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# *Waiver of State Immunity and Enforcement of Arbitral Awards*

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**Abstract**

If a state has waived state immunity by agreement with a non-state entity in advance of court proceedings brought by that entity to enforce an arbitral award against that state, then the enforcement court should give effect to the waiver. That is the opposite of what the Hong Kong Court of Final Appeal decided in *Democratic Republic of the Congo v. FG Hemisphere*, but it is the approach reflected in the 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property. After examining that Hong Kong case and that United Nations Convention, this paper considers the position in various jurisdictions. The prevalent position is in general terms that consent to arbitration usually constitutes waiver of state immunity from jurisdiction of a court to recognize the arbitral award as creating a debt binding on the state, but usually does not constitute waiver of state immunity from execution of that debt against the assets of the state. The conclusion of the paper includes a model waiver of state immunity from jurisdiction and from execution.

When a state consents to arbitration with a non-state entity, an ensuing arbitral award may create a debt from the state to the non-state entity. If the state does not pay that debt voluntarily, the successful party in the arbitration might seek enforcement of the arbitral award in the courts of another state. The debtor state might then claim state immunity before the courts of that other state. A question for such courts may then be whether the debtor state has waived state immunity from their jurisdiction. If it has, a further question may be whether it has also waived state immunity from execution of the debt arising from the arbitral award against the assets of the debtor state within the jurisdiction of the court seized of the enforcement action. If it has, then forced execution of the debt created by the arbitral award against the assets of the debtor state may follow. If both types of immunity have not been waived, then such execution will typically not follow.

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When a state resists an attempt to enforce an arbitral award against it by claiming state immunity, the applicable rules of state immunity will be those of the jurisdiction in which the immunity is invoked. Rules of public international law on state immunity have grown out of rules adopted by states and their national courts.[1] State immunity "exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum".[2]

Precisely because of the diversity of national approaches to questions of state immunity, the International Law Commission developed the United Nations Convention on the Jurisdictional Immunities of States and their Property. It was opened for signature in January 2005 but has still not entered into force.

Absent a codified body of rules of public international law on state immunity that is both generally applicable and generally observed, some national courts continue to apply their own idiosyncratic ideas about state immunity. A notable example is the majority judgment of the Hong Kong Court of Final Appeal in *Democratic Republic of the Congo v. FG Hemisphere Associates* (*FG Hemisphere*).[3] The majority held that it was possible for a state to waive state immunity only (i) after the arbitral award against it had already been rendered and (ii) in a communication directly to the foreign enforcement court during the proceedings in which it was called upon to enforce that award.[4] The Hong Kong Court held that a contractual waiver of state immunity agreed between a state and a private entity before their dispute arose cannot constitute an effective waiver of state immunity to the jurisdiction of a Hong Kong Court to recognize the binding force of any eventual arbitral award.[5] This decision raises significant questions of principle and is contrary to the approach taken in the 2004 UN Convention on State Immunity and in many other jurisdictions.

The theme of this paper is that when in the context of applications to enforce arbitral awards against states, domestic courts come to consider the question of waiver of state immunity, they should give effect to the terms of any agreement between the state and the award creditor on that question. Since that may be regarded by many as an uncontroversial proposition, this paper begins in Part I by analyzing in detail the challenge to that approach represented by the decision of the Hong Kong Court in the *FG Hemisphere* case. The 2004 UN Convention on State Immunity does propose rules that give effect to agreements between states and non-state entities on waiver of state immunity and it is accordingly the subject of Part II of this paper. Since that Convention is not in force, and the extent to which different jurisdictions act in conformity with the rules it expresses varies, Part III examines the approach in a number of different legal systems to waiver of state

1. See *Report of the International Law Commission on the Work of its Thirtieth Session*, UN Doc. A/33/10 (1978), at 386.
2. James CRAWFORD, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012) at 488; also see James CRAWFORD, "Execution of Judgments and Foreign Sovereign Immunity" (1981) 75 American Journal of International Law 820 at 851–2.
3. *Democratic Republic of the Congo v. FG Hemisphere Associates* [2011] HKCFA 41 [*FG Hemisphere*].
4. *Ibid.*, at paras. 374–93.
5. *Ibid.*, at para. 392.

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immunity from jurisdiction and from execution, after starting with an explanation of the different terminology in use in this area of the law so as to ensure that terminological differences do not impede accurate comparison of concepts. The general, but not uniform, rule that emerges from a comparative review is that where an action is brought against a state in the courts of another state to enforce an arbitral award, the fact that the debtor state had consented to arbitration constitutes waiver of state immunity from jurisdiction but does not constitute waiver of state immunity from execution. The conclusion to this paper in Part IV includes a model waiver of state immunity that takes into account the 2004 UN Convention on State Immunity and the position in various jurisdictions, and is designed to be an effective waiver of state immunity both from jurisdiction and from execution, at least if considered by a court that is willing to give effect to the terms of an agreement reached by a state and a non-state entity in advance of a dispute arising.

## 1. *DEMOCRATIC REPUBLIC OF THE CONGO V. FG HEMISPHERE ASSOCIATES*, HONG KONG COURT OF FINAL APPEAL

### A. *Background to the* FG Hemisphere Case

Ergoinvest was a company headquartered in Sarajevo. In the 1980s it constructed a hydro-electricity facility and high-tension power lines in Zaire. Ergoinvest not only undertook to build this infrastructure, but also extended credit to Zaire and its state-owned electricity company. In their contracts, all parties agreed to arbitration under the rules of the International Chamber of Commerce, the ICC. When Zaire and its electricity company both defaulted on their repayment obligations, arbitration there was.

Ergoinvest and the state-owned electricity company participated in two arbitrations under two credit agreements. The government of what was by then the Democratic Republic of the Congo (DRC) elected not to. That did not stop two tribunals awarding substantial damages and interest against the DRC and its electricity company jointly and severally. That was in 2003.

Neither the DRC nor its electricity company paid a penny to satisfy either award. In 2004 Ergoinvest sold the debts owed to it under the awards to FG Hemisphere Associates. That was a Delaware company whose only meaningful assets were these awards. It was established by a New York company of the kind that acquires distressed debts at a discount from the creditor and then tries to collect the full value from the debtor—including the continually accruing interest. Such firms are sometimes rather graphically referred to as "vulture funds".

This one swooped on an announcement made by China Railways and three of its subsidiaries on the Hong Kong Stock Exchange that they were to pay the government of the DRC US$221 million. That amount was to constitute part of the entry fees for a mining project in the DRC. FG Hemisphere sought a number of orders from the Hong Kong High Court designed ultimately to allow it to enforce the arbitral

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awards against the DRC by diverting part of those mining entry fees before they left Hong Kong.

The judgment of the Hong Kong Court of Final Appeal was controversial in a number of respects. The two most controversial were:

1. adoption of the doctrine of absolute state immunity (which permits immunity from suit for everything states do and own) rather than restrictive state immunity (under which immunity does not attach to states' commercial activities or assets);[6] and

2. referral under the Basic Law of the Hong Kong Special Administrative Region of the judgment of the Hong Kong Court of Final Appeal to the Standing Committee of the National People's Congress in Beijing for approval—approval that was forthcoming in the following terms: "The Hong Kong Special Administrative Region, as a local administrative region of the People's Republic of China that enjoys a high degree of autonomy and comes directly under the Central People's Government, must give effect to the rules or policies on state immunity as determined by the Central People's Government. The laws previously in force in Hong Kong relating to the rules on state immunity may continue to be applied after 1 July 1997 only if they comply with the above requirements."[7]

Less attention has been given to the approach of the majority judgment in the *FG Hemisphere* case to waiver of state immunity.

On that point, all parties in the case agreed that the court should address only the question of whether the DRC had waived its state immunity from the jurisdiction of the courts of Hong Kong.[8] The application was for leave to enforce the awards, but not yet for actual execution against the third-party funds of the debt due under those awards, which would have raised the additional question of immunity from execution.

There are two points to note about the approach of the majority to waiver of state immunity. They are (i) as between whom immunity may be waived, and (ii) when immunity may be waived. The majority held that:

1. State immunity from the jurisdiction of a national court to recognize and enforce an arbitral award cannot be waived by a state by means of a contract with a private entity. The majority so held on the basis that state immunity is an inter-state matter and thus a state can waive its immunity only in

6. On the general historical shift in state practice from absolute to restrictive immunity, see *Second Report on Jurisdictional Immunities of States and their Property*, International Law Commission, finalized by Motoo OGISO, UN Doc. No A/CN.4/422 (1989), at paras. 4–10 [*Second Report on Jurisdictional Immunities*].

7. Interpretation of para. 1, art. 13 and art. 19 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* by the Standing Committee of the National People's Congress, 26 August 2011; see *FG Hemisphere*, *supra* note 3, annex 2.

8. *FG Hemisphere*, *supra* note 3 at paras. 11, 382–3.

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a communication directly to a court of the state in which recognition or enforcement is sought. That means that under the common law of Hong Kong an express waiver of state immunity in a contract between a state and a non-state entity, even if directed explicitly to recognition and enforcement of any arbitral award rendered pursuant to that contract, is not the waiver that it purports to be.[9]

2. Waiver can occur only at the time of the court proceedings in which the court's jurisdiction to recognize or enforce an arbitral award is invoked—that is after the respondent state has already lost the arbitration.[10]

### B. *The Authorities Relied on by the Hong Kong Court*

The majority judgment in *FG Hemisphere* considered the source of these rules of the common law of Hong Kong to be a decision of the English Court of Appeal from 1894, *Mighell v. Sultan of Johore*. In that case, Lord Esher MR said of the Sultan's sovereign immunity that:

> [I]t is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shewn that he is an independent sovereign, and does not submit to the jurisdiction, the Court has no jurisdiction over him. It follows from this that there can be no inquiry by the Court into his conduct prior to that date.[11]

In a phrase adopted by the Hong Kong court 117 years later, Lopes LJ considered in *Mighell v. Sultan of Johore* that the only way sovereign immunity could be waived was "by a submission in the face of the Court",[12] *in facie curiae*. The Hong Kong Court was not dissuaded from relying on this judgment by the fact that it arose from very peculiar circumstances. A head of state lived incognito in London under an adopted persona, that of Albert Baker. Under that persona he was engaged to be married. He apparently changed his mind. He left England without marrying. He returned later as the real him, the Sultan of Johore, a sovereign. He was met by a suit brought by his betrothed for breach of their agreement to marry, in which these factual allegations were made, and in response to which he claimed immunity as a sovereign. The case had nothing to do with enforcement of an arbitral award against a state that had consented to arbitration.

It was, however, approved and applied by the House of Lords in 1924 in its judgment in *Duff Development v. Kelantan* (*Duff*),[13] declining to enforce an arbitral award against a state[14] that had consented to arbitration. The Hong

9. *Ibid*., at para. 377.
10. *Ibid*., at paras. 383, 390, 392.
11. *Mighell v. Sultan of Johore* [1894] 1 QBD 149 at 159–60.
12. *Ibid*., at 161. See the characterization of the procedural context necessary to a proper understanding of this case in Ernst Joseph COHN, "Waiver of Immunity" (1958) 34 British Yearbook of International Law 260 at 261–3.
13. *Duff Development v. Kelantan* [1924] AC 797 [*Duff*].
14. The judgment records a letter from the Colonial Office: "I am directed by Mr. Secretary Churchill to inform you in reply to your letter of July 18 that Kelantan is an independent State in

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Kong Court in *FG Hemisphere* relied in turn on Viscount Finlay's observation in *Duff* that:

> To the arbitration the Government of Kelantan had no objection; they attended the proceedings throughout. It was only when it was proposed to take a step which involved the right to execution against the Government that there was any occasion to raise the objection of sovereignty.[15]

The Hong Kong Court was given no pause by the fact that this decision expressly concerned immunity from "execution", rather than immunity from jurisdiction, and had been interpreted in precisely that way by the Supreme Court of Hong Kong in a judgment reported in 1947.[16] Professor Cohn thought it "regrettable" that the 1947 judgment of the Supreme Court of Hong Kong had "not been referred to in later writings on the topic in this country", meaning England.[17] It is even more regrettable that it was not later followed in Hong Kong.

