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Quick Answers on State Immunity – Switzerland

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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. Switzerland however has a restrictive interpretation of State immunity, which is not considered absolute.

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 specific legislation concerning sovereign immunity in Switzerland. The issue is mainly governed by case law, in particular that of the Federal Supreme Court (e.g., ATF 113 Ia 172; ATF 104 Ia 43; ATF 86 I 23; ATF 82 I 75; ATF 56 I 237) and international treaties to which Switzerland is a party and that apply directly, such as:

- the 1972 European Convention on State Immunity (European Immunity Convention);
- the 1972 Additional Protocol to the Convention for the Establishment of a European Court for State Immunity;
- the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (UN Immunity Convention), ratified by Switzerland on 16 April 2010 (but with entry into force once ratified by thirty States, Switzerland being the ninth contracting party); to date, the UN Immunity Convention has twenty-eight signatories and twenty-three parties.

Although the UN Immunity Convention is not yet in force, it has already been taken into consideration in certain cases by Swiss courts as it is considered to be a codification of customary international law regarding immunity from jurisdiction (ATF 4A_308/2022; ATF 4A_481/2021; ATF 4A_331/2014; ATF 4A_542/2011 and 4A_544/2011; ATF 136 III 575; *see* however ATF 2C_820/2014 where the Federal Supreme Court left open the question as to whether the provisions of the UN Immunity Convention could be invoked as customary international law). The UN Immunity Convention will not affect the rights and obligations of States under other international agreements (e.g. European Immunity Convention); given the limited scope of the European Immunity Convention, Switzerland has however announced its intention to denounce it once the UN Immunity Convention enters into force.

For the rest, Switzerland made the following declaration regarding the European Immunity Convention: 'with article 24 of the Convention, that in cases not falling within articles 1 to 13, the Swiss courts shall be entitled to entertain proceedings against another contracting State to the extent that its courts are entitled to entertain proceedings against States not a party to the present Convention.'

Switzerland also made the following interpretative declarations concerning the UN Immunity Convention:

- the UN Immunity Convention does not cover criminal proceedings;
- Article 12 does not govern the question of pecuniary compensation for serious human rights violations that are alleged to be attributable to a State and are committed outside the State of the forum; consequently, the UN Immunity Convention is without prejudice to developments in international law in this regard; and
- service of process to a Swiss canton shall be made in the official language or one of the official languages of the canton in which process is to be served.

Switzerland is also a party to special multilateral instruments which have a bearing on

the regime of immunity from jurisdiction such as:

- 1961 and 1963 Vienna Conventions on Diplomatic Relations, respectively on Consular Relations;
- 1958 Convention on High Seas; and
- the 1969 Convention on Special Missions.

Furthermore, Switzerland is the home of many international organizations with which it has entered into host State agreements, most of them containing provisions relating to immunity (ATF 137 I 371; ATF 136 III 379; ATF 130 I 312; ATF 118 Ib 562).

International organizations headquartered or operating in Switzerland are indeed generally immune from jurisdiction under their respective host State agreement with Switzerland. These agreements typically provide that the organization benefits for itself and for its property of immunity from any form of legal action, except to the extent that immunity has been formally waived by the director of the organization or a duly authorized representative. The 2007 Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Act) as well as its corresponding Ordinance set out inter alia the possible beneficiaries of privileges, immunities, and facilities within the framework of international law (ATF 5A_106/2012). The Host State Act provides for different categories of organizations that qualify for privileges, immunities and facilities of varying scope.

As to the UN and other international organizations that form part of the UN system, Switzerland is a party to the 1946 Convention on the Privileges and Immunities of the UN and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, which provide for the immunity of the organizations and of some of their personnel.

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

Switzerland adopts the common definition under international law whereby a State will be recognized as such when the following three elements exists:

(i) a population;

(ii) a delimited territory; and

(iii) a public authority able to effectively exercise sovereign power domestically and internationally.

The Swiss practice is generally to recognize the existence of a State (but not of a government) when the foregoing elements are objectively satisfied but Switzerland reserves its right to consider other elements such as general recognition by the international community.

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

According to the relevant case law and the legal doctrine, agencies and instrumentalities of the State or other entities also fall under the concept of 'State' to the extent that they are entitled to perform and are actually performing acts in the exercise of the sovereign authority of the State, i.e. acts de iure imperii (ATF 1B_200/2017; ATF 5A_681/2011; ATF 130 III 136; ATF 1A.94/2001; ATF 110 Ia 43).

Serving diplomatic and consular agents as well as related persons (as defined in Article 37 of the Vienna Convention on Diplomatic Relations, respectively Article 53 of the Vienna Convention on Consular Relations) benefit from immunity (Articles 29 and 31 of the Vienna Convention on Diplomatic Relations, respectively, Article 43 of the Vienna Convention on Consular Relations), as do serving heads of State, heads of government and ministers of foreign affairs (the so-called 'Triad') (Articles 29 to 39 of the Vienna Convention on Diplomatic Relations by analogy; ATF 1B_539/2020; ATF 130 III 136). Other persons may enjoy functional immunity depending on their situation and activities (ATF 130 III 136). Employees of international organizations may also enjoy immunity pursuant to international law, notably the treaties concluded by Switzerland regarding the UN system's immunity and the host State agreement existing between the organization and Switzerland.

Is the immunity from jurisdiction of foreign sovereign States and related persons absolute or qualified?

Qualified.

Exceptions to immunity from jurisdiction are essentially based on the case law of the Federal Supreme Court, which has consistently applied the concept of sovereign immunity restrictively.

A distinction is made between cases in which the foreign State acts in the exercise of its sovereign capacity (de iure imperii), where immunity from jurisdiction is applicable and the State cannot be a party to proceedings before Swiss courts, nor can its assets be subject to measures of constraint, and cases in which the foreign State acts in a private capacity (de iure gestionis), in respect of which cases may be brought before a Swiss court, provided that the transaction out of which the claim against the foreign State arises has a connection to Switzerland (in German: 'Binnenbeziehung'; in French 'rattachement suffisant') (ATF 5A_550/2023; ATF 5A_469/2022; ATF 149 III 318; ATF 144 III 411; ATF 135 III 608; ATF 134 III 122).

