When Immunity Means Impunity: Lessons for Canada from Recent Cases on State Immunity from Execution

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Immunité ou impunité? Leçons pour le Canada tirées de la jurisprudence récente en matière d'immunité d'exécution

KELSEY A. ROSE

Abstract

This article reviews recent cases from Canada, Australia, the United Kingdom, and the United States involving state immunity from execution and suggests the burden on creditors to disprove this immunity is excessively onerous. While the problem is much belaboured, few solutions have been explored or implemented. This article proposes that in the Canadian context, adjusting the evidentiary burden on parties to an execution immunity dispute would improve the ability of creditors to obtain fair payment from debtor states, without infringing state sovereignty.

Résumé

Cet article passe en revue des cas récents du Canada, de l'Australie, du Royaume-Uni et des États-Unis impliquant l'immunité d'exécution de l'État, et suggère que le fardeau imposé aux créanciers pour réfuter cette immunité est excessivement onéreux. Alors que le problème est très marqué, peu de solutions ont été explorées ou mises en œuvre. Cet article propose que, dans le contexte canadien, un ajustement au fardeau de preuve imposé aux parties à un différend relatif à l'immunité d'exécution améliorerait la capacité des créanciers à se faire compenser par les États débiteurs sans porter atteinte à la souveraineté des États.

Kelsey A Rose, Lawyer, Harper Grey LLP, Vancouver, Canada (krose@harpergrey.com).
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Introduction

Creditors need clarity on the law of execution against states in Canada. To date, the dilemma of execution immunity has seen little light in Canadian courtrooms, but as Canada continues to engage in international trade treaties and Canadian companies continue to invest abroad, it is only a matter of time before our courts will have to grapple with the complexities of this issue. Canada is positioning itself as a force to be reckoned with in international trade, thanks in no small part to Prime Minister Justin Trudeau. The *Comprehensive Economic and Trade Agreement* (*CETA*) is now in force and is likely to increase Canada's trade with Europe substantially.[1] On 8 March 2018, Canada signed the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (*CPTPP*) along with ten other states, which promises to expand trade with the Asian Pacific.[2] Renegotiation of the *North American Free Trade Agreement* (*NAFTA*) is now underway.[3] Dispute resolution is a key contentious issue in these negotiations – but even if the dispute resolution mechanisms change, *NAFTA* disputes will continue. All of these agreements encourage trade and investment and, in turn, increase the potential for investor–state disputes to confront Canadian courts.

First, some context. Should a dispute arise between a state and a private party, the parties may proceed to litigation or arbitration. If a private actor is successful in obtaining a judgment against a foreign state — whether judicial or arbitral — the creditor must locate the state's assets.[4] The creditor must then seek to execute its judgment against those assets. Here, the

[1] *Canada-European Union Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union and Its Member States, of the Other Part*, 30 October 2016 (provisionally applied 21 September 2017).

[2] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018 (in progress).

[3] *North American Free Trade Agreement between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force January 1994).

[4] The private actor may sue or arbitrate with a state pursuant to a contract with the state. It may also arbitrate the dispute under the umbrella of a bilateral investment treaty between the state and the creditor's home state. For a thorough review of the ways in which a litigant may reach the execution immunity stage, see Alexis Blane, "Sovereign Immunity as a Bar to the Execution of International Arbitral Awards" (2009) 41 NYU J Intl L & Pol 453.

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problem of execution immunity arises. Under customary international law, foreign state assets are presumed to be immune from execution, with some exceptions.[5] Although the exceptions suggest this immunity is not absolute, it often is, in practice. As a result, the creditor, despite holding a valid judgement — often a multimillion-dollar judgment — is left without recourse against the state.

Although it is unclear what proportion of states fail to pay their debts, the fact that serious litigation over execution immunity claims continues each year suggests a trend of unpaid debts persists.[6] None of the traditional methods of addressing this problem offer a satisfactory solution. Obtaining a waiver from the state in advance is one solution, but this option is not a panacea; it includes the risk that courts will refuse to recognize that waiver.[7] Similarly, a state's past performance regarding the payment of debts is no guarantee of its future performance. Relying on payment history runs the risk that the state may change its position and simply refuse to pay, which becomes more likely if other states continue to avoid debts with impunity. New solutions to the execution immunity problem therefore deserve attention; one such solution is to adjust the evidentiary burden for execution claims.

Currently, the guidance for Canadian courts faced with a claim for execution immunity with regard to evidentiary rules is sparse and inconsistent. This gap represents an opportunity to re-evaluate the way that Canadian courts apply the presumption of state immunity in an execution context and, in the process, make execution against states more balanced. After reviewing recent legal developments in execution immunity in Canada, Australia, the United States, and the United Kingdom, this article posits that an expansion of the evidentiary burden upon states in Canadian law is both feasible and advisable. More specifically, where the property of a foreign state appears to be (1) vacant or (2) in use or available for use for a commercial purpose, and the state claims the property is in fact for a sovereign governmental purpose, it is reasonable for courts to ask the foreign state to demonstrate that its claim for immunity has an air of

[5] Sompong Sucharitkul, Special Rapporteur, *Seventh Report on Jurisdictional Immunities of States and Their Property*, UN Doc A/CN.4/388 (1987), reprinted in *Yearbook of the International Law Commission 1985*, vol 2, part 1 (New York: International Law Commission (ILC), 1987) at 21, paras 33–82 [Sucharitkul, *Seventh Report*].

[6] For recent litigation over execution immunity, see *Firebird Global Master Fund II Ltd v Republic of Nauru*, [2015] HCA 43 [*Firebird*]; *Canadian Planning v Libya*, Ruling No 4 on Motions, 2015 ONSC 3541, 256 ACWS (3d) 598 [*Canadian Planning*, Ruling 4]; *SerVaas Inc v Rafidian Bank and Others*, [2012] UKSC 40 [*SerVaas*]; *Orascom Telecom Holding SAE v Republic of Chad & Ors*, [2008] EWHC 1841 (comm.) [*Orascom*].

[7] Blane, *supra* note 4.

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reality.[8] Adopting this evidentiary framework would clarify and therefore expedite the execution process.

Background

absolute immunity

The shape of state immunity has changed over time largely in response to the changing international role of states. Under the classical model, immunity was absolute; states were considered immune from all processes instituted by another state, whether for adjudication of disputes (that is, adjudication immunity) or the enforcement of judicial decree (that is, execution immunity).[9] In the absolute immunity paradigm, the only way for a domestic court to assume jurisdiction over a foreign state was by way of a waiver of immunity provided by the foreign state.[10] Such a system was shaped by the diplomacy of the time, which was concerned less with legal obligation and more with quid pro quo.[11]

During the mid-twentieth century, as states began to engage in private commerce on a greater scale, the view of absolute immunity as unjust gained momentum.[12] Relief could not always be found in the foreign state's own domestic courts. States could engage in private business transactions and yet faced none of the risks of doing business. States could (and did) avoid consequences of failed business dealings with impunity.[13] The only remedy for the private party left holding an empty judgment in this paradigm was to call upon their home state — that is, their state of citizenship or incorporation — to take up their cause via a diplomatic protection claim.[14]

[8] The scheme could also work with assets that appear to be for "non-governmental" purposes, but since the Canadian *State Immunity Act*, RSC 1985, c S-18 [*SIA*], focuses on an exception for "commercial" assets, I adopt this benchmark. Funds that are apparently commercial could include, for example, a bank account used to pay a private party, possibly the creditor.

[9] Xiaodong Yang, *State Immunity in International Law* (Cambridge, UK: Cambridge University Press, 2012) at 7.

[10] *Ibid* at 7, 10.

[11] Hazel Fox & Philippa Webb, *The Law of State Immunity*, 3rd ed (Oxford: Oxford University Press, 2013) at 28.

[12] Yang, *supra* note 9 at 6–32.

[13] Fox & Webb, *supra* note 11 at 32–33.

[14] In *Mavrommatis Palestine Concessions Case (Greece v United Kingdom)*, Jurisdiction, (1924) PCIJ (Ser A) No 2 at 12, the predecessor to the International Court of Justice (ICJ), the Permanent Court of International Justice, articulated the principle as follows: "[A] state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels." See also ILC, *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN Doc A/56/10 (2001) at paras 30–77 (Draft Articles on State Responsibility) and paras 158–207 (Draft Articles on Diplomatic Protection).

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Diplomatic protection is a highly political process, involving state-to-state negotiation, and does not provide a dependable source of relief for private creditors, particularly small- and medium-sized enterprises or private individuals.

