

Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries

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Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries

For commercial parties that contract with States and State-controlled entities and then seek to arbitrate disputes or execute on judgments, an increasingly common problem is the attempt by these State parties to raise the defense of sovereign immunity to challenge the jurisdiction of the arbitral tribunal and/or to avoid enforcement of an arbitral award. The difficulties in handling disputes with these sovereign entities are a major concern, especially with the growing prospect of sovereign defaults leading to cross-border disputes.

In this white paper, we review the body of law dealing with sovereign immunity issues in the United States, Germany, Hong Kong (under the sovereignty of the People's Republic of China), Brazil, and England and Wales. We consider how different countries have attempted to strike a balance between the important policy goal of protecting the rights of those who enter into commercial transactions with State or their entities, and the legitimate interest of sovereign States in preserving their immunity from legal proceedings before foreign courts and arbitration tribunals.

Enforcing an International Arbitration Award Against a State-Party in the United States

In this section, we address issues experienced by prevailing parties in arbitrations that attempt to enforce and execute arbitration awards against State-parties in the United States. In particular, this section focuses on the process of confirming the validity of an award in the United States, and the process of satisfying a judgment against a State-party's assets located in the United States in accordance with sections 1610 and 1611 of the Foreign Sovereign Immunities Act.¹

Greater global economic interdependence and the proliferation of bilateral investment treaties have significantly increased the number of arbitrations involving State-parties as well as the amounts issue and the complexity of the disputes. When an arbitration tribunal issues an award against a State-party, the prevailing party should be mindful of the unique challenges involved in selecting a forum in which to enforce and execute that award.

Foreign States generally enjoy immunity from all types of claims, and, as a result, the rendering of an arbitral award against a state-party will likely present additional enforcement and execution challenges. States vary in their willingness to enforce and execute awards against a foreign sovereign and its assets.

Enforcement

Foreign sovereign immunity exists on two levels—jurisdictional and remedial. Arbitrators and courts alike have ruled that a State’s submission to arbitration evidences an explicit or implicit waiver of sovereign immunity at the jurisdictional level. In fact, the United States has codified the jurisdictional waiver issue.² Such a waiver, however, applies only to immunity from suit and liability in the first instance. Submission to an arbitration is not presumed to be a waiver of immunity against the enforcement of an award, including against the assets of the foreign sovereign. Because most contracts do not waive immunity from enforcement, a party contracting with a foreign State should negotiate for an express waiver of immunity not only from suit and liability but from enforcement and execution as well. Failure to do so may hinder enforcement of an arbitral award.

Barring unusual circumstances involving fraud or corruption, enforcement of an international arbitration award in the United States is fairly straightforward. US courts have jurisdiction to confirm an arbitration award so long as there was a valid agreement to arbitrate, and so long as either the arbitration took place or could have taken place in the United States, or the award is governed by a treaty to which the United States is a party.

Because of its large number of signatories, the New York Convention is often initially identified as the governing treaty. It is, however, by no means necessarily the most favorable enforcement regime. Prevailing parties should consider whether local law or multilateral or bilateral treaties provide a more attractive

alternative. Doing so is specifically contemplated by the New York Convention, which states:

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.³

Execution and the Foreign Sovereign Immunities Act

Once a US court confirms the validity of the award, the next step is to execute the award against the State-party's assets. To do so, a court must determine whether the property in question falls within two exemptions to the general protection of state property from attachment found in the Foreign Sovereign Immunities Act (the Act). The Act allows attachment of State property as provided in 28 U.S.C. sections 1610 and 1611. Section 1610 applies to property used for a particular purpose while section 1611 applies to certain asset classes without inquiry into the manner in which they are used.

SECTION 1610(A): THE "COMMERCIAL ACTIVITY" EXCEPTION

Execution is less difficult where the forum state permits execution against the commercial assets of a foreign sovereign, as is the case in the United States. Section 1610(a) authorizes execution against a foreign State's property located in the United States if, as a threshold issue, the property is used for "commercial activity" in the United States. This provision sets forth various circumstances under which attachment is permitted, subject to the prerequisite that the property subject to attachment must be "property in the United States of a foreign state" and must have been "used for a commercial activity" at the time the writ of attachment or execution is issued. Even when a foreign state completely waives its immunity from execution, US courts may only execute against property that meets the criteria set forth in section 1610(a).⁴

The Act draws a sharp distinction between the property of States and the property of state instrumentalities. A state instrumentality's property may be attached without the "commercial activity" limitation, as long as the instrumentality itself is engaged in commercial activity in the United States. This distinction reflects

“the historical and international antipathy” toward executing against a foreign State’s property.⁵ One of the chief themes of the Act is avoiding possible disruptions of a sovereign state’s “public acts,” as the primary function of sovereign states is government.⁶ The commercial activity exception for state property thus differentiates between a “foreign state’s public acts performed in its sovereign capacity and [its] private acts performed as a market participant.”⁷ When a foreign state behaves as a commercial actor, the protection falls away.

The Meaning of “Used for a Commercial Activity in the United States”

As defined in 28 U.S.C. § 1603(d), “commercial activity” is “either a regular course of commercial conduct or a particular commercial transaction or act.” The commercial character of an activity is determined not by reference to its purpose, but, instead, by reference to the nature of the course of conduct or a particular transaction or act. Consequently, a foreign State engages in commercial activity when it acts not as a market regulator, but in a manner commensurate to a private player within it. The issue is whether the particular actions performed by the foreign State are the type of actions by which a private party engages in “trade and traffic or commerce.” If the asset at issue is not used for a purpose that corresponds to this definition, there will be no mechanism for enforcing the award in the United States against the foreign State.

The property at issue must be “used for” a commercial activity. Two federal appellate courts have considered this, and both adopted the same construction: to use property for a commercial activity means to put the property in the service of the commercial activity, *i.e.*, to carry out the activity by means of the property. These cases do not involve arbitration awards, but the “used for” analysis would apply all the same.

In *Connecticut Bank of Commerce v. Republic of Congo*, a creditor obtained a declaratory judgment against the Republic of Congo in a Texas state court and thereafter sought to execute against the country’s property in the United States. Upon removal to federal district court, the district judge ruled that the Act rendered royalty and tax obligations owed by particular Texas oil companies to the Republic of Congo immune from garnishment. On appeal, the Fifth Circuit observed that the phrase “used for” is “not a mere syntactical infelicity that permits courts to look beyond the ‘use’ of property, and instead find any kind of nexus or connection to a commercial activity in the United States.”⁸

The Fifth Circuit then rejected the creditor’s claim that property is “used for” commercial activity in the United States whenever it is “integral to” or “related to” a commercial activity located in the United States, noting that the royalty obligations at issue represented the revenue or income from a commercial activity. Because revenue derived from a transaction is not commonly understood to be used for that transaction, reasoned the court, the obligations at issue were not used for a commercial activity but merely the end result or income acquired from the activity.

