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## Quick Answers on State Immunity – Sweden

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### Jurisdiction of National Courts Regarding States and Connected Persons

#### Persons Entitled to Immunity from Jurisdiction

##### Are foreign sovereign states and connected persons entitled to assert immunity from jurisdiction in civil court proceedings?

Yes, a sovereign State may, as a matter of general principle, claim immunity from jurisdiction in Swedish civil law proceedings. However, this immunity is not unlimited, and exceptions are generally made in relation to commercial actions taken by a state ('acta jure gestionis').

##### What is the legal foundation for immunity from jurisdiction of foreign sovereign States and connected persons in civil court proceedings (e.g., legislation, code, case law, international treaty)?

There is no general legislation in Sweden concerning immunity of foreign sovereign States and connected persons. However, certain areas of State immunity have been regulated in Swedish law. The Act on Foreign State-Owned Ships and other matters from 1938 implements the 1926 Brussels Convention on State-owned vessels (Lag (1938:470) med vissa bestämmelser om främmande statsfartyg m.m.). There is also a statute from 1939, the Act on the Exemption of Certain Aircraft from Attachment and Injunction, implementing the Rome Convention.

As regards diplomatic immunity, Sweden has implemented the 1961 and 1963 Vienna Conventions and various other treaties concerning diplomatic immunities. The 1961 and 1963 Vienna Conventions have been implemented through sections 2 and 3 in the Act (1976:661) on Immunity and Privileges in Certain Cases (Lag (1976:661) om immunitet och privilegier i vissa fall).

Sweden has also ratified the United Nations Convention on Jurisdictional Immunities of States and their Property and the Swedish Parliament has approved an Act incorporating the Convention into Swedish law, see the Act (2009:1514) on Jurisdictional Immunity of States and Their Property (Lag (2009:1514) om Immunitet för stater och deras egendom). However, the Convention is not yet in force and neither is the Swedish Act. The Act will enter into force the day the Swedish Government so decides.

As regards immunity in civil court proceedings in general, the legal foundation is therefore still case law. Existing case law is relatively limited and does not address all aspects of State immunity in existing international State practice. That being said, State immunity has since long been recognized and applied as a matter of international customary law by the courts.

##### How is the concept of a 'state' defined for these persons?

In Sweden, there is no general definition of the concept of a 'State'. Instead, the traditional criteria for what constitutes a sovereign and independent State under international law – that is, that there is a defined territory, a permanent population and a government that maintains efficient control over the territory and the relation to other States – have been applied. As a matter of applying international customary law, Swedish law appears to recognize the following persons to enjoy State immunity:

(1) the sovereign or other head of that State; (2) the government of that State; (3) any department of that government; (4) foreign diplomatic officials and the staff of a foreign embassy, including their families and service staff as well as diplomatic couriers, see section 2 of the Act (1976:661) on Immunity and Privileges in Certain Cases, implementing the 1961 Vienna Convention; (5) foreign State consulates and the staff of the consulate including their families and service staff, and couriers (with some exceptions), see section 3 of the Act (1976:661) on Immunity and Privileges in Certain Cases, implementing the 1963 Vienna Convention; and (6) certain foreign state vessels (see the travaux préparatoires to the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, Governmental Bill 2008/2009:204, p. 38, SOU 2008:2, p. 49, and legal doctrine, Eek, Bring and Hjerner, *Folkrätten*, pp. 393f).

##### What other persons, connected to a foreign State but falling outside the definition of a 'State', are entitled to assert immunity from jurisdiction?

There is no general legislation governing which persons may enjoy State immunity in Sweden. A foreign sovereign State may, however, as a matter of customary law, claim protection for persons representing it with respect to acts that such persons perform on

behalf of the foreign sovereign State (see the travaux préparatoires to the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, Governmental Bill 2008/2009:204, p. 38).

To determine whether an entity is to be regarded as a part of the State for the purposes of State immunity, the conclusive criteria will be the character of and the extent to which the State exercises control over the operations of the relevant entity. There is, however, no common State practice which can provide a clear guidance as to whether such characterization is to depend primarily on the entity's status, its right to exercise State power or the character of its actions (see Governmental Bill 2008/2009:204, p. 38).

In Swedish court practice, the assessment of whether such entities as trade offices, tourist organizations and State-owned companies are to be regarded as State entities has been based on such things as the extent to which the relevant operations are regulated by law in the foreign State, if the operations are financed with public funds or if they are profit oriented and to what extent the foreign State influences and controls the concerned entity's actions (see the travaux préparatoires to the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, SOU 2008:2, p. 111).

The issue of whether or not a tourist organization could claim State immunity was considered by the Swedish Labour Court in the case AD 2001 no. 96. The dispute concerned a claim by an employee against his previous employer, the Cypriot State's tourist organization. The employee claimed that his employment had been unjustifiably terminated by the tourist organization and wanted compensation. The tourist organization claimed State immunity and requested that the case be dismissed. The Labour Court found that, in the relevant circumstances, the tourist organization was such an entity that was entitled to claim State immunity.

The Labour Court came to a different conclusion in the case AD 2004 no. 26, where a former employee presented a claim against his employer, the Italian Institute for Foreign Trade (ICE). The court noted that ICE, as such, is an entity which may claim State immunity, but that immunity may only be invoked in disputes concerning acts of a public nature, and not acts of a commercial or otherwise private character. The court also held that an overall assessment must be made of all relevant circumstances in the particular case. In the situation at hand, there was a strong connection to Sweden, as the employee was a Swedish citizen and the work had been carried out from a permanent office in Sweden. The court ultimately found that ICE was not entitled to rely on immunity as a reason for not responding in Swedish courts in the relevant case.