The final English decision on which the majority of the Hong Kong Court in *FG Hemisphere* relied in this connection was the judgment of Saville J in *A Company Ltd v. Republic of X*.[18] The Hong Kong Court said that "Saville J summarised the position thus", and then quoted Saville J as follows: "on the authorities no mere *inter partes* agreement could bind the State to such a waiver, but only an undertaking or consent given to the Court itself at the time when the Court is asked to exercise jurisdiction over or in respect of the subject matter of the immunities."[19] The "such a waiver" that Saville J was referring to was a waiver of diplomatic immunity under the Diplomatic Privileges Act 1964, implementing the 1961 Vienna Convention on Diplomatic Relations. It did not concern state immunity. By the time of Saville J's judgment, the State Immunity Act 1978 had been in force in the United Kingdom, and in Hong Kong, for thirteen years. Its Section 2(2) explicitly provided for contractual waiver of state immunity in advance of proceedings being commenced. Saville J's judgment is therefore not authority for the proposition that state immunity may be waived only by submission in the face of the court, and not by prior agreement.[20] On state immunity, as opposed to diplomatic immunity, Saville J actually said:

> It seems to me that, read in the context of what was undoubtedly a commercial bargain between the parties, the intent and purpose of the clause is quite clear, namely to put the

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the Malay Peninsula and that His Highness Ismail … is the present sovereign ruler thereof." *Ibid.*, at 806.

15. *Ibid.*, at 819.
16. See Cohn, *supra* note 12 at 266–70, and examining, at 268–9, the case decided by the Hong Kong Supreme Court concerning the China National Relief and Rehabilitation Administration, reported in the *Annual Digest*, 1947, Case No. 29, at 79.
17. Cohn, *supra* note 12 at 269.
18. *A Company Ltd v. Republic of X* [1990] 2 Lloyd's Rep. 520 [*A Company*].
19. *Ibid.*, at 524.
20. An authority concerning the common-law position on waiver of state immunity prior to the 1978 *State Immunity Act* that could have been referred to would have been *Kahan v. Pakistan Federation* [1951] 2 KB 1003 at 1012 [*Kahan v. Pakistan*], which Saville J cited in his discussion of diplomatic immunity.

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> State on the same footing as a private individual so that neither in respect of the State or its property would any question of State immunity arise in connection with the State's obligations under the agreement.[21]

That passage was not referred to by the majority of the Hong Kong Court as part of their reliance on Saville J's judgment. Even concerning the application of Saville J's decision to diplomatic immunity, rather than state immunity, Dr Mann considered that: "It is simply impossible to conclude that the framers of the Vienna Convention intended and were prepared to perpetuate this English rule which is unknown in any other country."[22] He remarked that "the proposition that a waiver or submission had to be declared in the face of the court was a peculiar (and unjustifiable) rule of English law".[23] Dr Mann concluded that: "It is sad to notice a revival of an English aberration which was believed to have been buried."[24] Insofar as state immunity was concerned, it had indeed been buried in the United Kingdom and in Hong Kong by the State Immunity Act 1978.

### C. *An Interstate Immunity*

The Hong Kong Court emphasized that "State immunity is concerned with relations between States".[25] It drew from that proposition the conclusion that:

> A State which waives its immunity, does so by voluntarily submitting to the exercise of jurisdiction by the courts of the forum State over the waiving State's governmental entities or property. Obviously, when a State enters into an arbitration agreement with a private individual or company, that act does not constitute a submission to any other State's jurisdiction. It involves merely the assumption of contractual obligations vis-à-vis the other party to the agreement. So if a State fails to honour a promise made in the arbitration agreement to carry out the award and waive its immunity, it may put itself in breach of its contract but it will have done nothing to submit to the jurisdiction of any forum State.[26]

This echoed the Statement of Viscount Cave in *Duff* that if "a Sovereign, having agreed to submit to jurisdiction, refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the court".[27] This historical statement must be viewed in the context of the rule that existed in England until 1982, but exists no more, that "a defendant outside the jurisdiction could not be served in an action on a foreign judgment even if there were assets within the jurisdiction to satisfy the judgment".[28]

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21. *A Company*, *supra* note 18 at 523.
22. F.A. MANN, "Waiver of Immunity" (1991) 107 Law Quarterly Review 362 at 364.
23. *Ibid*.
24. *Ibid*.
25. *FG Hemisphere*, *supra* note 3 at para. 377.
26. *Ibid*.
27. *Duff*, *supra* note 13 at 810; cf. Cohn, *supra* note 12, especially at 268.
28. *NML Capital Limited v. Republic of Argentina* [2011] UKSC 31, at para. 114 [*NML Capital*].

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The Hong Kong Court did not take that important historical context into account, and its failure to do so is one reason why the approach of the Hong Kong Court in June 2011, and of the House of Lords in 1924, is inconsistent with a statement made by the United Kingdom Supreme Court in *NML Capital v. Argentina* in July 2011:

> If a state waives immunity it does no more than place itself on the same footing as any other person. A waiver of immunity does not confer jurisdiction where, in the case of another defendant, it would not exist. If, however, state immunity is the only bar to jurisdiction, *an agreement to waive immunity is tantamount to a submission to the jurisdiction*.[29]

Obviously much may turn on the terms of a contract, but if in a contract a state waives state immunity, then in signing that contract a state does not promise to waive its immunity in the future. It does waive its immunity.

Accepting it to be true that "State immunity is concerned with relations between States",[30] it is not obvious why it would follow from that proposition that a state could not waive its immunity by agreement with a non-state entity. In such an agreement, the state waiving the immunity is the state possessing the immunity, so it is its to waive. It is surely no longer controversial in international law that non-state entities can hold and enforce rights conferred on them by states, including rights conferred by contract. It follows that the fact that the entity with which a state agrees a waiver is not also a state should not eviscerate the effectiveness of the waiver when that non-state entity asks the courts of another state to enforce an arbitral award against the state that waived its immunity.

The International Law Commission emphasized the importance of the "triangular relationship" between (i) the interests of the state against which the action is brought, (ii) the state in whose courts the action is brought, and (iii) the private claimant.[31] The approach of the Hong Kong Court effectively disregards the interests of the private claimant by finding that the contractual agreement between it and the respondent state has no meaningful effect. This is to put contractual waivers of state immunity in an extraordinary category of contracts that are valid, but the terms of which will be given no effect by a court later called upon to apply them. Lord Dunedin acknowledged as much in *Duff*: "True, it is, that the Sultan contracted to allow the jurisdiction to be exercised against him, but he did so out of court, and now he has changed his mind. He has broken his contract, but the court has no jurisdiction to enforce any performance of it."[32] That position may have been comprehensible in a context where there was no procedural basis to exercise jurisdiction against a defendant that was not present in the jurisdiction. If applied in a modern context where

29. *Ibid*., at para. 59 (emphasis added).
30. *FG Hemisphere*, *supra* note 3 at para. 377.
31. See *Report of the International Law Commission on the Work of its 37th session (6 May–26 July 1985)*, UN Doc. A/40/10 (1985), at para. 228.
32. *Duff*, *supra* note 13 at 821.

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that is not necessary,[33] it overlooks that the contract contains a waiver of immunity from jurisdiction.

Lord Carson dissented in *Duff*, remarking on the "palpable injustice" involved in allowing a state to enforce an arbitral award if it wins the arbitration, but allowing it to prevent enforcement on grounds of state immunity if it does not.[34] In the English Court of Appeal case of *Kahan v. Pakistan*, decided in 1951, Birkett LJ was "exercised about" following *Duff*, although that did not stop him from acerbically remarking that there "were times" when counsel arguing against it "seemed to me to be getting a little impassioned".[35] In the same case, Jenkins LJ said: "Regarding the matter as if it were free from authority, there is considerable attraction" to the argument that a state should be held to its contractual waiver:

> for it may be said with force: What reason is there why a party to an agreement, whether a foreign Government or any other person not ordinarily amenable to the jurisdiction of the English courts, should, after solemnly and expressly agreeing to submit to the jurisdiction of those courts for the purposes of a particular agreement, be allowed to resile from that bargain made in perfectly clear terms?[36]

In *Kahan v. Pakistan*, the Court of Appeal did not, however, consider that the point was free from authority, and expressed itself to be following *Duff*.[37] Dr Mann was in turn exercised by the Court of Appeal's decision in *Kahan v. Pakistan*, labelling it "unfortunate and unjust",[38] and the doctrine that it embodied as "based on unacceptably narrow and dogmatic reasoning".[39] The UK State Immunity Act 1978 meant that by 2011 the interpretation of *Duff* adopted in *Kahan v. Pakistan* had not been the law in the United Kingdom for a long time, but the Hong Kong Court followed it anyway.

## D. *The UK State Immunity Act 1978*

In the United Kingdom, common-law rules on state immunity were replaced in 1978 by the State Immunity Act. It explicitly allowed waiver "by a prior written agreement".[40] Lord Collins has observed that this "reversed" the "principle

33. By virtue of provisions such as the UK Civil Procedure Rules 1998/3132, Rule 6.33, and the Hong Kong Rules of the High Court, Cap. 4A Order 11, Rule 1(1) (provisions in relation to service of process out of the jurisdiction).

34. *Duff*, *supra* note 13 at 835.

35. *Kahan v. Pakistan*, *supra* note 20 at 1017.

36. *Ibid*., at 1012.

37. See Cohn, *supra* note 12 at 266–70, arguing that the *ratio decidendi* of *Duff* was limited to the point that "a submission to arbitrate or even submission to the jurisdiction is not a submission to execution", and therefore did not require the Court of Appeal to rule as it did in *Kahan*. In *NML Capital*, *supra* note 28 at para. 125, Lord Collins, with whom Lord Walker agreed, referred with approval to Professor Cohn's analysis. See also F.A. MANN, "State Contracts and International Arbitration" (1967) 42 British Yearbook of International Law 8 at 17.

38. Mann, *ibid*., at 16.

39. *Ibid*., at 17.

40. *United Kingdom State Immunity Act 1978*, s. 2(2).

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enunciated in *Kahan v. Federation of Pakistan*".[41] Dame Rosalyn Higgins noted that this statutory provision "effectively overrules" the decision of the House of Lords in *Duff*.[42] Sir Ian Sinclair remarked that the common-law rule applied in *Kahan v. Pakistan* was "abolished for the future" by the 1978 Act.[43] In Hong Kong, the UK State Immunity Act applied from 1979 until the handover in 1997. It did not, however, become part of the law of Hong Kong upon the handover.[44]

### E. *Evaluation of the Hong Kong Court's Approach*

The majority of the Hong Kong Court exhumed a deceased rule of the common law of England, and found it to be the current common law of Hong Kong, where it had also been overridden by legislation for a period of seventeen years between 1979 and 1997. They did so on the basis of their view that:

> the common law rule as to waiver is consonant with elementary good sense by requiring an unequivocal submission to the jurisdiction of the forum State at the time when the forum State's jurisdiction is invoked against the impleaded State. Courts would be ill-advised to attempt to deem an impleaded State to have submitted to their jurisdiction when it has not done so explicitly by its words or conduct and where its objection to such jurisdiction is made clear in the recognition proceedings. Such a course is likely to be damaging to the relations between the two States and may very well be ineffectual in any event.[45]

By contrast, while Legal Adviser to the United Kingdom Foreign and Commonwealth Office, Sir Ian Sinclair rather politely described the common-law position on waiver as "over-strict".[46] Sir Humphrey Waldock thought that it seemed "most undesirable".[47] Professor Allen was less diplomatic and, when discussing *Duff*, referred to the "brutal cynicism"[48] of the approach of the government of Kelantan, permitted by the courts.

