or indeed a State corporation, taking into account the scope and the subject matter of the activity of the State agency in question. Thus, for instance, if the transaction in question is purely commercial and falls under the scope of activity of a State corporation, it would be generally quite legitimate for the State to seek to limit its potential direct liability and have the contract concluded in the name of the State corporation, which would then be exclusively legally responsible for the execution of the contract as well as for any legal liabilities that may be incurred in the context of the execution.

The private party faces these questions obviously from a different perspective. It must carefully assess whether the party that the State proposes to name as the party to the contract is, from both a legal and a commercial perspective, the proper party to the contract. Does such party have the legal authority to bind the State, or can it act only in its own name and on its own behalf? Does the named party have the legal, administrative and logistical capacity to comply with the contract? Does it have sufficient assets to cover any potential legal liabilities? Would such assets be considered "commercial" and as such exempt from immunity in the context of execution of an arbitral award?

When considering these issues (the importance of which for the private party can hardly be underestimated), the private party must analyze the applicable law which usually – and unless otherwise agreed by the parties – is the personal law of the State party in question (for matters involving personal jurisdiction)[10] or international law, as adopted by the jurisdiction in which the relevant asset is located (for matters involving immunity from execution).[11]

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[10] For discussion see Heiskanen, *supra* note 4, pp. 377-82. *See also* Eduardo Silva Romero, "Are States Liable for the Conduct of Their Instrumentalities," in EMMANUEL GAILLARD & JENNIFER YOUNAN (EDS.), STATE ENTITIES IN INTERNATIONAL ARBITRATION 31, 37 (2008) (noting that under ICC case law, "the issue of whether the State entity is an 'organ' or an 'instrumentality' seems to be determined in accordance with the internal law of the State.") (Footnote omitted.)

This rule is not without exceptions. Thus, if the personal law of the State party seeks to limit the State's capacity to arbitrate, certain jurisdictions apply an "anti-conflict" rule that precludes the application of the personal law. *See, e.g.*, Art. 177(2) of the Swiss Private International Law Act, which provides that, "[i]f a party to the arbitration agreement is a state, a state-held enterprise, or a state-owned organization, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement." For further discussion see Heiskanen, *supra* note 4, pp. 403-06.

[11] *See, e.g.*, Art. 19(c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* note 6 (providing that the property in question must be located in the territory of the State of the forum, for the courts of that State to be able assert jurisdiction over such property).

In the arbitration context, the question of the proper party usually translates into a question of the jurisdiction of the arbitral tribunal. In other words, is the named State party part of the "core" State, or the central government, or is it a formally separate legal entity? If the latter, was such party acting exclusively in its own name when concluding the contract, or also on behalf of the "core" State? What is the evidence required to show that it is the State "itself" and not the named State agency or instrumentality that is in fact the party – or indeed should both be considered parties to the contract? Is it of any relevance, when determining the proper party to the arbitration, whether or not the State instrumentality in question is entitled to own and dispose of its assets, or whether as a matter of fact it has any assets in its own name?

Arbitral tribunals and courts have sometimes struggled with these issues, and one can distinguish between two distinct lines of jurisprudence – one seeking to extend the applicability of the arbitration clause to the non-signatory "core" State, and another one seeking to respect the corporate veil between the "core" State and State agencies and instrumentalities which possess a separate legal personality. Very roughly speaking, arbitral tribunals have sometimes (but by no means always) tended to adopt the former approach, whereas courts in a number of cases (but again, by no means always) have tended to sustain challenges of arbitral awards on the basis that they improperly extend the jurisdiction of the arbitral tribunal to a non-signatory. There is obviously a tension between these two approaches, which in turn tends to increase rather than decrease the importance of the issue in practice.

Arbitral tribunals following the former approach have tended to extend the arbitration clause to cover the core State even when the State instrumentality that entered into the contract is technically separate from the State in that it possesses separate legal personality. Thus, in ICC Case No. 9762, where the claimant had named as respondents, *inter alia*, a ministry of the country as well as its "government," the arbitral tribunal decided to extend the arbitration agreement to cover the "State," even if the contract had been concluded only with the ministry, which had a separate legal personality under the applicable law.[12] Noting that, when referring to the "government," the claimant should be considered to have meant the "State" (a

[12] ICC Case No. 9762, Final Award of 22 Dec. 2001, 29 Y.B. INT'L COM. ARB. 26 (2004).