#### **Is the immunity from jurisdiction of foreign sovereign states and related persons absolute or qualified?**

Qualified (or restricted). Although the Swedish courts traditionally have been reluctant to reject claims for immunity by foreign States, the qualified immunity doctrine has been confirmed in case law. In the Supreme Court cases NJA 1999 section 825, NJA 2009 section 905 and NJA 2011 section 475 (Sedelmayer), which are the leading Swedish precedents on the distinction between sovereign acts by a State and commercial transactions by a State, the court applied the qualified immunity doctrine and held that this theory is nowadays applied in Sweden in accordance with general international law. This means that, under Swedish law, a foreign State can only claim immunity from jurisdiction with respect to sovereign acts, and not with respect to its commercial transactions or other civil law actions.

#### **What is the legal foundation for any exceptions to the immunity from jurisdiction of foreign sovereign States and related persons?**

Swedish case law, primarily applying international customary law and, as applicable, various international conventions entered into by Sweden. It should be noted that Articles 7 and 17 of the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, which is not yet in force, list circumstances under which a State may not invoke immunity before a court. In case NJA 2011 section 475 (Sedelmayer), the Swedish Supreme Court referred to the United Nations Convention on Jurisdictional Immunities of States and their Property, and stated that the Convention is to a great extent – although not in all aspects – a codification of general international law. As in the Sedelmayer case, the courts are likely to take the Convention into account when ruling on an issue falling under its scope even though the Convention and the implementing Swedish legislation has not yet entered into force. One recent example is the Svea Court of Appeal case ÖA 7709-19, where the Court of Appeal held that Swedish courts are to apply customary law as expressed in the Convention when determining questions of State immunity.

#### **Application of Immunity from Jurisdiction**

##### **Does the immunity from jurisdiction in civil court proceedings enjoyed by foreign sovereign States, and connected persons, potentially affect the jurisdiction of an arbitral tribunal having its seat within the jurisdiction? If so, how?**

In Sweden, the arbitrators are regarded as deriving their authority from the arbitration agreement. They are not considered to be engaged in any exercise of sovereign power, and they do not represent the Swedish State. The generally accepted view in Sweden is

that a sovereign state may not claim immunity from jurisdiction of arbitrators sitting in Sweden. If a sovereign party, although having entered into an arbitration agreement, claims immunity before a Swedish arbitral tribunal, the arbitral tribunal should refuse to accept the claim (see also Hobér, *International Commercial Arbitration in Sweden*, 2011, pp. 26–31).

**Does the immunity from jurisdiction in civil court proceedings enjoyed by foreign sovereign States, and connected persons, potentially affect the jurisdiction of national courts? If so, how?**

Yes, provided that the foreign sovereign State objects to the court's jurisdiction on grounds of immunity. A Swedish court will issue a summons even if an action has been instituted against a party who may be entitled to claim sovereign immunity. If such a party subsequently moves for a dismissal of the action on the ground of sovereign immunity, the court will examine whether the party in question is in fact entitled to immunity in the particular case. Should the court find that the State has a right to immunity, the court must dismiss the case for lack of jurisdiction.

### **Exceptions to Immunity**

**Is there an exception to the immunity from jurisdiction in civil court proceedings enjoyed by foreign sovereign states, and connected persons, that relates specifically to arbitration proceedings and related national court proceedings ('Arbitration Exception to Immunity')?**

There is no statutory arbitration exception to immunity, and the case law on this subject is limited. However, although there is no Swedish case law expressly declaring the standpoint that an arbitration agreement equals a waiver by a State of its right to immunity from jurisdiction, it is generally understood and accepted, as a matter of State practice, that an arbitration agreement represents a waiver of immunity by the State. In the Svea Court of Appeal case RH 1981:76 (the *Liamco* case), which concerned the question of whether the State of Libya could claim immunity against enforcement of an arbitral award, the Court of Appeal held that by accepting the arbitration clause, Libya was deemed to have waived its right to invoke immunity. The decision was appealed by Libya to the Supreme Court, but the dispute was settled before the Supreme Court rendered any decision. Although the decision of the Svea Court of Appeal never became *res judicata*, the decision merits attention and it is submitted that it represents the present state of Swedish law. In other words, the generally accepted view in Sweden is that an arbitration clause is deemed to constitute a waiver of immunity in judicial proceedings aimed at the recognition and enforcement of a foreign arbitral award in Sweden. Such a waiver would extend to all judicial proceedings that may be instituted in connection with the arbitration in question (Hobér, *International Commercial Arbitration in Sweden*, 2011, p. 31).

**What is the legal foundation for the Arbitration Exception to Immunity?**

Swedish case law applying international customary law as well as legal doctrine.

**What are the terms of the Arbitration Exception to Immunity?**

There is no statutory arbitration exception to immunity, but according to court and state practice, as applied in Sweden, a State may not claim immunity to arbitration proceedings or related court proceedings where the State, by entering into a valid arbitration agreement, has agreed to have the dispute settled by arbitration (see the Svea Court of Appeal case RH 1981:76 (the *Liamco* case), where the Libyan State was found to have waived its immunity from jurisdiction of the Swedish courts by means of an arbitration agreement).

### **Scope of the Exceptions to Immunity**

**Does the Arbitration Exception to Immunity apply to all arbitration proceedings?**

Yes, provided that they are covered by the arbitration agreement.

**Does the Arbitration Exception to Immunity apply only to arbitration proceedings having their seat within the jurisdiction?**

No. There is no indication that the waiver of immunity represented by the arbitration agreement would only apply to arbitration proceedings having their seat within the Swedish jurisdiction. As indicated by the Court of Appeal in the *Liamco* case (RH 1981:76), the waiver of immunity is likely to apply also to court proceedings in Sweden concerning arbitration proceedings having its seat outside of Sweden.

**Does the Arbitration Exception to Immunity extend to foreign arbitration proceedings (e.g., proceedings for the recognition or enforcement of a foreign arbitral award)?**

Yes, the waiver of immunity represented by the arbitration agreement likely extends to foreign arbitration proceedings.

In the Svea Court of Appeal case RH 1981:76, brought by the Libyan American Oil Company

in 1979 (the *Liamco* case), which concerned the issue of recognition and enforcement of a foreign arbitral award in Sweden, the Court granted the application by *Liamco* and accordingly declared the award enforceable in Sweden. *Libya* appealed the decision to the Supreme Court, but the dispute was settled before the Supreme Court issued a ruling on the question. However, following the *Liamco* case, the generally accepted view in Sweden is that an arbitration agreement constitutes a waiver of immunity in judicial proceedings aimed at the recognition and enforcement of a foreign arbitral award in Sweden.

