60 Years of the New York Convention

Key Issues and Future Challenges

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CHAPTER 22

Waivers of Sovereign Immunities in Enforcement Proceedings and the 1958 NY Convention

Félix J. Montero & Paloma Castro[*]

SUMMARY

An important concern for any corporations engaged in international transactions is the ability to obtain effective relief by means of actual recovery if it becomes involved in legal proceedings. A key benefit of international arbitration is the ability of victors to enforce awards across multiple jurisdictions, which is easier precisely because of the 1958 NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards celebrating its 60th anniversary this year. However, special considerations apply where the party against whom enforcement is sought is a sovereign state or a State-owned entity. Those considerations are particularly important because recalcitrant states may choose to rely on the doctrine of sovereign immunity to insulate their assets from enforcement. In this respect, securing a legally valid waiver of immunity is a key strategic device for any award creditors willing to succeed during the post-award phase. Conversely, inexistent or deficient waivers do play in favor of award debtors. The purpose of this chapter is to provide a snapshot of what constitutes comprehensive waivers of state immunity both in respect of immunity from jurisdiction and immunity from enforcement, under French, English and Spanish domestic laws.

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§22.01 INTRODUCTION

Generally, the immediate step a party may take after obtaining a favorable award to its interests is trying to enforce the award. When discussing enforcement proceedings, the NY Convention always comes first to mind as the governing enforcement treaty, which has been signed by 159 states.[1] This Convention allows the enforcement of foreign arbitral awards to be carried out with utmost ease given that the enforcing courts of the signatory states are committed to "proactively make sure that awards are recognized and enforced."[2]

The NY Convention provides for certain circumstances or particular cases in which the recognition and enforcement of an award may be refused.[3] By way of example, under the NY Convention recognition and enforcement of an award may be refused if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties[4] or if the subject matter of the difference is not capable of settlement by arbitration under the law of the country where recognition or enforcement is sought.[5] However, in the list of limited grounds for refusing recognition or enforcement of the award sovereign immunity is not included. Therefore, in the event a state raises the defense of sovereign immunity in order to prevent an award from being enforced, the national courts may deal with the matter according to their national law.[6]

Sovereign immunity is an established principle of public international law which is based on the principle of equality of states. It is a legal principle incorporated both in international legal materials and national legislation by which any state as a sovereign entity is immune from any civil or criminal proceedings before the courts of another sovereign entity. This privilege includes enforcement of judgments or arbitral awards. In this respect, questions of sovereign immunity must be considered on two levels, in relation to jurisdiction and enforcement.

Jurisdictional immunity means limitation on the forum state to exercise jurisdiction over a foreign state. Enforcement immunity is understood as immunity from any interim or compulsory execution measures that could be taken against state's assets.[7] The United Kingdom, France and Spain are signatories of the United Nations Convention on Jurisdictional Immunities of States and their Property of December 2, 2004 (UN

1. Uncitral Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed August 29, 2018).
2. Rajesh Sharma, *Enforcement of Arbitral Awards and Defence of Sovereignty: The Crouching Tiger and the Hidden Dragon*, https://www.ulapland.fi/loader.aspx?id=9d3552eb-bc97-4627-9933-81bea431ec16 (accessed on August 29, 2018).
3. NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V (1958).
4. NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(1)(d) (1958).
5. NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(2)(a) (1958).
6. Sharma, *supra* n. 2, at https://www.ulapland.fi/loader.aspx?id=9d3552eb-bc97-4627-9933-81bea431ec16.
7. Eva Wiesinger, *State Immunity from Enforcement Measures* https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/wiesinger.pdf (accessed August 27, 2018).

Convention), which – although not yet in force – erects the jurisdictional immunities of states and their property as principles of customary international law. In addition, the UN Convention defines the term "State" to include, *inter alia*, "agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State."[8] According to this definition, arbitration proceedings commenced against a state agency, enterprise or instrumentality would be considered to be against the state itself for the purpose of invoking a plea of sovereign immunity, if applicable.

Under the theory of absolute immunity, no state or state agency could normally be sued in the courts of another, thus its assets are sacrosanct.[9] However, absolute state immunity is no longer a rule of international law.[10] Restrictive immunity confers immunity only to sovereign acts of a State – acta iure imperii – while acts of a State in respect to commercial transactions – acta iure gestionis – are not covered by immunity but governed by private law in the same way as a private person would not enjoy immunity. This restrictive approach on enforcement immunity was confirmed in the *Villa Vigoni* case by the International Court of Justice which decided that:

> [B]efore any measure of constraint may be taken with respect to property belonging to a foreign state
> 1) The property must be in use for an activity "not pursuing government non-commercial purposes."
> 2) The foreign state must have expressly consented to the measure, or
> 3) The foreign state must have allocated the property for the satisfaction of a judicial claim.[11]

Essentially, these exceptions to sovereign immunity from enforcement are to be found under English, French and Spanish laws. However, the first question that arises before any Court in enforcement proceedings against a foreign state is whether the state in question is immune from enforcement proceedings themselves. At this stage, the foreign state is likely to raise the shield of immunity from jurisdiction. The underpinning issue is to know whether the agreement by the state entity to arbitrate amounts to an effective waiver of immunity from jurisdiction.