The reasoning of the majority of the Hong Kong Court in the *FG Hemisphere* case allows a state to waive immunity in signing a contract with a private entity, and then when faced with proceedings arising from breach of that contract, successfully to invoke precisely the immunity that it had already waived.[49]

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41. *NML Capital*, *supra* note 28 at para. 126.
42. Rosalyn HIGGINS, "Execution of State Property in English Law" in Rosalyn HIGGINS, ed., *Themes and Theories: Volume IV* (Oxford: Oxford University Press, 2009), 400.
43. Ian SINCLAIR, "The Law of Sovereign Immunity, Recent Developments" (1979) Recueil des cours at 274, ftn 288, and see 259.
44. The *State Immunity Act 1978* applied to Hong Kong by virtue of the *State Immunity (Overseas Territories) Order 1979*, and ceased to have effect there upon China's resumption of the exercise of sovereignty over Hong Kong on 1 July 1997. See *FG Hemisphere*, *supra* note 3 at para. 222.
45. *Ibid*., at para. 392.
46. Sinclair, *supra* note 43 at 204.
47. Humphrey WALDOCK, ed., *J. L. Brierly, The Law of Nations,* 6th ed. (Oxford: Oxford University Press, 1963) at 275.
48. Carleton ALLEN, *Bureaucracy Triumphant* (Oxford: Oxford University Press, 1931) at 14, cited in Hersch LAUTERPACHT, "The Problem of Jurisdictional Immunities of Foreign States" (1951) 28 British Yearbook of International Law 220 at 235.
49. This is equivalent to, for example, the position of Venezuela communicated to the International Law Commission as the Commission prepared the 2004 Convention: *Venezuela*, *Comments and*

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In the context of enforcement of arbitral awards against states, the question of the effectiveness of a contractual waiver of state immunity leads directly to a more fundamental question. When an arbitration involves a state, is the award just an advisory opinion issued by a panel of wise elders[50] that an unsuccessful state can choose not to comply with if it does not agree with it—or even if the government thinks the award is correct but just does not wish to pay? Or is an arbitral award a manifestation of the rule of law that creates binding and enforceable rights and obligations for the parties that consented to the process by which it was produced?

If a state does not wish to consent to arbitration, it need not do so. If it does not wish to waive its state immunity by agreement in advance of a dispute arising, it need not do so. But when in consenting to arbitration it waives its state immunity, that is an exercise of its sovereignty the terms of which it should not be permitted to revoke if it later does not like the result of the process to which it consented.

These propositions are contrary to the approach of the majority of the Hong Kong Court of Final Appeal in the *FG Hemisphere* case, which found that if in a contract with a private entity agreed before a dispute arises, a state:

1. consents to arbitration,
2. undertakes to comply with the arbitral award, and
3. waives its state immunity,

that does not prevent a state that has an arbitral award rendered against it from successfully invoking the exact state immunity that it has already purported to waive when the successful party in the arbitration seeks the aid of a court to enforce the award. Among other possibilities, this allows a state:

1. to sign a contract with a private entity under which the private entity builds important infrastructure in the state and under which the state promises to pay for it, and consents to arbitration and waives its state immunity in case it does not; and then
2. to take the benefit of the infrastructure project, not pay for it, and when an arbitral award against it is presented to a national court for enforcement, or at least to a Hong Kong court, successfully invoke in the face of that court the very immunity that it purported to waive in the contract in which the private entity undertook to build the infrastructure.

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*Observations Received from Governments*, *Jurisdictional Immunities of States and their Property*, International Law Commission, UN Doc. A/CN.4/410 (1988), at 90, para. 6.

50. Cf. the comments of Bulgaria on the draft article concerning arbitration agreements in the 2004 UN Convention (then art. 19, which became art. 17 in the final text):

> The logic of article 19 is also unacceptable. An arbitration agreement between a State and a natural or juridical person should not mean the automatic waiver of immunity even in the cases specified in the text. On the contrary, an arbitration agreement means that the State is unwilling to waive its immunity from jurisdiction relating to possible specific disputes and accepts arbitration as a means of their out-of-court settlement.

*Bulgaria*, *Comments and Observations Received from Governments*, *Jurisdictional Immunities of States and their Property*, International Law Commission, UN Doc. A/CN.4/410 (1988), at 59, para. 12.

This is the result that the majority in the *FG Hemisphere* case described as "consonant with elementary good sense".[51] A better approach would be that if a state by contract waives its state immunity, a court later dealing with any attempt to renege on that bargain should hold the state to the waiver that it has already effected. As Mr Justice Bokhary PJ opined in his dissenting judgment in *FG Hemisphere*, "it is positively consonant with the dignity of a state that it should honour judgments and arbitral awards in respect of commercial transactions into which it has entered".[52]

There is a reference in the judgment of the majority of the Hong Kong Court to the ends that the funds to be transferred from China Railways to the DRC were to be put, including railways, roads, hospitals, universities, airports, and, with a striking resemblance to an investment made in the 1980s by a company from Sarajevo which later sold two arbitral awards in its favour to a company called FG Hemisphere, two hydroelectric dams and two electricity distribution networks.

If there are good reasons for state immunity to exist at all, then the fact that states are responsible for these public goods might be among them, but ignoring contractual waivers of state immunity does not serve these ends. If a company is only prepared to invest in infrastructure projects in a state on the condition that the state waives its state immunity, and courts feel themselves free to establish a rule that fails to give effect to such contractual waivers, then one might wonder about increased reticence to make investments in the very states that most need investment. In dissent, Mr Justice Mortimer NPJ said that Ergoinvest would not have granted credit to Zaire under the relevant contracts absent the enforceable ICC arbitration clauses they contained.[53] As it stands now, credit was granted without having been repaid.

Mr Justice Mortimer NPJ referred to the "increasing consensus that the rule that a waiver can only be made before the court, whether in the suit proceedings or the enforcement proceedings in spite of earlier agreements to submit is unjust to those with whom sovereign States make commercial contracts."[54] As long ago as 1951, and presumably with absolute, rather than restrictive immunity in mind, Sir Hersch Lauterpacht thought that state immunity was "productive of inconvenience, injustice and resentment which may be more inimical to friendly international intercourse than assumption of jurisdiction".[55] He considered that:

> In view of recent experience, of the overwhelming consensus of legal opinion, of economic necessities, and the general tendency to subject the State—the domestic State and the foreign State—to the rule of law in all its manifestations, it is difficult to assume that it will continue to form part of the law.[56]

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51. *FG Hemisphere*, *supra* note 3 at para. 392.
52. *Ibid*., at para. 161.
53. *Ibid*., at para. 528. See also *NML Capital*, *supra* note 28 at paras. 11, 62.
54. *FG Hemisphere*, *supra* note 3 at para. 529.
55. Hersch LAUTERPACHT, "The Problem of Jurisdictional Immunities of Foreign States" (1951) 28 British Yearbook of International Law 220 at 226.
56. *Ibid*.

He called state immunity "a principle that places the sovereign State above the law".[57] Lest there be any doubt about his opinion, he also called it "an archaic and cumbersome doctrine of controversial validity and usefulness".[58]

Notwithstanding Sir Hersch's critique, state immunity has managed to survive. As codified in the 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property,[59] in most places this is subject to the significant exception that state immunity does not attach to the commercial activities and assets of states and their emanations. Just as this exception tempers the unfairness to private entities that might otherwise be caused by state immunity, so too does respect for contractual waivers of immunity.

The ineffectiveness of anticipatory contractual waivers in Hong Kong is all the more significant because the residual position there is now absolute immunity. If a state's commercial activities and assets were not protected by state immunity anyway, as is the position under the 2004 UN Convention on State Immunity and in many states, then waiver would not be necessary for enforcement in connection with a state's commercial activities and against a state's commercial assets. In a jurisdiction that persists with, or, more accurately, has reintroduced, absolute immunity, adopting restrictive rules on waiver has a multiplier effect, since if waiver cannot be established, then the residual position will be that states and their emanations will be immune from jurisdiction and their assets will be immune from execution for commercial activities and assets just as for sovereign ones.

Contrary to the current position in Hong Kong, and the historical position of the common law more generally, the prevailing position in civil-law systems has long been that waiver of state immunity can occur in a contract in advance of proceedings and that such a contract is binding and will be given effect by an enforcement court—so prevailing that in 1958 Professor Cohn, after reviewing the authorities,[60] felt able to say of state immunity from jurisdiction that with the exception of one decision of the Japanese Supreme Court from the 1920s:

> it can be taken for certain that with the solitary exception of this one decision the judicial consensus in the civil law countries is to the effect that waiver of immunity can be agreed upon in advance between the foreign State and a private individual, that such an agreement can be express or implied and that it has the effect of vesting jurisdiction in the State to whose courts the parties have agreed to submit their dispute.[61]

Since then, Japanese law too has come to accept that state immunity may be waived by contract between a foreign state and a non-state party in advance of actual enforcement proceedings.[62] Indeed, the more common position in modern state

57. *Ibid.*

58. *Ibid.*, at 247.

59. Art. 10, *United Nations Convention on the Jurisdictional Immunities of States and their Property*, 2 December 2004, GA Res. A59/38, UN Doc. A/RES/59/38 (not yet entered into force) [*UN Convention on State Immunity*].

60. Cohn, *supra* note 12 at 264–6.

61. *Ibid.*, at 266.

62. *Act on the Civil Jurisdiction of Japan with respect to a Foreign State*, Act No. 24 of 2009, ss. 5(1)(ii), 16 and 17(1).

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practice in common-law as well as civil-law jurisdictions is that waiver of state immunity may occur by contract between a private party and a state in advance of a dispute arising,[63] and the 2004 UN Convention on State Immunity reflects that position.[64]

## II. UN CONVENTION ON STATE IMMUNITY

The United Nations General Assembly referred the question of jurisdictional immunities of states and their property to the International Law Commission in December 1977. The General Assembly adopted the resulting Convention in December 2004. Although it was opened for signature in January 2005, only sixteen states have ratified, accepted, approved, or acceded to it. If thirty states do so, it will enter into force thirty days later.[65]

The Convention begins by recalling that "the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law".[66] The Convention proceeds on the basis of a general rule of immunity of a state and its property from the jurisdiction of the courts of another state, subject to the provisions of the Convention.[67] The most significant exception is that a state cannot

63. See, in general, *Third Report on Jurisdictional Immunities of States and Their Property*, Thirty-first session of the International Law Commission, finalized by Sompong SUCHARITKUL, UN Doc. A/CN.4/340 (1981), at paras. 85–9, and for examples of specific jurisdictions:

    1. Australia: *Foreign States Immunities Act 1985*, ss. 10(2), 17(2), 31(1).
    2. Canada: *State Immunity Act*, R.S.C., 11985, c. S-18, ss. 4(2)(a) and 12(1)(a); *TMR Energy Limited v. State Property Fund of Ukraine*, 2003 FC 1517 at para. 65; and Frederic BACHAND, "Overcoming Immunity-Based Objections to the Recognition and Enforcement in Canada of Investor-State Awards" (2009) 26 Journal of International Arbitration 59 at 79–86.
    3. Germany: *Sedelmayer v. Russian Federation*, Judgment of 6 October 2003 of the Oberlandesgericht, Cologne, extracts translated into English in (2005) XXX YCA 541 at 543.
    4. Ghana: *NML Capital Limited v. The Republic of Argentina*, High Court of Ghana, Suit No. RPC/343/12, 11 October 2012, at 13, 16, 21–2, in which the High Court accepted that immunity can be waived (overturned on appeal on other grounds).
    5. Israel: *Foreign States Immunity Law 5769-2008*, ss. 9, 11, 17.
    6. Japan: *Act on the Civil Jurisdiction of Japan with Respect to a Foreign State*, Act No 24 of 24 April 2009, ss. 5(1)(ii), 16, 17(1).
    7. Russian Federation: *Civil Procedure Code (2003)*, s. 401.
    8. Singapore: *Singapore State Immunity Act 1979*, ss. 4(2) and 11(1).
    9. Sweden: *LIAMCO v. Socialist Peoples' Libyan Arab Jamahirya*, Decision 0261/79 of the Svea Court of Appeal, 18 June 1980, 20 I.L.M. 893 at paras. 4–5;
    10. South Africa: *Foreign State Immunities Act 87 of 1981*, ss. 3(2) and 10(1).
    11. United Kingdom: *State Immunity Act 1978*, ss. 2(2), 9(1), 13(3); *Sabah Shipyard v. Pakistan* [2002] EWCA Civ. 1643 at paras. 18–27; *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania* [2006] EWCA Civ. 1529 at para. 117 [*Svenska Petroleum*].
    12. United States of America: *Foreign Sovereign Immunities Act (1976)* 28 U.S.C. 1605(a)(1), 1610(a)(1), discussed by Congress at H. Rep. No. 94-1487, 94th Cong., 2d Sess; *Ipitrade International v. Federal Republic of Nigeria*, Judgment of the United States District Court for the District of Columbia, 25 September 1978, 465 F. Supp 824 (1978), 826; *Restatement of the Law (Third): The Foreign Relations Law of the United States* (American Law Institute, 1987) at 456 [*Third Restatement*].