The connection to Switzerland is a requirement set by Swiss case law. It does not arise from Swiss legislation or customary international law (ATF 106 Ia 148; ATF 104 Ia 370, ATF 86 I 27; ATF 82 I 85; ATF I 249) and has been heavily criticized by scholars as both breaching the rights to equal treatment and access to justice, and running contrary to the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, which has been ratified by Switzerland but has not yet come into force. This requirement was however again recently confirmed by the Federal Supreme Court (ATF 5A_550/2023; ATF 5A_469/2022; ATF 149 III 318). The connection is established for instance when the claim originated or had to be performed in Switzerland, when the debtor performed certain acts in Switzerland, or when the State guaranteed payment with explicit references to Swiss legal remedies and the State's assets in Switzerland. Conversely, the mere location of assets in Switzerland does not create such a connection (ATF 5A_550/2023; ATF 5A_469/2022; ATF 149 III 318; ATF 144 III 411; ATF 135 III 608).

The principal criteria to distinguish between acts de iure imperii and acts de iure gestionis are the nature of the transaction by contrast to its purpose and whether the act being considered lies within the competence of a public entity or is an act that any individual may perform (ATF 110 II 255; ATF 86 I 29).

Except for the requirement of a connection to Switzerland, the current Swiss practice does not depart significantly from the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, which provides that a State cannot in principle invoke immunity from jurisdiction in respect of proceedings concerning:

- commercial transactions;
- contracts of employment (with substantial exceptions);
- personal injury and damage to property;
- determination of rights of ownership;
- possession and use of property;
- intellectual and industrial property;
- participation in companies or other collective bodies; and
- ships owned or operated by a State.

As for international organizations, contrary to States' immunity, the scope of international organizations' immunity is not based on the distinction between acts de iure imperii and acts de iure gestionis. International organizations' immunity is in principle absolute and thus covers all their activities (ATF 136 III 379; ATF 130 I 312; ATF 118 Ib 562). This broad immunity is explained by the fact that, owing to the functional character of the legal personality of international organizations, all their activities must be closely related to their purposes. Such a wide immunity is however increasingly contested by scholars.

As a corollary to their absolute immunity of jurisdiction, international organizations must provide for an alternative dispute resolution mechanism for disputes of a private law character. If such a mechanism has not been put in place, is not appropriate or does not allow to obtain a form of relief, the claimant is in principle entitled to pursue its claims against the international organization before local courts (ATF 130 I 312; ATF 4C_518/1996). This requirement flows from Article 6 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights (ECHR), to which Switzerland is a party (*Waite and Kennedy v. Germany* [GC], No. 26083/94, ECHR 1999-I and *Beer and Regan v. Germany* [GC], No. 28934/95, 18 February 1999). Arbitration is

deemed a suitable alternative dispute resolution mechanism, provided the arbitration complies with the minimum standards of due process set out in Article 6(1) ECHR.

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

The legal foundation for the exceptions to the immunity from jurisdiction is essentially the case law of the Federal Supreme Court, which distinguishes between acts de iure imperii and acts de iure gestionis and determines the test of connection to Switzerland for the latter (in German: 'Binnenbeziehung'; in French 'rattachement suffisant').

In addition, Article 31 of the Vienna Convention on Diplomatic Relations and Article 43 of the Vienna Convention on Consular Relations provide for an exception to the immunity from jurisdiction of diplomatic and consular agents for acts not performed in their official capacity. While not confirmed by case law, this same exception might also apply to the immunity of serving heads of State, heads of government and ministers of foreign affairs (the so-called 'Triad') (Article 31 of the Vienna Convention on Diplomatic Relations by analogy; ATF 130 III 136).

Host State agreements of international organizations with seat in Switzerland also provide for certain exceptions to the immunity they foresee. The same is true of the 1946 Convention on the Privileges and Immunities of the UN and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, for the UN and other international organizations that form part of the UN system.

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?

No. Questions of immunity only arise with respect to court proceedings ancillary to arbitration. According to the majority of the legal doctrine, by entering into an arbitration agreement, the foreign State indeed waives its right to assert a plea of immunity from jurisdiction with regard to the arbitral tribunal's jurisdiction. It is also generally understood that, unless it has expressly sought to avoid any intervention by State courts, the State will have waived its immunity before the local courts of the seat of the arbitration insofar as the law of the seat empowers local courts to intervene in the arbitral proceedings, e.g. assisting in the constitution of the arbitral tribunal, deciding on the validity, interpretation or application of the arbitration agreement, the confirmation or setting aside of the award. The same is true with respect to international organizations. These questions have, however, not been finally decided by the Federal Supreme Court (ATF 130 I 312; ATF 118 Ib 562; ATF of 4 December 1985, *MINE v. Guinea*, unpublished; ATF 106 Ia 142).

This is in line with the UN Immunity Convention whereby a State cannot invoke immunity from jurisdiction before a court of another State which otherwise has jurisdiction in proceedings which relates to:

(i) the validity, interpretation or application of the arbitration agreement;

(ii) the arbitration procedure; or

(iii) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides (Article 17).

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. Lack of immunity is a requirement for the admissibility of claims (Article 59 of the Swiss Code of Civil Procedure; in German: 'Prozessvoraussetzungen; in French: 'recevabilité'), relating to the competence ratione materiae of the court.

From a procedural standpoint, immunity is a defence and must thus in principle be raised by the defendant (ATF 130 III 136). This principle is however nuanced in practice, as:

- Swiss courts will determine ex officio whether this admissibility requirement is met, before possibly turning to the merits of the case (ATF 133 III 539; ATF 124 III 382 and Article 60 of the Swiss Code of Civil Procedure; *see* contra Geneva Court of

Justice Decision dated 29 January 2013 cited in ATF 5A_200/2013). This is so, and the analysis of the State's immunity cannot be deferred to a decision on the merits, even if the facts pertaining to immunity are also relevant to the merits of the case; accordingly, the theory of the facts of double relevance does not apply (in German: 'doppelrelevante Tatsachen'; in French: 'théorie des faits de double pertinence') (ATF 147 III 159; ATF 131 III 153; ATF 124 III 382); and

– in accordance with Article 8(4) UN Immunity Convention, failure on the part of a State to enter an appearance before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court (*see also* Article 15 of the European Immunity Convention). Accordingly, Swiss courts should not consider the fact that the State does not appear in the proceedings as a waiver to its immunity (which is interpreted by some scholars as forcing the judge to consider that the State has raised immunity; as to the procedure in case of default, *see* notably Article 23 UN Immunity Convention).

The requirement of a lack of immunity must still be met at the time the judgment is rendered (ATF 133 III 539). If the plea of immunity succeeds, the court seized must decline jurisdiction to hear the case.