**Does the Arbitration Exception to Immunity apply to proceedings for the recognition or enforcement of an arbitral award?**

Yes. In the Svea Court of Appeal case RH 1981:76, brought by the Libyan American Oil Company in 1979 (the *Liamco* case), which concerned the issue of recognition and enforcement of a foreign arbitral award in Sweden, the Court granted the application by *Liamco* and accordingly declared the award enforceable in Sweden. *Libya* appealed the decision to the Supreme Court but the dispute was settled before the Supreme Court issued a ruling on the question. However, following the *Liamco* case, the generally accepted view in Sweden is that an arbitration agreement constitutes a waiver of immunity in judicial proceedings aimed at the recognition and enforcement of a foreign arbitral award in Sweden. With respect to the actual execution of a judgment or award against the assets of a foreign state, the traditional view has been that this requires a separate and specific waiver of immunity from execution. However, although additional protections from measures of execution may apply at the subsequent execution stage, recent case law suggests a shift towards a more liberal view of enforcement measures against foreign states, where the determinative factor is whether the property is held for sovereign purposes or not (see Supreme Court decision NJA 2011 section 475 (Sedelmayer)).

**Does the Arbitration Exception to Immunity apply to proceedings to obtain provisional/protective measures (e.g., the attachment of assets) in support of arbitration proceedings?**

As there is no statutory 'Arbitration Exception' in Sweden and case law is limited in this regard, the requirements for an arbitration agreement or similar to constitute a waiver of immunity to obtain provisional/protective measures, as well as any possible implications of such a waiver, are not entirely clear. In the Svea Court of Appeal case RH 1981:76, brought by the Libyan American Oil Company in 1979 (the *Liamco* case), the Court found that *Libya* had waived its right to immunity from jurisdiction by entering into an arbitration agreement. Even though this may be interpreted as to imply that a foreign State's waiver of immunity from jurisdiction in an arbitration agreement includes all judicial proceedings, it should be noted that Swedish court practice makes a distinction between immunity from jurisdiction and that from attachment and execution. It is likely that additional protections exist from measures involving the actual attachment and execution. However, although additional protections from measures of execution may apply at the subsequent execution stage, recent case law suggests a shift towards a more liberal view of enforcement measures against foreign states, where the determinative factor is whether the property is held for sovereign purposes or not (see Supreme Court decision NJA 2011 section 475 (Sedelmayer)).

**Does the Arbitration Exception to Immunity depend on the court finding the existence of a valid arbitration agreement entered into by the state or other person?**

There is no statutory 'Arbitration Exception' in Sweden and case law is limited in this regard. However, since the arbitration exception under Swedish law is based on the principle that the arbitration agreement constitutes a waiver of immunity in arbitration proceedings covered by the arbitration clause as well as related court proceedings, the application of such an exception presupposes a valid arbitration agreement. Thus, if the court for some reason would find the arbitration agreement to be invalid, it cannot constitute an effective waiver of immunity.

**If the Arbitration Exception to Immunity does depend on the court finding the existence of a valid arbitration agreement, to what arbitration agreements does it apply?**

All forms of valid arbitration agreements may potentially constitute a waiver of immunity.

**If the Arbitration Exception to Immunity does depend on the court finding the existence of a valid arbitration agreement, what rules of law and standard of proof will the court apply in determining questions concerning the existence and validity of an arbitration agreement?**

Section 48 of the Swedish Arbitration Act provides that where the arbitration agreement has an international connection, the agreement is to be governed by the law agreed upon by the parties, or, where they have not made such an agreement, by the law of the country in which the arbitration has its seat. Under Swedish law, there are no formal requirements for the validity of an arbitration agreement and general Swedish evidentiary rules would apply.

**If the Arbitration Exception to Immunity does depend on the court finding the existence of a valid arbitration agreement, will any ruling by the arbitral tribunal on that question be applied/taken into account?**

If the question of the validity of the arbitration agreement has been submitted to the courts of Sweden under section 2 or 34 of the Swedish Arbitration Act, the court will make its own determination of the validity of the arbitration agreement and is not bound by any finding of the arbitral tribunal.

**Are any exceptions other than the Arbitration Exception to Immunity potentially relevant to national court proceedings relating to arbitration?**

The general exception from immunity for commercial transactions may potentially be relevant also to court proceedings relating to arbitration. Similarly, the exception from immunity in situations where the State has voluntarily submitted to the jurisdiction of the courts of Sweden may be relevant.

**What is the legal foundation for, and terms of, any other exceptions which may be relevant to national court proceedings relating to arbitration? If possible, please give one or more examples of their application by national courts in such proceedings.**

State practise as applied in Swedish case law.

### **Non-Justiciability of Subject Matter**

**Apart from any immunity from jurisdiction, may civil proceedings relating to arbitration be held to raise matters that are non-justiciable by reason of their subject matter or character? If possible, please give one or more examples.**

Swedish law does not include the principle of non-justiciability as applied by the courts of England. However, matters for which there is no interest in the administration of justice (Sw: rättskipningsintresse) by the Swedish courts may be dismissed by the courts. Similarly, if a party has no legitimate interest in bringing a declaratory action, such action may be deemed inadmissible (Sw: sakna fastställelseintresse).

### **Investment Treaty Arbitrations**

**Do the rules concerning immunity from jurisdiction of foreign States and connected persons, and the exceptions to that immunity, apply differently to proceedings concerning investor-state arbitrations arising from bilateral investment treaties? If so, please explain how.**

This has not been tried in Swedish case law, but it can be assumed that where a bilateral investment treaty contains a dispute resolution clause, this clause may be regarded as a waiver of immunity from jurisdiction with regard to disputes that comes within the scope of such clause. To the extent such clause provides for arbitration, the waiver is likely to extend to related court proceedings.