Similarly, in *Af-Cap Inc. v. Chevron Overseas (Congo) Limited*,⁹ another creditor sought to enforce a judgment against the Republic of Congo, citing royalties and tax obligations owed by third parties. The creditor urged the court to consider whether the property was used for a commercial activity in the United States by examining in its entirety the underlying activity that generated the property at issue. The Congo, however, pointed to the Fifth Circuit’s interpretation in *Connecticut Bank of Commerce*, which the Ninth Circuit adopted.

In both cases, the courts concluded that what matters under the Act is what the property is used for, not how the property was generated or produced, or whether the property has some nexus or connection to commercial activity in the United States.¹⁰ Thus, property in the United States used for a commercial purpose is subject to attachment and execution even if it was purchased with tax revenues or another non-commercial revenue source. Conversely, even if a foreign State’s property has been generated by commercial activity in the United States, that property is not subject to attachment or execution if it is not used for commercial activity within the United States. Moreover, the property must be used for a commercial activity at the time the writ of attachment or execution is issued.

Property of a foreign state in the United States that *will be used* or *could potentially be used* for a commercial activity is still immune from attachment or execution until it is used for that purpose.¹¹ For example: Suppose an airplane owned by a foreign State is used solely to shuttle a foreign heads of state for official visits. If that plane lands in the United States, it would not be subject to attachment or execution because it is not used for a commercial activity when used solely as transportation for the foreign leader—even if the airplane could potentially be used for commercial activity at some point in the future.

The property must also be located in the United States. Disputes may arise regarding this requirement, particularly if intangible property is involved.

Intangible property is located, for purposes of the Act, in the same location as the party whose performance is required pursuant to the contract terms. For example, if a financial institution located in the United States is required to perform under a contract by selling shares of stock held in trust for a foreign party's beneficial interest, that beneficial interest is considered to be located where the financial institution is located. Thus, the beneficial interest would constitute property in the United States and could be properly attached.

Pre-Judgment Attachment

A related point to consider when entering into arbitration agreements with State-parties is that, in some circumstances, a party that can satisfy section 1610(a)'s requirements may seek pre-judgment attachment of the property in question. Section 1610(d)(1) provides an exemption from immunity that allows a foreign State's property to be attached prior to judgment if the state has explicitly waived its immunity to pre-judgment attachment.

A foreign State's waiver of immunity to pre-judgment attachment should be as explicit as possible. Waiver language contained in a contract between a party and a foreign State must evince the foreign State's clear and unambiguous intent to waive immunity to pre-judgment attachment. A waiver stating that the foreign State waives all claims of immunity in all legal proceedings would fare much better than a waiver wrought with ambiguities and thus ill-suited to encompass pre-judgment attachments.¹²

SECTION 1611: EXEMPTED ASSETS

Even if one of section 1610's exceptions apply, execution may still be prohibited under section 1611. Section 1611 exempts certain types of property from execution regardless of the applicability of immunity exceptions.

Frequent targets in executing awards against foreign states are assets held by foreign central banks or monetary authorities. Under section 1611, property of a foreign central bank or monetary authority is immune from attachment and execution provided that such property is "held for its own account" and the foreign State has not waived its immunity. Property is held for a central bank's own account when used or held in connection with central banking activities, as distinguished from property used solely to finance the commercial transactions of other entities or foreign States. In other words, immunity applies where property

is used for central banking functions as such functions are typically understood, and even if used for commercial purposes.¹³

An activity regarded as commercial should be an activity not typically regarded as a central banking activity. To be sure, there is no finite list of activities “typically regarded” as those of central banks. Central monetary systems vary widely among countries, so courts must often examine the particular facts presented in each case to make such determinations.

Though the mixing of funds used for central banking functions with funds used for other purposes in an account does not abrogate immunity with regard to the entire account, it also does not immunize the funds used for other purposes from execution.¹⁴ Thus, it may be possible to execute against some of the funds, but, depending on the make-up of the funds in the account, a party may still be left at a financial disadvantage. Moreover, unlike the waiver provision of section 1610(d)(1), section 1611 does not contain an exception allowing the waiver of immunity with respect to pre-judgment attachment. In fact, some courts have interpreted section 1611 as rendering a foreign central bank incapable of waiving immunity from pre-judgment attachment, regardless of any attempts it makes to do so.¹⁵

Conclusion

It is essential that parties consult experienced local counsel prior to commencing any enforcement or execution proceedings in the United States against a foreign State, to explore available options and develop a thoughtful plan. A party that succeeds in obtaining an arbitral award against a foreign state should consider (i) in what country or countries does the losing State-party have assets upon which the prevailing party could commence execution; (ii) if the assets are located in multiple countries, which forum will provide the quickest and most effective outcome; and (iii) what is the best method of enforcement (i.e., whether it is preferable to proceed under the New York Convention (if possible) or to seek enforcement under some other more favorable law).

An unsuccessful party can only challenge the award in the court system of the place of arbitration, and the prevailing party may choose the United States as the forum for enforcement or execution. A losing party will need to do two things: (i) assess the viability of challenging the award using the court system in the place where the award was made, which may be outside the United States (Please see

the article on *Dallah v Pakistan* included in the Winter 2011/2012 issue of *Perspectives*) and (ii) in light of the complexity inherent in enforcing an award in the United States, consider whether settlement for an amount less than the award is achievable.

Applicability of Mainland China’s Civil Law Doctrine of Absolute Immunity in the Context of Post-Handover Hong Kong (*FG Hemisphere v. Democratic Republic of Congo*)

In this section, we examine Hong Kong’s approach toward foreign-State immunity and the immunity of sovereign interests of the People’s Republic of China. In particular, we examine two recent decisions that have brought to the fore the impact of Hong Kong’s unique legal and political history on its approach to Sovereign immunity.

State Immunity in the Context of Post-Handover Hong Kong

The unique legal and political history of Hong Kong’s recent past has meant that Hong Kong’s approach toward foreign State immunity and to the immunity of the sovereign interests of the People’s Republic of China (PRC) before the Courts of the Hong Kong Special Administrative Region (SAR) has been unclear for the last 14 years. However, two recent decisions, one involving the enforcement of an arbitral award, have brought these issues to the fore.

The Constitution and Laws of the Hong Kong SAR (HKSAR)

It is important at the outset to introduce the unique features of the constitution and laws that have governed Hong Kong since it became an SAR upon the transfer of sovereignty from the United Kingdom to China in 1997 (the Handover) and adopted the model of “One Country, Two Systems.”

The constitution is the *Basic Law of the HKSAR*. It provides that for a period of 50 years from 1 July 1997, the HKSAR will enjoy a high degree of autonomy and will be allowed to retain its current political, social, commercial and legal systems including the capitalist economic and trade systems that have made it an

international financial and business centre.¹⁶ The HKSAR is vested with independent executive, legislative and judicial power, including that of final adjudication, with the exception of foreign and defense affairs, which are the responsibility of the PRC Central Government.¹⁷

The HKSAR's legal system is based on English common law and rules of equity, which is fundamentally different from the legal system in the PRC, which is largely a legal code in the civil law tradition. Articles 8¹⁸ and 18(1)¹⁹ of the *Basic Law* provide for the continuity of laws previously in force in Hong Kong.

