**[Invoking immunity](https://www.dawn.com/news/1605219/invoking-immunity)**

[Jahanzeb Durrani](https://www.dawn.com/authors/8876/jahanzeb-durrani)Published February 3, 2021

THE Broadsheet saga has laid bare the ad hoc and casual attitude of the ruling elite. In the past few years, Pakistan has lost almost every international arbitration, be it Karkey, Reko Diq or Broadsheet, the reason being, Pakistan has dealt with these issues myopically.

The staggering degree of political and legal ineptitude within the state has brought us to the point that Pakistan’s prized assets, the Roosevelt Hotel in New York and the Scribe Hotel in Paris, have been charged by the high court of the British Virgin Islands, whereas a court in the United Kingdom had ordered authorities to deduct $28.7 million from the Pakistan High Commission’s account in London.

The penalty against the National Accountability Bureau in the Broadsheet case, due to a woefully drafted, open-ended and lopsided agreement cost us around Rs4.5 billion, whereas, until now, more than Rs2bn had been spent on its litigation alone. It has become imperative now to ask why NAB has not invoked the ‘sovereign immunity shield’ at the arbitral award’s execution stage.

The general principle is that when a state agrees to arbitrate its disputes with a private individual, it cannot raise the defence of sovereign immunity because of its obligations under Article 31 of the Vienna Convention on the Law of Treaties (1969) or pacta sunt servanda, ie agreements must be kept. As Prof Kaj Hober, the author of Arbitration Involving States, has rightly pointed out there is simply nothing to be immune from for a sovereign state involved in international arbitration.

Greater foresight could have averted international arbitration disasters.

However, this waiver does not apply to sovereign immunity from execution of arbitral awards. For example, in the case of EURODIF Corporation et al vs Islamic Republic of Iran et al, the French court held: “…immunity from execution is independent of immunity from suit … the former is neither the consequences of nor accessory to the latter and that it continues to prevail even if the latter is never invoked or applied.”

Let us examine this point in detail.

The enforcement stage in arbitration proceedings comprises three steps: “recognition, enforcement and execution”. States can validly raise sovereign immunity from execution when private individuals seek to enforce and execute arbitral awards in their favour through means such as having the state’s assets or accounts attached through court enforcement orders.

Therefore, NAB being an organ of the state, should have validly raised the defence of state immunity from execution and demonstrated to the enforcement court that the Pakistan High Commission’s accounts or assets were for public purposes, not commercial activities. The defence would have aligned with the Swedish Court of Appeal Judgment in Franz Sedelmayer vs The Russia Federation that a foreign state’s property enjoys immunity from attachment, arrest, and execution when used for sovereign or public purposes.

As the renowned arbitration scholar, C.H. Schreuer sums up the position well in the following words: “For purposes of immunity of foreign states from jurisdiction the overwhelming authority points towards a test that looks at the nature of the activity and not its purpose. But the test for immunity from execution is usually the purpose of the property that is to be seized, although the origin of the property is also sometimes taken into account.”

The ‘purpose test’ is a dominant test to determine the nature of the states’ assets.

Thus, Article 21 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNSCI), also imposes limitations on execution of states’ properties including any bank account, which is either used or intended for use in the performance of the functions of the diplomatic mission of the state or its consular posts.

Therefore, it is baffling to learn that no serious effort was made to seek an injunction against the order of debiting $28.7m (Rs4.5bn) from the Pakistan High Commission’s account. It was evident that the account was used solely for public purposes, ie in the diplomatic mission’s functions. Had it been successfully argued, Broadsheet might have been awarded compensation, but would never have been able to seek those funds through Pakistani sovereign funds or assets.

Hence, the onus is now on the incumbent government to practically assume responsibility of the matter and investigate the entire controversy adhering to the highest standards of integrity, transparency and scrutiny, and take stern action against those responsible for this loss.

Additionally, the advocate general’s office or law ministry should propose that the federal government constitute a committee of legal experts in arbitration, investment law and contract drafting to review Pakistan’s remaining international agreements to avoid similar mishaps in the future.

*The writer is a lawyer.*

*Published in Dawn, February 3rd, 2021*