In the following sections, we will provide an overview of the exceptions to immunity from jurisdiction, focusing on the arbitration agreement as an implicit waiver of sovereign immunity, and of the exception to immunity from enforcement. Moreover, we will refer to several landmark cases in this regard.

8. United Nations Convention on Jurisdictional Immunities of States and Their Property, Article 2.1(b)(iii).
9. Nicholas Pengelley, *Waiver of Sovereign Immunity from Execution: Arbitration Is Not Enough*, 26(6) J. Int'l Arb. 859 (2009).
10. International Law Commission, *Yearbook of the International Law Commission (1991)*, http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1991_v2_p1.pdf&lang=EFSRAC (accessed August 27, 2018).
11. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, I.C.J. Reports 2012, 99, (ICJ, February 3, 2012).

§22.02 EXCEPTION TO IMMUNITY FROM JURISDICTION: THE AGREEMENT BY THE STATE ENTITY TO ARBITRATE

With respect to immunity from jurisdiction, Dr. J. Gillis Wetter and scholars alike claim that the agreement to arbitrate amounts to an implicit waiver of sovereign immunity.[12] The general accepted view is indeed that a state may not be allowed to claim immunity from jurisdiction of an arbitral tribunal after it has entered into an arbitration agreement because the consent to arbitrate is treated as a waiver of immunity from the jurisdiction before the arbitral tribunal.[13] Pursuant to Article 12 of the European Convention on State Immunity of May 16, 1972 (EU Convention) – to which the UK and France are signatories but not Spain – a waiver of immunity is also deemed from submission to arbitration.

[A] France

French case law recognizes that, if a state enters into an arbitration agreement in writing and agrees to submit to arbitration disputes related to a commercial transaction, it cannot claim immunity from jurisdiction thereafter. An iconic illustration of this principle stems from the 1986 *SEEE v. République de Yougoslavie* case in which the *Cour de Cassation* held that Yugoslavia's agreement to arbitration meant that it "has submitted itself to the jurisdictional power of the arbitrators, and thereby accepted that their award be recognized as enforceable."[14] Ever since, French case law has been consistent in this regard.

Conversely, the French Court de Cassation has also stated that it could not be held that an arbitration clause implied a waiver of immunity from enforcement because an expression of unequivocal intention of such effect was required.[15]

[B] England

Under English law, the regime of immunities is covered by the State Immunity Act (SIA). In particular, Article 9 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 regards proceedings in the courts of the United Kingdom which relate to the arbitration.

The question that arises in this context is whether enforcement proceedings can be said to "relate to the arbitration" such that there is no immunity where proceedings

12. Gillis J. Wetter, *Pleas of Sovereign Immunity and Act of Sovereignty Before International Arbitral Tribunals*, 2(1) J. Int'l Arb. 7, 12 (1985).
13. Li Zhenhua, *International Commercial Arbitration and State Immunity*, 1(1) AALCO Q. Bull. 1, 49 (2005).
14. *Société européenne d'Etudes et d'Entreprise (S.E.E.E.) v. République de Yougoslavie*, Bulletin (Cass. 1re civ, Novembre 18, 1986), pourvoi no. 85-10912 85-12112.
15. *République Islamique d'Iran et al. v. Eurodif et Sofidif*, Bulletin (Cass. 1re civ, March 14, 1984), pourvoi no. 82-12462.

are brought to enforce an arbitral award pursuant to an arbitration agreement. In *Svenska Petroleum Exploration AB v. Lithuania* (No. 2),[16] the Court of Appeal held that there was no ground for construing the SIA as excluding proceedings relating to the enforcement of a foreign arbitral award. As such, an agreement to arbitrate will constitute a waiver of immunity in respect of proceedings to enforce an award as well as any other related proceedings before the English Courts.

More recently, in *Gold Reserve Inc v. The Bolivarian Republic of Venezuela*,[17] the High Court analyzed Venezuela's claim to immunity in the context of enforcement of an investment arbitral award.[18] In interpreting section 9 of the SIA, the Court found that there had been a waiver of immunity on the basis of the consent to arbitrate given by the party claiming immunity. Hence, on grounds of waiver resulting from the state's standing offer to arbitrate, the Court rejected Venezuela's immunity plea in the award enforcement proceedings. This ruling is arguably extensible to any investor-State dispute.