DEVELOPMENT OF THE RESTRICTIVE THEORY

Gradually, however, courts became more willing to treat states as persons. The development of this trend is well documented.[15] Although the presumption of state immunity from execution remained intact, courts began to make exceptions for property that was not used for a sovereign purpose.[16] Concurrently, legislation began to reflect these changes.[17] Over time, this practice, known as the restrictive doctrine of immunity, took on the status of customary international law. Its status as custom was recognized in the 1988 *Philippine Embassy Bank Account* case, in which the German Constitutional Court held:

> There is a general rule of international law that execution by the State having jurisdiction on the basis of a judicial writ of execution against a foreign State, issued in relation to non-sovereign action (*acta iure gestionis*) of that State upon that State's things located or occupied within the national territory of the State having jurisdiction, is inadmissible without assent by the foreign State, insofar as those things serve sovereign purposes of the foreign State at the time of commencement of the enforcement measure.[18]

The restrictive doctrine was adopted by courts around the world.[19] While a few states have persistently objected, favouring absolute immunity, most states now adhere to a restrictive approach to immunity.[20]

Canada is one of the states that has adopted the restrictive approach. The Supreme Court of Canada made this position clear in *Amaratunga v Northwest Atlantic Fisheries Organization*, stating: "Canada has adopted a restrictive

[15] For a succinct summary, see Fox & Webb, *supra* note 11 at 483.

[16] Sucharitkul, *Seventh Report*, *supra* note 5 at 35–36, paras 73–77.

[17] *Ibid* at 31–35, paras 45–72.

[18] *Philippine Embassy Bank Account* (1977), 65 ILR 140 at 164 [*Philippine Embassy*].

[19] See *Abbott v Republic of South Africa* (1992), 113 ILR 411 (Spanish Constitutional Court) [*Abbott*]; *Condor and Filvem v National Shipping Co of Nigeria* (1992), 33 ILM 593 (Italian Constitutional Court); *Canadian Planning*, Ruling 4, *supra* note 6.

[20] Outliers include Russia and China, where immunity is treated as absolute in the absence of a specific waiver. See *Democratic Republic of the Congo v FG Hemisphere Associates*, [2011] HKCU 1049 (Hong Kong Court of Final Appeal); *Civil Procedure Code of the Russian Federation* (No 138-FZ of 2002), art 401; ILC, "Draft Articles on Jurisdictional Immunities of States and Their Property" in *Report of the International Law Commission on the Work of Its Forty-third Session*, UN Doc A/46/10 (1991) at 36 [ILC, "Draft Articles on Jurisdictional Immunities"]; August Reinisch, "European Court Practice Concerning State Immunity from Enforcement Measures" (2006) 17 EJIL 4.

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approach to state immunity and rejected the absolute approach under which states had historically enjoyed immunity in all circumstances."[21]

ATTEMPTS AT CODIFICATION: THE UNITED NATIONS CONVENTION ON STATE IMMUNITY

In 2004, the United Nations (UN) General Assembly adopted the *UN Convention on Jurisdictional Immunities of States and Their Property* (*State Immunity Convention*).[22] Currently, twenty-one states have ratified the convention (it comes into force on the thirtieth ratification),[23] but Canada has not yet signed or ratified it. In the 2012 case *Jurisdictional Immunities of the State*, the International Court of Justice (ICJ) declined to decide whether the *State Immunity Convention* represented customary international law.[24] As such, the convention does not represent formally binding treaty law for Canada. Although not binding, the *State Immunity Convention* is persuasive. It emanates from lengthy discussions among states and is accompanied by careful International Law Commission commentary.[25] In *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, Lord Bingham opined that the convention is "the most authoritative statement available on the current international understanding of the limits of State immunity in civil cases."[26]

In the *Jurisdictional Immunities* case, the ICJ articulated the current state of the law on execution immunity:

> [T]here is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim.[27]

[21] *Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66 at para 28, 365 DLR (4th) 511 [*Amaratunga*].

[22] *United Nations Convention on Jurisdictional Immunities and Their Property*, 2 December 2004 (not yet in force).

[23] *Ibid*, art 30.

[24] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, [2012] ICJ Rep 99 at 115 [*Jurisdictional Immunities*].

[25] ILC, "Draft Articles on Jurisdictional Immunities," *supra* note 20.

[26] *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] 2 WLR 1424 (UKHL); *Mitchell v Al-Dali*, [2006] UKHL 26 at paras 8, 26; Paul David Mora, "Jurisdictional Immunities of the State for Serious Violations of International Human Rights Law or the Law of Armed Conflict" (2012) 50 Can YB Intl L 243 at 273.

[27] *Jurisdictional Immunities*, *supra* note 24 at para 118; see also *Philippine Embassy*, *supra* note 18; *Spain v Company X* (1986), 82 ILR 44 (Swiss Federal Tribunal); *Alcom Ltd v Republic of Colombia*, [1984] 1 AC 580 (UKHL) [*Alcom*]; *Abbott*, *supra* note 19.

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In short, state-held assets in use for a governmental purpose are immune, but commercial assets are not necessarily immune. In this case, the ICJ held that a cultural centre intended to promote cultural exchanges between two countries, pursuant to an agreement between the two governments, would clearly constitute property in use for a governmental purpose.[28] The ICJ may revisit these issues in *Certain Iranian Assets (Islamic Republic of Iran v United States of America),* though proceedings on the merits are currently suspended while the parties deal with the preliminary objections raised by the United States.[29]

COMPOUNDED IMMUNITIES: STATE IMMUNITY FROM DISCOVERY

It is worth noting here that determining whether state assets are commercial or sovereign is complicated by the diplomatic immunities afforded to the state's ambassador and certain records. In domestic execution proceedings, a creditor can compel a debtor to provide wide-ranging documentary evidence pertaining to the debtor's worldwide assets. The creditor can also compel the debtor to participate in an examination in aid of execution. Failure to comply with the post-judgment discovery process may lead to sanctions by the court. This discovery process is a critical mechanism that enables the creditor to execute on their judgment.

In contrast, Article 31 of the *Vienna Convention on Diplomatic Relations* (*VCDR*) provides that a diplomat cannot be compelled to give evidence.[30] This rule is not subject to the exceptions to immunity discussed above.[31] The premises and archives of embassies and consulates are similarly inviolable, according to Articles 24 and 25 of the *VCDR*. Bank accounts held by an embassy may also be protected from discovery.[32] Further, domestic courts have little if any ability to sanction states for a refusal to engage in post-judgment discovery, due to the state's adjudicative immunity and particularly its diplomatic immunity for state personnel.[33]

[28] *Jurisdictional Immunities*, *supra* note 24 at para 119.

[29] *Certain Iranian Assets (Islamic Republic of Iran v United States of America),* Order of 1 July 2016, [2016] ICJ Rep 249, suspended by order dated 2 May 2017, online: <http://www.icj-cij.org/files/case-related/164/19430.pdf> [*Certain Iranian Assets*].

[30] *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95, art 31(2) (entered into force 24 April 1964) [*VCDR*].

[31] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations,* 4th ed (Oxford: Oxford University Press, 2016) at 261.

[32] See *Alcom*, *supra* note 27 at 604; *Banamar-Capizzi v Embassy of Republic of Algeria* (1989), 87 ILR 56 at 61 (Italy, SC) [*Banamar*]; *Iraq v Vinci Constructions* (2002), 127 ILR 101 at 106 (Brussels, CA) [*Vinci Constructions*]; Denza, *supra* note 31 at 130. For an exception to this, see *Thai-Lao Lignite (Thailand) Co, Ltd v Gov't of the Lao People's Democratic Republic,* 2011 WL 4111504 at 6 (SDNY), where the court ordered discovery of the bank accounts. The proceeding was later vacated on appeal, 864 F 3d 172 (2nd Circuit 2017).

[33] Fox & Webb, *supra* note 11 at 585.

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These immunities from discovery compound the difficulty facing creditors seeking execution.

TENSIONS BETWEEN THEORY AND PRACTICE

Despite changes in the letter of the law flowing from the advent of restrictive immunity that seemingly expanded the potential to rebut the presumption of immunity, in practice, not much has changed.[34] Attempts to execute on state property have been predominantly ineffective.[35] Cases involving a successful rebuttal of the presumption of immunity against execution are almost non-existent — the total number of successful judgments for creditors in all common law jurisdictions to date comprise perhaps two or three final decisions.[36]

Holding states to their legal obligations is important for a multitude of reasons. For one, ensuring states pay their debts promotes justice and

[34] For a detailed review of the interaction between execution immunity and the arbitration regime, see Blane, *supra* note 4 at 454–505.