64. *UN Convention on State Immunity*, *supra* note 59, art. 7(1).

65. *Ibid.*, art. 30.

66. *Ibid.*, First Recital.

67. *Ibid.*, art. 5.

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invoke immunity in a proceeding arising out of a commercial transaction into which it has entered with a foreign natural or juridical person.[68] This is so even without a waiver.

There are three features of the Convention of most significance to the issue of waiver. The first is that the Convention is explicit that waiver of state immunity from jurisdiction can occur in a written contract with a private entity prior to a dispute arising:

> A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:
>
> a. By international agreement;
> b. In a written contract; or
> c. By a declaration before the court or by a written communication in a specific proceeding.[69]

Second, where a state has agreed to arbitrate a commercial or investment matter, it thereby waives its state immunity from proceedings concerning the "confirmation" of the award by a national court:

> If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction,[70] that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:
>
> a. the validity, interpretation or application of the arbitration agreement;
> b. the arbitration procedure; or
> c. the confirmation or setting aside of the award, unless the arbitration agreement otherwise provides.[71]

An earlier version of this Article had omitted any reference to "confirmation" of the award on the ostensible basis that "recognition of the award" was "a matter that pertained more to immunity from execution and, accordingly, had no place" in what became Article 17, dealing with the effect of an arbitration agreement.[72] The subsequent appearance of "confirmation" in Article 17 raises the question of whether it applies only to the exercise of supervisory powers by the courts of the seat of arbitration,[73] or whether it applies to recognition of arbitral awards as a step towards enforcement, including in jurisdictions other than the seat of the arbitration. Unless and until clarity on the answer to this question develops, private entities entering into

68. *Ibid*., art. 10.

69. *Ibid*., art. 7(1).

70. The annex to the *UN Convention on State Immunity*, *supra* note 59, specifies that in this article the "expression 'commercial transaction' includes investment matters".

71. *UN Convention on State Immunity*, *supra* note 59, art. 17.

72. See the comments of the Chairman of the Drafting Committee in *2219th Meeting, Summary Records of the Meetings of the Forty-third Session*, International Law Commission, UN Doc. A/CN.4/L.457 (1991), at para. 60.

73. See Hazel FOX and Philippa WEBB, *The Law of State Immunity*, 3rd. ed. (Oxford: Oxford University Press, 2013) at 393.

arbitration agreements with states or their emanations in any context in which the rule in Article 17 of the Convention might be or become relevant will wish to request, in addition to an agreement to arbitrate, a specific waiver of state immunity from jurisdiction, as well as from execution.

The third significant point about the 2004 UN Convention on State Immunity is that it treats immunity from execution as a separate matter from immunity from jurisdiction. A general waiver of state immunity will waive immunity from the jurisdiction of a court, but it will not waive a foreign state's immunity from execution against its assets.[74] Under the Convention, waiver of state immunity from execution of an arbitral order or award against the assets of a state will exist if the state has "expressly consented" to that result in "an arbitration agreement or in a written contract"[75] or if one of the other criteria in Articles 18 or 19 dealing with "measures of constraint" is fulfilled. Article 18 deals with "pre-judgment measures of constraint", which in arbitration would typically be referred to as provisional or interim measures. Article 19 deals with "post-judgment measures of constraint", most significantly actual execution against a state's assets of the debt imposed by a judgment, including a judgment giving effect within the relevant jurisdiction to an arbitral award. Those two Articles are different in some respects, but the parts of them relevant for present purposes are identical:

> No measures of constraint:
>
> such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
>
> a. the State has expressly consented to the taking of such measures as indicated:
>
> i. by international agreement;
> ii. by an arbitration agreement or in a written contract; or
> iii. by a declaration before the court or by a written communication after a dispute between the parties has arisen.[76]

Waiver of state immunity from jurisdiction and, if expressly so provided, execution, by contract between a state and a private party in advance of a dispute arising is thus clearly provided for by the 2004 UN Convention on State Immunity. In the *Jurisdictional Immunities of the State* case between Germany and Italy decided by the International Court of Justice in 2012, Germany submitted that Article 19 of the UN Convention on State Immunity codified existing rules of customary international law.[77] In response, the Court observed that during the drafting of the Convention "these provisions gave rise to long and difficult discussions".[78] The Court preferred just to observe that it was "unnecessary for

74. *UN Convention on State Immunity*, *supra* note 59, art. 20.
75. *Ibid*., arts. 18(a)(ii) and 19(a)(ii).
76. *Ibid*., arts 18(a) and 19(a).
77. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, [2012] I.C.J. Rep. 99 at para. 115 [*Jurisdictional Immunities Case*].
78. *Ibid*., at para. 117.

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purposes of the present case for it to decide whether all aspects of Article 19 reflect customary international law".[79]

Some courts have been more enthusiastic about the possibility of the 2004 UN Convention on State Immunity representing customary international law. In the year that it was opened for signature, the Convention was described as follows by Mr Justice Aikens in *AIG Capital Partners v. Kazakhstan* in the High Court of England and Wales:

> I regard the UN Convention on *Jurisdictional Immunities of States and their Property*, adopted by the General Assembly, as a most important guide on the state of international opinion on what is, and what is not, a legitimate restriction on the right of parties to enforce against State property generally. I accept that the Convention does not constitute a *jus cogens* in international law. I recognise that the Convention has not yet been adopted by any States. But its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, powerfully demonstrates international thinking on the point.[80]

In *Jones v. Ministry of Interior for Saudi Arabia*, Lord Hoffmann stated that the Convention "is the result of many years of work by the International Law Commission and codifies the law of state immunity".[81] The French *Cour de cassation* was explicit that it considers that the Convention reflects customary international law.[82] The European Court of Human Rights has equally held that the rules contained in the 2004 UN Convention on State Immunity constitute customary international law, at least for states that have "not opposed it".[83] On that basis, a Chamber of the Strasbourg Court considered that the rules contained in the 2004 UN Convention on State Immunity applied to the Russian Federation, which has signed, but not ratified, the Convention.[84] The Strasbourg Court found that since the 2004 UN Convention on State Immunity does not confer immunity on states in connection with their commercial transactions, Russia breached the applicant's right of access to court under Article 6(1) of the European Convention on Human Rights because the Russian courts had applied a rule of absolute state immunity.[85] The basis of this finding was that in applying absolute state immunity, the Russian courts had refused to examine the merits of a claim, rather than determining whether the claim concerned a commercial transaction so as not to attract state immunity under customary international law, codified, the Strasbourg Court held, in the 2004 UN Convention on State Immunity.[86] The Strasbourg Court noted that customary

79. *Ibid*.
80. *AIG Capital Partners v. The Republic of Kazakhstan* [2005] EWHC 2239 (Comm) at para. 80.
81. *Jones v. Ministry of Interior for Saudi Arabia* [2007] 1 AC 270 at para. 47.
82. *NML v. Argentina*, French *Cour de cassation*, Judgments No. 394, 395, and 396 of 28 March 2013.
83. *Oleynikov v. Russia*, Judgment of 14 March 2013, Application No. 36703/04, European Court of Human Rights, at para. 66.
84. *Ibid*., at paras. 66–8.
85. *Ibid*., at paras. 66–73.
86. *Ibid*., at paras. 69–71.

international law forms part of the Russian legal system in accordance with Article 15(4) of the Russian Constitution.[87]

The Convention was afforded rather less significance by the Hong Kong court in the *FG Hemisphere* case. In the context of waiver it was not mentioned once, even in either of the two dissenting judgments. As well as exhuming a rule of the common law that had been reversed by statute in its home jurisdiction, and in Hong Kong until the handover, the Hong Kong Court did so for a rule that is contrary to the 2004 UN Convention on State Immunity, without any acknowledgement of that conflict. This was perhaps because the court had already made clear in the context of its discussion of absolute immunity that, although the People's Republic of China signed the Convention, the Government of the PRC indicated in the proceedings that it was of no legal significance to it absent ratification.[88]

Unless and until the UN Convention on State Immunity enters into force for a large number of states, or there is greater certainty about the content of customary international law in this area, the specific rules of state immunity as they have been developed in individual national jurisdictions, and differences between jurisdictions, will continue to be important.

## III. CONSENT TO ARBITRATION USUALLY CONSTITUTES WAIVER OF STATE IMMUNITY FROM JURISDICTION BUT USUALLY NOT OF STATE IMMUNITY FROM EXECUTION

In the account that follows of the position in various jurisdictions, the focus is on three related issues. One is the distinction between waiver of immunity from jurisdiction and waiver of immunity from execution. The second is the extent to which consent to arbitration constitutes a waiver of one or both of those immunities. The third is whether the particular arbitration rules chosen, especially if the ICC Arbitration Rules, make a difference to whether immunity from execution, not only immunity from jurisdiction, has been waived. As a precursor to an examination of those issues across different jurisdictions, this section commences with a discussion of terminology, to ensure that differences and ambiguities in terminology do not impede comparison and analysis of concepts.

### A. *Terminology: Confirmation or Recognition or Enforcement or Execution?*

There are at least four pertinent words, and it is not always obvious which is being used to refer to what. Nor is it always obvious whether the author, including when the author is a legislature or judge, appreciates the distinction between them, and the

87. *Ibid*., at para. 71. Russia's request for a referral of this case to the Grand Chamber of the Court was rejected; see European Court of Human Rights, "Cases referred to the Grand Chamber" (September 2013), online: ECHR <http://hudoc.echr.coe.int/webservices/content/pdf/003-4486072-5407555>.

88. *FG Hemisphere*, *supra* note 3 at para. 261. Cf. art. 18 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) concerning the "Obligation not to defeat the object and purpose of a treaty prior to its entry into force".

fact that the term being used may have different connotations in different jurisdictions. Since, as Lord Steyn remarked: "Categorisation is an indispensable tool in the search for rationality and coherence in law",[89] these four terms are analyzed further in this section before turning to a discussion of the extent to which in various jurisdictions consent to arbitration constitutes a waiver of state immunity. This is because the next question is: Immunity from what? Those terms are:

1. confirmation;
2. recognition;
3. enforcement; and
4. execution.