Additionally, in *Pearl v. Kurdistan,*[19] the High Court found that by consenting to arbitration in the contract, the Respondent had waived its immunity from the jurisdiction of the courts. Furthermore, the Court considered that any immunity to which the Respondent might have been entitled under section 13 of the SIA was in any event waived by the waiver clause included in the contract at stake that read: "the KRG waives on its own behalf and that of the KRG any claim to immunity for itself or its assets." Significantly, although the waiver clause did not specifically refer to injunctions or other interim relief, Justice Burton J considered it sufficiently broad to be akin to a waiver. Hence, this judgment illustrates that while immunity waiver clauses should be drafted comprehensively, courts are also tackling them with pragmatism when it is clear that, even in the absence of comprehensive waiver phraseology, a general waiver of sovereign immunity is intended.

[1] The Commercial Transaction Exception to Immunity from Jurisdiction under English Law

In addition to the agreement by the state entity to arbitrate, section 3 of the SIA provides that a state is not immune from jurisdiction as regards proceedings relating to *inter alia* a "commercial transaction" entered into by the state. Section 3(1) of the SIA defines commercial transaction as follows:

(i) Any contract for the supply of goods or services.

16. *Svenska Petroleum Exploration AB v. Lithuania*, NY Convention Guide (EWCA Civ 1529 QB 886, November 13, 2006), Case No. B6/2005/2737.
17. *Gold Reserve Inc. v. The Bolivarian Republic of Venezuela*, Westlaw UK (EWHC 153, Comm, February 2, 2016), Case No. CL-2015-000015.
18. *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1.
19. *Pearl Petroleum Co Ltd v. Kurdistan Regional Government of Iraq*, Westlaw UK (EWHC 3361 Comm, November 20, 2015).

(ii) Any loan or other transactions for the provision of finances and any guarantee or indemnity in respect of any such transaction or any other financial obligation.
(iii) Any other transaction or activity (whether of a commercial, industrial financial, professional or similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

In the *Pearl* case, the High Court considered whether the contract for the exploitation of gas fields located in Kurdistan was an exercise of sovereign authority, as opposed to a commercial transaction within the meaning of section 13 SIA. Although Justice Burton J eventually rejected Respondent's claim to sovereign immunity for the abovementioned reasons – because the party claiming immunity had given its consent to arbitrate and because there was an express waiver clause in the contract – this judgment is noteworthy as it considered a petroleum contract involving the vesting of long-term rights relating to the ownership and management of oil and gas, as tantamount to a transaction involving the exercise of sovereign authority.

The High Court in the *Pearl* case goes further than the Court of Appeal in *Svenska v. Lithuania* and is the premier authority reaching a definitive answer on this issue. This decision could be critically important to a wide range of disputes concerning diverse mining and energy agreements related to the exploitation of a state's natural resources.

[C] Spain

The question of immunities under Spanish law is covered by Spanish Organic law 16/2015, of October 27, on Privileges and Immunities of Foreign States, International Organizations with headquarters or office in Spain and Conferences and International Meetings held in Spain (Immunities Act). In particular, Article 4 of this regulation determines that every foreign state and its assets shall enjoy immunity from jurisdiction and enforcement before Spanish Courts.

However, the Immunities Act also establishes several exceptions to immunity from jurisdiction similar to the ones determined by French and English law. In particular, Articles 9-16 of the Immunities Act deal with the exceptions to immunity from jurisdiction, stating that foreign states are prevented from claiming immunity from jurisdiction in proceedings related to:

(i) Commercial transactions (Article 9).
(ii) Employment agreements (Article 10).
(iii) Damages to property or injuries (Article 11).
(iv) Certain property rights (Article 12).
(v) Intellectual and industrial property rights (Article 13).
(vi) Participation in corporations and other legal entities (Article 14).
(vii) Exploitation of State-owned ships or their cargo provided that they are not used for noncommercial public purposes (Article 15).
(viii) Arbitration agreements (Article 16).

In connection with the arbitration agreements exception, Article 16 of the Immunities Act establishes the following:

> When a foreign state has agreed with a natural or legal person of another state the submission to arbitration of any dispute relating to a commercial transaction, unless otherwise agreed by the parties in the arbitration agreement or in the arbitration clause, the state may not assert immunity before a Spanish Court in a proceeding related to:
>
> a) the validity, interpretation or application of the arbitration clause or the arbitration agreement;
> b) the arbitration proceedings, including the judicial appointment of the arbitrators;
> c) confirmation, annulment or review of the arbitration award; or
> d) recognition of the effects of foreign awards.