"government" not being a legal entity), the arbitral tribunal concluded that the "State" must be considered to be a party to the arbitration agreement in the circumstances:

> "What is important in our case is that the contracts with Ax and Ay were not signed by an entity separate from the State of Z, but by a Ministry, i.e., by an organ of the State, whose acts are undoubtedly performed on behalf and in the interest of the State. … Even if the Ministry is a legal person, as it certainly is [in the present case]. …. There is no ground in the respondent's objection according to which, since the Ministry of Agriculture and Water Management of Z took full responsibility for the contracts, the claimant would not be entitled 'to attempt to find some other respondents to share responsibility for the underlying contracts.' The right of a claimant to act against all possible responsible subjects cannot be denied. The respondent's objection would only be correct if interpreted in the sense that there is no substantial difference between the Ministry and the State. In fact, we might say that we have in this arbitration only one respondent in two: the Government of Z (to be better designated as the State of Z), represented by the Ministry of Agriculture and Water Management of Z."[13]

Similarly, in *Svenska Petroleum Exploration AB v. Lithuania*, another ICC case, the contract was entered into on the part of the State by AB Geonafta, a State corporation, but the contract was also signed by government officials and contained a statement above their signatures to the effect that the government approved the agreement and "acknowledge[d] itself to be legally and contractually bound as if the Government were a signatory to the Agreement."[14] The ICC tribunal found that the government was bound by the agreement. When Svenska sought to enforce the award in England, the State challenged the award on grounds that it was entitled to immunity from process. English courts dismissed the challenge and upheld the award.[15]

The second line of jurisprudence, which seeks to preclude the extension of the arbitration agreement to the "core" State, in the absence of an unambiguous consent on its part, has been adopted in a number of cases, including, for instance, *Southern Pacific Properties (Middle East) Ltd v. Egypt* and two more recent ones, *Dallah v. Pakistan* and *Bridas SAPIC v. Turkmenistan*. In the *SPP* case, the contract was signed by EGOTH, a State organization with separate legal personality, as well as the Minister of Tourism of Egypt, the Minister's

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[13] *Id.* p. 40.
[14] *Svenska Petroleum v. Lithuania*, [2006] APP.L.R. 11/13, p. 1.
[15] For further discussion of ICC jurisprudence following this line of reasoning see Silva Romero, *supra* note 10, pp. 49-52; Horacio Grigera Naón, "Choice of Law Problems in International Commercial Arbitration," in 289 RECUEIL DES COURS 152, note 132 (2002).

signature appearing underneath the words "approved, agreed and ratified."[16] While the arbitral tribunal found jurisdiction, the Court of Appeal of Paris considered that the words did not imply the Government's intention to be bound by the arbitration agreement; they simply meant that the government had approved the agreement. Accordingly, the Court set aside the award.[17]

Dallah arose out of an agreement between Dallah, a Saudi Arabian company, and the Awami Hajj Trust, a body set up by the Ministry of Religious Affairs of Pakistan, to accept deposits from prospective Hajj pilgrims and invest them for the purpose of covering the costs of the pilgrimage.[18] The arbitral tribunal having upheld its jurisdiction over the Ministry, the Ministry challenged the award in London, arguing that as a non-signatory it was not bound by the arbitration agreement. The High Court (Aikens, J) upheld the challenge, finding that under French law (the law governing the arbitration agreement, in the absence of a choice of law clause) Pakistan was not bound. The decision was recently upheld by the Court of Appeal.[19]

In *Bridas*, the arbitral tribunal upheld its jurisdiction over both Turkmenneft, a State instrumentality, and the Government of Turkmenistan, even if the latter was formally not party to the underlying contract, on grounds, *inter alia*, that the contract contained undertakings which only the Government could fulfill.[20] When Bridas sought to enforce the award in the United States, the Government objected on the basis that the arbitral tribunal had exceeded its jurisdiction. The matter eventually landed on the U.S. Court of Appeals for the 5th Circuit, which rejected all of the various theories pursued by Bridas – except for the alter ego doctrine. The Court remanded the matter on this basis. When the district court vacated the award, the matter again ended up at the Court of Appeals, which this time upheld the award on the basis of the alter ego theory.

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[16] *Southern Pacific Properties (Middle East) Ltd v. Egypt*, 16 Feb 1983, 3 ICSID REP. 79, 87.
[17] *Id.* p. 91.
[18] *Dallah Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2009] EWCA Civ 755.
[19] *See* Gary Born, "Enforcement of International Arbitral Awards in England and the New York Convention," Kluwer Arbitration Blog, 22 Aug. 2009.
[20] *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003).

B. Procedural issues

In terms of procedure, the fact that one of the parties is a State does not raise particular issues of legal principle. On the contrary, it is a standard procedure that arbitral tribunals must treat parties equally – a requirement that is incorporated in most international arbitration rules, including the ICC Rules of Arbitration.[21] However, this does not mean that the fact that one of the parties is a State has no legal implications.