### **Immunities and Privileges Regarding Enforcement of Awards**

#### **Other Significant Features**

**Are there any other features of the rules concerning the jurisdiction of national courts in relation to arbitration proceedings involving foreign sovereign states and connected persons that may have a significant effect on the outcome of civil proceedings? If so, please describe.**

No.

#### **Entitlement to Immunities and Privileges**

**Are foreign sovereign states, and connected persons, entitled to assert immunity or other protection from measures to enforce, or to secure enforcement of, an arbitral award given against them ('Enforcement Measures')?**

Traditionally, the Swedish view has been that the actual execution of a judgment or award against the assets of a foreign state requires a separate and specific waiver of immunity from execution. However, later case law evidence a shift towards a more liberal view on enforcement measures against foreign states.

In the case NJA 2011 section 475, the Swedish Supreme Court issued a decision with respect to an attempt by Mr Sedelmayer to enforce one of many rulings against the Russian Federation. This particular case concerned Mr Sedelmayer's application for execution of a court order against the Russian Federation. According to the court order, the Russian Federation was to compensate Mr Sedelmayer for his litigation costs before the courts of Sweden in proceedings initiated by the Russian Federation to challenge an arbitration award. The award ordered the Russian Federation to pay compensation to Mr Sedelmayer for unlawful expropriation. Thus, this particular enforcement case only concerns Swedish litigation costs, and not the arbitration award as such.

The Swedish Supreme Court upheld the Court of Appeal's ruling and allowed executive measures to be taken in assets in Sweden belonging to the Russian Federation. In reaching its decision, the Supreme Court referred to the United Nations Convention on Jurisdictional Immunities of States and their Property. It stated that the Convention expresses the principle, nowadays accepted by many states, that execution measures can be taken in property belonging to a foreign state which is specifically in use or intended for use by the state for other than 'government non-commercial purposes'. The Supreme Court attempted to clarify the meaning of the expression 'property specifically in use or intended for use for government non-commercial purposes'. According to the Supreme Court, the expression generally means that a state can invoke immunity in relation to property which is used for the state's official functions. The Supreme Court also held that where the relevant property is intended for use for a State's sovereign acts or similar official assignments, the property should be protected from execution measures. The mere fact that certain property belongs to a state and is used by the state for a non-commercial purpose is, however, not sufficient to protect it from execution measures.

In the *Sedelmayer* case, the property in question was a real estate with a number of apartments. Although it was partly used as residence for diplomats and servants of the Russian Federation, the main part of it was used for private, but non-commercial, and non-official purposes. The Supreme Court thus found that the estate was not to a significant part used for the Russian Federation's sovereign assignments. It further concluded that the Russian Federation's purpose with owning the estate had not been of such particular sovereign nature that would protect it from execution measures. For these reasons, the Supreme Court ultimately held that there was nothing that prevented enforcement of the decision on litigation costs by seizure of the estate itself as well as the rental income from the apartments in the building.

In the *Sedelmayer* case, the Supreme Court has to some extent confirmed what the Court stated as obiter dicta in another case, NJA 2009 section 905. Even if this case did not directly concern immunity from execution measures, the Swedish Supreme Court stated in its ruling that a court judgment for payment of a monetary amount must generally be regarded as enforceable, even when it is directed against a state. The Court continued by stating that even though the view in different jurisdictions varies when it comes to the possibility to invoke immunity against enforcement measures, it must be considered as generally accepted that monetary judgments against states, at least when it comes to certain assets belonging to the state, are enforceable.

#### **What is the legal foundation for any immunity or other protection from Enforcement Measures (e.g, legislation, code, case law, international treaty)?**

Swedish case law applying customary international law. There is also certain legislation covering particular types of assets (see the Act (1938:470) containing Certain Rules on Foreign State-Owned Ships and other matters and the Act (1939:6) on the Exemption of Certain Aircraft from Attachment and Injunction).

#### **How is the concept of a 'state' defined for the purposes of any immunity or other protection from Enforcement Measures?**

In Sweden, there is no general definition of the concept of a 'State'. Instead, the traditional criteria for what constitutes a sovereign and independent State under international law – that is, that there is a defined territory, a permanent population and a government that maintains efficient control over the territory and the relation to other States – have been applied. As a matter of applying international customary law, Swedish law appears to recognize the following persons to enjoy State immunity:

(1) the sovereign or other head of that State; (2) the government of that State; (3) any department of that government; (4) foreign diplomatic officials and the staff of a foreign embassy including their families and service staff as well as diplomatic couriers, see section 2 of the Act (1976:661) on Immunity and Privileges in Certain Cases, implementing the 1961 Vienna Convention; (5) foreign State consulates and the staff of the consulate, including their families and service staff, and couriers (with some exceptions), see section 3 of the Act (1976:661) on Immunity and Privileges in Certain Cases, implementing the 1963 Vienna Convention; and (6) certain foreign state vessels (see the travaux préparatoires to the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, Governmental Bill 2008/2009:204, p. 38 and SOU 2008:2, p. 49, and legal doctrine; Eek, Bring and Hjerner, *Folkrätten*, pp. 393f).

#### **What other persons, connected to a foreign sovereign State but falling outside the definition of a 'State', are entitled to assert immunity or other protection from Enforcement Measures?**

There is no general legislation governing which persons may enjoy State immunity in Sweden. A foreign sovereign State may, as a matter of customary law, claim protection for persons representing it with respect to acts that such persons perform on behalf of the foreign sovereign State (see the travaux préparatoires to the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, Governmental Bill 2008/2009:204, p. 38). To determine whether an entity is to be regarded as a part of the State for the

purposes of State immunity, the conclusive criteria will be the extent to which the State exercises control over and the character of the operations of the relevant entity. There is, however, no common State practice which can provide a clearer guidance as to whether the characterization is to depend primarily on the entity's status, its right to exercise State power or the character of its actions (see Governmental Bill 2008/2009:204, p. 38).