[35] James Crawford, "Execution of Judgments and Foreign Sovereign Immunity" (1981) 75 AJIL 820; Michael Brandon, "Immunity from Attachment and Execution" (1982) 1 Intl Fin L Rev 32; Leo J Bouchez, "The Nature and Scope of State Immunity from Jurisdiction and Execution" (1979) 10 Nethl YB Intl L 3; Rosalyn Higgins, "Execution of State Property: United Kingdom Practice" (1979) 10 Nethl YB Intl L 35; I Seidl-Hohenveldern, "State Immunity: Federal Republic of Germany" (1979) 10 Nethl YB Intl L 55; I Seidl-Hohenveldern, "State Immunity: Austria" (1979) 10 Nethl YB Intl L 97; Joe Verhoeven, "Immunity from Execution of Foreign States in Belgian Law" (1979) 10 Nethl YB Intl L 73; T Varady, "Immunity of State Property from Execution in the Yugoslav Legal System" (1979) 10 Nethl YB Intl L 85; Fritz Enderlein, "The Immunity of State Property from Foreign Jurisdiction and Execution: Doctrine and Practice of the German Democratic Republic" (1979) 10 Nethl YB Intl L 111; SK Agrawala, "A Note on Indian State Practice with Respect to the Immunity of Indian Property Located within the Jurisdiction of Foreign States" (1979) 10 Nethl YB Intl L 125; Stanley D Metzger, "Immunity of Foreign State Property from Attachment or Execution in the USA" (1979) 10 Nethl YB Intl L 131; Sompong Sucharitkul, "Immunity from Attachment and Execution of the Property of Foreign States: Thai Practice" (1979) 10 Nethl YB Intl L 143; Jean-Flavien Lalive, "Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State" (1979) 10 Nethl YB Intl L 153; MM Boguslavsky, "Foreign State Immunity: Soviet Doctrine and Practice" (1979) 10 Nethl YB Intl L 167; Luigi Condorelli & Luigi Sbolci, "Measures of Execution against the Property of Foreign States: the Law and Practice in Italy" (1979) 10 Nethl YB Intl L 197; Kazuya Hirobe, "Immunity of State Property: Japanese Practice"(1979) 10 Nethl YB Intl L 233; CCA Voskuil, "The International Law of State Immunity, As Reflected in the Dutch Civil Law of Execution" (1979) 10 Nethl YB Intl L 245; see also ILC, "Draft Articles on Jurisdictional Immunities," *supra* note 20 at 56 (Commentary to art 18, para 1); Reinisch, *supra* note 20; Eva Wiesinger, *State Immunity from Enforcement Measures* (2006) [unpublished, archived at the University of Vienna].

[36] Fox & Webb, *supra* note 11 at 479, n 1: "Again and again thwarted judgment creditors have sought to attach assets of foreign States within the forum State territory, only to be refused orders for execution by national courts." See also Crawford, *supra* note 35; Brandon, *supra* note 35.

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respect for the rule of law. Pragmatically, the state's self-interest in protecting the rights of its citizens aligns with equity for creditors. Moreover, support for enforcing debt obligations is likely to grow, not shrink. As the world continues to move from a model of might is right towards a model based on fair play and the rule of law, public tolerance for states who default on debts decreases.[37] Eloquent as usual, Lord Denning summarized this perspective thusly: "It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction."[38]

In an ideal world, a state would always pay its debts. Unfortunately, this is not *Game of Thrones*, and states are not Lannisters.[39] Relying on the goodwill of states to comply with a legal obligation to pay is not working; creditors continue to go unpaid.[40] Recent evidence suggests state compliance with arbitration awards is worse than previously thought.[41] The problem is compounded by the trouble courts have in balancing sovereignty and the rule of law. Execution immunity cases throw this question into sharp relief — which "good" deserves priority: the rule of law or state sovereignty? Courts are loath to find exceptions to a state's immunity, in part due to fears of intruding on sovereignty: "The application by one State of forcible measures of constraint against the conduct or property of another State is an unfriendly act generally prohibited by international law, except where that State has itself contravened international law."[42]

In addition to fears of intruding on sovereignty, courts may wish to avoid entering the political arena. The judiciary, despite being deliberately separate from the political branch of government in most liberal democracies, is not blind to the political realities associated with enforcing a judgment against a foreign state. Courts have executed on state property in only a handful of cases; political concerns are likely one reason why. There is room to strike a better balance between these interests — namely, by providing

[37] Ruti Teitel, "Humanity's Law: Rule of Law for the New Global Politics" (2002) 35:2 Cornell Intl LJ 355 at 385–86.

[38] *Rahimtoola v Nizam of Hyderabad*, [1958] AC 379 at 609.

[39] In the HBO series *Game of Thrones*, the Lannister family motto is "[a] Lannister always pays his debts."

[40] See *Canadian Planning*, Ruling 4, *supra* note 6; *SerVaas*, *supra* note 6; *Firebird*, *supra* note 6; *Mr Frank Sedelmayer v Russian Federation*, SCC, Decision of the Swedish Supreme Court, 1 July 2011, reprinted in (2012) 106 AJIL 347; *Creighton Ltd v Qatar*, 181 F(3d) 118 at 120 (DC Cir 1999).

[41] See the summary of findings in David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment no 2012/03 (2012) at 30.

[42] Fox & Webb, *supra* note 11 at 31.

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courts with clear direction as to what evidence is needed to determine whether an asset is presumed to be immune from execution.

A Proposal for Change

In order to better assess the merits of any proposal for changing the process by which the presumption of execution immunity is displaced, it is worth considering what factors have inhibited judgment creditors' progress to date. For one thing, execution immunity lags behind adjudication immunity. Both immunities are governed by the restrictive approach, featuring a rebuttable presumption of immunity, yet litigants have been much more successful in rebutting the presumption of immunity in the adjudication context than in the execution context.[43] The primary reasons for this discrepancy appear to be:

1. execution immunity is more directly tied to the sovereign independence of states than adjudication immunity because it deprives a state of physical property;
2. execution against state assets interferes with the foreign relations of the forum state;[44]
3. evidence that would be required to rebut the presumption in an execution context is usually barred by independent, but concomitant, immunities (such as the immunity for diplomatic personnel from discovery and the immunity for certain state-held records);[45] and
4. developing nations, often the debtor defendants in commercial transactions, are not shielded by any measures of insolvency protection, necessitating deference to their sovereign responsibilities in some cases.[46]

If the above factors (collectively, the "lag factors") explain the lag in implementation of the restrictive approach in the execution immunity context, mitigating these factors should result in better uptake of the restrictive approach and fewer unpaid debts. One other issue should be noted. The murky, narrow definition of "commercial" causes courts significant confusion. The ambiguity of this term is worth examining, but it is a subject that deserves an article unto itself and cannot be done justice here.[47]

[43] *Ibid* at 481; see also Sir Ian Sinclair, "Law of Sovereign Immunity: Recent Developments" (1980) 167 Rec des Cours 113 at 219.

[44] Fox & Webb, *supra* note 11 at 481, re: "political consequences"; see also Sinclair, *supra* note 43.

[45] See *Liberian Eastern Timber v Gov of Rep of Liberia*, 659 F Supp 606 (DDC 1987); *Foxworth v Permanent Mission of Uganda*, 796 F Supp 761 (SDNY 1992) [*Foxworth*].

[46] Jeremy Ostrander, "The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments" (2004) 22 BJIL 541 at 574.

[47] See further *Banamar*, *supra* note 32 at paras 59–60; *Birch Shipping v Embassy of United Republic Tanzania*, 507 F Supp 311 (DDC 1980); *Alcom*, *supra* note 27.

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Some of the academic commentary on execution immunity identifies aspects of the framework of immunity that could stand to change. One possibility is the evidence by which a court determines whether an asset is immune or not. This area is particularly fraught with complexity. Jurisdictions differ on the extent to which a foreign state can be compelled to participate in the discovery process. Following discovery, courts must wrestle with how to weigh any evidence obtained by a creditor against a state's claim of immunity, which is often a bare assertion. The need for change with regard to execution immunity afforded to commercial state property is well recognized in the academic literature:

> [T]here should be some adjustment to the absolute nature of immunity of State property which continues to be categorized as in use for sovereign purposes when invested in commercial markets for the purpose of economic gain; the immunity of such State property should be removed, at least to the extent of the claims of a commercial nature of parties whose work assisted in the enhanced status and value of State property. There has to be a balance between the uniformity of law applicable to everyone and immunity of the State. For sovereign funds, where they are used solely for public good and objectively so shown to be, greater transparency may provide a sufficient remedy.[48]

In a similar vein, others have noted that "reallocation of the burden of proving sovereign use could facilitate execution without offending truly sovereign assets."[49]

The academic literature evidences that state property is often characterized as sovereign even when it is used in commercial markets. In response, I propose that when state property is apparently vacant or apparently available for a commercial purpose, the state should be required to demonstrate an air of reality to any assertion that the property is in fact used for sovereign purposes. In the following discussion, I show how expanding transparency in this way could alleviate unfairness to valid state creditors, without unduly intruding on sovereignty.

State Practice

There are many articles covering the evolution of state practice and *opinio juris* in relation to execution immunity.[50] I discuss only the most recent cases here, focusing on Canada, in addition to common law jurisdictions with legal systems similar to that of Canada such as the United States, the United Kingdom, and Australia.

[48] Fox & Webb, *supra* note 11 at 612.

[49] Blane, *supra* note 4 at 504.

[50] Reinisch, *supra* note 20; Blane, *supra* note 4; Ostrander, *supra* note 46.