There have been attempts to explain them,[90] but those attempts have not been entirely consistent with each other.

"Confirmation" is the term used in Section 13 of the Federal Arbitration Act of the United States of America. If an application is made to a US court to "confirm" an arbitral award, the "judgment shall be docketed as if it was rendered in an action" and: "The judgment so entered shall have the same force and effect … as … a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."[91] The term was then used in the final text of the 2004 UN Convention on State Immunity, with the ambiguous result discussed above. If the objective intention in the Convention was to use the word "confirmation" in the same way that it is used in US legislation, then that would militate towards the result that an agreement to arbitrate, without more, includes an agreement to waive state immunity from jurisdiction in an application to recognize the award as having the same binding effect as a court judgment, whether in the seat of the arbitration or in another jurisdiction.[92]

"Recognition" is a word widely used to describe the step by which a court grants to an arbitral award the force of a national court judgment, known as an *exequatur* in France and systems equivalent to the French.[93] In connection with recognition of foreign court judgments in England—and the same logic applies to arbitral awards—Professor Briggs has explained that recognition "means treating the claim which was adjudicated as having been determined once and for all".[94] He notes that it "does not

89. *Boddington v. British Transport Police* [1999] 2 AC 143 at 170.

90. See, for example, *Second Report on Jurisdictional Immunities*, *supra* note 6 at paras. 38–40; Mann, *supra* note 37 at 18–19; Albert Jan VAN DEN BERG, "Recent Enforcement Problems Under the New York and ICSID Conventions" (1989) 5 Arbitration International 2 at 10–12; and New York City Bar, "Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered Under the ICSID Convention" (July 2012), online: <http://www2.nycbar.org/pdf/report/uploads/20072262-Procedures forAwardsunderICSID.pdf> at 5–6.

91. *Federal Arbitration Act*, 9 USC Title 9 (1947, as amended).

92. See the use of "confirm" in the "arbitration exception" in the *Foreign Sovereign Immunity Act*, 28 USC 97, s. 1605(a)(6).

93. See, for example, *Yugoslavia v. SEEE*, Tribunal de grand instance de Paris, 6 July 1970, 65 ILR 47 at 48–9 [*Yugoslavia v. SEEE*].

94. Adrian BRIGGS, *The Conflict of Laws*, 2nd ed. (Oxford: Oxford University Press, 2013) at 140.

matter whether it was determined in favour of the claimant or the defendant".[95] In either case the "matter is then *res judicata*, and the losing party will be estopped from contradicting it in subsequent proceedings in an English court".[96] The New York Convention is, in full, the New York Convention on the Recognition and Enforcement of Arbitral Awards. It thus draws a distinction between recognition and enforcement. Typically, there should be no difference of substance between a process referred to as "confirmation" of an arbitral award by a national court and a process referred to as "recognition" of an arbitral award by a national court. Both come within the term "recognition" as used in the New York Convention. Under either name, a successful respondent will have done enough to defeat any claim brought in the jurisdiction concerned that is inconsistent with the arbitral award, and a successful claimant will have taken a necessary but not sufficient step towards turning an award into cash.[97]

"Execution" occurs when the debt arising under an arbitral award, by then already given the force of a national court judgment, is executed against the assets of the debtor, for example through a compulsory conveyance, attachment, garnishment, or sale. It comes within the term "enforcement" as used in the New York Convention.

"Enforcement" is sometimes used:

1. to refer to the process by which a court grants an arbitral award the force of a national court judgment, more precisely called confirmation or recognition,
2. to refer to actual execution of a debt against specific assets of the debtor, more precisely called execution,
3. to refer to various intermediate steps between the two existing in some jurisdictions, or
4. as an omnibus word to describe in general terms the process of turning an award rendered by an arbitral tribunal into a transfer of cash to the successful party, encompassing each of the individual steps of recognition and execution involved in doing so, however they may differ from one jurisdiction to another.

The *FG Hemisphere* case concerned an application for "leave to enforce" two arbitral awards "in the same manner as judgments" of a Hong Kong court.[98] The parties agreed that this concerned recognition, not execution, and the court proceeded on that basis.[99] Since "enforcement" is sometimes used in the context of jurisdiction to recognize an award as binding, and sometimes used in the context of

95. *Ibid.*
96. *Ibid.*, citing George Spencer BOWER and Kenneth R. HANDLEY, *Spencer Bower, Turner and Handley on The Doctrine of Res Judicata*, 3rd ed. (London: Butterworths, 1996).
97. Lawrence COLLINS *et al.*, eds., *Dicey, Morris, and Collins: Conflict of Laws*, 15th ed. (London: Sweet & Maxwell, 2012) at 678–88.
98. *FG Hemisphere*, *supra* note 3 at paras. 19 and 194. See also *Svenska Petroleum*, *supra* note 63(11) at para. 10, discussed below.
99. *FG Hemisphere*, *supra* note 3 at paras. 11 and 382–3.

execution, it can be a troublesome word if too much precision is expected of it. It would be best consigned to a general word covering the entire process within a domestic judicial system designed to satisfy the debt due under an arbitral award, from first presentation of an arbitral award to a court, until the forcible transfer of assets to satisfy the debt due under the judgment recognizing the binding force of the arbitral award. It is in this very general sense that it is used in this paper.

For each term, to which precise aspect of local procedure it attaches may vary according to the jurisdiction in which the relevant step is taken. Whichever of these four terms is used, the main distinction that needs to be drawn is between (i) immunity from jurisdiction over a state to recognize an arbitral award against it as binding, as though it were a judgment of the recognizing court, and (ii) immunity from execution of the judgment debt against that state's assets. Immunity from jurisdiction concerns whether a court can be prevented from *deciding* something involving a state, including concerning the binding force of an arbitral award. Immunity from execution concerns whether an organ of a state, whether a court or some other organ of the judicial or executive branch, can be prevented in execution of a debt owed under a judgment from *taking* something that belongs to another state.

Confirmation and recognition will always relate to immunity from jurisdiction. Execution will, of course, always relate to immunity from execution. Enforcement might relate to either, or both, depending on how the word is being used.

### B. *Hong Kong*

For the minority of the Hong Kong Court in the *FG Hemisphere* case, it was possible for a state to waive its absolute state immunity by contract in advance of a dispute. A further question therefore arose for the minority: had the DRC waived its state immunity from the jurisdiction of foreign courts?

*FG Hemisphere* argued that a waiver of state immunity was to be found not just in the fact that the state had consented to arbitration, but that it had agreed to the ICC Arbitration Rules of 1998, which in Rule 28(6) stated that:

> Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

The majority thought that this was "plainly insufficient"[100] to constitute waiver of state immunity from jurisdiction, not because of its terms, but because of (i) who agreed it, namely a state and a private party, rather than two states, and (ii) when it was agreed, that is prior to the forum state being asked to exercise jurisdiction over the state the waiver of whose immunity was in question.

In dissent, Mr Justice Mortimer NPJ thought that: "Justice requires that in submitting to the [ICC] rules a State is also submitting to the enforcement procedure."[101] Mr Justice Bokhary PJ, with whom Mr Justice Mortimer NPJ agreed,

100. *Ibid*., at para. 390.
101. *Ibid*., at para. 530.

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viewed "a State's submission to arbitration in a commercial dispute as a waiver of any immunity from an enforcement leave application that it might have had in Hong Kong".[102] Mr Justice Bokhary PJ agreed[103] with the statement in *Fouchard, Gaillard and Goldman* that it "would be absurd to conclude that a State could agree to submit disputes to arbitration despite its immunity from jurisdiction, but that it could subsequently prevent the award from becoming enforceable by simply relying on that immunity".[104]

## C. *France*

Neither the views of those distinguished French authors, nor the final text of the 2004 UN Convention on State Immunity, accord entirely with the comment made by France on the text that ultimately developed into Article 17 of that Convention, dealing with arbitration agreements. In its comments in 1988 on the International Law Commission's draft articles, France said that it "believes, subject to the final opinion of the French courts, that an arbitration clause cannot be regarded in itself as constituting a waiver of immunity from jurisdiction in all circumstances and that account should also be taken of the nature of the contracts".[105]

The French *Cour de cassation* subsequently took a different view, holding in *Creighton v. Qatar* in 2000 that agreement to arbitration in the form of agreement to the ICC Arbitration Rules constituted not only a waiver of immunity from jurisdiction, but also a waiver of immunity from execution.[106] One month later the

102. *Ibid*., at para. 163; also see at paras. 176 and 178. The sections of the dissenting judgments of Mr Justice Bokhary PJ and of Mr Justice Mortimer NPJ relevant to waiver more generally may be found at paras. 149–79 and 526–31, respectively.

103. *Ibid*., at para. 164.

104. Emmanuel GAILLARD and John SAVAGE, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at 391. This has also been expressed drawing a sharper distinction between immunity from jurisdiction and that from execution: "the French courts have endeavoured to give full effect to an award rendered against a state, rather than allowing the state to submit disputes to arbitration despite its immunity from jurisdiction, but then prevent the award from becoming enforceable simply by relying on its immunity from execution."; Emmanuel GAILLARD, "Waiving State Immunity from Execution in France: An Update" (2000) 224 New York Law Journal 33 at para. 5. See also the concurring opinion of Judge Tillinger in *LIAMCO v. Socialist Peoples' Libyan Arab Jamahirya*, Decision of 18 June 1980, Svea Court of Appeal, 20 I.L.M. 893 at paras. 9–10; and Albert Jan VAN DEN BERG, "Recent Enforcement Problems under the New York and ICSID Conventions" (1989) 5 Arbitration International 2 at 12.

105. *France*, *Comments and Observations Received from Governments on Jurisdictional Immunities of States and Their Property*, International Law Commission, UN Doc. A/CN.4/410 (1988), at para. 36.

106. Cass Civ 1, 6 July 2000, [2000] 1 Bull Civ. 207, the relevant short extract from a very short judgment being: "l'engagement pris par l'Etat signataire de la clause d'arbitrage d'exécuter la sentence dans les termes de l'article 24 du règlement d'arbitrage de la Chambre de commerce international impliquait renonciation de cet Etat à l'immunité d'exécution." This controversial judgment was received differently by different French commentators, for example Nathalie MEYER-FABRE, "Enforcement of Arbitral Awards against Sovereign States, a New Milestone: Signing ICC Arbitration Clause Entails Waiver of Immunity from Execution Held by French Court of Cassation in Creighton v Qatar, July 6, 2000" (2000) Mealey's International Arbitration Report 48, thought it "far-fetched", whereas, for example, Gaillard thought it "a very significant step forward in ensuring the enforceability of arbitral awards against states"; see Gaillard, *supra* note 104 at para. 2. On inconsistencies in the French jurisprudence in this area, before and after the decision in *Creighton*, see Sarah FRANÇOIS-PONCET, Brenda HORRIGAN, and Lara KARAM, "Enforcement of Arbitral Awards Against Sovereign States or State Entities—France" in Doak BISHOP, ed., *Enforcement of Arbitral Awards Against Sovereigns* (New York: Juris Publishing, 2009), 369–72. Contrast, for example, *Yugoslavia v. SEEE*, *supra* note

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*Cour d'appel de Paris* held in the *Russian Federation v. Noga* case that a contract in which a state renounced "all rights of immunity relative to the application of any arbitral award against it in relation to the present contract" did not constitute a waiver of diplomatic immunity and that the debt owed under the arbitral award could not be executed against the bank accounts of the Russian embassy in France.[107] State immunity had been waived, but not diplomatic immunity.