On the part of the State, such issues range from more practical ones, such as which State agency should represent the State in the arbitration and coordinate the input required from other government agencies and instrumentalities, to legal issues such as whether defenses such as *force majeure* are available for the State party where the relevant circumstances are a result of a government decision. The former types of issues are ones that counsel for the State must consider early on in the proceedings, as they will have an impact on the efficiency and effectiveness of the State's defense. It is well known that, because of the need to coordinate between various State agencies, the State often needs more time than a private party to collect the relevant information and evidence, identify potential witnesses and other sources of information, and to instruct their counsel on key strategic, procedural and substantive issues. This, in turn, requires effective advocacy on the part of the counsel to ensure that the State's legal interests are properly defended in the course of the arbitration.

While the challenges facing the counsel for the State in the international commercial arbitration context are formidable, they are usually not as daunting as they tend to be in investment treaty arbitration. This is in part because international commercial disputes arise out of contractual arrangements between a private party and a particular State organ or instrumentality, which means that the relevant information and evidence is usually available within that particular agency or instrumentality and need not be collected from several sources. The same applies to witnesses and other sources of information; they are usually available within the agency that manages the contract. In investment treaty arbitration, however, the dispute may arise, and often does arise, as a result of actions or omissions of a variety of State organs and agencies, which obviously complicates the defense of the State

[21] *See* Art. 18(2) ("Rules Governing the Proceedings") ("In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.")

and requires more coordination work both on the part of both the client and the counsel. Obtaining instructions also tends to be more complicated and often requires interventions at the highest level of the government. All this takes not only more time but also requires a more concerted effort by the counsel when communicating with the client.

As to legal issues such as the availability of legal defenses such as force majeure, arbitral tribunals tend to respect the corporate veil between the "core" State, or State organs proper, and State instrumentalities having a separate legal personality. Since *Rolimpex*, this has been the case in particular for State corporations, *i.e.*, State instrumentalities established under private rather than public law, to the extent such corporations are considered to be functionally and financially sufficiently independent from the State.[22] In the case of public law entities, the issue is more complex, and the outcome likely will depend on the factual circumstances of each case, although in practice the same factors – degree of government control and financial independence – are likely to be considered relevant.

C. Enforcement and execution

If the arbitral tribunal finds in favor of the private party and the State does not comply with the award, the question arises whether the State may be able to rely on sovereign immunity as a defense against enforcement and execution. In other words, may the State argue that, even if it is considered to have waived its sovereign immunity when concluding the arbitration agreement, the award cannot be enforced as against its assets because they enjoy sovereign immunity from execution?

Under private international law, the answer is again, it depends. That is to say, the answer depends on the applicable law. While certain jurisdictions take the view that, when entering into an arbitration agreement the State waives not only its sovereign immunity from the jurisdiction of the arbitral tribunal and the competent State courts, but also from execution, most jurisdictions have adopted the contrary view and distinguish between immunity from jurisdiction – which applies to person – and immunity from execution – which applies to assets. Consequently, in jurisdictions falling under the former category a waiver of immunity from jurisdiction implies a waiver of immunity from execution, whereas in jurisdictions

[22] *See Czarnikow v. Rolimpex*. [1978] Vol. 2 Lloyd's Rep. 305. *Cf.* ICC Case No. 3093, in Y. DERAINS & S. JARVIN (EDS), COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 at 365 (1990).

falling under the latter category a distinction is made between sovereign assets, or assets *juri imperii*, and commercial assets, or assets *jure gestionis*.

As noted above, the latter approach appears to dominate, at least among the jurisdictions where the issue has arisen. These jurisdictions tend to take the view that a waiver of immunity of sovereign assets must be specific; otherwise it is considered a waiver of immunity from execution applicable to commercial assets only. This is the view adopted, for instance, by the Paris Court of Appeal in *Société Noga v. Russian Federation*. In its ruling in August 2000, the Court held:

> "The simple statement in the contracts in dispute that 'the borrower waives all rights of immunity with regard to the execution of the arbitral award rendered against it in relation to this contract' did not manifest an unequivocal intention on the part of the borrower State to waive in favor of its private contractual partner, its right to rely on immunity."[23]

Such a position is not mandated by public international law. Immunity of sovereign assets from execution is not a norm of *jus cogens* under international law and accordingly may be waived by the State; it is a matter of international law, as interpreted and applied by the jurisdiction concerned, whether such waiver can be implied or whether it must always be specific. Thus the precise position on this issue is in practice a matter of how national courts interpret international law or their own statutes (if any) dealing with the matter. The position of each jurisdiction is ultimately driven by legal policy concerns such as reciprocity: if the courts of one State adopt a doctrine of implied waiver, the courts of the other State concerned are more likely to adopt a similar approach to the issue *vis-à-vis* the former State. Thus, by rejecting the implied waiver doctrine States effectively seek to protect themselves from exposure to assertions of jurisdiction over their assets by foreign courts.[24]

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[23] Court of Appeal of Paris, 1st Chamber, section A, decision No. 287, 10 Aug. 2000, published in 16 ASA Bull. 610, 620 (2000). *Cf. Moscow Center for Automated Air Traffic Control v. Commission de surveillance des offices des poursuites et des faillites du Canton de Genève*, Swiss Federal Tribunal, 15 Aug. 2007 (finding that the Russian Federation had waived its sovereign immunity from execution in a settlement agreement between the parties). For discussion see Noradèle Radjai, Case Note, YIAG E-Letter Dec. 2008, available at http://www.lcia.org/YIAG_folder/documents/YIAGE-NewsDecember2008.pdf.