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CANADA

Legislation

The purpose of the *State Immunity Act* (*SIA*) is to incorporate the customary international law rules for both jurisdictional and execution immunity into Canadian domestic law.[51] It provides immunity from execution for foreign state property, with some exceptions, including an exception for property used for a commercial activity.[52] The execution immunity provision is found in section 12:

12 (1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture except where

(a) the state has, either explicitly or by implication, waived its immunity from attachment, execution, arrest, detention, seizure or forfeiture, unless the foreign state has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal;
(b) *the property is used or is intended to be used for a commercial activity* or, if the foreign state is set out on the list referred to in subsection 6.1(2), is used or is intended to be used by it to support terrorism or engage in terrorist activity;
(c) the execution relates to a judgment establishing rights in property that has been acquired by succession or gift or in immovable property located in Canada, or
(d) the foreign state is set out on the list referred to in subsection 6.1(2) and the attachment or execution relates to a judgment rendered in an action brought against it for its support of terrorism or its terrorist activity and to property other than property that has cultural or historical value. [Emphasis added]

For section 12(1)(b), what constitutes "commercial" is a question deliberately deferred to the judiciary.[53]

[51] *SIA*, *supra* note 8, s 12(1)(b); see *Debates of the Senate*, 32nd Parl, 1st Sess, vol 2 (22 January 1981) at 1561 [*Debates*] for a discussion of the purpose of the Act — that is, to bring Canada into line with the United Kingdom, the United States, and other major trading jurisdictions.

[52] *SIA*, *supra* note 8 at s 12(b).

[53] *Debates*, *supra* note 51 at 1563. In addition to the exception for commercial purposes, s 12(b) also makes an exception where the property in question was used to support terrorist activity or where the state is listed as one that supports terrorism and the judgment to be executed was rendered in an action brought against the state for its support of terrorism. This provision has been litigated, which has allowed Canadian courts to bypass dealing with the commercial purpose exception to immunity. This provision is analogous to that in the US *Foreign Sovereign Immunities Act*, 28 USC § 1062–1611 [*FSIA*]. Iran has initiated a proceeding at the ICJ to challenge the validity of this provision of the *FSIA*. See *Certain Iranian Assets*, *supra* note 29.

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Cases

Most of the jurisprudence flowing from the *SIA* concerns adjudicative immunity, though a few cases do touch on execution immunity. There are several cases pertaining to section 12(1)(d), which is not relevant here. How to determine the purpose of a state-held asset is a key issue that remains unresolved. The Supreme Court of Canada outlined the framework for the application of the Canadian *SIA* in *Kuwait Airways Corp. v Iraq* but did not decide the issue of execution immunity nor the burden of proof required for a creditor to prove "commercial purposes."[54] After commenting on the commercial activity exception to adjudicative jurisdiction at section 5 of the *SIA*, the Court in *Kuwait Airlines* held that the application ought to have been dismissed on that basis. The Court therefore found it unnecessary to decide the issue of execution immunity.[55]

Lower courts have not directly decided the issue either. Perhaps the closest Canadian courts have come is a series of decisions on motions made before the Ontario Superior Court of Justice in *Canadian Planning v Libya*.[56] The applicant, a Canadian company, had successfully obtained an arbitral award for the equivalent of $11 million following Libya's breach of contract; Libya failed to pay Canadian Planning for its work assisting in building a hospital in Libya. Canadian Planning then applied, successfully, to enforce the award in Ontario. To execute on the judgment, Canadian Planning attempted to garnish the bank account of the Libyan embassy in Ottawa. Thus, the court was required to consider issues of diplomatic immunity under the *Foreign Missions and International Organizations Act* (*FMIOA*) as well as the customary international law on state immunity.[57]

The Superior Court of Justice held that the onus to rebut a presumption of diplomatic immunity of embassy bank accounts rested with the creditor.[58] In the result, the court held that Canadian Planning had not adduced sufficient evidence to rebut the presumption created by the certificate from the Libyan ambassador that the embassy bank account was used for non-commercial sovereign purposes.[59] The court held that this finding

[54] *Kuwait Airways Corp v Iraq*, 2010 SCC 40, 325 DLR (4th) 236.

[55] *Ibid* at para 35.

[56] *Canadian Planning*, Ruling 4, *supra* note 6.

[57] It is worth noting here the distinction between state immunity and diplomatic immunity; the latter attracts greater deference at international law and is governed in Canada by the *Foreign Missions and International Organizations Act*, SC 1991, c 41, rather than the *SIA*, *supra* note 8.

[58] *Canadian Planning*, Ruling 4, *supra* note 6 at para 27.

[59] *Ibid* at para 51.

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precluded the usual discovery opportunities available to parties under the Ontario *Rules of Civil Procedure*.[60]

This case was decided under the *FMIOA* rather than the *SIA* and was informed by additional rules governing diplomatic immunity. Diplomatic assets and personnel are usually provided more deference than other state assets because of their special position in fostering good relations between states. The *State Immunity Convention* provides that diplomatic property is excluded from execution. However, the *Philippine Embassy Bank Account* case and other cases have relied on the restrictive approach to immunity and have applied the rebuttable presumption of immunity from execution to diplomatic property. The *Canadian Planning* case nonetheless exemplifies several of the lag factors outlined above: the influential role of foreign relations in execution cases and a heightened level of scrutiny, which reflects the court's recognition of the significant encroachment on sovereignty that execution against state property poses.[61] The case is also an example of the difficulties courts face in adjudicating the presumption of immunity in the face of unclear evidence about the use of state property.[62]

UNITED STATES

Legislation

State immunity in the United States is codified in the *Foreign Sovereign Immunities Act* (*FSIA*).[63] Section 1609 sets out a general presumption of immunity from execution for states and their instrumentalities, and section 1610 sets out exceptions to that presumption:

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if —

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding

[60] *Canadian Planning v Libya*, Ruling No 3 on Motions, 2015 ONSC 3386 at paras 79–80, 255 ACWS (3d) 468 [*Canadian Planning*, Ruling 3]; Ontario, *Rules of Civil Procedure*, r 60.18 [*Ontario Rules*].

[61] *Canadian Planning*, Ruling 3, *supra* note 60 at para 20.

[62] *Ibid* at paras 43, 60.

[63] *FSIA*, *supra* note 53, § 1330.

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any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property–

  (A) which is acquired by succession or gift, or

  (B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim [arising out of torture].

The *FSIA* was the first legislative scheme for state immunity from execution. It is also one of the more restrictive schemes. At subsection (2), the *FSIA* requires that there be a nexus between the original claim and the property sought to be attached. This further limits the property available to satisfy a valid judgment against a state.

In 1999, the American Bar Association Working Group (ABAWG) recommended doing away with the nexus requirement.[64] The ABAWG explained:

[T]he practical application of section 1610's provisions produces an extremely restrictive regime for enforcement of judgments against foreign sovereigns. Courts have applied section 1610(a) (as well as the limitations in section 1611) to prevent the enforcement of judgments even where the court had found that it otherwise properly had jurisdiction to adjudicate over the foreign sovereign. This has meant that successful plaintiffs have been denied satisfaction when the foreign state defendant has refused to comply voluntarily with an adverse judgment.

[64] Andrew N Vollmer et al, Working Group of the International Litigation Committee of the Section of International Law and Practice of the American Bar Association, *Recommendations and Report on the US Foreign Sovereign Immunities Act* (2001), online: <https://www.americanbar.org/content/dam/aba/migrated/intlaw/policy/civillitigation/foreignsovereignimmunities.authcheckdam.pdf>.

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The ABAWG went further and recommended doing away with the separate regimes of immunity for adjudicative and execution immunity. The ABAWG suggested the *FSIA* would be improved by simply providing that a state be considered not immune from execution where the judgment relates to a claim for which the state has no adjudicative immunity, so long as execution does not contravene any arbitral agreement between the parties.[65] However, these recommendations were not adopted. Other than a 2008 amendment to section 1610(a)(7) — the provision removing immunity for claims arising out of torture — section 1610 of the *FSIA* remains the same as in 1999.[66]

Cases

A review of recent cases citing section 1610 reveals that the execution immunity mountain facing creditors remains as unscalable as ever. In *EM Ltd. v Banco Central de la República Argentina*, the court held that the state's use of a New York bank account was "too incidental to the gravamen of the plaintiffs' claim" to allow reliance on the commercial exception to immunity.[67] In *EM Ltd.*, the court further found that the property was held not by Argentina but, rather, by an instrumentality of Argentina. Citing reciprocity and respect for sovereignty, the court reinforced that government instrumentalities should be treated as "entities distinct and independent from their sovereign." The court also reproduced comments from *First National City Bank v Banco Para El Comercio Exterior de Cuba*: "Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee."[68]

In *Ladjevardian v Republic of Argentina*, funds were irrevocably assigned to the Bank of New York Mellon as a settlement trustee, with a contingency plan that the funds return to Argentina. Applying the *FSIA*, the court considered that the funds were not "used" by Argentina and, therefore, could not fall within the commercial exception to immunity.[69] Similarly, in *Export-Import Bank of China v Grenada et al*, the court held that funds

[65] *Ibid.*

[66] *FSIA*, *supra* note 53, § 1610(7)(a).