Prior Application of the “Restrictive Immunity” Doctrine in Hong Kong

Essentially, there are two approaches to State immunity: the restrictive approach and the absolute immunity approach. Restrictive immunity recognises a commercial exception to the otherwise absolute immunity a foreign State is granted from jurisdiction and execution before a foreign court. The absolute immunity approach was traditionally aligned with civil law jurisdictions (including the PRC), whereas the restrictive immunity was traditionally aligned with common law jurisdictions, in particular the United Kingdom.

Prior to the Handover, Hong Kong was covered by the State Immunity Act 1978 (UK)²⁰ (the Act), which adopted a restrictive approach to State immunity. The Act provided that foreign States were immune from the jurisdiction of the courts of the United Kingdom (and relevant British Commonwealth jurisdictions), except where a State submitted to the jurisdiction or the transaction entered into by the State was of a commercial nature.²¹ The Act also provided for immunity from the process of execution unless the State consented to the same in writing and in respect of property in use for commercial purposes.²² Since the Handover, no legislation had been enacted by the HKSAR to mirror the provisions of the Act; as a result, the HKSAR's position with regard to State immunity has remained unclear.

The Congo Case

The issue of State immunity has recently been considered in *FG Hemisphere Associates LLC v. Democratic Republic of the Congo & Ors.*²³ In the Congo case, a 3-2 majority of the HKSAR's highest court, the Court of Final Appeal

(CFA), held that the applicable principles of State immunity are those of the common law, modified in accordance with the *Basic Law*. This modification has resulted in the application of the PRC's approach of absolute immunity, following the subsequent interpretation of the relevant *Basic Law* provisions by the Standing Committee of the National People's Congress (SCNPC) upon referral by the CFA.

In *Congo*, FG Hemisphere, a Delaware company, purchased 2 ICC arbitral awards against the Democratic Republic of the Congo (DRC) and sought to enforce them against the DRC in the HKSAR. FG Hemisphere had become aware that a consortium of Chinese enterprises (the Chinese Entities) had entered into agreements with the DRC with respect to mineral exploitation rights for which entry fees were payable to the government of the DRC. FG Hemisphere sought to enforce both arbitral awards by executing against US\$104 million (out of approximately US\$221 million in entry fees) due from the Chinese Entities to the DRC.

FG Hemisphere obtained an order allowing it to enforce the awards as a judgment of the HKSAR court, including interim injunctions restraining the Chinese Entities from paying US\$104 million to the DRC by way of entry fees. The DRC subsequently applied to set aside the order on the basis that the HKSAR courts had no jurisdiction to adjudicate, as the DRC enjoyed sovereign immunity. The HKSAR's Secretary for Justice was granted leave to intervene in the proceedings on the basis that the case was in the public interest.

In the Court of First Instance (CFI), Mr. Justice Reyes ruled that the transaction in question was not commercial, but was a cooperative venture between two sovereign States: the Chinese Entities were to build extensive infrastructure in the DRC and entry fees were paid in consideration of the grant of license to exploit the natural resources of the DRC.²⁴ As the CFI held the transaction was not of a commercial nature, and would therefore not fall within the restrictive immunity doctrine, it was not necessary to form a settled view on the issue of State immunity. The orders against the DRC, including the interim injunctions, were set aside.

FG Hemisphere appealed the decision to the Court of Appeal. In a detailed judgment that considered several States' approach to the question of State immunity, the Court of Appeal held, by a 2-1 majority, that the doctrine of restrictive immunity had been widely accepted by States so as to constitute a rule

of customary international law, and, as such, the common law of Hong Kong as of 30 June 1997 recognised the doctrine of restrictive immunity.²⁵

The Court of Appeal held that the application of the restrictive doctrine did not infringe upon the powers reserved for the PRC under the *Basic Law*, and legislation would need to be enacted were it intended that the HKSAR courts should apply the PRC Central Executive's theory of sovereign immunity.²⁶ The dissenting Judge recognised that the restrictive doctrine had gained popularity in the international community, but concluded that there had been insufficient uniformity and consistency required to attain the status of customary international law.²⁷

The CFA's Decision

The CFA overturned the Court of Appeal's decision. By a 3-2 majority, the CFA held that, subject to a subsequent interpretation by the SCNPC (see below), the HKSAR courts must adopt a doctrine of absolute immunity, to be consistent with the PRC's approach to State immunity.

The CFA agreed with the Court of Appeal that the proper approach is to apply the common law previously in force governing State immunity after the lapse of the Act. However the CFA held the common law must be subject to "such modifications, adaptations, limitations or exceptions as are necessary to bring its rules into conformity with Hong Kong's status as a Special Administrative Region of the PRC and to avoid any inconsistency with the Basic Law,"²⁸ and, as such, that it was not open to the HKSAR courts "to adopt a legal doctrine of state immunity which recognises a commercial exception to absolute immunity and therefore a doctrine on state immunity which is different from the principled policy practised by the PRC,"²⁹ namely the doctrine of absolute immunity.

The majority of the CFA held that they were under a duty to refer to the SCNPC questions of interpretation of Articles 13 and 19 of the *Basic Law*. Articles 13 and 19(3) provide, respectively, that the Central People's Government (CPG) shall be responsible for foreign affairs relating to the HKSAR, and that the HKSAR courts have no jurisdiction over "acts of state" such as foreign affairs, and questions of fact regarding the same require the CPG's determination. The interpretation by the CPG of the PRC's policy on State immunity was held to be an "act of state such as defence and foreign affairs" within the meaning of Article 19(3).³⁰

The SCNPC's Interpretation

As anticipated, and consistent with the CFA's provisional conclusions, the SCNPC confirmed in August 2011 that the CPG (and not the courts of the HKSAR) has the power to determine the rules or policies on State immunity to be applied in the HKSAR and that the determination by the CPG as to the rules or policies of State immunity falls within the scope of Article 19(3) of the *Basic Law*.³¹ Accordingly, the SCNPC concluded the HKSAR must adopt the same policy as the PRC, namely that foreign States enjoy absolute immunity from jurisdiction and execution in the HKSAR.

The *Congo* case is significant because this was the first occasion in which the CFA has referred to the SCNPC a matter of interpretation of the *Basic Law*. It does not however open the floodgates for the interference of the SCNPC in the HKSAR's judicial process, as the issues arose from a unique anomaly caused by the absence of any legislation regarding State immunity following the Handover.

Waiver of Immunity

Another question raised in *Congo* was whether the DRC's submission to international arbitration constituted a waiver as to jurisdiction of the HKSAR courts in respect of the execution of the arbitral award. Even if the doctrine of absolute immunity applied, FG Hemisphere would succeed in enforcing the award in the HKSAR if the DRC had waived such immunity.