[24] United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* note 6, has made an attempt to codify the principal rules relating to State immunity from jurisdiction and execution. Thus, as regards execution, Art. 19 of the Convention provides that "[n]o post-judgment measures of constraint, such as attachment, arrest or execution, against the 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 (a) the State has expressly consented to the taking of such measures as indicated by … (ii) by an arbitration agreement or in a written contract … ." (Emphasis added.) While the formulation suggests that waiver of sovereign immunity cannot be implicit, the

A related but inverse issue is whether the assets belonging to a State instrumentality which has a separate legal personality can be used to satisfy an award rendered against the State. Courts in jurisdictions such as France have held that this may be possible in certain circumstances where the instrumentality cannot be considered sufficiently independent from the State. Thus, the Paris Court of Appeal in its recent decisions *Société nationale des pétroles du Congo (SNPC) v. Walker International Holdings Ltd.* and *Winslow Bank & Trust Company Ltd. v. Société nationale des hydrocarbures (SNH)* allowed enforcement of arbitral awards against the States concerned (the Republic of Congo and Cameroon) through assets belonging to a national company controlled by these States. The Court held in the former case:

> "If supervision or even control by a State over a legal person exercised through its directors, and the public interest function assigned to it, are not usually sufficient to consider that a company is a State instrumentality entailing its merger with the State ... the entity at issue here was in reality a fictional legal person and therefore an instrumentality of the Republic of Congo."[25]

The Court followed essentially the same reasoning in the *SNH* case, considering that the SNH was *de facto* part of the State, even if formally a separate legal entity.[26]

III. Conclusion

The participation of the State as a party in international commercial arbitration tends to raise a variety issues, both practical and conceptual. Contrary to what one might think, the State is not, in practice, a coherent or unitary concept. While public international law effectively equates the State with public power, in particular for purposes of determining the scope of its potential legal liability, private international law leaves the issue open and refers to the applicable law – which in issues concerning status and legal personality tends to be, almost invariably, the personal law of the party in question. This effectively means that, in the

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clause begs the question to the extent that it fails to specify whether an arbitration clause, as such, amounts to an "express" waiver of immunity from execution.

[25] *Société Nationale des Petroles du Congo v. Walker International Holdings Ltd.*, Paris Court of Appeals, 8th Chamber, Section B, Decision of 3 July 2003, published in STATE ENTITIES IN INTERNATIONAL ARBITRATION, *supra* note 10, at 487.

[26] *Winslow Bank & Trust Co. Ltd. v. Société Nationale des Hydrocarbures*, Paris Court of Appeals, 8th Chamber, Section B, Decision of 22 Jan. 2004, published in STATE ENTITIES IN INTERNATIONAL ARBITRATION, *supra* note 10, at 99.

context of international commercial arbitration, there is no generally applicable concept, or a universal definition, of the State.

The applicable law may establish the other party as not being part of the "core" State but rather as a separate legal personality that can enter into legal commitments and has capacity to sue and be sued in its own name, as well as to acquire and dispose of its own assets. In other words, it is not, legally speaking, part of the "State" at all. For a private party, it is obviously important in such circumstances to determine whether the other party to the transaction has in fact the commercial and financial means to comply with its obligations under the contract – as well as to discharge its potential liabilities under an adverse arbitral award. Similarly, the possibility of maneuvering with the identity of the party that will in fact sign the contract and the arbitration clause on behalf of the State may offer certain strategic opportunities for the State party as well. These considerations may ultimately lead to complex jurisdictional issues in the arbitration context.

While the participation of the State in the arbitration proceedings themselves tends to raise mostly strategic and logistical issues rather than issues of legal principle, it is the enforcement context where the fact that one of the parties is a State may offer the greatest surprises. Even if it is generally accepted that, when entering into an arbitration agreement, the State waives its sovereign immunity from jurisdiction, such a waiver does not necessarily extend – unless the arbitration agreement, or the applicable law, provide otherwise – to the assets of the State in question. In other words, assets that are considered as being immune from execution under the applicable law cannot be used for purposes of satisfying the award. On the other hand, however, the State may find itself in a situation where an award is found enforceable against its assets if the State instrumentality that concluded the contract is not considered functionally and financially sufficiently independent from the State.

In other words, when acting as a private, the State may surprise not only the other party, but also itself.