[67] *Em Ltd v Banco Central de la Republica Argentina*, 800 F(3d) 78 (2d Cir 2015), petition for writ of certiorari dismissed, 136 S Ct 1731 (2016) [*Em*].

[68] *First National City Bank v Banco Para El Comercio Exterior de Cuba*, 462 US 611 (SC 1983) at 626; *EM*, *supra* note 67 at 89.

[69] *Ladjevardian v Republic of Argentina*, 2016 US Dist Lexis 69348 (SDNY), affirmed 2016 US App Lexis 18731 (2d Cir NY).

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owed by commercial third parties to Grenadian statutory corporations fell outside the *FSIA*'s commercial exception as the statutory corporations were devoted to carrying out public functions in Grenada.[70] The court did remit the matter to the lower court to determine whether greater discovery should be permitted to establish the factual foundation, stating:

> In [*EM Ltd. v Republic of Argentina*, 695 F(3d) 201 (2d Cir 2012)], we upheld the district court's grant of post-judgment discovery related to assets held at third-party banks in the United States by judgment-debtor Argentina. 695 F.3d at 204-05. In so doing, we concluded that judgment creditors need not satisfy the "stringent requirements for attachment" under the FSIA "to simply receive information about [a sovereign's] assets." *Id.* at 209. We also noted that discovery of information related to assets held by third-party banks did not infringe Argentina's sovereignty even if those assets ultimately proved immune from attachment: "Once the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party, including ordering third-party compliance with the disclosure requirements of the Federal Rules." … The Court emphasized the absence of any FSIA provision "forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets," and endorsed an approach to discovery — once jurisdiction over the foreign sovereign has been established, as it has here — more generally consonant with the Federal Rules of Civil Procedure.[71]

Clearly, the *FSIA*'s stringent presumption of execution immunity remains entrenched. The first two lag factors discussed above — that is, greater concern for sovereignty in the context of execution immunity and concern for foreign relations — continue to inform decision-making by US courts.

In *Republic of Argentina v NML Capital, Ltd.*, the Supreme Court of the United States considered whether the normally permissive post-judgment discovery rules should be altered when the judgment debtor is a foreign state.[72] NML had successfully received judgments in New York against Argentina for a total of US $2.5 billion. The judgment went unpaid. NML issued subpoenas on two banks, seeking documents and information relating to Argentina's accounts. Argentina and one bank sought to quash the subpoena. The US District Court denied the motion to quash and granted motions to compel, approving the subpoenas in principle.[73] The US Court of Appeals for the Second Circuit affirmed, granting certiorari.[74]

[70] *Export-Import Bank of China v Grenada et al*, 768 F(3d) 75 (2d Cir 2014).

[71] *Ibid* at 92–93.

[72] *Republic of Argentina v NML Capital, Ltd*, 134 S Ct 2250 (2014) [*NML*].

[73] *NML Capital, Ltd v Republic of Argentina*, 2011 WL 3897828 (SDNY).

[74] *EM Ltd v Republic of Argentina*, 695 F(3d) 201 (2nd Cir 2012).

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The Supreme Court explicitly considered the origins of the *FSIA*, commenting on the grace and comity involved in grants of immunity.[75] The court noted that the *FSIA* contains no provision that limits discovery in aid of execution.[76] The court thereupon found that the *FSIA* did not contain the "plain statement" necessary to displace federal discovery rules.[77] Justice Antonin Scalia rejected Argentina's argument that silence should equate to a return to the absolute immunity present before the introduction of the *FSIA*.[78] The court was careful to note that there is no right to discovery relating to assets that could not possibly be executable to satisfy the judgment, such as diplomatic property or extraterritorial property.[79] However, the court explained that the creditor would be barred from asking about such property not because of any immunity from discovery but, rather, because these properties were simply not relevant to the execution.[80] The court declined to determine whether Congress intended to leave a gap in the statute.[81] In noting the parties' concerns for foreign relations, the court suggested those concerns be directed to Congress.[82] In the result, the court approved the lower court's discovery order. While *NML* clarifies the role of discovery in the execution process, it is unclear what impact this will have on creditors' ability to prove that an asset is in use for commercial purposes. It does not displace the high bar the *FSIA* requires to rebut the presumption of immunity from execution.

UNITED KINGDOM

Legislation

The United Kingdom enacted the *State Immunity Act 1978* (UK *SIA*) in 1978.[83] With regard to execution immunity, section 13 of the UK *SIA* provides:

(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.
(2) Subject to subsections (3) and (4) below —

[75] *NML*, *supra* note 72 at para 3.

[76] *Ibid* at para 8.

[77] *Ibid*.

[78] *Ibid* at para 9.

[79] *Ibid*.

[80] *Ibid*.

[81] *Ibid*.

[82] *Ibid* at para 10.

[83] *State Immunity Act 1978* (UK), c 33 [UK *SIA*].

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(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
(b) *the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award* or, in an action *in rem*, for its arrest, detention or sale.

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.
(4) Subsection (2)(b) above *does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes*; …
(5) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, *his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.* [Emphasis added]

A state may adduce a certificate that the property is not for commercial purposes, though it is not compelled to do so. The certificate will satisfy the court unless the creditor can provide evidence to the contrary. The bar for a creditor to meet is clearly lower where there is no certificate. In those cases, the creditor is more likely to be successful. While, at first glance, this seems reason for hope, in the preponderance of cases, a state will adduce a certificate to bar that result.[84]

Cases

The first major decision on the interpretation of the UK legislation came in *Alcom Ltd. v Republic of Colombia*, wherein a judgment creditor sought execution of the bank account of the diplomatic mission of Colombia. Lord Diplock provided in *Alcom* that bank accounts were "not subject to anticipatory dissection into the various uses to which the funds might be put in the future."[85] Such an account (which was the subject of the ambassador's certificate that the funds were not used for commercial purposes)

[84] *Orascom, supra* note 6; *SerVaas, supra* note 6.

[85] *Alcom, supra* note 27 at 604.

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would only be capable of execution if it were earmarked by the state exclusively for commercial purposes.[86]

Lord Diplock's reading of the UK *SIA* was extremely narrow. The lag factors cited above as reasons for the slow progress of execution immunity plainly influenced the court's decision in *Alcom*. The role of embassies in facilitating foreign relations, in particular, played a role in the conservative approach he took with respect to statutory interpretation. Lord Diplock was no doubt attuned to the heightened deprivation of sovereignty involved in an execution order, stating the order could "gravely hamper" the functioning of the diplomatic mission.[87] In holding that any account with mixed uses cannot be attached,[88] and confirming that the onus is on the creditor to rebut the presumption of immunity,[89] Lord Diplock set a very high bar that would set the stage for the low success rate of future creditors.

While the *Alcom* case concerned a diplomatic bank account, which attracts greater deference at international law than other types of state bank account, this distinction appears to have been lost, and the ruling has prevented execution against state bank accounts in most circumstances. One of the only (if not the only) UK case where a creditor was successful in attaching a state bank account was *Orascom v Republic of Chad*.[90] *Orascom* involved a London bank account of Chad. Chad's oil revenues flowed through several accounts for the purposes of first discharging loans to the World Bank and then for general use in the management of the economy. The World Bank required that all of Chad's oil revenues be paid directly into an escrow account at Citibank in London. The High Court of England and Wales held that the account's purpose was to receive proceeds of a contract for supply of goods or services and/or as part of a system for repayment of loans made by the World Bank, each of which constituted a commercial purpose.[91] The fact that separate bank accounts were used for these distinct purposes allowed the court to conclude that the account at issue was used exclusively for commercial purposes and, therefore, to allow attachment of the account.[92]

[86] *Ibid* at 604.

[87] *Ibid* at 597.

[88] *Ibid* at 604.

[89] *Ibid*.

[90] *Orascom*, *supra* note 6; see also *EM Ltd v Republic of Argentina*, 473 F(3d) 463 (2d Cir 2007).

[91] *Orascom*, *supra* note 6 at para 23.

[92] *Ibid*. It should be noted that *Orascom* involved an order made to Citibank to produce information relating to the account, including its balance and certain recent transfers (at para 9). The broad discovery of the bank account likely also assisted the court in concluding the account was subject to attachment.