Again, the lower courts disagreed, and the CFA was divided on the issue. The minority expressed the view that even if absolute immunity applied, the DRC waived such immunity by its agreement to submit the dispute to arbitration. However, the majority held that where no legislation applies on this point (as is the case in the HKSAR), a party seeking to enforce an arbitration award against a State on the basis of waiver of State immunity must demonstrate the State has *unequivocally* waived its immunity, and such waiver "can only be made before the court." The majority concluded the submission of the DRC to international arbitration did not constitute such a waiver to jurisdiction or execution in the HKSAR courts.

Immunity of the PRC's Sovereign Interests before the HKSAR Courts

The CPG is not a “foreign” State in the HKSAR, since the HKSAR and the PRC are “one country,” albeit with two systems. Although foreign State immunity does not apply to the PRC in the HKSAR, a recent decision of the CFI (the *Hua Tian Long* case³²) held that post-Handover, the CPG enjoys protection under the common law doctrine of “Crown immunity” in the HKSAR.

Foreign State immunity derives from the notion of equality of States. It is based on the premise that no State can interfere in the affairs of another foreign State by claiming jurisdiction over that State. In contrast, Crown immunity is a common law judicial doctrine that stems from the inequality of the ruling sovereign and the ruled and the ancient English principle that the monarch can do no wrong.

Although they stem from different concepts, the practical effect of foreign State immunity and Crown immunity in the HKSAR is the same: they confer on foreign States and the CPG immunity both from suit and from the execution of judgments in the HKSAR courts.

In *Hua Tian Long*, the CFI noted that the common law had extended the meaning of “the Crown” from the sovereign to all bodies and persons acting as servants or agents of the Crown. When determining whether an entity is part of “the Crown” for the purposes of asserting immunity, the material consideration is the control the CPG exercises over the entity. If the entity is controlled by the CPG then it is likely to enjoy Crown immunity. In applying the “control test,” courts will have regard to whether the entity is able to exercise independent powers of its own. It may be that an entity is able to act independently with respect to some of its purposes, but not others. In these circumstances, it is possible that the entity may only claim Crown immunity for particular purposes.

The Crown may waive immunity. In *Hua Tian Long*, the court held that the owner of the ship, an entity of the CPG, was entitled to claim Crown immunity but its conduct amounted to a waiver of such immunity and it had therefore submitted to the jurisdiction of the HKSAR courts.

The questions of “control” and waiver in this context are complex issues that will require careful assessment of the facts in each case.

Sovereign Immunity in Arbitration under German Law

In this section, we address the restrictions placed on enforcement of arbitral awards against sovereigns and their property serving sovereign purposes. We also outline the requirements established by German case law as to a valid waiver of the sovereign with regard to execution against its assets.

According to the prevailing opinion in Germany, the conclusion of an arbitration agreement by a foreign sovereign with a non-State party principally implies a waiver of immunity regarding the initiation of arbitral proceedings against it.³³ This can also apply to the proceedings of recognition and declaration of enforceability—as distinct from execution—before the national courts.

Under the rules of public international law, however, the waiver established by the arbitration agreement does not also enable a creditor to enforce the arbitral award in its favor against the sovereign by executing against its assets. The same limitations applicable to the enforcement of a state court judgment against the assets of a foreign sovereign apply to arbitral awards. Pursuant to these general rules, the enforcement of arbitral awards against the assets of foreign States depends on whether those assets serve “sovereign” or “commercial” purposes.

General Rule: No Execution Against Property Serving Sovereign Purposes

While execution against the assets of foreign States located in the jurisdiction of German courts is not generally precluded, execution without the consent of the foreign State is precluded if the assets served sovereign purposes of the State at the time when the enforcement act would have become effective.

According to the consistent adjudication of the German Federal Constitutional Court (*Bundesverfassungsgericht* or “BVerfG”),³⁴ assets of a foreign State that are of a *sovereign nature* are not subject to execution in the Federal Republic of Germany.

Whether the assets are of a sovereign nature is to be determined by German law as the *lex fori*. Property serving sovereign purposes comprises any assets that the foreign State uses in order to exercise its sovereign powers and duties, e.g., military

equipment or assets used for diplomatic purposes as well as for consular functions—such as embassy bank accounts, State ships and State airplanes used by diplomats. In contrast, property solely used for commercial or cultural purposes is not covered by sovereign immunity and can be subject to execution.

The principle of *ne impediatur legatio* arising from public international law requires that execution against the assets of a foreign State will not be permitted if the effect would be to impede the conduct of diplomatic activities. In this regard, the abstract possibility of an impediment of the diplomatic functions is sufficient according to the Federal Constitutional Court. Therefore, it is sufficient for an authorized representative of the foreign State to provide *credible* evidence (e.g., by way of an affidavit) that the assets in question are exclusively used for the upkeep and safeguarding of the diplomatic and consular missions of the foreign State.

The German Federal Supreme Court (*Bundesgerichtshof* or “BGH”) followed this course and ruled that German courts cannot issue execution measures against assets to the extent that the assets are of a sovereign nature.³⁵ Therefore, payment claims of the State arising from the granting of overflight permits or claims for VAT reimbursement cannot be subject to execution where such funds are used for sovereign purposes. In its judgments, the Federal Supreme Court also determined what evidence must be at hand to prove that assets serve a diplomatic purpose, and confirmed that the standard for adducing proof in respect of the use for sovereign functions is not high.

No Immunity from Execution in connection with Commercial Activities

Foreign States do not enjoy immunity from execution in connection with commercial activities. As a consequence, it is possible to attach central bank accounts of a State-owned enterprise where the funds are derived from the non-sovereign activities of the enterprise. This rule is confirmed by several treaties such as Article 18 of the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of 29 October 1954, pursuant to which enterprises publicly owned or controlled shall not claim or enjoy immunity from execution if they engage in commercial, industrial, shipping or other business activities.

Execution Against Assets of Sovereign Nature Only in case of Consent or Waiver of Immunity

The foreign State may, in principle, choose to waive its immunity specifically with regard to execution against assets serving sovereign purposes. The Federal Constitutional Court, while concluding that an arbitration agreement waives sovereign immunity with regard to the initiation of arbitral proceedings, established that such waiver does not automatically constitute a waiver as to execution of an arbitral award (see above).

Even if the arbitration clause refers to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and states that the award shall be recognized and enforced in accordance with the Convention, it cannot be assumed that this reference contains a general waiver of immunity with respect to execution against assets serving sovereign purposes. That is, firstly because the New York Convention refers to the national procedural laws which include the rules of public international law, encompassing the right to sovereign and diplomatic immunity. And secondly, a reference to the New York Convention reflects an intention that an arbitral award can be enforced in general, but does not infer an intention to entirely waive immunity. Neither can a general waiver of immunity be inferred from public international law as is evident, for example, in Article 55 of the ICSID Convention,³⁶ which contains an express reservation regarding immunity from execution.

With regard to execution against property serving *diplomatic* functions in particular, German case law goes even further, stipulating that even if the arbitration agreement contains a far-reaching waiver of immunity of the foreign State, including *enforcement* of an award, such a “catch-all” waiver of immunity clause does not apply to immunity from execution of assets serving specifically diplomatic purposes. According to the Federal Constitutional Court, there exists no rule of general international law that allows such a broad waiver clause to suffice. Instead, in order to attach such specially protected property, the State has to *explicitly* include it in the waiver clause.³⁷ Blanket waivers of sovereign immunity therefore do not affect the immunity afforded the government’s diplomatic assets under German law.