A State (or international organization) may however choose to waive its immunity from jurisdiction. For the waiver of immunity from jurisdiction to be valid, the State must consent to the exercise by the Swiss courts of jurisdiction over the dispute explicitly or implicitly. There is little case law on the issue, but generally, the State's consent may be considered given by agreeing to a jurisdictional clause referring a dispute to Swiss courts, or if the State proceeds to the merits of a case without contesting the court's jurisdiction or raises a counterclaim. Such waivers should nevertheless be unambiguous, failing which Swiss courts will not consider them as valid. As an illustration, the Federal Supreme Court has considered that a contractual clause stating that disputes had to be resolved by local courts 'in so far as diplomatic customs allow' did not amount to a waiver of immunity (ATF 4A_386/2011). The approach was upheld by the European Court of Human Rights (*see Ndayegamiye-Mporamazina v. Switzerland*, No. 16874/12, 5 February 2019).

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')?

Yes. According to the majority of the legal doctrine, by entering into arbitration agreement, a State waives its right to assert a plea of immunity from jurisdiction with regard to the arbitral tribunal's jurisdiction. It is also generally understood that, unless it has expressly sought to avoid any intervention by State courts, the State will have waived its immunity before the local courts of the seat of the arbitration insofar as the law of the seat empowers local courts to intervene in the arbitral proceedings, e.g. assisting in the constitution of the arbitral tribunal, deciding on the validity, interpretation or application of the arbitration agreement, the confirmation or setting aside of the award. The same is true with respect to international organizations. These questions have, however, not been finally decided by the Federal Supreme Court (ATF 130 I 312; ATF 118 Ib 562; ATF of 4 December 1985, *MINE v. Guinea*, unpublished; ATF 106 Ia 142).

This is in line with the UN Immunity Convention whereby a State, which agreed in writing to submit to arbitration disputes related to a commercial transaction, cannot invoke immunity from jurisdiction in court proceedings regarding the validity, interpretation or application of the arbitration agreement, the arbitration procedure or the confirmation or setting aside of the award (Article 17). Moreover, Article 177(2) of the Private International Law Act provides that if one party to an arbitration agreement is a State or an enterprise dominated or an organization controlled by a State, it may not invoke its own law to contest the arbitrability of a dispute or its capacity to be subject to arbitration.

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

The exception to immunity relating to arbitration is based on the majority of the legal doctrine; the Federal Supreme Court has not finally decided on the issue. This exception is specifically mentioned in the UN Immunity Convention which, although not yet in force, has been already applied in several instances by the Federal Supreme Court on the

ground that it codifies international customary law on immunity (ATF 4A_331/2014; ATF 4A_542/2011 and 4A_544/2011; ATF 136 III 575; *see* however ATF 2C_820/2014 where the Federal Supreme Court left open the question as to whether the provisions of the UN Immunity Convention could be invoked as customary international law).

What are the terms of the Arbitration Exception to Immunity?

In principle, by entering into an arbitration agreement, a State waives its right to invoke its immunity from jurisdiction vis-à-vis both the arbitral tribunal and the local courts competent to exercise judicial review and supervisory powers over the arbitral proceedings (in line with Article 17 of the UN Immunity Convention).

Scope of the Exceptions to Immunity

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

Yes.

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

No. The legal doctrine does not distinguish between arbitration proceedings with a seat in Switzerland and those with a seat abroad so that the exception could apply, for instance, when seeking provisional measures in Switzerland in support of arbitration commenced abroad. However, the Federal Supreme Court has not finally decided on the issue (ATF of 4 December 1985, *MINE v. Guinea*, unpublished; ATF 106 Ia 142).

Conversely, the limitation to State immunity (rather than true exception) provided in Article 177(2) of the Private International Act only applies in respect of arbitration proceedings with a seat in Switzerland and if at least one of the parties at the time the arbitration agreement was entered into did not have its domicile, habitual residence or seat in Switzerland (Article 176(1) of the Private International Law Act). However, parties to a domestic arbitration (where all of them have their seat or residence in Switzerland) may opt in for the application of the Chapter 12 of the Private International Law Act (Article 353(1) Swiss Code of Civil Procedure).

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. While not confirmed by the Federal Supreme Court, the arbitration exception to immunity recognized by the majority of the legal doctrine should also apply with respect to proceedings for the recognition or enforcement of a foreign arbitral award in Switzerland. The question of immunity from enforcement will however arise.

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

No. Awards made in Switzerland, either under Chapter 12 of the Private International Law Act, which applies to international arbitration, or under the Swiss Code of Civil Procedure, which applies to domestic arbitration, are directly enforceable by operation of law, as judicial decisions, without any additional exequatur (Article 387 of the Swiss Code of Civil Procedure). Accordingly, there is no possible plea of immunity from jurisdiction or plea of exception to the immunity from jurisdiction before the court at this stage. The question of immunity from enforcement will however arise.

For the recognition or enforcement of a foreign arbitral *see* previous question.

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?

There is no case law or legal doctrine on this issue which remains uncertain.

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?

Yes, it is most likely. This issue has never been addressed in case law or by the legal doctrine. However, it is likely that the court would examine the issue of validity of the arbitration agreement, at least prima facie. According to Article 7(b) of the Private International Law Act (which is based upon Article II(3) of the 1958 New York Convention

on Recognition and Enforcement of Foreign Arbitral Awards), if the parties have entered into an arbitration agreement with respect to an arbitrable dispute, the court before which an action is brought shall decline jurisdiction, unless it 'finds that the arbitration agreement is null and void, inoperative or incapable of being performed.'

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?

The approach of the courts will be the same for all arbitration agreements.

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?

The position of the Federal Supreme Court is twofold. When the seat of arbitration is in Switzerland, the courts must only carry out a prima facie review of the validity of the arbitration agreement when considering a plea of lack of jurisdiction, leaving the arbitral tribunal to decide on the validity of the arbitration agreement in full (so-called negative effect of the Kompetenz–Kompetenz principle). When the seat of arbitration is outside Switzerland, the courts have to carry out a full review of the arbitration agreement pursuant to Article II(3) of the New York Convention (ATF 138 III 681; ATF 122 III 139; ATF 121 III 38; *see also* ATF 140 III 367 which nuances this binary system for arbitration under the Swiss Code of Civil Procedure).

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?

There is no rule on this issue but in practice a ruling by an arbitral tribunal on the existence of a valid arbitration agreement would likely be taken into consideration.

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

No.

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.

Swiss law does not make express provision for this.

Non-Justiciability of Subject Matter (Jurisdiction of National Courts Regarding States and Connected Persons)

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.