In Swedish court practice, the assessment of whether such entities as trade offices, tourist organizations and State-owned companies are to be regarded as State entities has, inter alia, been based on the extent to which the relevant operations are regulated by law in the foreign State, if the operations are financed with public funds or if they are profit oriented and to what extent the foreign State influences and controls the concerned entity's actions (see the travaux préparatoires to the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, SOU 2008:2, p. 111).

The issue of whether or not a tourist organization could claim State immunity was considered by the Swedish Labour Court in the case AD 2001 no. 96. The dispute concerned a claim by an employee against his previous employer, the Cypriot State's tourist organization. The employee claimed that his employment had been unjustifiably terminated by the tourist organization and wanted compensation. The tourist organization claimed State immunity and argued that the case subsequently should be dismissed. The Labour Court found that, in the circumstances of the case, the tourist organization was such an entity that was entitled to claim State immunity.

**Are the immunities and privileges of foreign sovereign States and related persons with respect to Enforcement Measures absolute or qualified?**

Traditionally, the Swedish view has been that the immunity from enforcement measures is absolute. However, the two rulings in the Supreme Court case NJA 1999 section 821 and the Supreme Court decision NJA 2011 section 475 (Sedelmayer) evidence a shift towards a qualified (or restrictive) doctrine of immunity with respect to enforcement measures.

**To the extent there are any exceptions to the immunities and privileges of foreign sovereign States and related persons with respect to Enforcement Measures, what is the legal foundation for any such exceptions?**

Swedish case law applying customary international law.

**Scope of Entitlement to Immunities and Privileges**

**What additional protection (including immunity from enforcement measures) does a foreign sovereign State enjoy with respect to Enforcement Measures, over and above that enjoyed by any person bound by an arbitral award?**

Swedish law does not make express provision for this.

**If possible, please give one or more examples of the additional protection enjoyed by foreign sovereign States with respect to Enforcement Measures, over and above that enjoyed by any person bound by an arbitral award.**

Swedish law does not make express provision for this.

**Does the protection apply equally to pre-award, as well as post-award, Enforcement Measures?**

There is no recent case laws or pre-award enforcement measures against foreign States. It is, however, likely that the same principles would apply to pre-award enforcement measures as to post-award enforcement measures.

**Does a foreign sovereign State enjoy special protection with respect to Enforcement Measures taken against particular categories of asset (e.g., military assets, diplomatic assets, central bank assets)?**

Even under the qualified view on immunity from enforcement measures, towards which Swedish courts seem to be shifting, it would be clear that in the absence of an express waiver by the foreign State, such measures may not be taken against property which a foreign State owns for certain particular sovereign purposes (see the Supreme Court decision NJA 2011 section 475 (Sedelmayer) and the travaux préparatoires to the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, Governmental Bill 2008/2009:204, pp. 45 and 56).

Swedish courts would likely also consider the additional protection enjoyed by certain categories of assets as expressed in Article 21 of the United Nations Convention on Jurisdictional Immunities of States and their Property (the Convention), as far as this article codifies customary international law. In the Svea Court of Appeal decision ÖÅ 7709-19 of 17 June 2020, which concerned the question of whether assets of the Kazakhstan Central Bank are protected under State immunity, the Court of Appeal held that Article 21(1)(c) of the Convention (stating that the property of a central bank or other monetary authority shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes), should be interpreted as establishing a categorical, rather than functional, exception to the exception to immunity

from measures of constraint under Article 19(c) of the Convention. According to the court, this means that property held by a central bank is protected by immunity already by its very nature, and regardless of its use. However, the Court of Appeal emphasized that a functional approach to immunity may have a limited scope of application in situations where it is obvious that the property is held in a manner which clearly deviates from the normal operations of the central bank. The Svea Court of Appeal decision has been appealed and is pending decision in the Swedish Supreme Court.

Particular protection is also awarded to the premises of a diplomatic mission and the furnishings and other property on such premises under Articles 2 and 3 in the Act (1976:661) on Immunity and Privileges in Certain Cases (Lag (1976:661) om immunitet och privilegier i vissa fall), giving effect to the 1961 and 1962 Vienna Conventions on diplomatic relations).

**Do different levels of protection from Enforcement Measures exist with respect to provisional awards (as compared with final awards)? If so, on what grounds?**

The issue has not been dealt with in Swedish law or Swedish case law.

**Do different levels of protection from Enforcement Measures exist with respect to non-monetary awards (as compared with monetary awards)? If so, on what grounds?**

The issue has not been dealt with in Swedish law or Swedish case law. However, in the case NJA 2009 section 905, the Swedish Supreme Court, in an obiter dictum, stated that judgments on payment of monetary amounts normally must be deemed enforceable against foreign States, possibly indicating that a distinction could be made between monetary and non-monetary awards.

**Does the level of protection vary according to the method by which an award is given legal effect (e.g., registration for enforcement under international convention, registration for enforcement under local rules, judgment upon award)? If so, please explain how the various methods of giving effect to an award are treated differently.**

No.

**What additional protection (including immunity from enforcement measures) do persons connected to a foreign sovereign State, but falling outside the definition of a 'State', enjoy with respect to Enforcement Measures, over and above that enjoyed by any person bound by an arbitral award?**

From the Swedish Supreme Court ruling in case NJA 1999 section 821, it follows that if the person concerned has acted on behalf of the foreign sovereign State and if the act is a sovereign act, the person in question is likely to be afforded the same level of protection as that provided to foreign sovereign States.

**How does the protection afforded to persons connected to a foreign sovereign State, but falling outside the definition of 'State' differ from that accorded to a 'State'?**

From the Swedish Supreme Court ruling in case NJA 1999 section 821, it follows that if the person concerned has acted on behalf of the foreign sovereign State and if the act is a sovereign act, the person in question is likely to be afforded the same level of protection as that provided to foreign sovereign States.

**Exceptions to and Waiver of Immunities and Privileges**

**May a foreign sovereign State or (where relevant) connected persons consent to the removal of, or otherwise waive, any additional protection afforded from Enforcement Measures? If so, what is the legal foundation for the removal of the protection in such cases?**

Yes. As a matter of customary international law, a foreign sovereign State is considered to dispose of its own right to State immunity, including the immunity from enforcement measures. This entails a possibility for the sovereign State to decide when to waive that right.