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The Supreme Court of the United Kingdom considered these issues in *SerVaas Inc. v Rafidian Bank and Others*, a summary proceeding arising from debts incurred when Saddam Hussein's reign ended.[93] In *SerVaas*, the parties agreed that a certificate tendered by the Iraqi ambassador created a rebuttable presumption that the funds in question were not used for commercial purposes. The question in that case was whether SerVaas could show "any real prospect" of rebutting the presumption. The UK Supreme Court reviewed the certificate of the head of the Mission of the Embassy of Iraq and concluded that the dividends were held by Iraq to replenish the Development Fund for Iraq, "which is manifestly not a commercial purpose … [and not] a mercantile or profit-making activity by Iraq."[94] The purpose of the dividends, therefore, did not fall within the commercial purposes exception, and they could not be executed against.[95]

While, on its face, the UK legislation seems to offer creditors a reasonable chance of success at execution, the rebuttable presumption that state property is immune from execution, combined with the facts that the ambassador's certificate of purpose of funds is conclusive proof unless the opposite is proved and that the ambassador cannot be cross-examined, creates what is tantamount to an unwinnable battle for creditors.[96] The severity of the burden is borne out by the paucity of UK decisions in which a creditor has been successful in attaching funds. Notably, distinct from the UK legislation, the Canadian *SIA* contains no provision that a certificate from the ambassador will be sufficient or conclusive evidence of the purpose of the funds. The Canadian *SIA* only provides, at section 14, that the certificate of the Canadian minister of foreign affairs will be conclusive proof that a country is a foreign state, that a particular person is a representative of that state, and that service was or was not effected properly on the foreign state.[97] As a result, the respective evidentiary burdens of the parties to an execution immunity dispute in Canada remain unclear.

AUSTRALIA

Legislation

As a means of mitigating the onerous task creditors face in amassing evidence that state assets are in use, or intended for use, for commercial purposes, the Australian *Foreign States Immunities Act* provides at section 32:

[93] *SerVaas*, *supra* note 6.

[94] *Ibid* at para 32.

[95] *Ibid* at paras 32–33.

[96] Fox & Webb, *supra* note 11 at 213.

[97] *SIA*, *supra* note 8, s 14.

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Execution against commercial property

(1) Subject to the operation of any submission that is effective by reason of section 10, section 30 does not apply in relation to commercial property.
(2) …
(3) For the purposes of this section:

 (a) commercial property is property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes; and
 (b) property that is apparently vacant or apparently not in use shall be taken to be being used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.[98]

The key component of this provision for the purposes of this article is section 32(3)(b), which flips the onus in favour of the creditor where property appears to be not in use.

Cases

The highest court in Australia recently had occasion to review this provision in *Firebird Global Master Fund II Ltd v Republic of Nauru*.[99] Following Nauru's abolition of bonds held by Firebird and guaranteed by Nauru, Firebird obtained judgment in Tokyo for 1,300 million yen against the Republic of Nauru. Firebird then applied to the Supreme Court of New South Wales and obtained an order for recognition and enforcement of the Japanese judgment.[100] Nauru applied to have the order (as well as a garnishee order that Firebird had obtained in the meantime) set aside, on the grounds that Nauru was entitled to adjudicative immunity and execution immunity. The Supreme Court of Australia ruled in favour of Nauru, and Firebird appealed. The Court of Appeal, and later the High Court of Australia, reviewed these issues along with the issue of whether Firebird had properly served Nauru with the orders obtained and whether certain provisions of Australian legislation had been impliedly repealed. Only the execution immunity issue is relevant here.

At the Court of Appeal, Chief Justice Thomas Bathurst held that all accounts except for a term deposit account were in use. The court relied on the certificate adduced by Nauru and Nauru's further evidence in holding that the accounts were for sovereign purposes. Bathurst CJ went on to

[98] *Foreign States Immunities Act 1985* (Cth), s 32.

[99] *Firebird, supra* note 6.

[100] *Firebird Global Master Fund II Ltd v Republic of Nauru*, [2014] NSWSC 1358.

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find that the certificate Nauru had produced was sufficient evidence that the funds were set aside by the government for non-commercial purposes, which rebutted the presumption that the funds were not in use.[101] The certificate was tendered by the ambassador for Nauru, and it set out the source of the funds and the purpose for which the monies had been and would be used. This was enough, the court held, to draw an inference as to the purpose of the funds.[102]

At the High Court of Australia, Firebird argued that the funds in the term deposit fell within the confines of section 32(3)(b). In this regard, the High Court stated:

> Firebird submits that, of its nature, money in a bank account is not "in use". It submits that a bank account can only be said to be "in use" to earn interest, as in the case of a term deposit, to act as security or to be drawn upon. A credit balance is an inseverable item of property which cannot be characterised by past or intended future drawings.
>
> …
>
> The words "in use" are not to be taken to refer to particular uses to which bank accounts may be put for the benefit of the account holder. They are used to distinguish accounts in which monies may be idle, as where a foreign State sets funds aside. In such a case, the purpose of the accounts cannot be readily discerned from the use to which they are put and it would be a simple enough matter for a foreign State to assert that they were intended for future government purposes. For these reasons, s 32(3)(b) creates the presumption that they are being used for commercial purposes and requires the foreign State to show that they were set aside other than for those purposes.[103]

The High Court found no reason to interfere with the conclusions reached by Bathurst CJ and, in particular, did not accede to Firebird's submission that something beyond evidence of intent was necessary (such as an administrative decree).[104]

Without the opportunity to cross-examine the source of the government's certificate, or another court-enforced form of discovery, it is difficult to see how the creditor could have gathered evidence to rebut the presumption of immunity. The fourth lag factor — that is, the practical difficulty of obtaining evidence with which to rebut the presumption — is in full effect here. With regard to the test for determining whether the various accounts were used "for commercial purposes," Firebird argued that "if the activity

[101] *Firebird*, *supra* note 6 at para 106.

[102] *Ibid* at para 117.

[103] *Ibid* at paras 105–07.

[104] *Ibid* at para 109.

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in question is properly characterised as commercial, the accounts are used for commercial purposes."[105] Nauru, on the other hand, argued that the court should look at "the reasons, objectively, why the property is in use in order to determine whether it is in use substantially for commercial purposes."[106] The High Court agreed with Nauru, citing statutory construction and particularly the desire to avoid problems caused by reverting to the "nature of the transaction" test (which is the test used for adjudicative immunity).[107] It held that a purchase of goods for running a government will be considered a sovereign purpose, despite the commercial nature of the transaction.[108]

The Nauru certificate provided that the term deposit was held as a cash reserve for future government services. Despite Firebird's complaints regarding the interest-bearing nature of the account, the High Court held that earning interest did not detract from the governmental purpose.[109] Firebird also characterized the accounts for aircraft leasing and fuel as being accounts held for a commercial purpose. The certificate, on the other hand, provided that the funds were for the procurement of aircraft and fuel for Nauru's government-run airline, which the government must necessarily operate because private airlines do not find it commercially viable to operate in Nauru.[110] The High Court held that "[e]vidence of this kind is relevant and necessary in order to understand that what might otherwise be thought to be a commercial enterprise is in fact no more than the provision of essential services to those resident in a foreign State by its government."[111] Since the court held that the certificate determined that all impugned accounts were for governmental and not commercial purposes, Firebird was unsuccessful in obtaining execution on the judgment.

While the result did not favour the creditor, the court engaged with the evidence provided by both parties. The court received and weighed more evidence from Nauru than is typical in the jurisprudence. Justices Geoffrey Nettle and Michelle Gordon, in their concurring judgment, particularly commented that Nauru's certificate provided sufficient evidence to persuade the court of a governmental purpose for the impugned property.[112] The inquiry into this evidence is an entry point to displacing immunity. This entry point, while admittedly slim, is one that is not available in

[105] *Ibid* at para 113.

[106] *Ibid* at para 114.

[107] *Ibid* at para 116.

[108] *Ibid.*

[109] *Ibid* at para 119.

[110] *Ibid* at para 123.

[111] *Ibid* at para 125.

[112] *Ibid* at para 255.

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most jurisdictions. Another lag factor that may have influenced the court is the political asymmetry of the parties. Nauru's financial difficulties demanded greater deference than would those of a private actor because of the potential impact on Nauru's citizens. Greater deference to states in similar circumstances is warranted because states do not benefit from the insolvency protections in the way that commercial entities do.

Ongoing Tensions between Sovereignty and the Rule of Law

The conflict between respect for state sovereignty and the rule of law remains a central tension in the development of execution immunity.[113] Concerned about preserving sovereignty, the Brussels Court of Appeal in *Iraq v Vinci Constructions* held:

> To require proof of the allocation of funds to be the responsibility of the State against which attachment is sought would be contrary to the very principle of immunity that, by definition, establishes a presumption in favour of the State that enjoys immunity. The imposition of a duty on a State to prove systematically and at any moment that it is indeed entitled to rely on its immunity would in practice exclude reliance on its immunity.[114]

Contrast the above with the dire warning issued over two decades ago by the Advocate General in *Eurodif Corporation et al. v Islamic Republic of Iran et al.*:

> It is, therefore conceivable that, in practical terms, the result will be tantamount to a return to the absolute nature of immunity from execution. No measure of execution can be taken against funds which have been declared to be public except in the unlikely event that the foreign government waives its immunity from execution.
>
> …
>
> The absolute nature this immunity would acquire in such circumstances would constitute a step backward to the time when governmental activity was confined to acts of public authority. It would be irreconcilable with the current developments in international trade in which the role played by governments and agencies created by them is significant. It would seriously endanger the security of international economic relations if governments could, merely by remaining silent, protect themselves from any measure of execution aimed at compelling respect for governmental commitments.[115]

[113] Fox & Webb, *supra* note 11 at 612.