Under Swiss law (statute law, case law, legal doctrine) there exists no such doctrine of non-justiciability. However, in international arbitration proceedings with a seat in Switzerland, only those disputes related to a financial interest are arbitrable (Article 177(1) of the Private International Law Act), while in domestic arbitration only claim of which the parties can freely dispose may be subject to arbitration (Article 354 of the Swiss Code of Civil Procedure).

Investment Treaty Arbitrations (Jurisdiction of National Courts Regarding States and Connected Persons)

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.

No, in particular for investor-State arbitrations arising from bilateral investment treaties where the arbitral tribunal is constituted outside the arbitration rules of ICSID (although this issue has never been addressed in statute or case law). For ICSID cases, the question of immunity from jurisdiction does not arise since the State has agreed to the exclusive

jurisdiction of ICSID and is deemed to have waived any immunity from jurisdiction. Consequently, a Swiss court seized of the matter will not examine the issue (ATF 5A_681/2011).

For the rest, the Federal Supreme Court recently confirmed that arbitral tribunals seated in Switzerland have jurisdiction over intra-EU investment disputes (ATF 4A_244/2023). Criticizing the Court of Justice of the European Union's case law on the question (in particular *Slowakische Republik v. Achmea BV* (Case C-284/16) EU:C:2018:158 and *Republic of Moldova v. Komstroy LLC (successor in law of Energoalians)* (Case C-741/19) EU:C:2021:655), the Federal Supreme Court held that:

(i) the 'unconditional consent' to arbitration given by States parties to the 1994 Energy Charter Treaty (ECT) under Article 26(3)(a) ECT could not be interpreted as excluding intra-EU disputes; and

(ii) contrary to the appealing State's assertion, the arbitration agreement in Article 26 ECT did not conflict with EU law. Yet, even assuming that Article 26 ECT were incompatible with EU law, there would be no grounds under public international law to conclude that EU law should take precedence over the ECT.

Other Significant Features (Jurisdiction of National Courts Regarding States and Connected Persons)

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.

Immunities and Privileges Regarding Enforcement of Awards

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')?

Yes. A State may assert immunity and protection from enforcement, subject to certain conditions.

The Federal Supreme Court treats immunity as a single concept and makes no distinction between immunity from jurisdiction and immunity from enforcement (ATF 124 III 382). The requirements set out in relation to jurisdictional immunity apply mutatis mutandis to immunity from execution and the determination of the nature of the assets against which enforcement is sought (by contrast to the nature of the matter in the context of immunity from jurisdiction). Accordingly, assets that are linked to the acts of a State in the exercise of its functions as a public authority, acts de iure imperii, benefit from immunity, while assets that are linked to the private or commercial activities, acts de iure gestionis, of a State do not (ATF 5A_550/2023; ATF 5A_469/2022; ATF 149 III 318; ATF 144 III 411; ATF 134 III 122; ATF 111 Ia 62). This assessment is made pursuant to Swiss law as the lex fori.

Swiss practice thus conditions enforcement measures against foreign sovereign States and related persons on three cumulative requirements (ATF 5A_550/2023; ATF 5A_469/2022; ATF 149 III 318; ATF 144 III 411; ATF 134 III 122):

(i) the claim of which enforcement is sought must be linked to the foreign State's iure gestionis activities. The determining criterion is the nature of the activity concerned and not its purpose;

(ii) the transaction out of which the claim against the foreign State arises must have a sufficient connection to Switzerland; and

(iii) the assets targeted by the enforcement measures must not be earmarked for tasks that are part of the foreign State's duty as a public authority, which are excluded from enforcement proceedings pursuant to Article 92(1) of the Debt Collection and Bankruptcy Act.

The UN Immunity Convention, once into force, will limit exceptions to immunity by prohibiting 'pre-judgment measures of constraint' save for an express waiver from the

State or where the State has allocated or earmarked property for the satisfaction of the claim which is the object of the proceedings (*see* Article 18 of the UN Immunity Convention).

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

The legal foundation for State immunity from enforcement is essentially the case law of the Federal Supreme Court and Article 92(1) of the Debt Collection and Bankruptcy Act, which provides that enforcement is excluded in relation to assets belonging to a foreign State or a central bank and earmarked for tasks which are part of their duty as public authorities.

Switzerland is also a party to a number of international treaties that apply directly in this context:

- the 1972 European Convention on State Immunity (European Immunity Convention);
- the 1972 Additional Protocol to the Convention for the Establishment of a European Court for State Immunity;
- the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (UN Immunity Convention), ratified by Switzerland on 16 April 2010 (but with entry into force once ratified by 30 States, Switzerland being the ninth contracting party). To date, the UN Immunity Convention has twenty-eight signatories and twenty-three parties.

Finally, Switzerland is party to special multilateral instruments which have a bearing on the regime of immunity from enforcement:

- the 1961 and 1963 Vienna Conventions on Diplomatic Relations (Articles 22, 30 and 31), respectively on Consular Relations (Article 31);
- the 1933 Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft;
- the 1944 Convention on International Civil Aviation;
- the 1948 Convention on the International Recognition of Rights in Aircraft;
- the 1926 International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages;
- the 1952 International Convention relating to the Arrest of Seagoing Ships;
- the 1958 Convention on High Seas; and
- the 1969 Convention on Special Missions.

Furthermore, Switzerland is the home of many international organizations with which it has entered into host State agreements, most of them entailing provisions relating to immunity of enforcement against the assets they hold or against their employees (ATF 136 III 379). The Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Act) as well as its corresponding Ordinance set out inter alia the possible beneficiaries of privileges, immunities, and facilities in the framework of international law.

As to the UN and other international organizations that form part of the UN system, Switzerland is a party to the 1946 Convention on the Privileges and Immunities of the UN and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, which provide for the immunity of the organizations and of some of their personnel. The requirements set out in relation to international organizations' jurisdictional immunity apply mutatis mutandis to immunity from enforcement.

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

Switzerland adopts the common definition under international law whereby a State will be recognized as such when the following three elements exists:

(i) a population;

(ii) a delimited territory; and

(iii) a public authority able to effectively exercise sovereign power domestically and internationally.

The Swiss practice is generally to recognize the existence of a State (but not of a

government) when the foregoing elements are objectively satisfied but Switzerland reserves its right to consider other elements such as general recognition by the international community.

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?