European Convention on State Immunity

If the arbitral proceedings include a Member State of the Council of Europe, the European Convention on State Immunity dated 16 May 1972 (State Immunity Convention) can be applicable. So far, the only signatories of the State Immunity Convention are the Federal Republic of Germany, Belgium, Luxembourg, the Netherlands, Austria, Switzerland, the United Kingdom and Cyprus.

Pursuant to Article 12 of the State Immunity Convention, where a contracting State has agreed in writing to submit a dispute to arbitration, that State may not claim immunity from the jurisdiction of a court of another contracting State in respect of any proceedings relating to the validity or interpretation of the arbitration agreement, the arbitration procedure and the setting aside of the award. However, this does not apply to arbitration agreements between States.

As regards execution measures against a contracting State, Article 23 of the State Immunity Convention contains a general prohibition on execution against the assets of a State. However, all contracting States except Austria and Cyprus have opted to exclude this provision. The general rules of the respective contracting State governing sovereign immunity in enforcement proceedings then applies to these cases.

Sovereign Immunity in Arbitration under Brazilian Law¹

The possibility of submitting to arbitration controversies involving foreign States or entities of the Government in Brazil may be doubtful in some cases. In this section, we analyze the distinction made by Brazil's Supreme Court between jure imperii and jure gestionis acts by foreign States, as well as the principle of legality applied to contracts with the Government, in order to determine the situations in which disputes with sovereign States can be resolved by arbitration, or be the subject of enforcement or execution proceedings in Brazil.

¹ Observations in this article about Brazilian law are by Tauli & Chequer Advogados.

Introduction

The sovereign immunity defense in arbitration under the Brazilian Law may be asserted in two different situations: (i) cases involving foreign States; and (ii) cases involving entities of the Brazilian federation.

In cases involving foreign States, the analysis of sovereign immunity will depend on the nature of the act that gave rise to the controversy. If the act was inherent to the State's prerogatives, it will be considered a public act (*jure imperii*) and, therefore, immune from Brazil's jurisdiction. If, however, it was an act perpetrated in the context of private relations, it will be considered a private act (*jure gestionis*), and it will be subject to Brazil's jurisdiction.

Arbitration may also involve entities of the Brazilian federation, particularly in matters related to contracts with the administrative bodies of the executive branch of government. According to Brazil's Constitution, the Brazilian federation is formed by: (i) the Federal Union; (ii) the States; (iii) the Federal District; and (iv) the Municipalities. In cases against these entities, arbitrability will depend on the provisions of the law and the nature of the matters involved—i.e., whether the dispute involves public policy or the public patrimony or is related to private issues only.

Foreign States in Arbitration and Sovereign Immunity

In the past, the Brazilian Supreme Court (STF)³⁸ considered that foreign States were completely immune from Brazil's jurisdiction.³⁹ In recent cases, however, the STF has held that foreign States can be subject to Brazil's jurisdiction in certain circumstances. The analysis in these more recent cases relies on the nature of the act that gave cause to the controversy—i.e., whether the act should be considered public or private. In a leading case,⁴⁰ STF stated that sovereign immunity was not absolute and could be mitigated “whenever the foreign State, acting in the context of strictly private relations, intervenes in matters that do not imply public acts.” Therefore, the immunity of the foreign State would depend on “the nature of the act that motivated the litigation.”

The Brazilian Superior Court (STJ)⁴¹ has also applied the same interpretation. It has decided that a foreign State involved in litigation related to commercial transactions was subject to Brazilian jurisdiction and could not allege sovereign immunity to avoid that jurisdiction.⁴²

The possibility of arbitration involving foreign States in Brazil has not yet been clearly determined. Following the enactment of the Arbitration Law (No. 9,307/1996), there was intense discussion about whether arbitration is consistent with the Article 5, Item XXXV, of the Brazilian Constitution, which provides that “the law shall not exclude from judicial examination violations or threat of violations of a right.”

The constitutionality of the Arbitration Law was carefully scrutinized by the STF to determine whether arbitration should be considered to improperly exclude the judicial examination of controversies between contracting parties that could involve harm or threat of violations of a right. That question was definitively resolved with the STF’s holding that “the manifestation of will by a party through the arbitration clause, on the occasion of the signing of the contract, and the legal permission given to the judge to obligate the party that refuses to submit to arbitration, are not in violation of the Article 5, Item XXXV, of the Federal Constitution.”⁴³

Therefore, although there are no precedents specifically related to arbitration involving foreign States in Brazil, Brazilian law does not prevent this situation if the controversy involves only private relations with a foreign State.

There are also no precedents in Brazilian courts for the execution of a foreign arbitral award involving the assets of a foreign State. However, the legislation indicates that execution would be possible in specific cases. Article 39 of the Arbitration Law establishes three situations in which a foreign arbitral award cannot be executed in Brazil: (i) if the parties did not adopt adequate procedure⁴⁴; (ii) if the controversy could not be resolved by arbitration in Brazil due to its nature⁴⁵; and (iii) if the award is against Brazil’s public policy. Thus, considering that Brazilian courts do not recognize sovereign immunity when the controversy relates to *jure gestionis* acts by a foreign State, it would be possible to execute against its assets located in Brazil as long as the award does not fall into one of these three situations.

The issue of what assets of a foreign State are subject to execution in Brazil was discussed by the STF in several cases related to labour litigation. In one important decision,⁴⁶ the court decided that a foreign State would not be immune from execution if the foreign State has waived its immunity or if there are, in the Brazilian territory, assets that have no relation with the foreign State’s diplomatic mission and representation in Brazil.

In another leading case, the STJ decided that the following assets of the foreign State could not be executed against in Brazil: (i) the assets used for diplomatic purposes; (ii) ships and vessels⁴⁷; (iii) assets owned by central banks and other monetary authorities; and (iv) assets used for military purposes.

Thus, in summary, it can be affirmed that all the assets of the foreign State are subject to execution in Brazil, except for those that are immune pursuant to law, court precedent, international treaties or any other rule.⁴⁸

Arbitrability of Controversies Involving Entities of the Brazilian Federation

According to the Brazilian Constitution,⁴⁹ contracts between entities of the Brazilian federation and private companies shall be preceded by a tender bid process, in order to ensure that the resources of the government will be spent efficiently. Additionally, the Constitution also requires that the executive branch observe the principles of legality, impartiality, morality, transparency and efficiency.⁵⁰

Under the principle of legality, the entities of the administration can only do what the law allows. Therefore, any administrative body of the executive branch can solve its dispute by arbitration only if the law provides for this possibility. The Brazilian Court of Audit (TCU) has stated, on several occasions,⁵¹ that an arbitration clause in administrative contracts is invalid if not authorized by law.