**If a foreign sovereign State or (where relevant) connected persons may consent to, or otherwise waive, the removal of additional protection afforded from Enforcement Measures, by what means can they do this?**

A waiver to immunity can be made either generally or in the specific case by means of an international agreement, in a bilateral treaty or in a regular agreement or contract in relation to a particular transaction or business (see the travaux préparatoires to the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, Governmental Bill 2008/2009:204, p. 45). In the Sedelmayer case NJA 2011 section 475, the Svea Court of Appeal referred to the travaux préparatoires and stated that a waiver of the right to immunity from enforcement measures by the foreign State has to be specific, clear and unambiguous in order for the court to remove the protection of State immunity in this regard. It should be noted that the Sedelmayer case was appealed and although the Supreme Court upheld the Court of Appeal's ruling, it did not address the issue of waiver of immunity.



**Do special rules as regards immunity or other protection from Enforcement Measures apply to particular categories of asset (e.g., military assets, diplomatic assets, central bank assets)? If so, please explain how each particular category to which special rules apply is defined and how such assets are treated differently.**

Even under the qualified view on immunity from enforcement measures, towards which Swedish courts seem to be shifting, it would be clear that in the absence of a waiver by the foreign State, such measures may not be taken against property which a foreign State owns for sovereign purposes (see the Supreme Court decision NJA 2011 section 475 (Sedelmayer) and the travaux préparatoires to the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, Governmental Bill 2008/2009:204, pp. 45 and 56).

Swedish courts would also likely consider the additional protection enjoyed by certain categories of assets as expressed in Article 21 of the United Nations Convention on Jurisdictional Immunities of States and their Property (the Convention), as far as this article codifies customary international law. In the Svea Court of Appeal decision ÖÅ 7709-19 of 17 June 2020, which concerned the question of whether assets of the Kazakhstan Central Bank are protected under State immunity, the Court of Appeal held that Article 21(1)(c) of the Convention (stating that the property of a central bank or other monetary authority shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes), should be interpreted as establishing a categorical, rather than functional, exception to the exception to immunity from measures of constraint under Article 19(c) of the Convention. According to the court, this means that property held by a central bank is protected by immunity already by its very nature, and regardless of its use. However, the Court of Appeal emphasized that a functional approach to immunity may have a limited scope of application in situations where it is obvious that the property is held in a manner which clearly deviates from the normal operations of the central bank. According to the Court of Appeal, central bank assets are defined as assets (i) held by a central bank or other monetary authority, and (ii) belonging to said central bank or monetary authority. The Svea Court of Appeal decision has been appealed and is pending decision in the Swedish Supreme Court.

Particular protection is also awarded to the premises of a diplomatic mission and the furnishings and other property on such premises under Articles 2 and 3 in the Act (1976:661) on Immunity and Privileges in Certain Cases (Lag (1976:661) om immunitet och privilegier i vissa fall), giving effect to the 1961 and 1962 Vienna Conventions on diplomatic relations.

**May the agreement by a foreign sovereign State to arbitrate a dispute be taken (whether alone or in combination with other factors) as indicating consent to, or as otherwise waiving, any additional protection afforded from Enforcement Measures?**

Traditionally, an arbitration agreement does not in itself, failing express wording to that effect, constitute a waiver of immunity from enforcement measures. However, depending on the circumstances in the relevant case, it may be that a court would come to the conclusion that an arbitration agreement together with other factors would constitute such a waiver. Generally, however, such a waiver must be specific, clear and unambiguous. In the Swedish Supreme Court decision NJA 2011 section 475 (Sedelmayer), which concerned enforcement measures against a foreign state, the Supreme Court found that the determinative factor was whether the property was held for sovereign purposes or not.

As to State immunity from jurisdiction, it is generally understood and accepted, as a matter of State practice, that an arbitration agreement represents a waiver of immunity by the State (see, e.g., the Svea Court of Appeal case RH 1981:76 (the Liamco case) and Hobér, International Commercial Arbitration in Sweden, 2011, p. 31).

**May the fact that a foreign sovereign State has, as a party to the New York Convention on the recognition and enforcement of foreign arbitral awards, undertaken to recognize foreign awards as binding and to enforce them be taken (whether alone or in combination with other factors) as indicating consent to, or as otherwise waiving, any additional protection afforded from Enforcement Measures?**

The argument has yet to be considered by a Swedish court, but the mere fact that a foreign sovereign State is a party to the New York Convention would likely not in itself be taken as an indication of consent or a waiver to claim immunity from jurisdiction against Enforcement Measures in another State. Whether or not such fact in combination with other circumstances could constitute a waiver would depend on those other circumstances.

**May the fact that a foreign sovereign State has agreed to arbitrate according to the rules of a particular arbitral body (such as the ICC or LCIA) or a particular set of rules (such as the UNCITRAL rules) be taken as indicating consent to, or as otherwise waiving, any additional protection afforded from Enforcement Measures?**

Yes, but probably only if such rules were to contain a specific, clear and unambiguous waiver of such immunity.

**Apart from consent/waiver, are there any other general or specific exceptions to the additional protection accorded to foreign sovereign States with respect to Enforcement Measures? If so, what?**

No.

**What is the legal foundation for, and terms of, any general or specific exceptions (other than consent/waiver) to the additional protection accorded to foreign sovereign States with respect to Enforcement Measures? If possible, please give one or more examples.**

Swedish law does not make express provision for this.

**Apart from consent/waiver, are there any other general or specific exceptions to the additional protection accorded to persons connected to a sovereign State, but falling outside the definition of 'state', with respect to Enforcement Measures?**

Swedish law does not make express provision for this.

**What is the legal foundation for, and terms of, any general or specific exceptions (other than consent/waiver) to the additional protection accorded to persons connected to a sovereign State, but falling outside the definition of 'state', with respect to Enforcement Measures? If possible, please give one or more examples.**

Swedish law does not make express provision for this.