According to the relevant case law and the legal doctrine, agencies and instrumentalities of the State or other entities also fall under the concept of 'State' to the extent that they are entitled to perform and are actually performing acts in the exercise of the sovereign authority of the State, i.e. acts de iure imperii (ATF 1B_134/2017; ATF 5A_681/2011; ATF 130 III 136; ATF 1A.94/2001). State entities with a legal personality independent from the State (e.g. central banks or public banks) do not benefit from immunity from enforcement ratione personae except when acting in a sovereign capacity (ATF 110 Ia 43); their assets are immune from enforcement when earmarked for acts de iure imperii (ATF 135 III 608) subject to international sanctions (ATF 2C_820/2014).

Serving diplomatic and consular agents as well as related persons (as defined in Article 37 of the Vienna Convention on Diplomatic Relations, respectively Article 53 of the Vienna Convention on Consular Relations) benefit from immunity (Articles 29 and 31 of the Vienna Convention on Diplomatic Relations, respectively, Article 43 of the Vienna Convention on Consular Relations), as do serving heads of State, heads of government and ministers of foreign affairs (the so-called 'Triad') (Articles 29 to 39 of the Vienna Convention on Diplomatic Relations by analogy; ATF 1B_539/2020; ATF 130 III 136). Other persons may enjoy functional immunity depending on their situation and activities (ATF 130 III 136). Employees of international organizations may also enjoy immunity pursuant to international law, notably the treaties concluded by Switzerland regarding the UN system's immunity and the host State agreement existing between the organization and Switzerland (ATF 5A_745/2010).

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

Qualified.

With respect to the immunity from enforcement, the Federal Supreme Court has consistently applied the concept of sovereign immunity restrictively. The Swiss practice thus conditions enforcement measures against foreign sovereign States and related persons to three cumulative requirements (ATF 5A_550/2023; ATF 5A_469/2022; ATF 149 III 318; ATF 144 III 411; ATF 134 III 122):

(i) The claim of which enforcement is sought must be linked to the foreign State's iure gestionis activities. Indeed, similarly to the practice regarding the immunity from jurisdiction, a distinction is made between cases in which the foreign State acts in the exercise of its sovereign capacity (de iure imperii), where the immunity from enforcement is applicable, and cases in which the foreign State acts in a private capacity (de iure gestionis), where it is not. The principal criteria to distinguish between acts de iure imperii and acts de iure gestionis are the nature of the transaction by contrast to its purpose and whether the act being considered lies within the competence of a public entity or is an act that any individual may perform (ATF 110 II 255; ATF 86 I 29);

(ii) The transaction out of which the claim against the foreign State arises must have a connection to Switzerland (in German: 'Binnenbeziehung'; in French 'rattachement suffisant') (ATF 5A_550/2023; ATF 5A_469/2022 ; ATF 149 III 318; ATF 144 III 411; ATF 135 III 608), although this requirement has been heavily criticized by scholars as both breaching the rights to equal treatment and access to justice, and running contrary to the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. The connection is established for instance when the claim originated or had to be performed in Switzerland, when the debtor performed certain acts in Switzerland, or when the State guaranteed payment with explicit references to Swiss legal remedies and the State's assets in Switzerland. Conversely, the mere location of assets in Switzerland has not been considered sufficient to create such connection (ATF 5A_550/2023; ATF 5A_469/2022; ATF 149 III 318; ATF 144 III 411; ATF 135 III 608). However, some scholars consider that the location of assets in Switzerland should suffice. Scholars further argue that this requirement should also be met where the parties have freely elected the seat of an arbitration to be in Switzerland. While older case law did not seem receptive to the

argument, the Federal Supreme Court has recently nuanced its position, declaring that the circumstances which led to the arbitral tribunal having its seat in Switzerland had to be taken into account in this context (ATF 5A_550/2023); and

(iii) The assets targeted by the enforcement measures must not be earmarked for tasks which are part of the foreign State's duty as a public authority, which are excluded from enforcement proceedings pursuant to Article 92(1) of the Debt Collection and Bankruptcy Act (ATF 5A_550/2023; ATF 149 III 318; ATF 5A_681/2011; ATF 134 III 122; ATF 111 Ia 62).

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?

The legal foundation for the exceptions to the immunity from enforcement is essentially the case law of the Federal Supreme Court, and Article 92(1) of the Debt Collection and Bankruptcy Act, which provides that enforcement is only excluded with respect to 'assets belonging to a foreign State or a central bank and assigned to tasks which are part of their duty as public authorities'. Additional exceptions are set out in various international instruments as well as host State agreements which provide both for certain immunities and privileges with respect to enforcement measures (ATF 137 I 371; ATF 136 III 379) and for exceptions relating to certain types of assets (e.g., airplanes, ships, etc.).

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?

None.

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.

Swiss law does not make express provision for this.

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

Swiss law does not make express provision for this, although the same rules should apply.

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)?

Yes. Pursuant to Article 92(1) of the Debt Collection and Bankruptcy Act enforcement is excluded with respect to 'assets belonging to a foreign State or a central bank and assigned to tasks which are part of their duty as public authorities'. The Federal Supreme Court also applies this principle generally based on public international law (ATF 1P.581/2000; ATF 111 Ia 62) subject to international sanctions which may apply irrespective of immunity (ATF 2C_820/2014).

The concept of tasks belonging to the public authority is interpreted widely by the Federal Supreme Court (ATF 5A_550/2023; ATF 134 III 122; ATF 5A_681/2011). State assets are further presumed to be used for sovereign tasks and as such protected by immunity. A creditor that intends to attach such assets thus bears the burden of proof that the assets are not used for sovereign tasks (ATF 5A_550/2023).

The assets of diplomatic missions and generally also cultural goods are in principle considered as assigned to sovereign tasks and thus covered by immunity. The Federal Supreme Court has however considered that a dispute relating to an embassy's lease agreement entered into by the State was not covered by immunity from enforcement (ATF 136 III 575).

Furthermore, money, in cash or bank accounts, is exempt from seizure only if clearly earmarked for concrete public purposes, which implies a separation from other assets. For such assets, the burden of proof is accordingly reversed. They are presumed to used for commercial tasks (ATF 5A_550/2023; ATF 5A_92/2008; ATF 134 III 122; ATF 111 Ia 62; ATF 86 I 23). Considering only the State against which enforcement is sought – and not the party seeking enforcement – is in a position to provide information about the sovereign

purpose to which an asset is assigned, it will not be enough for such State to make general assertions about the sovereign purpose concerned. It must provide concrete information and substantiate it, for instance, by means of officially certified extracts of its accounting books (ATF 5A_550/2023; ATF 5A_92/2008; ATF 111 Ia 62). Proof of the use of assets for sovereign tasks must meet high standards when the entity raising immunity is also active in commercial activities. As the Federal Supreme Court points it out, it would otherwise be inequitable if a company with close financial ties to a State could compete freely with private companies in international financial transactions, whilst at the same time being able to avoid legal consequences by invoking immunity (ATF 5A_550/2023; ATF 5A_92/2008). As for bank accounts and other assets belonging to an embassy, they are presumed to be for public purpose and are thus immune from enforcement (ATF 112 Ia 148).