The principle of legality is strictly related to the idea that the patrimony of the State belongs to the collectivity, and therefore it is presumed that it cannot be the subject of alternative proceedings of dispute resolution. The STF⁵² has stated that “the patrimony and public policy are not private, since they affect the collectivity. That is why the administration, as a mere manager of the public patrimony, cannot negotiate the rights entrusted to its custody.”

In a leading case related to an arbitration involving the Federal Union,⁵³ the STF affirmed the validity of an arbitration clause because there was a law allowing the submission of the controversy to an alternative dispute resolution proceeding. The constitutionality of the law was questioned because it would imply exclusion of the judicial branch from determining the case. However, the request was overruled and the validity of the arbitration clause was recognized. It was the first case that

expressly determined that entities of the administration could be subject to arbitration where allowed by law.

Currently, several statutes provide the parties with the possibility of resolving disputes related to administrative contracts by arbitration. The most relevant are: (i) Law no. 8,987/1995; (ii) Law no. 9,472/1997; (iii) Law no. 9,478/1997; and (iv) Law no. 11,079/2004.

Law no. 8,987/1995 regulates concession and permission contracts in connection with public services provided by private companies. Article 23, Item XV of the statute determines that the contract shall establish an extra-judicial method of dispute resolution, which can also be established by the rules of the bid proceeding in connection with the concession or permission.⁵⁴

Law no. 9,472/1997 created the National Agency for Telecommunications (ANATEL) and sets forth rules to regulate the telecommunication sector. Article 93, Item XV, determines that the concession contract for telecommunications services shall establish an extra-judicial method to resolve contractual disputes between the agency and companies. Moreover, Item X of Article 120, in connection with the permission to provide telecommunications services, also determines that contractual disputes shall be resolved by extra-judicial proceedings.

Alternative methods of dispute resolution are also set forth by Law no. 9,478/1997, which created the National Agency of Petroleum, Natural Gas and Biofuels (ANP). Article 43, Item X, provides that the concession contract shall contain provisions establishing “the rules regarding dispute resolution, related to the contract and its execution, including conciliation and international arbitration.”

Finally, Law no. 11,079/2004, regarding rules for public-private partnerships, determines the use of alternative methods of dispute resolution in connection with controversies related to administrative contracts. Article 11, Item III, establishes that the contract shall provide “the use of private methods of dispute resolution, including arbitration, to be carried out in Brazil and using Portuguese as applicable language.”

Notwithstanding all the aforementioned laws, there is still much uncertainty regarding the possibility of arbitration in some situations as a result of Article 55, paragraph 2, of Law no. 8,666/1993, which sets forth general rules for bid proceedings and administrative contracts. This provision provides that any

controversy related to an administrative contract shall be resolved in the administration's jurisdiction. However, Article 54 of the same Law provides that the general theory and dispositions that regulate private relations may also apply to administrative contracts, which can be interpreted as an allowance to the use of arbitration.⁵⁵

Therefore, although arbitration has been widely accepted in administrative contracts by the law, there is still much discussion in the courts about this issue in situations that are not specifically regulated. Nevertheless, there are several occasions in which the entities of the Brazilian federation can be involved in commercial international or domestic arbitration, including against foreign companies.

Conclusion

The use of arbitration in Brazil has substantially increased since the enactment of the Arbitration Law, no. 9,307/1996. The constitutionality of the statute was subject to challenge in the courts, and only in 2001, five years after its enactment, Law no. 9,307/1996 was declared to be in compliance with the provisions of the Constitution.⁵⁶ Therefore, the issue of sovereign immunity as a defense in arbitration is new and still under discussion. However, the courts have already analyzed cases related to arbitration or lawsuits involving entities of the Brazilian federation and foreign States.

In this context, it can be concluded that: (i) foreign States can be made subject to Brazilian jurisdiction, including enforcement and execution proceedings, if the controversy is related only to private relations and does not involve public acts; and (ii) entities of the Brazilian federation can use arbitration to resolve its disputes if the law allows them to do so. Therefore, the sovereign immunity defense under the Brazilian law can only be alleged in specific cases, specially in those that affect the public patrimony, collective rights or any other factors that are not related to private relations.

Navigating the Law of Sovereign Immunity and Enforcement of Arbitral Awards Against States and State-Controlled Entities in the United Kingdom

In this section, we address the State Immunity Act 1978, the key statute governing sovereign immunity in the United Kingdom. We consider both the general proposition under the Act, that a foreign State is immune from the jurisdiction of the UK courts, and the exceptions to this proposition.

The State Immunity Act 1978

In the United Kingdom, sovereign immunity is governed by the State Immunity Act 1978 (the Act). The general proposition under section 1 of the Act is that a foreign State is immune from the jurisdiction of the UK courts unless one of the exceptions in the Act applies.

Pursuant to section 14(1), the definition of a State includes the government or any department of the government of that jurisdiction. This does not include a “separate entity,” which is “distinct from the executive organs of the government of the State and capable of suing or being sued.” Under section 14(2), a separate entity will, however, be immune where the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a State would have been immune to such proceedings.

Under section 9(1) of the Act, immunity to the jurisdiction of the UK courts is waived where a State or State entity is a signatory to an arbitration agreement, thereby expressly agreeing to submit a dispute to arbitration. This exception extends to all agreements to arbitrate (whether or not the proceedings may also relate to a “commercial transaction” pursuant to the exception in section 3).

Sovereign Immunity in Arbitration Proceedings

The Act does not expressly provide that a State waives immunity as respects the arbitral process by agreeing to submit a dispute to arbitration. As a general rule, however, an arbitral tribunal will have jurisdiction over a dispute where the parties have agreed to refer that dispute to arbitration. Accordingly, in the United Kingdom, a valid arbitration agreement will be construed as a waiver of immunity,

and jurisdictional immunity will not ordinarily present itself as an issue as regards an arbitral tribunal.

In *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania*,⁵⁷ the English Court of Appeal explained that “Arbitration is a consensual procedure and the principle underlying [section 9 of the Act] 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.”

Accordingly, while not an issue that is exclusively of concern to States or State entities, the first issue to be considered in determining whether the defence of sovereign immunity may apply is whether the State or State entity has entered into a valid arbitration agreement. For example, a State may argue that it is not bound by an arbitration agreement because it was not a direct signatory.

Even where a State or State entity is a signatory, there are other challenges that could be made to the validity of the arbitration agreement. A State entity may assert, for example, that a waiver of immunity is not permitted by its national laws, and that it did not, therefore, have authority to enter into the arbitration agreement. Any objections as to the validity of an agreement to arbitrate need to be raised early in the proceeding in order to avoid the risk that the relevant party may lose the right to argue that there is no valid arbitration agreement under section 73 of the Arbitration Act 1996. This means that issues in relation to sovereign immunity tend to be raised at an early stage of the arbitration, at the same time as any other issues with respect to jurisdiction of the arbitral tribunal.

In such circumstances, the tribunal may rule on the issue in an award as to jurisdiction or address the issue in the final award on the merits. Alternatively, the tribunal may stay the proceedings while an application is made to the court under section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction).