[114] *Vinci Constructions, supra* note 32 at 106.

[115] *Eurodif Corporation et al v Islamic Republic of Iran et al* (1984), 23 ILM 1062 at 1067 (French Court of Cassation).

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These two statements exemplify the tense conflict between two interests that lie at the heart of international law: the sovereign equality of nations[116] and respect for the rule of law.[117] Execution immunity shines a light on the competition between these interests. Often the perfect balance is elusive —one comes at the expense of the other. Refusing to enforce a valid judgment for debt may respect sovereignty, but in doing so, thwarts the rule of law. Judges tasked with resolving this dilemma are in an unenviable position, especially since courts of first instance receive little guidance on how to make a determination on whether an asset is subject to execution.

Simply put, sovereignty demands that host states refrain from interfering with a foreign state's public assets. As it stands, however, creditors who have secured a valid judgment against a state face almost insurmountable odds in trying to obtain satisfaction. Much of the jurisprudence reviewed above pits any evidence that a creditor is able to obtain (which ability is inherently limited by other immunities at international law) against a certificate from the state declaring, without particularization, that the asset is used for a sovereign purpose. Placing the entire evidentiary burden on creditors, with no requirement that a state particularize its claim or participate in the discovery process, essentially duplicates the presumption of immunity.

With the framework as it is, the likelihood of rebutting the presumption of immunity is very low. The current framework means that states will succeed in avoiding debts with impunity. The many recent cases reviewed above demonstrate that the problem of defaulting states persists. Some might argue that states should be entitled to not pay their debts, and private parties should assume the risk of default whenever contracting with a state. There are certainly situations that warrant this approach — for example, in situations where a state is facing bankruptcy or otherwise cannot afford to pay for basic support for its citizens. This reflects the fourth lag factor referenced above — namely, that developing nations do not have the luxury of insolvency protections that corporations receive, and, accordingly, there should be greater deference to their sovereign responsibilities. However, these situations should be dealt with separately and directly. Incorporating this concern into the overall framework for execution immunity minimizes the importance of providing accommodation to deserving states, while also providing unwarranted latitude to undeserving states. States should be entitled to make this plea explicitly, by way of their certificates claiming immunity. Deference should be afforded to these states where appropriate.

[116] SW Armstrong, "The Doctrine of the Equality of Nations in International Law and the Relation of the Doctrine to the Treaty of Versailles" (1920) 14:4 AJIL 540.

[117] Teitel, *supra* note 37.

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Where the state claiming immunity is financially stable, and where enforcement of a debt would not threaten its ability to meet the basic demands of its citizens, there is no reason why a private party should assume the risk of its contracting partner abandoning its legal obligations. Although the equality and sovereignty of states remains an intrinsic pillar of the international order, there is nevertheless room to improve the lot of creditors and more clearly delineate a court's role in resolving enforcement disputes between states and creditors.

The Evidentiary Threshold for Immunity

In describing the reticence of courts to allow execution against state assets, Xiaodong Yang writes:

> Courts have displayed remarkable caution and restraint with respect to enforcement and execution against foreign State property, and even those most liberal in exercising their jurisdiction of adjudication have treated the issue with circumspection, and have taken meticulous care to ensure that measures of constraint are allowed only in the most indisputable cases where the least possible hassle and hindrance is caused to the defendant foreign State in performing its public functions.[118]

One reason for courts' circumspection could be the absence of guidance as to how to determine when a finding of an exception to immunity is appropriate.

While international law sets out a presumption of immunity for sovereign state-held assets and puts the burden of proof of commerciality on creditors, it does not address the evidentiary threshold required to rebut the presumption nor how a creditor may obtain the evidence with which to meet its onus. [119] These issues are left to domestic law. For example, as seen above, the UK legislation provides that a certificate of the ambassador of the foreign state that any state property is not in use or intended for use for commercial purposes is not conclusive but only constitutes "sufficient evidence of that fact, unless the contrary is proved."[120]

In five major international decisions that followed the *Philippine Embassy Bank Account* case, the ambassador's statements that property was in use for governmental purposes was taken as conclusive proof, despite the fact that the ambassador's statements were unparticularized and unsupported

[118] Yang, *supra* note 9 at 421.

[119] Reinisch, *supra* note 20 at 831–33.

[120] *SIA*, *supra* note 8, s 13(5); see also Fox & Webb, *supra* note 11 at 506.

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by evidence.[121] For example, in *Z. v Geneva Supervisory Authority*, the court relied on diplomatic notes asserting a state purpose. The plaintiff in that case argued that, in practical terms, the onus on him to contradict these notes, absent the ability to compel discovery, makes execution impossible. The court acknowledged that the creditor's task was difficult but suggested it might be possible to deduce the intended purpose of an asset from known activities of the state.[122]

The problem with this holding is that, in practice, evidence about the intended allocation of funds is almost never available. A state's activities rarely, if ever, make clear what the intended purpose of a specific bank account is. Although one might attempt to elicit this evidence by cross-examination of a state representative or ambassador, diplomatic personnel cannot be compelled to participate in a proceeding because of the protections in the *VCDR*.[123] Herein lies the problem with placing the entire evidentiary and persuasive burden on the creditor. In purely domestic disputes, a creditor can compel a bank to provide evidence of the types of transactions taking place in a particular account or compel a company representative to provide evidence on the company's intent with regard to a certain fund or piece of investment property.[124] This evidence would allow the court to deduce the intended use of the asset, as contemplated in *Geneva Supervisory Authority*. However, when the debtor is a state, the creditor loses these mechanisms to compel discovery. Without these mechanisms, or clear, publicly available evidence that the state-held asset is for a commercial purpose (which would be very unusual), the creditor is bound to fail.

Paths Forward: A Proposal for Change

incorporating the air-of-reality test into claims for immunity

A solution for mitigating the difficulty creditors face when executing against states is to expand the evidentiary burden on states. I suggest drawing

[121] *Philippine Embassy*, *supra* note 18; *Alcom*, *supra* note 27; *Banamar*, *supra* note 32; *Foxworth*, *supra* note 45; *Z v Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy* (1990), 102 ILR 205 (Tribunal fédéral Suisse) [*Geneva Supervisory Authority*]; *Netherlands v Azeta BV* (1998), 128 ILR 688 (Dist Ct Rotterdam) [*Azeta BV*].

[122] *Geneva Supervisory Authority*, *supra* note 121 at 207; see also *Vinci Constructions*, *supra* note 32 at 105.

[123] *VCDR*, *supra* note 30.

[124] See British Columbia, *Supreme Court Civil Rules*, r 13-4; Manitoba, *Court of Queen's Bench Rules*, r 60.17; New Brunswick, *Rules of Court*, r 61.14; Nova Scotia, *Civil Procedure Rules*, r 79.23; *Ontario Rules*, *supra* note 60, r 60.18; Prince Edward Island, *Rules of Civil Procedure*, r 60.19 [*PEI Rules*]; Saskatchewan, *Queen's Bench Rules*, part XXXI; Northwest Territories, *Rules of the Supreme Court of the Northwest Territories*, r 512; Yukon, *Rules of Court*, r 45.

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from the Canadian criminal law context. There, the onus of proof clearly rests with the prosecution. Nevertheless, certain defences require the accused to put forth evidence demonstrating that the defence has an air of reality.[125] This burden on the accused is evidential but not persuasive.[126] The distinction between evidentiary and persuasive burdens is key. The air-of-reality test requires the accused to show, either by adducing new evidence or by pointing to evidence already on record, that the defence "rests upon an evidential foundation warranting that it be put to a jury."[127] In other words, if believed, a reasonable jury properly charged could acquit the accused on the basis of the defence. Applying this to the execution immunity context, the test could be: does the state's claim of immunity rest on an evidential foundation that, if believed, would be sufficient to establish that the targeted property is in use or intended for use for a sovereign non-commercial purpose?

If incorporated into the execution immunity context in appropriate circumstances — that is, where the asset in question appears to be not in use or appears to have a commercial purpose, the air of reality test would improve the ability of creditors to rebut the presumption of immunity. Yet, as the persuasive burden remains on the creditor, sovereignty would not be infringed. Using an air-of-reality test, a foreign state would not be required to adduce any evidence. The state could point to evidence already before the court, avoiding sovereignty concerns that requiring proof of allocation of funds would exclude reliance on immunity.[128] Since the onus is an evidentiary not a persuasive one, the state would have no obligation to persuade the court that its funds were allocated for a particular purpose. It would only need to point out evidence that supported a suggestion that the funds are for a sovereign purpose.