Will accordingly be immune from enforcement funds specifically allocated to:

- the purchase of arms (ATF 86 I 23);
- the rolling stock of a State railway company (ATF 112 Ia 148);
- the shares of an international corporation created by an international agreement but performing public functions (ATF in Annuaire suisse de droit international 1975, 219); and
- the cultural centre/buildings for foreign citizens run by a foreign consulate in Switzerland (ATF 112 Ia 148).

Even though case law is in part nebulous, the same rules apply to overflight charges collected on behalf of States by an external entity. As per Article 92(1) of the Debt Collection and Bankruptcy Act, it is indeed only if such charges are assigned to sovereign tasks that they are immune from enforcement (ATF 5A_550/2023; ATF 5A_681/2011; ATF 5A_483/2008; ATF 5A_156/2007; ATF 134 III 122; Geneva Court of Justice Decisions DCSO/690/2006 dated 30 November 2006 and DCSO/318/2011 dated 15 September 2011). In a recent decision, the Federal Supreme Court held that such was the case if the overflight charges were assigned to the operation of airports and international air navigation services (ATF 5A_550/2023).

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

No.

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?

No, although there is no specific statute or case law on this point.

Enforcement of non-monetary awards is regulated by the Swiss Code of Civil Procedure and not by Article 92(1) of the Debt Collection and Bankruptcy Act, which excludes specifically the enforcement against certain State assets used for public purposes. Moreover, the general principles regarding the immunity from enforcement, as determined by case law, apply: i.e. where the foreign State acted in the exercise of its sovereign capacity (de iure imperii), the immunity from enforcement is applicable, and where the foreign State acted in a private capacity (de iure gestionis), there is no immunity, provided that the transaction out of which the claim against the foreign State arises has a connection to Switzerland (in German: 'Binnenbeziehung'; in French 'rattachement suffisant') (ATF 5A_550/2023; ATF 5A_469/2022; ATF 149 III 318; ATF 144 III 411; ATF 135 III 608). Although not specifically mentioned in any statute, the Federal Supreme Court considers that pursuant to international law the immunity of enforcement applies to specific assets belonging to a foreign State such as assets earmarked for diplomatic services or other tasks pertaining to the exercise of public authority (ATF 1P.581/2000; ATF 111 Ia 62).

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?

Serving diplomatic agents as well as related persons (as defined in Article 37 of the Vienna Conventions on Diplomatic Relations) benefit from immunity from enforcement in respect of acts performed in their official capacity (Articles 29 and 31 of the Vienna Convention on Diplomatic Relations). To the same extent, consular agents benefit from immunity from enforcement, but only insofar as they benefit from immunity from jurisdiction as provided in fine by Article 43 of the Vienna on Consular Relations. While not confirmed by case law, serving heads of State, heads of government and ministers of foreign affairs (the so-called 'Triad') should enjoy the same immunity as diplomatic agents (Articles 29 to 39 of the Vienna Convention on Diplomatic Relations by analogy; ATF 1B_539/2020). Employees of international organizations may enjoy the same immunity and privileges pursuant to international law, notably the treaties concluded by Switzerland regarding the UN system's immunity and the host State agreement existing between the organization and Switzerland (ATF 5A_745/2010).

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'?

Persons connected to a foreign State but falling outside the definition of a 'State' are protected only in respect of acts they perform in their official capacity as representatives of the State ('functional immunity'; Article 31(3) of the Vienna Convention on Diplomatic Relations and Article 43(1) of the Vienna Convention on Consular Relations; ATF 130 III 136).

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. The consent to remove or waive any immunity or additional protection must be clear and unequivocal (ATF 134 III 122; *see also* Articles 18 ff. of the UN Immunity Convention). There can only be a waiver of immunity insofar as an immunity exists, i.e., in respect of acts made de iure imperii. Articles 32 of the Vienna Convention on Diplomatic Relations and 45 of the Vienna Convention on Consular Relations specifically provide for the possibility for a State to waive the immunities and privileges afforded to diplomatic agents, respectively members of the consular.

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 State can waive its immunity from enforcement by a clear statement (ATF 134 III 122; *see also* Articles 18 ff. of the UN Immunity Convention), either explicitly or by conclusive acts. The legal doctrine agrees that an explicit waiver may be contained in a treaty, an agreement or binding contract or another statement in writing. A waiver may be implied where the State has earmarked funds or other assets specifically for the purpose of settling disputes or making payments for the debts incurred in relation to the transaction in dispute. A waiver may also be implied where the State, or the 'appearance' of a State, initiates court proceedings to defend a lawsuit before a court without raising a plea of immunity (ATF 4A_541/2009). The legal doctrine is divided on whether entering into an arbitration agreement can alone imply a waiver of any immunity from enforcement. The most likely position is that the State's agreement to arbitrate will not imply a waiver of its immunity from enforcement, absent other conclusive acts. Articles 32 of the Vienna Convention on Diplomatic Relations and 45 of the Vienna Convention on Consular Relations provide that a waiver must be express. Moreover, these conventions expressly provide that a waiver of immunity from jurisdiction does not imply a waiver of immunity from enforcement; separate waivers are required. This is also the case of Article 20 of the 2004 UN Immunity Convention. *See also* in this respect International Court of Justice, Jurisdictional Immunities of the State (*Germany v. Italy: Greece* intervening), Judgment, I.C.J. Reports 2012, p. 99, paragraph 113.

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.

Yes. Pursuant to Article 92(1) of the Debt Collection and Bankruptcy Act enforcement is excluded with respect to 'assets belonging to a foreign State or a central bank and assigned to tasks which are part of their duty as public authorities'. The Federal Supreme Court also applies this principle generally based on public international law (ATF 1P.581/2000; ATF 111 Ia 62) subject to international sanctions which may apply irrespective of immunity (ATF 2C_820/2014).

The concept of tasks belonging to the public authority is interpreted widely by the Federal Supreme Court (ATF 5A_550/2023; ATF 5A_681/2011; ATF 134 III 122). State assets are further presumed to be used for sovereign tasks and as such protected by immunity. A creditor that intends to attach such assets thus bears the burden of proof that the assets are not used for sovereign tasks (ATF 5A_550/2023).