In a case involving interim measures in pursuit of eventual enforcement of a foreign court judgment, rather than an arbitral award, the *Cour de cassation* has more recently applied a much more restrictive test to waiver of immunity of execution than that which it applied in *Creighton*. In *NML v. Argentina* it held in a trio of simultaneous judgments that:

> Given that, according to customary international law, as reflected by the United Nations Convention of 2 December 2004 on the Jurisdictional Immunities of States and their Property, whilst States can waive, by written contract, their immunity from execution against assets or categories of assets used or destined to be used for public purposes, they can only do so in an express and specific manner, mentioning the assets or the category of assets over which the waiver is granted.[108]

The suggestion in these Delphic judgments that for a waiver of immunity from execution to be effective in the context of prejudgment measures of constraint it is necessary for a state to specify the assets or category of assets against which execution may occur is without foundation in the terms of the 2004 UN Convention on State Immunity, and in particular its Article 18 on prejudgment measures of constraint, and without support in the *Cour de cassation*'s earlier judgment in *Creighton v. Qatar.* Article 18(b) of the Convention does refer in the context of prejudgment measures of constraint to a situation where a "State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding". This exception to immunity is explicitly an alternative to the forms of waiver listed in Article 18(a), which include consent by a state to prejudgment measures of constraint "by an arbitration agreement or in a written contract". Article 18(a) certainly does not require that any such agreement specify the assets or category of assets to which the waiver applies.

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93 at 49, *Eurodif v. Iran*, Court of Appeal of Paris, 21 April 1982, and the French cases cited by August REINISCH, "European Court Practice Concerning State Immunity from Enforcement Measures" (2006) European Journal of International Law 803 at 818–19, and Fox and Webb, *supra* note 73 at 385–7. See also the distinction drawn between the French and English positions by Lord Mance in *Dallah Co v. Ministry of Religious Affairs* [2010] UKSC 46 at para. 19.

107. CA Paris, 10 August 2000, [2001] Rev. Arb. 114. On waiver of state immunity not constituting a waiver of diplomatic immunity now also see *NML v. Argentina*, French *Cour de cassation*, Judgment No 867 of 28 September 2011.

108. *NML v. Argentina*, French *Cour de cassation*, Judgments No. 394, 395, and 396 of 28 March 2013. The original French reads:

> Attendu que, selon le droit international coutumier, tel que reflété par la Convention des Nations Unies, du 2 décembre 2004, sur l'immunité juridictionnelle des Etats et de leurs biens, si les Etats peuvent renoncer, par contrat écrit, à leur immunité d'exécution sur des biens ou des catégories de biens utilisés ou destinés à être utilisés à des fins publiques, il ne peut y être renoncé que de manière expresse et spéciale, en mentionnant les biens ou la catégorie de biens pour lesquels la renonciation est consentie.

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Perhaps the *Cour de cassation* really meant to say that under Article 18(a) a waiver can only apply to prejudgment measures of constraint if it specifically says so, and that if it does not, then the only other way for a waiver to apply to "*saisies conservatoires*" is, in accordance with Article 18(b), for specific assets to be identified by the respondent state for satisfaction of the claim against it, and for the prejudgment measures of constraint to apply only to those assets. That is not, however, what the judgments say. They cite the Convention as authority for the much more far-reaching proposition that "whilst States can waive, by written contract, their immunity from execution against assets or categories of assets used or destined to be used for public purposes, they can only do so in an express and specific manner, mentioning the assets or the category of assets over which the waiver is granted".[109] Article 18(a) of the 2004 UN Convention on State Immunity does not require that a waiver of state immunity from execution expressed to apply to prejudgment measures of constraint must also identify the specific assets or category of assets to which it applies.

In the context of post-judgment measures of constraint, Article 19(b) also allows for execution against property "allocated or earmarked" by the respondent state "for the satisfaction of the claim which is the object of that proceeding". As with the equivalent provision in Article 18(b), Article 19(b) is in the alternative to paragraph (a) of the same Article. Article 19(a), like Article 18(a), provides for waiver of immunity from execution by way of an arbitration agreement or other contract without any particular assets or category of assets being identified.

In between the *Cour de cassation*'s decision in *Creighton v. Qatar*, in 2000, and its decisions in *NML v. Argentina*, in 2013, France signed and deposited its instrument of approval of the 2004 UN Convention on State Immunity. This may have made the Court more willing to refer to international rules on state immunity but it did not, unfortunately, lead to their correct application. Although the recent French judgments in *NML v. Argentina* create a very restrictive regime in France for *saisies conservatoires*, the position with respect to enforcement of final awards remains the very expansive one articulated in *Creighton v. Qatar*: agreement to arbitration in the form of the ICC Arbitration Rules constitutes waiver of state immunity from jurisdiction and of state immunity from execution.

### D. *United Kingdom*

The position in the United Kingdom is that consent to arbitration constitutes waiver of state immunity from jurisdiction, but not from execution. Understanding the extent to which an arbitration clause waives state immunity in the UK requires a close examination of the interpretation of the UK State Immunity Act 1978 adopted by the Court of Appeal of England and Wales in *Svenska Petroleum v. Government of the Republic of Lithuania* (*Svenska Petroleum*). A private Swedish party and the government of Lithuania consented to ICC arbitration in Denmark to resolve disputes arising under a contract between them governed by Lithuanian law.

109. *Ibid.*

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The English courts interpreted Section 9(1) of the UK State Immunity Act such that Lithuania was deemed to have waived immunity from proceedings in the UK for leave to enforce a resulting award, but not to have waived immunity from execution against its assets.

Section 9(1) of the State Immunity Act provides that:

> Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.[110]

Distinguished commentators had doubted whether this provision applied to proceedings related to enforcement of an arbitral award (rather than just the supervision of the arbitral process by the courts of its seat),[111] or to arbitrations seated somewhere other than the UK.[112] The High Court considered their writings,[113] but both it and the Court of Appeal decided otherwise on both points, including by reference to relevant passages from *Hansard*.[114] The Supreme Court of the UK has since confirmed that an effect of Section 9 was "to lift State immunity in respect of the enforcement of arbitration awards against States, including foreign arbitration awards".[115]

In *Svenska Petroleum*, the Court of Appeal found as follows:

> The judge held that there was no basis for construing section 9 of the State Immunity Act (particularly when viewed in the context of the provisions of section 13 dealing with execution) as excluding proceedings relating to the enforcement of a foreign arbitral award. We think that is right. Arbitration is a consensual procedure and the principle underlying section 9 is that, if a State has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective.[116]

The Court of Appeal held that if a state consents to arbitration, it follows that it has waived state immunity from proceedings before any court in the UK for recognition of that award or for leave to enforce it.[117] The Court of Appeal considered that an application for leave to enforce an award as a judgment under

110. United Kingdom *State Immunity Act 1978*, s. 9(1). With the substitution of "Singapore" for "United Kingdom", the same text appears verbatim in s. 11(1) of the Singapore *State Immunity Act of 1979*, as amended.

111. Lawrence COLLINS, ed., *Dicey & Morris: The Conflict of Laws,* 13th ed. (London: Sweet & Maxwell, 2000) at 251; Hazel FOX, "States and the Undertaking to Arbitrate" (1988) 37 International and Comparative Law Quarterly 1 at 11–18. Also see *Foreign State Immunity* (1984) Australian Law Reform Commission Report No. 24 at paras. 104–5.

112. Fox, *ibid.*, at 11–18.

113. *Svenska Petroleum*, *supra* note 63(11) at paras. 68–73.

114. *Ibid.*, at paras. 69–71; *Hansard*, House of Lords Debates, 16 March 1978, vol. 389, cols. 1516–17 (The Lord Chancellor) and *Hansard*, House of Lords Debates, 28 June 1978, vol. 394 col. 316 (The Lord Chancellor): "The Amendment removes the links with the United Kingdom, and by deleting the reference to the United Kingdom or its law, it will ensure that a State has no immunity in respect of enforcement proceedings for any foreign arbitral award."

115. *NML Capital*, *supra* note 28 at paras. 89 and 90.

116. *Svenska Petroleum*, *supra* note 63(11) at para. 117.

117. *Ibid.*

Section 101(2) of the Arbitration Act 1996 is "one aspect of its recognition and as such is the final stage in rendering the arbitral process effective".[118] The Court indicated, however, that: "Enforcement by execution on property belonging to the State is another matter, as sect. 13 makes clear."[119]

Section 13(2)(b) of the State Immunity Act provides that "the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award". Section 13(4) provides that this "does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes". Section 13(3) provides that even in the case of non-commercial property, process may be issued against that property:

> with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.[120]

Dr Mann once observed that an "application for enforcement serves no useful purpose except as a first step towards execution".[121] True though that may be, the result of the statutory provisions and case-law discussed above is that the prevailing position in the UK is that in agreeing to arbitration anywhere, a state waives its immunity from the jurisdiction of any court in the UK to recognize the award and to grant leave to enforce it, but that when it comes to execution of the debt imposed by the award against a state's assets, immunity against that result is not waived just by having consented to arbitration. Rather, a specific waiver of immunity from execution is required in accordance with Section 13(3) of the State Immunity Act.[122]

After *Svenska Petroleum*, in the 2008 judgment of *Orascom Telecom Holding SAE v. Republic of Chad*,[123] Mr Justice Burton considered in the High Court of England and Wales whether by agreeing to the ICC Arbitration Rules a state waived its immunity from execution, noting that this question had not previously been considered by any court in that jurisdiction.[124] He reviewed the French decision in *Creighton*, discussed above, and the US decision in *Walker International Holdings Ltd v. The Republic of Congo*, discussed below, which, like *Creighton*, decided that agreement to the ICC Arbitration Rules constituted waiver of state immunity from execution.[125] Mr Justice Burton indicated that he was "reluctant" to conclude that the position adopted in these judgments should be "imported into" England and Wales, noting the significance of the 1978 Act in the UK.[126] Since he had already decided the

118. *Ibid.*
119. *Ibid.* Also see Higgins, *supra* note 42 at 406–7.
120. Singapore *State Immunity Act of 1979*, as amended, s. 15(3) contains identical terms. See also to equivalent effect, *Foreign States Immunities Act 1985*, Australia, s. 31(1).
121. Mann, *supra* note 37 at 19.
122. *Svenska Petroleum*, *supra* note 63(11) at paras. 117, 121, 123.
123. [2008] EWHC 1841 (Comm).
124. *Ibid.*, at para. 33.
125. *Ibid.*, at paras. 38–48.
126. *Ibid.*, at para. 49.

case against Chad on the basis that the bank account against which execution was sought was used for commercial purposes and therefore did not attract state immunity, he did not need to, and did not, ultimately decide whether agreement to the ICC Arbitration Rules constituted a waiver of state immunity from execution in the UK.[127]

## E. *Australia*

The Australian Foreign States Immunities Act is similar in effect to the UK State Immunity Act, as interpreted in *Svenska Petroleum*, but with more clarity in the statutory terms. It states in Section 17 that where a foreign state is party to an arbitration agreement "then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding concerning the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made".[128] Section 17 deals with recognition and enforcement as matters of jurisdiction. Sections 30 to 33 then deal separately with execution of the debt arising under an arbitral award against the non-commercial property of a state. Any waiver of immunity from execution must specifically provide for that result.[129]

## F. *United States of America*

Similarly, the American Law Institute's Third Restatement of the Foreign Relations Law of the United States provides that "a State may waive its immunity from attachment of its property or from execution against its property, but a waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit".[130]

Prior to the Third Restatement, the US District Court for the District of Columbia had held in 1980 that: "While an agreement to entry of judgment reinforces any waiver, an agreement to arbitrate, standing alone, is sufficient to implicitly waive immunity."[131] The immunity in question in that case was immunity from execution, not just immunity from jurisdiction.