### **Awards Against Third Parties**

**Do the rules relating to immunity or other protection from Enforcement Measures apply differently in cases in which the arbitral award is against a person other than the foreign sovereign State or connected person against whom the Enforcement Measure is sought (e.g., where the State etc. is claimed to hold assets as nominee for such person or it is sought to 'pierce' the corporate veil)? If so, please illustrate how.**

The issue has not been dealt with in Swedish law.

**Do special rules regulate the availability of immunity or other protection from Enforcement Measures in a situation in which a foreign sovereign State or connected person asserts a proprietary or other interest in an asset held by a third person against which an Enforcement Measures is sought? If so, please describe.**

No.

**In a situation in which a foreign sovereign State or connected person asserts a proprietary or other interest in an asset held by a third person against which an Enforcement Measure is sought, can the State or connected person intervene in enforcement proceedings between the creditor and third party to assert any immunity or other protection it may enjoy?**

There is no procedural legislation that allows a third party to intervene in a court proceeding concerning an enforcement measure. However, the substantive rules in the Swedish Enforcement Code (Sw. Utsökningsbalken) allow a concerned third party to appeal a decision that concerns distraint upon assets. A third party who asserts a proprietary interest in an asset being distrained may also initiate civil proceedings against the creditor and the debtor to assert his interest in the asset.

### **Non-Justiciability of Subject Matter**

**Separately from any immunity or other protection from enforcement, may Enforcement Measures be precluded or restricted on the ground that the application/proceedings to obtain them raise matters that are non-justiciable by reason of their subject matter or character?**

Although the principle of non-justiciability does not exist under Swedish law as such, it may be that certain claims would not be considered to be recognized by the Swedish legal order, or that there would be no Swedish interest in the administration of justice to enforce certain types of claims.

**If possible, please give one or more examples of non-justiciable matters that may be relevant in civil proceedings relating to the enforcement of arbitration awards.**

Swedish law does not make express provision for this.

### **Investment Treaty Arbitrations**

**Do the rules concerning immunities and privileges against Enforcement measures apply differently to awards in investor-state arbitrations arising from bilateral investment treaties? If so, please illustrate how.**

Investment treaty awards are enforceable either under section 53 of the Swedish Arbitration Act (implementing the New York Convention), or, in the case of ICSID awards, under the Act (1966:735) on recognition and enforcement of arbitral awards in certain

international investment disputes (Lag (1966:735) om erkännande och verkställighet av skiljedomar i vissa internationella investeringstvister). However, neither the New York Convention nor the 1965 ICSID Convention contains any provision exempting investment treaty awards from immunity from execution. To the contrary, Article 55 of the 1965 ICSID Convention provides that the submission by a State to an ICSID arbitration will not be taken as a waiver of the protection given to a State with respect to enforcement measures. It is therefore likely that, subject to any provision in the bilateral investment treaty to the contrary, investment treaty awards will be treated in the same way as regular awards.

**Do the rules concerning immunities and privileges against Enforcement measures apply differently to ICSID awards? If so, please illustrate how.**

No.

## **Procedural Aspects for Enforcing Awards**

### **Other Significant Features**

**Are there any other features of the rules concerning the enforcement of arbitral awards against foreign sovereign States and connected persons that may have a significant effect on the ability of a party to enforce an arbitral award in its favour? If so, please describe.**

No.

### **Additional Procedural Requirements in Proceedings to Register / Obtain Judgment upon Award**

**What additional procedural requirements (e.g., requirements for service, notice, entry of judgment in default of appearance, legal representation) apply to proceedings/applications to register for enforcement, or to obtain judgment upon, an arbitral award against a foreign sovereign state, over and above those that ordinarily apply in such proceedings?**

None, as regards creditors or the State. However, it could be noted that the Swedish Enforcement Authority has an obligation, pursuant to Chapter 10, section 13 of the Instrument (1974:152) of Government (regeringsformen 1974:152)), to notify the Swedish Ministry of Foreign Affairs whenever matters arise which has a significance for relations with another state. The Swedish Enforcement Authority has interpreted this so as to mean that enforcement proceedings initiated in Sweden against another state are such matters and thus notifies the Swedish Ministry of Foreign Affairs if such matters come before it. The Ministry of Foreign Affairs may submit observations in the matter, but it may not intervene.

**What is the legal foundation for any additional procedural requirements which apply to proceedings/applications to register for enforcement, or to obtain judgment upon, an arbitral award against a foreign sovereign state?**

Swedish law does not make express provision for this.

**What additional procedural requirements (e.g., requirements for service, notice, entry of judgment in default of appearance, legal representation) apply to proceedings/applications to register for enforcement, or to obtain judgment upon, an arbitral award against a person connected with a state but falling outside the relevant definition of 'state,' over and above those that ordinarily apply in such proceedings?**

Swedish law does not make express provision for this.

**What is the legal foundation for any additional procedural requirements which apply to proceedings/applications to register for enforcement, or to obtain judgment upon, an arbitral award against a person connected with a State but falling outside the relevant definition of 'State'?**

Swedish law does not make express provision for this.

### **Additional Procedural Requirements for the Obtaining of Enforcement Measures**

**What additional procedural requirements (e.g., requirements for service, notice, entry of judgment in default of appearance, legal representation) apply to proceedings/applications to obtain measures to enforce, or to secure enforcement of, an arbitral award against a foreign sovereign state, over and above those that ordinarily apply in such proceedings?**

None, as regards creditors or the State. However, it could be noted that the Swedish Enforcement Authority has an obligation, pursuant to Chapter 10, section 13 of the Instrument (1974:152) of Government (regeringsformen 1974:152)), to notify the Swedish Ministry of Foreign Affairs whenever matters arise which has a significance for relations with another state. The Swedish Enforcement Authority has interpreted this so as to mean

that enforcement proceedings initiated in Sweden against another state are such matters and thus notifies the Swedish Ministry of Foreign Affairs if such matters come before it. The Ministry of Foreign Affairs may submit observations in the matter, but it may not intervene.