Such issues can be raised at a later stage, provided that the State or State entity can show that at the time it took part in the arbitral proceedings, it did not know, or could not with reasonable diligence have discovered, the grounds for objecting to the jurisdiction of the tribunal (*i.e.*, in relation to the issue of whether there is a valid arbitration agreement).

In *Svenska Petroleum*, the arbitral tribunal issued an interim award in which it found that the Government of Lithuania had validly agreed to submit disputes to

arbitration, and accordingly that the tribunal had jurisdiction to determine the claim. The interim award was not challenged at the time, and a final award on the merits was given sometime later in favour of Svenska.

The Government challenged enforcement of the award on the basis of sovereign immunity. The Court of Appeal held that by failing to make an application to the court under section 32 of the Arbitration Act 1996, and by continuing to participate in the arbitration, the Government was estopped from denying that it had agreed to refer disputes to arbitration and that there was, therefore, no basis on which it could avoid enforcement on the grounds of sovereign immunity.

The case of *Tsavliris Salvage (International) Limited v. The Grain Board of Iraq*⁵⁸ centered on a challenge to an arbitration award by a State-owned entity, the Grain Board of Iraq (GBI). Tsavliris was the salvor and argued that GBI, as owner of the cargo on the vessel, was liable for the cargo's portion of the salvage. Tsavliris had been successful in obtaining an arbitration award against GBI, but GBI applied to challenge the award under section 67 of the Arbitration Act 1996 on the basis that:

- There was no valid arbitration agreement (as the owners of the cargo were not parties to the Lloyds Standard Form of Salvage Agreement, 2000 edition) and, therefore, the arbitrator had no jurisdiction to determine the question of GBI's liability; and
- GBI was not a separate entity, it was part of the Ministry of Trade (MOT) of the Republic of Iraq and it was therefore immune from the arbitration proceedings.

The case was decided in favour of Tsavliris on the first ground. The judge held that GBI had entered into a valid arbitration agreement and therefore no state immunity existed (pursuant to section 9(1) of the Act). Although the case was determined on this basis (*i.e.*, that there was no sovereign immunity due to the existence of a valid arbitration agreement) the Judge went on to provide some helpful guidance on distinguishing between a department of government and a separate entity for the purposes of section 14(1) of the Act:

- A consideration of all the relevant circumstances is necessary to decide whether an entity is distinct from the executive organs of government. This determination does not depend on one single factor;

- A detailed analysis of the constitution, function, powers and activities of the party is likely to be essential; and
- Caution needs to be exercised before treating a party with separate legal personality as a department of government.

Having considered all of these matters, the court concluded that GBI was a separate entity that possessed a separate legal personality, together with financial and administrative independence. In reaching this conclusion, the Judge had regard to the fact that GBI's main function and purpose was to import grain, and that it was entitled to enter into contracts in its own name, without referring to the MOT for approval.

Having concluded that GBI was a separate entity, the Judge considered whether GBI would have attracted immunity under section 14(2) of the Act, in that it was acting in the exercise of sovereign authority. The Judge found that GBI would not have been entitled to rely on this provision in any event because entry into the salvage agreement was deemed not to have the character of a governmental act.

Enforcement of Arbitral Awards Against States and State Entities

Where an arbitration has its seat in the United Kingdom, proceedings in support of the arbitral process can be brought in the UK courts pursuant to section 9(1) of the Act. This provision enables the UK courts to give a declaration of enforceability of foreign arbitral awards (e.g., *Svenska Petroleum*) as well as in respect of any award made in an arbitration with the seat in London or elsewhere in the United Kingdom.

A declaration of enforceability of a foreign judgment can also be obtained under section 31 of the Civil Jurisdiction and Judgments Act 1982, as confirmed recently by the Supreme Court in *NML Capital Limited v. Republic of Argentina*.⁵⁹ The case concerned a claim by NML to enforce a New York court judgment in England against the Republic of Argentina in relation to sovereign bonds issued by Argentina. The Supreme Court unanimously held that Argentina was not entitled to claim State immunity in respect of the enforcement proceedings. One of the key factors influencing the court was the fact that the bonds contained a widely drawn provision whereby Argentina agreed to submit to the jurisdiction of the English courts for the purposes of enforcement and to waive its immunity.

The final hurdle will be to locate State-owned assets within the United Kingdom that are available for execution purposes under section 13 of the Act. The Act enables execution against a State's assets but only with the written consent of the State (section 13(3) of the Act) or where the relevant property is for the time being in use or intended for use for commercial purposes (section 13(4) of the Act).

Where State-owned property is not used or intended to be used exclusively for commercial purposes, it will not be possible to execute a judgment or award against those assets. The English courts are, therefore, unlikely to allow execution against certain categories of assets belonging to States, such as the property of a State's central bank or other monetary authority or the property of a diplomatic mission. In *Alcom v. Republic of Colombia*,⁶⁰ enforcement was not permitted in respect of a bank account used to make payments both in relation to commercial transactions as well as by the Republic of Colombia's diplomatic mission in the United Kingdom.

Drafting Arbitration Clauses when Contracting with a State or State-Controlled Entity

The position with respect to sovereign immunity in arbitral proceedings is reasonably clear in the United Kingdom. However, it remains sensible to consider including an express waiver of immunity from jurisdiction, enforcement and execution, including pre-judgment execution (e.g., to enable a party to obtain a freezing injunction) when drafting an arbitration agreement with a State or State-controlled entity. Such provisions will minimise any risk of a successful challenge to the jurisdiction of an arbitral tribunal or to the enforcement and execution of any arbitral award on the grounds of sovereign immunity.

Endnotes

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- ¹ The terms enforcement and execution are often used imprecisely. Typically, and for purposes of this white paper, enforcement refers to the confirmation of the authenticity of an award and acknowledgement of its legal consequences, while execution refers to the mechanics of attaching assets to satisfy the award.
 - ² 28 U.S.C. § 1605(a)(6).
 - ³ New York Convention art. VII(1), June 10, 1958, 9 U.S.C. § 201, 330 U.N.T.S. 38.

4 Despite the enforcement limitations imposed by the Act, the Act does not abrogate a court's power to
impose contempt sanctions on a foreign state. *See FG Hemisphere Assocs. v. Democratic Republic of*
Congo, 637 F.3d 373, 380 (D.C. Cir. 2011).

5 Connecticut Bank of Commerce v. Republic of Congo, 309 F.3d 240, 252 (5th Cir. 2002).

6 *Id.* at 253.

7 Eckert Int'l, v. Government of Republic of Fiji, 834 F. Supp. 167, 170 (E.D. Va. 1993).

8 309 F.3d 240, 254 (5th Cir. 2002).

9 475 F.3d 1080 (9th Cir. 2007).

10 *See Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 235-37 (5th Cir. 2004) (defining the
issue as what the property is "used for" and stating that even if property is *generated by* commercial
activity in the United States, it is not subject to execution unless it is *used for* commercial activity in the
United States).