After the Third Restatement, the US Court of Appeals, Fifth Circuit, held in the case of *Walker International Holdings Ltd v. The Republic of Congo* that Rule 28(6) of the ICC Arbitration Rules, quoted above in connection with the judgment of the French *Cour de cassation* in *Creighton v. Qatar*, constituted a waiver of state immunity against execution.[132] The production-sharing contract at issue in that case

127. *Ibid*., at para. 50.

128. *Foreign States Immunities Act 1985*, Australia, s. 17(2).

129. See especially, *ibid*., ss. 30 and 31(1).

130. *Third Restatement*, *supra* note 63(12). See also the *Foreign Sovereign Immunity Act*, 28 USC 97, s. 1605(a), especially 1605(a)(1) and 1605(a)(6), dealing with immunity from jurisdiction, and see further s. 1610(a)(1), dealing separately with waiver of immunity from attachment and execution.

131. *Birch Shipping Corporation v. The Embassy of the United Republic of Tanzania*, Judgment of the United States District Court for the District of Columbia, 18 November 1980, 507 F. Supp. 311 (1980) at 312.

132. 395 F. 3d 229 (5th Cir. 2004).

contained an explicit waiver of immunity from execution.[133] The ICC Arbitration Rules were referred to by way of "addition".[134] Nonetheless, the decision is explicit that agreeing to the ICC Arbitration Rules "precluded the ROC from asserting a sovereign immunity defense" in connection with the execution against the state's assets of the debt imposed by the award.[135] This places it in the same category as the French judgment in *Creighton v. Qatar*. Neither of those judgments, however, is authority for the proposition that waiver of immunity from jurisdiction implies waiver of immunity from execution. They are both authority for the proposition that agreement to the ICC Arbitration Rules constitutes implied waiver of immunity from execution.

Solely on immunity from jurisdiction, as opposed to execution, in 1988 the Foreign Sovereign Immunities Act was amended by the US Congress to provide that:

> A foreign State shall not be immune from the jurisdiction of courts of the United States … in any case … in which the action is brought … to confirm an award made pursuant to … an agreement to arbitrate, if … the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.[136]

In three different cases, US courts have observed that the New York Convention "is exactly the sort of treaty Congress intended to include in the arbitration exception" contained in this statutory provision.[137] In those three cases, *Cargill International v. M/T Pavel Dybenko*,[138] the US decision in *Creighton v. Qatar*,[139] and *S & R Davis International v. The Republic of Yemen*,[140] three different US federal courts all held that agreement by a state to arbitration in a state other than the US did not itself constitute a contractual waiver of state immunity from jurisdiction in the US.[141] Dr Mann observed that it is "usually assumed" that when there is a question about immunity from enforcement of an arbitral award, "the answer is supplied by the general law relating to immunity rather than any specific rules relating to

133. *Ibid*., at 233.

134. *Ibid*., at 234.

135. *Ibid*. Also see *Ipitrade International v. Federal Republic of Nigeria*, Judgment of the United States District Court for the District of Columbia, 25 September 1978, 465 F. Supp 824 (1978) at 826.

136. *Foreign Sovereign Immunity Act*, 28 USC 97, s. 1605(a)(6).

137. *S & R Davis International v. The Republic of Yemen* 218 F.3d 1292 at 1301–1302 (11th Cir. 2000) [*Davis v. Yemen*], citing *Creighton Limited v. Qatar* 181 F.3d 118 at 123–4 (D.C. Cir. 1999) [*Creighton v. Qatar*], citing *Cargill International S.A. v. M/T Pavel Dybenko* 991 F.2d 1012 at 1018 (2nd Cir. 1993) [*Cargill International*].

138. *Cargill International*, *ibid*., at para. 24.

139. *Creighton v. Qatar*, *supra* note 137 at 122–3.

140. *Ibid*.

141. Compare, for example, *Ipitrade International v. Federal Republic of Nigeria*, *supra* note 135; and *Libyan American Oil Company v. Socialist People's Libyan Arab Jamahirya*, Judgment of the United States District Court for the District of Columbia, 18 January 1980, 482 F. Supp 1175 (1980), decided following the introduction of the *Foreign Sovereign Immunity Act* and prior to the introduction of s. 1605(a)(6) of that Act, and, for example, *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala* 989 F. 2d 572 (2nd .Cir. 1993) at 576–9, decided after the introduction of s. 1605(a)(6).

international arbitration".[142] Proving the exception to that proposition, those same US courts did find, however, that since the award was presented for enforcement in the US pursuant to the New York Convention, this statutory "arbitration exception" to immunity applied and subject matter jurisdiction was thus established.[143] Establishing personal jurisdiction is then an additional hurdle.[144]

## G. *Canada*

Unlike its counterparts in the United Kingdom, Australia, and the United States, Canada's State Immunity Act[145] does not contain a provision specifically dealing with the relationship between consent to arbitration and waiver of state immunity. It does say that waiver of state immunity to jurisdiction can be by way of submission to the jurisdiction of the court by "written agreement" made "before or after the proceedings commence", but it conditions that on the submission to jurisdiction being made "explicitly".[146] Notwithstanding this rather strict statutory language and the absence of an explicit "arbitration exception", the Federal Court of Canada has held that "the mere fact" of agreeing to arbitration seated in a state party to the New York Convention is sufficient to waive state immunity to jurisdiction in Canada:

> by the mere fact that a State entity should have entered into an arbitration agreement providing for arbitration in a country signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, without reserving its right to jurisdictional immunity, it must be taken to have known and accepted that any resulting award could be subject to recognition and enforcement by judicial process, and thus, have waived jurisdictional immunity in relation to recognition of the award.[147]

Curiously, the Canadian statute provides that, unlike waiver of immunity from jurisdiction, which can only be waived "explicitly", immunity from execution can be waived "explicitly or by implication".[148] Perhaps it was on that basis that one provincial court has in *obiter dicta* gone further than the Federal Court and said that consent to arbitration constitutes waiver of immunity from execution.[149] In the light of the separate treatment of immunity from jurisdiction and immunity from execution in the Canadian statute, it is perhaps not safe, however, to rely on this one *dictum* of a lower court as an authoritative statement of the law in Canada.

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142. Mann, *supra* note 37 at 15.

143. *Cargill International*, *supra* note 137 at 1018; *Creighton v. Qatar*, *supra* note 137 at 123–4; *Davis v. Yemen*, *supra* note 137. See also, for a more recent example, the Opinion of Judge Boasberg in *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, Civil Action No. 12-1247 (JEB), United States District Court for the District of Columbia, 6 June 2013, at 3–7.

144. Compare *Creighton v. Qatar*, *supra* note 137, where personal jurisdiction was not established, with *Davis v. Yemen*, *supra* note 137 at 1303 *et seq*., where personal jurisdiction was established. On the distinction between subject matter jurisdiction and personal jurisdiction in the US generally, see *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

145. RSC 1985, c S-18. For commentary, see Bachand, *supra* note 63(2).

146. RSC 1985, c S-18, s. 4(2)(a).

147. *TMR Energy Limited v. State Property Fund of Ukraine*, 2003 FC 1517, at para. 65.

148. RSC 1985, c S-18, s. 12(1).

149. *Collavino Incorporated v. Yemen (Tihama Development Authority)*, 2007 ABQB 212 at para. 139.

## H. *Germany*

The German Federal Supreme Court recently decided a case concerning whether Thailand could rely on state immunity in seeking to resist recognition and enforcement of an arbitral award against it. The Court held that:

> Whether the conclusion of an arbitration agreement entails at the least a waiver of immunity in proceedings on the recognition and enforcement of an arbitral award (as a distinct type of procedure on the merits) does not require a principled decision.[150]

This was because:

> … in the 2002 IIA [Germany–Thailand bilateral investment treaty] the respondent has subjected itself not just to an arbitration in general. Rather, Art 10 II 3 of the 2002 IIA provides that any 'award will be executed according to domestic law'. The respondent has thereby also subjected itself to the preliminary procedure necessary in Germany for any later execution proceedings. If recognition and enforcement proceedings are necessary for the execution of a foreign arbitral award in Germany, it would contradict the rationale and purpose of the agreement if the treaty provisions were to be interpreted such that the respondent could rely on its immunity in the necessary intermediate proceedings and thus hinder execution from the outset. Such hindrance would occur, for example, in spite of the fact that execution of non-sovereign assets of a foreign State is permissible in principle and thus requires no consent or waiver of immunity.[151]

Thus, in Germany, a waiver of immunity from execution also constitutes an implicit waiver of immunity from jurisdiction for the purposes of recognition and enforcement prior to actual execution.[152]

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150. BGH SchiedsVZ 2013, 110, at 111. The original German reads:

> Ob aus dem Abschluss einer Schiedsvereinbarung zumindest ein Verzicht auf Immunität im Verfahren auf Anerkennung und Vollstreckbarerklärung eines Schiedsspruchs (als Erkenntnisverfahren besonderer Art) abgeleitet werde kann, bedarf keiner grundsätzlichen Entscheidung.

Discussion may also be found at: BVerfG NJW 2007, 2605 at para. 37; BGH, 4 October 2005, extracts translated into English in (2006) 31 YCA 707 at 716; BGH NJW-RR 2002, at 933; OLG München Schieds VZ 2007, 164, 165; Alfred ESCHER, Patricia NACIMIENTO, and Christoph WEISSENBORN, "Investment Arbitration and the Participation of State Parties in Germany" in Karl-Heinz BÖCKSTIEGEL, Stefan Michael KRÖLL, and Patricia NACIMIENTO, eds., *Arbitration in Germany: The Model Law in Practice* (The Hague: Kluwer Law International, 2007), 1013 at 1048; Uwe SCHÖNFELD, "Die Immunitat ausländischer Staaten vor deutschen Gerichten" (1986) NJW 2980, at 2985; Karl Heinz SCHWAB and Gerhard WALTER, *Schiedsgerichtsbarkeit* (München: C.H. Beck Verlag, 2005), chapter 26 at para. 3, and chapter 27 at para. 1.

151. BGH SchiedsVZ 2013, 110 at 111. The original German reads:

> Denn der Antragsgegner hat sich im ISV 2002 nicht nur allgemein einem Schiedsverfahren unterworfen. Vielmehr bestimmt Art. 10 II 3 ISV 2002, dass "der Schiedsspruch nach innerstaatlichem Recht vollstreckt wird." Damit hat sich der Antragsgegner auch dem Verfahren unterworfen, das in Deutschland als Vorstufe einer späteren Zwangsvollstreckung notwendig ist. Bedarf es zur Vollstreckung eines ausländischen Schiedsspruchs in Deutschland eines Verfahrens der Anerkennung und Vollstreckbarerklärung, widerspräche es dem Sinn und Zweck des Übereinkommens, wenn man die vertraglichen Regelungen dahingehend auslegen würde, dass sich der Antragsgegner im insoweit notwendigen Zwischenverfahren auf seine Immunität berufen und damit eine Zwangsvollstreckung von vorneherein vereiteln könnte, obwohl zB die Zwangsvollstreckung in nicht hoheitlich genutzte Gegenstände eines fremden Staates grundsätzlich zulässig ist, also keiner Einwilligung oder eines Immunitätsverzichts bedarf (vgl nur BVerfG NJW 2007, 2605 Rn 39 mwN).

152. Cf. *Third Restatement*, *supra* note 63(12), s. 456(1)(b): "a waiver of immunity from attachment of property does not imply a waiver of immunity from suit."

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The opposite is not true. The German Federal Supreme Court observed in the same case that waiver of jurisdictional immunity does not imply a waiver of state immunity of execution.[153] It is settled law in Germany that "the conclusion of an arbitration agreement does not entail a waiver of immunity in execution proceedings".[154] The Cologne Court of Appeal considered that it "is accepted in particular that signing an arbitration agreement may imply a waiver of immunity".[155] It added that this "does not automatically extend to the proceedings for the enforcement of an arbitral award nor to the ensuing execution".[156] The Cologne Court of Appeal recorded that "it is clearly undisputed in German jurisprudence and literature that submission to an arbitration agreement concerns at the most the recognition and enforcement proceedings …".[157]

The highest courts in Germany have not yet taken a position on whether consent to arbitration alone constitutes waiver of state immunity from jurisdiction for the purposes of recognition and enforcement of an arbitral award. The approach of the Cologne Court of Appeal, however, gives good reason to think that it does.