The assets of diplomatic missions and generally also cultural goods are in principle considered as assigned to sovereign tasks and thus covered by immunity. The Federal Supreme Court has however considered that a dispute relating to an embassy's lease agreement entered into by the State was not covered by immunity from enforcement (ATF 136 III 575).

Furthermore, money, in cash or bank accounts, is exempt from seizure only if clearly earmarked for concrete public purposes, which implies a separation from other assets. For such assets, the burden of proof is accordingly reversed. They are presumed to used for commercial tasks (ATF 5A_550/2023; ATF 5A_92/2008; ATF 134 III 122; ATF 111 Ia 62; ATF 86 I 23). Considering only the State against which enforcement is sought – and not the party seeking enforcement – is in a position to provide information about the sovereign purpose to which an asset is assigned, it will not be enough for such State to make general assertions about the sovereign purpose concerned. It must provide concrete information and substantiate it, for instance, by means of officially certified extracts of its accounting books (ATF 5A_550/2023; ATF 5A_92/2008; ATF 111 Ia 62). Proof of the use of assets for sovereign tasks must meet high standards when the entity raising immunity is also active in commercial activities. As the Federal Supreme Court points it out, it would otherwise be inequitable if a company with close financial ties to a State could compete freely with private companies in international financial transactions, whilst at the same time being able to avoid legal consequences by invoking immunity (ATF 5A_550/2023; ATF 5A_92/2008). As for bank accounts and other assets belonging to an embassy, they are presumed to be for public purpose and are thus immune from enforcement (ATF 112 Ia 148).

Will accordingly be immune from enforcement funds specifically allocated to:

- the purchase of arms (ATF 86 I 23);
- the rolling stock of a State railway company (ATF 112 Ia 148);
- the shares of an international corporation created by an international agreement but performing public functions (ATF in Annuaire suisse de droit international 1975, 219); and
- the cultural centre/buildings for foreign citizens run by a foreign consulate in Switzerland (ATF 112 Ia 148).

Even though case law is in part nebulous, the same rules apply to overflight charges collected on behalf of States by an external entity. As per Article 92(1) of the Debt Collection and Bankruptcy Act, it is indeed only if such charges are assigned to sovereign tasks that they are immune from enforcement (ATF 5A_550/2023; ATF 5A_681/2011; ATF 5A_483/2008; ATF 5A_156/2007; ATF 134 III 122; Geneva Court of Justice Decisions DCSO/690/2006 dated 30 November 2006 and DCSO/318/2011 dated 15 September 2011). In a recent decision, the Federal Supreme Court held that such was the case if the overflight charges were assigned to the operation of airports and international air navigation services (ATF 5A_550/2023).

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?

There is no statute or case law directly on this issue. According to the majority of the legal doctrine, entering into an arbitration agreement implies a waiver of the State's immunity from jurisdiction, but the legal doctrine is more divided on whether it also implies a

waiver of its immunity from enforcement. The most likely position is that it does not, absent other conclusive acts.

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?

No.

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 the UNCITRAL rules) be taken as indicating consent to, or as otherwise waiving, any additional protection afforded from Enforcement Measures?

No.

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.

Swiss 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?

Serving diplomatic agents as well as related persons (as defined in Article 37 of the Vienna Conventions on Diplomatic Relations) benefit from immunity from enforcement in respect of acts performed in their official capacity (Articles 29 and 31 of the Vienna Convention on Diplomatic Relations). To the same extent, consular agents benefit from immunity from enforcement, but only insofar as they benefit from immunity from jurisdiction as provided in fine by Article 43 of the Vienna on Consular Relations. While not confirmed by case law, serving heads of State, heads of government and ministers of foreign affairs (the so-called 'Triad') should enjoy the same immunity as diplomatic agents (Articles 29 to 39 of the Vienna Convention on Diplomatic Relations by analogy; ATF 1B_539/2020). Employees of international organizations may enjoy the same immunity and privileges pursuant to international law, notably the treaties concluded by Switzerland regarding the UN system's immunity and the host State agreement existing between the organization and Switzerland (ATF 5A_745/2010).

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.

Serving diplomatic agents as well as related persons (as defined in Article 37 of the Vienna Conventions on Diplomatic Relations) benefit from immunity from enforcement in respect of acts performed in their official capacity (Articles 29 and 31 of the Vienna Convention on Diplomatic Relations). To the same extent, consular agents benefit from immunity from enforcement, but only insofar as they benefit from immunity from jurisdiction as provided in fine by Article 43 of the Vienna on Consular Relations. While not confirmed by case law, serving heads of State, heads of government and ministers of foreign affairs (the so-called 'Triad') should enjoy the same immunity as diplomatic agents (Articles 29 to 39 of the Vienna Convention on Diplomatic Relations by analogy; ATF 1B_539/2020). Employees of international organizations may enjoy the same immunity and privileges pursuant to international law, notably the treaties concluded by Switzerland regarding the UN system's immunity and the host State agreement existing between the organization and Switzerland (ATF 5A_745/2010).

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.

No, although there is no statute law, case law or legal doctrine directly on point.

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?

Yes. A foreign State or connected person can assert proprietary or other interest over a monetary claim by way of a third party claim pursuant to Articles 106 ff. of the Debt Collection and Bankruptcy Act, like any other party. According to these provisions, if a third party owns a seized asset or an interest over it which frustrates the seizure or which should be taken into account during the enforcement proceedings, the Debt Collection Office (which is not a court) must records the third party claim in the deed of seizure or, if the latter has already been served on the relevant parties (debtor and creditor), must notify the parties formally; thereafter, if the third party claim is not contested, it is deemed acknowledged and the asset is protected for further enforcement proceedings.

Non-Justiciability of Subject Matter (Immunities and Privileges Regarding Enforcement of Awards)

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?

Under Swiss law (statute law, case law, legal doctrine) there exists no such doctrine of non-justiciability.

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.

Swiss law does not make express provision for this.

Investment Treaty Arbitrations (Immunities and Privileges Regarding Enforcement of Awards)

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.

No, although the issue has never been addressed in statute or case law.

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

No, although the issue has never been addressed in statute and only partially by case law (ATF 149 III 318). Moreover, the limited doctrine is not unanimous.