11 *See Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130(2d Cir. 2009) (stating that
satisfaction of the commercial activity requirement involves more than a mere showing that the foreign
state's property *will be used or could potentially be used*).

12 *See, e.g., S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 417 (2d Cir.), *cert denied*, 464 U.S. 850
(1983) (holding that the waiver at issue was "ill-suited to encompass pre-judgment attachments"); *Libra*
Bank Ltd. v. Banco Nacional de Costa Rica, 676 F.2d 47, 49 (2d Cir. 1982) (concluding that the bank
explicitly waived its immunity from pre-judgment attachment); *Banque Compafina v. Banco de*
Guatemala, 583 F. Supp. 320, 323-25 (S.D.N.Y. 1984) (concluding that the notes at issue did not
contain explicit waivers of immunity from pre-judgment attachment under § 1610(d)(1)).

13 *Olympic Chartering S.A. v. Ministry of Industry & Trade of Jordan*, 134 F. Supp. 2d 528, 534 (S.D.N.Y.
2001) (citing H.R. Rep. No. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630).

14 Weston Compagnie de Finance et D'Investissement, 823 F. Supp. 1106, 1114 (S.D.N.Y. 1993).

15 *See id.* at 1111; *see also Concord Reinsurance Co. v. Caja Navional de Ahorro Y Seguro*, No. 93-Civ.-6606,
1994 WL 86401, at *2 (S.D.N.Y. Mar. 16, 1994).

16 See Articles 5 and 12 of the *Basic Law of the Hong Kong SAR*.

17 Article 11, 17 and 19 of the *Basic Law of the Hong Kong SAR*.

18 Article 8 of the *Basic Law of the Hong Kong SAR* provides that "The laws previously in force in Hong
Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law
shall be maintained, except for any that contravene this Law, and subject to any amendment by the
legislature of the Hong Kong Special Administrative Region."

19 Article 18 (1) of the *Basic Law of the Hong Kong SAR* provides that "The laws in force in the Hong Kong
Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided
for in Article 8 of this Law, and the laws enacted by the legislature of the Region."

20 As extended by the State Immunity (Overseas Territories) Order 1979.

21 Sections 2 and 3 of the Act.

22 Section 13(3) and 13(4) of the Act.

23 FACV Nos. 5,6 and 7 of 2010, dated 8 June 2011 and 8 September 2011.

24 [2009] 1 HKC 111, pages 124-125.

25 CACV 373/2008 and CACV 43/2009, dated 10 February 2010, para. 78.

26 *Ibid.* paras. 118 121, 264 and 266.

27 *Ibid.* paras. 197 and 211.

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- 28 See the SCNPC's Decision "On the Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law," dated 23 February 1997.
- 29 FACV 5,6& 7/2010, dated 8 June 2011, paras. 225,226.
- 30 *Ibid.* para. 355.
- 31 "Interpretation of paragraph 1, article 13 and article 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" adopted at its 22nd Session on 26 August 2011.
- 32 *Intraline Resources SDN BHD v. The Owners of the Ship or Vessel "Hua Tian Long"* [2010] 3 HKLRD 67.
- 33 Geimer/Reinhold, *Internationales Zivilprozessrecht*, 6th edition 2009, marginal no. 521, 3854;
- 34 See e.g. German Federal Constitutional Court, decision of 13 December 1977, Case No. 2 BvM 1/76; NJW 1978, 485; decision of 6 December 2006, Case No. 2 BvM 9/03, NJW 2007, 2605.
- 35 Federal Supreme Court, decisions of 4 October 2005, Case No. VII ZB 08/05 and VII ZB 09/05, SchiedsVZ 2006, 44 *et seq.*
- 36 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
- 37 German Federal Constitutional Court, decision of 6 December 2006, Case No. 2 BvM 9/03, NJW 2007, 2605.
- 38 The STF is Brazil's highest court on constitutional matters.
- 39 STF, AC no. 9,684, Reporter: Rafael Mayer, 02.01.1983, D.J. 03.04.1983, p. 1,935; STF, AC no. 9,704, Reporter: Carlos Madeira, 06.10.1987, D.J. 06.26.1987, p. 13,242; STF, AC no. 9,705, Reporter: Moreira Alves, 09.09.1987, D.J. 10.23.1987, p. 23,154.
- 40 STF, AI-AgR no. 139,671, Reporter: Celso de Mello, 06.20.1995, D.J. 03.29.1996, p. 9,348.
- 41 The STJ is the highest Brazilian Court on non-constitutional matters.
- 42 STJ, Ag no. 757/DF, Reporter: Sálvio de Figueiredo Teixeira, 08/21/1990, D.J. 10/01/1990, p. 10,448.
- 43 STF, SE no. 5,206 AgR, Reporter: Sepúlveda Pertence, 12.12.2001, D.J. 04.30.2004, p. 29.
- 44 For instance, if one of the parties was not notified about the arbitration or did not have the chance to appoint an arbitrator, or if the controversy could not be submitted to arbitration under the law of the relevant jurisdiction, among other situations.
- 45 Please note that an award related to arbitration involving *jure imperii* acts by foreign States would not be enforced in Brazil, since the controversy could not be resolved by arbitration, in accordance with the Arbitration Law.
- 46 STF, AgR-RE no. 222.368-4/PE, Reporter: Celso de Mello, 04.30.2002, DJ 02.14.2003, p. 70.
- 47 In accordance with the United Nations Convention on the Law of the Sea of December 10, 1982.
- 48 This premise would also apply to State-owned companies and similar entities, as Brazilian legal commentators generally agree that they are an extension of the State and, therefore, have some of the sovereignty characteristics. In this sense, see ANTENOR PEREIRA MADRUGA FILHO, A RENÚNCIA À IMUNIDADE DE JURISDIÇÃO PELO ESTADO BRASILEIRO E O NOVO DIREITO DA IMUNIDADE DE JURISDIÇÃO [The waiver from jurisdiction immunity by the Brazilian State and the new Law of jurisdiction immunity] 186 (2003).
- 49 Article 37, item XXI.
- 50 Article 37.
- 51 TCU, Process no. 008,217/1993-9, Reporter: Homero Santos, 07.15.1993, D.J. 08.04.1993, p. 11,192; TCU, Process no. 006,098/1993-2, Reporter: Carlos Átila Álvares da Silva, 12.13.1994, D.J. 01.03.1995, p. 147.

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- 52 STF, RE no. 253,885, Reporter: Ellen Gracie, 06.04.2002, D.J. 06.21.2002, p. 118.
- 53 STF, AI no. 52,181, Reporter: Bilac Pinto, 11.14.1973, D.J. 02.15.1974.
- 54 TJDF, MSG no. 1998002003066-9, Reporter: Nancy Andrighi, Conselho Especial, 05.18.1999, D.J. 08.18.1999, p. 44.
- 55 See case mentioned in footnote 14.
- 56 See case mentioned in footnote 7.
- 57 [2006] EWCA Civ 1529 at 117.
- 58 [2008] EWHC 612 (Comm).
- 59 [2011] UKSC 31.
- 60 [1984] AC 580.

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