Both the German Federal Supreme Court[158] and the Cologne Court of Appeal[159] have held that immunity from execution is not waived just because the state concerned had agreed that any arbitral awards against it would be recognized and enforced in accordance with the New York Convention. The Federal Supreme Court has pointed out that the New York Convention provides that, where specified conditions are met, arbitral awards must be enforced, but that it does not constitute a waiver of immunity from execution.[160]

## I. *The ICSID Convention*

In the case of arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965, known as the ICSID Convention, an agreement to arbitrate will not constitute a waiver of state immunity from execution, unless that is the result of the rules on waiver of state immunity applicable in the enforcement forum. Article 54 of the ICSID Convention provides that: "Execution of the award shall be governed by the law concerning the execution of judgments in force in the State in whose territories such execution is sought." Article 55 states that: "Nothing in

153. BGH SchiedsVZ 2013, 110 at 112. The original German reads:

> Zwar beinhaltet der Abschluss einer Schiedsvereinbarung keinen Verzicht auf die Immunität in einem Vollstreckungsverfahren. Immunität im Erkenntnis- und Vollstreckungsverfahren sind getrennt zu prüfen; allein von der Unterwerfung unter die Jurisdiktion eines Staates oder von einem entsprechenden Immunitätsverzicht im Erkenntnisverfahren lässt sich nicht auf einen Verzicht für das Zwangsvollstreckungsverfahren schließen (vgl. nur BVerfG NJW 2007, 2605 Rn 37, BGH NJW-RR 2006, 425 Rn 22 mwN.

154. *Ibid*.; BGH, 4 October 2005, extracts translated into English in (2006) 31 YCA 707 at 716; *Sedelmayer v. Russian Federation*, Oberlandesgericht, Cologne, 6 October 2003, extracts translated into English in (2005) XXX YCA 541 at 544.

155. *Sedelmayer v. Russian Federation*, Oberlandesgericht, Cologne, 6 October 2003, extracts translated into English in (2005) XXX YCA 541 at 544 [*Sedelmayer*].

156. *Ibid*.

157. *Ibid*., at 545.

158. BGH, 4 October 2005, extracts translated into English in (2005) 31 YCA 707 at 709.

159. *Sedelmayer*, *supra* note 155 at 544.

160. BGH, 4 October 2005, extracts translated into English in (2005) 31 YCA 707 at 709.

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Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." This provision has prevented execution against property of states in the Southern District of New York in *LETCO v. Liberia*,[161] in the *Cour d'appel de Paris* in *SOABI v. Senegal*,[162] and was relevant in the High Court of England and Wales in *AIG Capital Partners v. Kazakhstan*.[163] This specific preservation of immunity from execution does not change the fact, and indeed confirms, that in consenting to ICSID arbitration, states will properly be regarded as having waived their immunity from jurisdiction.[164]

## IV. CONCLUSION AND A MODEL WAIVER OF STATE IMMUNITY

Notwithstanding examples of enthusiasm for a contrary position, the general rule is clear, in the 2004 UN Convention on State Immunity, in customary international law,[165] in the domestic statutes and jurisprudence described above,[166] and in the ICSID Convention: state immunity from jurisdiction is different from state immunity from execution, and waiver of immunity from jurisdiction does not imply waiver of immunity from execution. Immunity from execution has accordingly been called the "last bastion of State immunity".[167] Notwithstanding the regressive position now adopted in Hong Kong, where a state has consented to arbitration, this will usually constitute waiver of state immunity from jurisdiction. It will usually not alone constitute waiver of state immunity from execution. Where consent to arbitration is accompanied by consent to the application of the ICC Arbitration Rules, this has been interpreted in France and the United States as constituting waiver of immunity from execution as well as immunity from jurisdiction, but that is not a proposition that can be relied on as likely to attract general acceptance.

Whatever decision a court might reach on whether particular words in particular circumstances do or do not constitute a waiver of state immunity from (i) jurisdiction of the courts of a particular place to decide whether an arbitral award has binding

161. Southern District of New York, 12 December 1986, YCA, 1988, vol. XIII, 661 at 665–6; 26 I.L.M. 695 at 699–700. Also see, on the application of diplomatic immunity to an attempt to enforce the same award against diplomatic bank accounts in the District of Colombia, *LETCO v. Liberia*, 659 F.Supp. 606 (Dist Ct D.C., 1987), (1988) 3 ICSID Review-FILJ 161.

162. *SOABI v. Senegal* (1990) 117 Journal du Droit International 141 at 167.

163. *AIG Capital Partners v. The Republic of Kazakhstan* [2005] EWHC 2239 (Comm) at paras. 5–7, and 95(6).

164. For a recent example see *Continental Casualty Company v. The Argentine Republic*, 893 F. Supp. 2d 747 (E.D. Va. 2012) at 750, and for a less recent one, see *S.A.R.L. Benvenuti & Bonfant v. Republic of the Congo*, 26 June 1981, Court of Appeal, Paris, (1982) Revue de l'arbitrage 207 at 208–9.

165. On customary international law, see *Jurisdictional Immunities Case*, *supra* note 77 at para. 113.

166. For others, see, for example, *Foreign States Immunity Law* 5769-2008 (Israel), ss. 15 and 17; the general statement of the Greek Supreme Civil and Criminal Court (*Areios Pagos*) in Cases No. 36 and 37/2002, 13 June 2002 that "immunity from execution … is different and independent from immunity from jurisdiction"; and August REINISCH, "European Court Practice Concerning State Immunity from Enforcement Measures" (2006) European Journal of International Law 803 at 817–18.

167. *State Immunity from Measures of Constraint in Connection with Proceedings before a Court*, *Report on Jurisdictional Immunities of States and their Property*, International Law Commission, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) (1991), at 56.

force in that place and may in principle be enforced against a foreign state; and (ii) measures of execution against that foreign state's property being taken to satisfy the debt under the arbitral award once judicially recognized, the point of principle is the same. Both logic and justice require that courts give effect to the terms of a waiver made in an agreement between a state and a non-state entity in advance of the rendering of an arbitral award.

Differences in approach to state immunity in different jurisdictions should in principle be reduced if and when the 2004 UN Convention on State Immunity enters into force. The International Law Commission's Special Rapporteur thought that this was "imperative if chaos is ever to be replaced by order".[168] Chaos will not, however, be eliminated, since national courts will inevitably apply the same international rules differently, as the French *Cour de cassation*'s recent judgments in *NML v. Argentina* demonstrate. The Hong Kong Court in *FG Hemisphere v. Democratic Republic of the Congo* prevented enforcement of an arbitral award against a state, and in doing so disregarded the rules on waiver of state immunity codified in the 2004 UN Convention on State Immunity. The French *Cour de cassation* purported to be implementing those rules, but did so in a confused way that also prevented enforcement against a state.

The peculiarities of some jurisdictions mean that, if a particular jurisdiction is of special relevance because of the known presence there of sufficient assets to satisfy any likely award, then the terms of a waiver may need to be tailored specifically for that jurisdiction. One rather dramatic example arises precisely from the judgments of the French *Cour de cassation* in *NML v. Argentina*[169] suggesting that, at least for prejudgment conservatory measures, for a waiver of state immunity from execution to be effective in France it must specify the particular assets or categories of assets to which it applies.

The International Centre for Settlement of Investment Disputes suggests the following wording for inclusion in investment agreements to waive immunity from execution: "The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement."[170] In the light of the terms of the 2004 UN Convention on State Immunity, and judicial reticence in some jurisdictions to give full effect to waivers of state immunity, particularly where execution against a state's assets is concerned, a more comprehensive waiver may be required for a successful party in an arbitration to have a better chance of being able to turn an award against a state into cash. It may also be possible to forestall by contract the use of the doctrine of *forum non conveniens* to resist enforcement of arbitral awards against states, an issue that has arisen in the US, but which is beyond the scope of this paper.[171]

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168. *Sixth Report on Jurisdictional Immunities of States and Their Property*, Thirty-first session of the International Law Commission, finalized by Sompong SUCHARITKUL, UN Doc. A/CN.4/376 (1984), at para. 29.

169. *NML v. Argentina*, French *Cour de cassation*, Judgments No. 394, 395, and 396 of 28 March 2013.

170. International Centre for Settlement of Investment Disputes, "Model Clauses-VII. Waiver of Immunity from Execution of the Award: Clause 15", online: ICSID <https://icsid.worldbank.org/ICSID/StaticFiles/mod el-clauses-en/15.htm>.

171. See, notably, *Figueiredo Ferraz Engenharia de Projeto Ltda v. Republic of Peru* 665 F.3d 384 (2nd Cir. 2011), and *In Re Arbitration Between Monegasque de Reassurances (Monde Re) v. Nak Naftogaz and the State of Ukraine* 311 F.3d 488 (2nd Cir. 2002). These cases are discussed in Ben JURATOWITCH,

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Leaving aside peculiarities specific to particular jurisdictions, in general terms a more comprehensive waiver of state immunity than that currently proposed on the ICSID website might be (with excision of the text in parentheses referring to the role of national courts for agreements providing for arbitration under the ICSID Convention):

> Where an arbitral tribunal is constituted pursuant to this agreement, each party shall comply with every obligation imposed on it by any award or other order rendered by that tribunal. In connection with any such arbitral process and any order or award resulting from it, State X hereby irrevocably and unconditionally waives any State immunity that would otherwise be available to it, now or in the future, in every jurisdiction, for itself and all of its organs and other emanations, and all of its and their current and future property and other assets.
>
> State X submits to (the jurisdiction of the courts of Y [being the jurisdiction in which any arbitration is to have its legal seat] to supervise or otherwise support any arbitration commenced pursuant to this agreement and to) the courts of any jurisdiction to (confirm, recognise and) enforce any arbitral award or order issued by a tribunal constituted under this agreement. State X consents to execution against any current or future property or other assets of it or of any of its organs or other emanations of any debt arising from such an award or order, wherever such property or other assets are located and whether or not they have any connection with the legal entity against which the award or order was rendered or with the subject matter of that award or order or with this contract. Such property and assets shall include bank accounts of the central bank and any other monetary authority of State X, but shall not include property, including any bank account, which is dedicated solely to the performance of the functions of a diplomatic mission or consular post, or property used or intended for use solely in the performance of military functions.
>
> State X hereby waives any defence that it might otherwise have to the jurisdiction of any court or other organ of any other State asked to (confirm, recognise,) enforce or execute such an award or order or a resulting debt. State X also hereby waives any entitlement that it might otherwise have to apply for such a court or other organ not to exercise its jurisdiction on the grounds that it would not be a convenient forum, or on any other ground.
>
> All of these provisions also apply to the taking of interim measures of constraint against the property or other assets of State X or any of its organs or other emanations by an arbitral tribunal or a court prior to a final award or judgment being rendered.

A clause such as this would work in conjunction with, but of course not replace, an arbitration clause. Whether or not a state and a private party agree on this clause, some variation of it, or a very different clause, the point of principle is the same. Whatever agreement a state and a private entity reach concerning waiver of state immunity in connection with enforcement of an arbitral award, and however restrictive or expansive that waiver is, it should be respected and enforced in accordance with its terms by a court later called upon to do so.

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"Fora Non Conveniens for Enforcement of Arbitral Awards Against States" (2014) 63 International and Comparative Law Quarterly 477.