For greater certainty, the circumstances in which the air-of-reality test would apply — that is, property that appears vacant or in use for commercial purposes — would exclude any property that appears to fall into the five categories of property listed in Article 21 of the *State Immunity Convention*:

(a) diplomatic property, including bank accounts used or intended for use in the performance of the functions of the State's embassy, consulates, or other missions;
(b) military property;
(c) property of the central bank of the State;

[125] *R v Cinous,* 2002 SCC 29, 210 DLR (4th) 64 [*Cinous*].

[126] *Ibid* at para 52; *R v Schwartz,* [1988] 2 SCR 443 at 466.

[127] *Cinous, supra* note 125 at para 60.

[128] *Vinci Constructions, supra* note 32.

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(d) cultural heritage property or part of a State's archives; and
(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

For real property, the "apparently vacant" test is sufficiently clear: property that is vacant would be open to attachment, unless the state raises an air of reality to the contrary. For intangible property, the "apparently vacant" test creates some confusion. Instead, the test could be formulated as "apparently available for commercial use." This formulation would include bank accounts that are not actively in use but that have not been set aside for any sovereign purpose. States would continue to be free to express the purpose for funds by earmarking an account for a specific (sovereign) purpose.

The court in *Alcom* required funds to be earmarked for a commercial purpose in order to displace the presumption of immunity.[129] I propose the converse: that funds not earmarked for a sovereign purpose be considered apparently available for commercial use. The earlier review of state practice is clear evidence that the *Alcom* test is so stringent as to be insurmountable for creditors in almost every case. The time is ripe to consider a change. With the "apparently-vacant" or "apparently-available-for-commercial-use" tests, the court would review any evidence (including a diplomatic certificate, if tendered) to determine whether there is an air of reality to the claim that an asset is being used for a governmental purpose, as in *Firebird*. If so, the onus would be on the creditor to prove (on a balance of probabilities) that, in fact, the asset was used for commercial purposes. If not, the asset would not be immune, and the creditor could proceed with execution.

COMPLEMENTING DISCOVERY RIGHTS

Requiring a modicum of information from states would also be a reasonable way of addressing the typical power imbalance between states and their creditors. It would also have the benefit of complementing rights of discovery for jurisdictions like the United States that have been willing to allow broader rights of discovery in relation to execution against foreign state assets.[130] Empowering creditors to conduct discovery of non-sovereign assets would allow courts to make decisions about the presumption of immunity with better information. If, following the post-judgment discovery process, a state asserts that certain assets are for a sovereign purpose, it would have to demonstrate an air of reality to that claim. This would facilitate discovery since it would prevent states from taking an

[129] *Alcom, supra* note 27 at para 604.

[130] See *NML, supra* note 72.

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obstructionist approach. The state would know that it will be required to demonstrate some ground for its claim in court, so it would be less likely to make that claim in unsupportable circumstances. Similarly, the creditor might have more confidence in a state's claim of sovereign purpose if both parties knew the court would not accept an unsupported assertion of sovereign purpose as dispositive proof of immunity.

Certainly, the question of mixed accounts weighs heavily here. This article argues that a state would only be required to show an air of reality to an assertion its property is used for governmental purposes, and the creditor would next need to show that the property is for commercial purposes. The extent of commerciality required to rebut the presumption of state immunity is a question for another article. This question is not reserved to the international law sphere, however. Domestically, a solution to the problem has been less elusive. In cases of jointly held domestic bank accounts, for instance, a debtor has been presumed to hold 50 percent of the account.[131]

Some might say that even were this evidentiary requirement imposed, states would simply provide an ambassador's certificate stating the purpose of funds is governmental and non-commercial. While that outcome is certainly possible, courts may find such a certificate does not sufficiently particularize the intended use of the asset. While *Firebird* was ultimately decided in favour of the state, the Australian legislative framework meant that the court was at least able to weigh the evidence, something that would not be possible in many jurisdictions.

Improving Adherence to the Rule of Law without Infringing Sovereignty

Many of the cases discussed above may have been decided differently if the air-of-reality test discussed above had been applied. In particular, in cases such as *Netherlands v Azeta BV*, *Geneva Supervisory Authority*, and *SerVaas*, in which states relied on a bare and unparticularized assertion of sovereign purpose, the creditor would have had a better chance of rebutting the presumption of immunity.[132] Where it appeared that a state was hiding behind its immunity improperly and without any real basis, the court could conclude the state had not shown an air of reality to its claims.

Both a strength and a limitation of the air-of-reality proposal is the limited property that would actually fall within the apparently vacant or apparently commercial category and thus receive the benefit of the test. The advantage of this approach is that the category is narrow enough not

[131] *Ontario Rules*, *supra* note 60, r 60.08(1.1); *PEI Rules*, *supra* note 124, r 60.09(1.1).

[132] *Azeta BV*, *supra* note 121; *Geneva Supervisory Authority*, *supra* note 121; *SerVaas*, *supra* note 6.

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to unduly encroach on sovereignty. The disadvantage is that much state-owned property does not appear vacant or commercial. State property is often designated for a purpose that would appear, at least facially, governmental. Despite these drawbacks, the narrow category is still a step forward from the current framework for execution immunity. Its narrowness may also be an advantage because, in the slow-moving international law realm, incremental changes are often more likely to be successful than drastic ones.

Measuring the Proposal Using the Lag Factors

The proposed framework clarifies the role of courts in the execution process. Currently, Canadian courts are left without much guidance on how to go about balancing the tension between infringement on sovereignty and the risk of a foreign relations backlash with the rights of creditors. It is unrealistic to expect a domestic court to undergo a review of the most recent international law each time this issue arises. Introducing a standard from criminal law, with which courts are familiar, has the advantage of being accessible for the judiciary. The proposal seeks to mitigate the third lag factor without improperly encroaching on sovereignty. The first two lag factors are, from a judicial perspective, intractable. Judicial concern for potential impacts on foreign relations and the degree of interference on sovereignty posed by execution is likely to persist. However, evidentiary barriers are more pliable. The proposed air-of-reality framework may therefore be a more feasible way of combatting the lag factors.

Conclusion

Before concluding, it is useful to recall again the comparison between the domestic and international execution processes. Domestic creditors are able to obtain a substantial amount of information about a debtor's financial affairs through the judicial system. The creditor has wide access to the debtor's financial information, which can later be used as the basis for a garnishment order. Creditors receive support in the form of clear legislative guidance to courts on how to assess ownership. The threat of contempt further encourages the debtor to comply with the information-gathering process.

In litigation against debtor states, the creditor's position is much the reverse. The creditor has no access to the state's financial information, except for information gleaned from its own relationship with the debtor state or from information that is on the public record. There is no way to compel the foreign ambassador to participate in the information-gathering process. There are no consequences for non-compliance. The proposed framework would bring the enforcement process against states just a hair closer to the domestic regime. The court would be able to conclude that

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an asset is used for commercial purposes unless there is an air of reality to the contrary. Requiring a state debtor to point to evidence of non-commerciality would not move the balance of power in execution towards creditors much, but would still be a productive step towards sustaining the integrity of dispute resolution between states and private parties. It would bring the execution process closer to the rule of law.

The creditor of a debtor state is not a mere litigant; she already has a valid judgment against the state. The targeted state property is property that is located outside that state and does not include military or diplomatic property. It is reasonable to expect a state to consider the possibility of attachment when it holds assets in a foreign state. There may be a good reason for the placement of the asset, but if not for a diplomatic, military, or otherwise apparently governmental purpose, it is reasonable to consider that the state may have placed property there to obtain a commercial benefit. In those circumstances, asking the state to point to evidence of the property's sovereign purpose is reasonable too.[133]

On a purely functional level, a system more analogous to the domestic scheme would be clearer and more familiar for the judiciary and might in turn lead to greater implementation of the restrictive approach. Courts would still face difficult choices. Courts would have to decipher whether property is apparently vacant or apparently in use or available for use for a commercial purpose. Additionally, courts would be tasked with assessing when the air-of-reality test is made out. However, these tasks would be well within the judiciary's purview. Greater clarity would improve conditions for both states and private parties as litigation would be less protracted and parties could be better prepared.

Canadian creditors should not come to believe that their judicial system provides no avenue for recourse when debts held by foreign states go unpaid. Debt collection, though never easy, should still be feasible. Similarly, Canadians doing business abroad should feel confident that states will be held to their legal obligations, whether those obligations arise from a contract or from trade treaties like the *CPTPP*, *CETA*, and *NAFTA*. Adopting a model that supports the rule of law would send a message to all Canadians that Canada stands behind them.

[133] Ostrander, *supra* note 46 at 578: "[W]hen a state enters the commercial arena, it takes on the persona of a private actor and must face all of the ensuing limitations and responsibilities."

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