Articles 54(3) and 55 of the ICSID Convention, to which Switzerland is a party, refer to the law in force in the Contracting State where the enforcement is sought. Accordingly, a Swiss court would apply the three requirements under Swiss law regarding immunity from enforcement (ATF 5A_550/2023; ATF 5A_469/2022; ATF 149 III 318; ATF 144 III 411; ATF 134 III 122), namely:

(i) the foreign State must have acted in a private capacity (de iure gestionis);

(ii) the transaction out of which the claim against the foreign State arises must have a

connection to Switzerland (in German: 'Binnenbeziehung'; in French 'rattachement suffisant'); the mere existence of assets in Switzerland is insufficient to establish such a connection, which is criticised by scholars; and

(iii) the assets targeted by the enforcement measures must not be assigned to tasks which are part of the foreign State's duty as a public authority, which are excluded from enforcement proceedings pursuant to Article 92(1) of the Debt Collection and Bankruptcy Act.

The application of the connection to Switzerland requirement (in German: 'Binnenbeziehung'; in French 'rattachement suffisant') to ICSID awards was confirmed by the Federal Supreme Court. The latter considered that this requirement does not lead to a review of the content of the award in the context of the attachment proceedings – which would not be allowed according to Article 54(1) of the ICSID Convention. It considers it rather as a procedural requirement of the law governing the execution of judgments in Switzerland, as allowed under Article 54(3) of the ICISD Convention (ATF 149 III 318).

Other Significant Features (Immunities and Privileges Regarding Enforcement of Awards)

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.

Procedural Aspects for Enforcing Awards

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?

There is no need to 'register' for enforcement or to 'obtain judgment upon an arbitral award' to enforce an arbitral award in Switzerland, including against a foreign sovereign State or a person connected with a State but falling outside the relevant definition of 'State'. Measures to enforcement can be sought directly.

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?

Swiss 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?

There is no need to 'register' for enforcement or to 'obtain judgment upon an arbitral award' to enforce an arbitral award in Switzerland, including against a foreign sovereign State or a person connected with a State but falling outside the relevant definition of 'State'. Measures to enforcement can be sought directly.

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'?

The personal immunity of diplomatic and consular agents (Articles 31 and 37 of the Vienna Convention on Diplomatic Relations and Article 43 of the Vienna Convention on Consular Relations), as well as the inviolability of their premises (Article 22 of the Vienna

Convention on Diplomatic Relations and Article 31 of the Vienna Convention on Consular Relations) command that service of proceedings/applications to obtain measures to enforce, or to secure enforcement of, an arbitral award must be performed via diplomatic channels. While not confirmed by case law, the same should be true for service on heads of State, heads of government and ministers of foreign affairs (the so-called 'Triad').

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?

According to the legal doctrine and the Guidelines of the Swiss Federal Office of Justice, the same procedural requirements apply for court proceedings which may result from an application to secure the enforcement of an arbitral award against a foreign State, as those arising out of proceedings for enforcement of a court judgment involving a foreign State.

For service on foreign States (and State-owned enterprises), Article 16 of the European Immunity Convention applies by analogy, i.e., service must proceed via diplomatic channels. Note that the Federal Supreme Court does not yet recognize the time limits foreseen by the UN Immunity Convention for service as amounting to customary international law (ATF 136 III 575). If the foreign State elects domicile with its mission, legal proceedings shall be served on the mission. The same holds true if the foreign State elects domicile with a lawyer. Reasonable time limits must also lapse before the court can enter a judgment by default against the foreign State and before the judgment becomes final (exhaustion of the right of appeal).

Service on international organizations must also proceed via diplomatic channels, through the Permanent Mission of Switzerland to the United Nations Office and to the other international organisations in Geneva.

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?

There is no statute or case law directly on this point, but the issue is addressed by the legal doctrine and the Guidelines of the Swiss Federal Office of Justice, which has confirmed that the rules of the European Immunity Convention are in keeping with normal practices and should be applied, even outside the specific scope of application of the Convention, i.e., in proceedings/applications to secure enforcement of an arbitral award against a foreign State. Note however that the Federal Supreme Court has confirmed the discretion of the Swiss authorities to assess whether service time limits should be extended in relation to another State (ATF 136 III 575).

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?

Service of proceedings/applications to obtain measures to enforce, or to secure enforcement of, an arbitral award against diplomatic or consular agents must be performed via diplomatic channels (the same should be true for serving heads of State, heads of government and ministers of foreign affairs). Note that a translation of the documents to be transmitted to the foreign State is not considered necessary by the Federal Supreme Court (ATF 136 III 575).

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'?

The personal immunity of diplomatic and consular agents (Articles 31 and 37 of the

Vienna Convention on Diplomatic Relations and Article 43 of the Vienna Convention on Consular Relations), as well as the inviolability of their premises (Article 22 of the Vienna Convention on Diplomatic Relations and Article 31 of the Vienna Convention on Consular Relations) command that service of proceedings/applications to obtain measures to enforce, or to secure enforcement of, an arbitral award must be performed via diplomatic channels. The same should be true for serving heads of State, heads of government and ministers of foreign affairs (Articles 29 to 39 of the Vienna Convention on Diplomatic Relations by analogy).

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?

No.

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?

The legal doctrine and the limited case law of the Federal Supreme Court confirm the application (although restrictive) of the theory of piercing of the corporate veil in cases involving foreign States and connected persons (ATF dated 23 April 1992, partly published in Blätter für Zürcherische Rechtsprechung 91 (1992), 88; ATF 104 Ia 367; *see also* ATF 5A_483/2008; ATF 5A_156/2007; ATF 134 III 122; Geneva Court of Justice Decisions C/4067/2008 dated 16 October 2008, ACJC/1342/2007 dated 8 November 2007 and DCSO/690/06 dated 30 November 2006; Geneva First Instance Tribunal Decision OSQ/15/2007 dated 13 July 2007).

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 case law or legal doctrine on this issue, but it is likely that such circumstance would be taken into account (*see e.g.* ATF 136 III 379).

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 case law or legal doctrine on this issue, but it is likely that such circumstance would be taken into account.

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 is no case law or legal doctrine on this issue, but it is likely that such circumstance would be taken into account.

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.

No, although the issue has never been addressed in statute and only partially by case law.

As per Article 54(1) of the ICSID Convention, to which Switzerland is a party, each Contracting State must recognize an ICSID award as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State. In line with this provision, the Federal Supreme Court recently confirmed that a creditor does not have to obtain a prior or separate exequatur decision when requesting the attachment of assets based on an ICSID award (Article 271(1)(6) Debt Collection and Bankruptcy Act). In accordance with Article 54(2) of the ICSID Convention, the creditor only needs to submit a copy of the ICSID award certified by the Secretary-General of ICSID. While Swiss courts may verify the authenticity of the ICSID award, they may not review the award in light of the general recognition requirements (ATF 149 III 318).