**What is the legal foundation for any additional procedural requirements which apply to proceedings/applications to obtain measures to enforce, or to secure enforcement of, an arbitral award against a foreign sovereign state?**

Swedish law does not make express provision for this.

**What additional procedural requirements (e.g., requirements for service, notice, entry of judgment in default of appearance, legal representation) apply to proceedings/applications to obtain measures to enforce, or to secure enforcement of, an arbitral award against a person connected with a State but falling outside the relevant definition of 'State', over and above those that ordinarily apply in such proceedings?**

None.

**What is the legal foundation for any additional procedural requirements which apply to proceedings/applications to obtain measures to enforce, or to secure enforcement of, an arbitral award against a person connected with a State but falling outside the relevant definition of 'state'?**

Swedish law does not make express provision for this.

### **National Courts and Enforcement Measures**

**Would a court be likely in exercising any discretion that it may have as to whether to grant or refuse an enforcement measure, to take into account the fact that the person bound by the arbitral award in question is a foreign sovereign state or person connected with a State?**

The answer to this question is likely to depend on the type of enforcement measure sought. In particular, with respect to pre-award security measures, courts have a certain degree of discretion in deciding whether or not to grant such measures. In such a case, it could not be ruled out that the fact that a sovereign State is involved would be a factor that is considered by the court in exercising its discretion.

**What approach, in summary, do national courts taken to questions of piercing (or looking through) the corporate veil in cases involving foreign sovereign States and connected persons, so as to enable the acts, omissions or assets of a corporate body to be identified with those of the state or other person that owns or controls it?**

There are no Swedish court precedents where the courts have 'pierced the corporate veil' to enable a separate corporate entity to be identified with a foreign sovereign State for enforcement purposes. The doctrine of 'piercing the corporate veil' is, however, recognized by the Swedish Supreme Court, but applied in a very narrow manner. From the existing case law, see the Supreme Court cases NJA 1942 section 473, NJA 1947 section 647, NJA 1975 section 45, NJA 1982 section 244, NJA 1992 section 375 and NJA 2014 section 877, it can be concluded that the following factors are relevant to determine whether or not to 'pierce the corporate veil':

(1) undercapitalization; (2) a subsidiary that lacks independence with regards to its administration as well as its operations; (3) disloyalty towards the creditors; and (4) good faith on part of the creditors. Thus, any 'piercing of the corporate veil' to support enforcement against a sovereign State would, apart from fulfilling the two first-mentioned requirements, also likely require a deliberate mala fide scheme to shield the State from liability.

**In deciding whether to pierce (or otherwise look through) the corporate veil in cases involving foreign sovereign States and connected persons, may a national court take into account that an entity owned or controlled, directly or indirectly, by a foreign sovereign State or connected person has been undercapitalized?**

There is no clear Swedish case law on this particular issue, but a Swedish court is likely to take all relevant circumstances in the particular case into consideration when determining whether to 'pierce the corporate veil' (see the Supreme Court case NJA 1999 section 821). Undercapitalization would generally be a necessary, although not in itself sufficient, factor when determining whether to 'pierce the corporate veil'.

**In deciding whether to pierce (or otherwise look through) the corporate veil in cases involving foreign sovereign States and connected persons, may a national court take into account that an entity owned or controlled, directly or indirectly, by a foreign sovereign State or connected person has misrepresented its financial position?**

There is no clear Swedish case law on this particular issue, but a Swedish court is likely to take all relevant circumstances in the particular case into consideration when determining whether to 'pierce the corporate veil' (see the Supreme Court case NJA 1999

section 821). Depending on the circumstances, including by whom the misrepresentation was made, misrepresentation of an entity's financial position may be a relevant factor to take into account, among other circumstances, in determining whether to 'pierce the corporate veil'.

**In deciding whether to pierce (or otherwise look through) the corporate veil in cases involving foreign sovereign States and connected persons, may a national court take into account that an entity owned or controlled, directly or indirectly, by a foreign sovereign State or connected person dealt with its assets to avoid satisfying a claim?**

There are no Swedish court precedents where the courts have 'pierced the corporate veil' to enable a separate corporate entity to be identified with a foreign sovereign State for enforcement purposes. A Swedish court is, however, likely to take all relevant circumstances in the particular case into consideration when determining whether to 'pierce the corporate veil' (see the Supreme Court case NJA 1999 section 821). Swedish case law shows that an important factor to take into account when determining if to 'pierce the corporate veil' is whether the companies involved have taken measures that can be regarded as disloyal towards the creditors (see the relevant statements by the Court of Appeal in the Supreme Court case NJA 1982 section 244, as well as NJA 2014 section 877). The fact that an entity owned or controlled by a foreign sovereign State has dealt with its assets to avoid satisfying a claim may thus, depending on the circumstances, be a relevant factor to take into account in determining whether to 'pierce the corporate veil'.

It should also be noted that certain disloyal dispositions executed by a bankrupt entity prior to the bankruptcy may be recoverable pursuant to the Swedish Bankruptcy Act (1987:672) (Konkurslag (1987:672)).

**Are there any other features of the approach of national courts to the enforcement of arbitral awards against foreign sovereign states and connected persons that may have a significant effect on the ability of a party to enforce an arbitral award in its favour? If so, please describe.**

No.

### **Investment Treaty Arbitrations**

**Do the rules concerning the procedural aspects of the enforcement of arbitral awards against foreign States and connected persons apply differently to proceedings concerning, and awards in, investor-state arbitrations arising from bilateral investment treaties? If so, please illustrate how.**

The same procedural rules apply to the enforcement of non-ICSID investment treaty awards. ICSID awards are enforceable in the same manner as a final judgment from a Swedish court pursuant to the Act (1966:735) on recognition and enforcement of arbitral awards in certain international investment disputes (Lag (1966:735) om erkännande och verkställighet av skiljedomar i vissa internationella investeringstvister), without the need of obtaining a court decision on enforceability. However, on the execution stage, the same procedural rules apply.

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