As it can be observed, according to the Immunities Act if a foreign State has expressly consented to arbitrate it cannot claim immunity from jurisdiction of an arbitral tribunal. This Article is consistent with Articles 5.b) and 6.b) of the Immunities Act which more broadly establish that:

> 5. The foreign state cannot assert immunity from jurisdiction in proceedings before a Spanish court with respect to an issue in relation to which it has expressly consented to the exercise of said jurisdiction: (…)
> b) in a written contract;
> 6. The foreign state cannot assert the immunity of jurisdiction before a Spanish court in relation to particular proceedings: (…)
> b) When the foreign state has intervened in the process or has performed any act in relation to the fund.

Before the Immunities Act was enacted, the issue of immunities was addressed in the Spanish Judiciary Act (*Ley Orgánica del Poder Judicial-LOPJ*) and in the Spanish Civil Procedure Act (*Ley de Enjuiciamiento Civil-LEC*). In particular, both regulations provide that Spanish Courts have jurisdiction to adjudicate disputes taking place in Spain and concerning Spanish and foreign nationals, with the exception of cases of immunity from jurisdiction and enforcement in accordance with Public International law regulations. Moreover, Article 2.2 of the Spanish Arbitration Act (*Ley de Arbitraje-LA*) also refers to the question of immunities in the framework of an international arbitration.

In relation to immunity from jurisdiction, the *Tribunal Superior de Justicia (TSJ)* of Madrid in its judgment dated September 28, 2016[20] related to the exequatur of a foreign arbitral award rejected the immunity from jurisdiction alleged by the Republic of Equatorial Guinea on the basis that it entered into a settlement agreement with *France Cables et Radio* in which the parties included an arbitration agreement in order to submit any potential dispute arising from the settlement agreement to arbitration. In

20. *Orange Middle East and Africa, S.A. (ORANGE) v. República de Guinea Ecuatorial*, Aranzadi Insignis (TSJ of Madrid, Civil and Criminal Chamber 1, September 28, 2016) [AC\2016\1745]. This is the authority in charge of the recognition of foreign arbitral awards in Spain.

this regard, the *Tribunal Superior de Justicia* of Madrid, leaning on Article 16 of the Immunities Act, understood that if a foreign state has agreed to submit any potential dispute arising from a commercial business transaction to arbitration, it cannot claim immunity from jurisdiction.

Furthermore, the Immunities Act also includes an exception to immunity from jurisdiction in connection with proceedings related to commercial transactions. In this regard, Article 9 of the Immunities Act establishes that:

> 1. A foreign state cannot assert immunity before Spanish Courts in relation to proceedings related to commercial transactions entered into by that state with natural or legal persons which do not have their nationality, except in the following cases:
>   a) When it is a commercial transaction between states; or
>   b) When the parties have expressly agreed otherwise.
> 2. A foreign state is not considered to be a party to a commercial transaction when the person making the transaction is a State-owned company or an entity created by that state, provided that said company or entity is endowed with its own legal personality and capacity to:
>   a) Sue or be sued; and
>   b) Acquire by any title the ownership or possession of assets, including those that this state has authorized to exploit or administer and dispose of.

In addition, the *Audiencia Provincial* of Madrid produced an order on September 19, 2007 in which it dealt, with great clarity, with the distinction between acts iure imperii and acts iure gestionis, in order to determine whether the issuance of bonds and, specifically, the subsequent suspension of their interests by Argentina – the object of the proceedings – were protected by immunity.[21] According to the *Audiencia Provincial*, the adoption of emergency legislation as a consequence of a critical situation, in which said suspension was declared by the Argentinian Government, is a clear exercise of jurisdiction of state sovereignty (acta iure imperii), which cannot be prosecuted by foreign courts. This decision marks a unique case in judicial practice on the subject, as, unlike the more classic cases in which the object of the proceedings is a private act of the state, here the activity was purely a sovereign one, which leads to conclusively affirm the immunity from jurisdiction of the foreign state.

§22.03 EXCEPTIONS TO IMMUNITY FROM ENFORCEMENT

The problem of immunity from enforcement arises only when a foreign state possesses property within the jurisdiction of another state.[22] In such a context, immunity from enforcement allows a sovereign state to resist attachment of its assets resulting from a court ruling or an arbitral award.[23]

21. *Mari Juana and Octavio v. República Argentina*, Aranzadi Insginis (AP Madrid, September 19, 2007) [JUR 2007\325577].
22. Khushal Vibhute, *International Commercial Arbitration and State Immunity*, 1, 69 (New Delhi: Butterworths India, 1999).
23. Raymond Doak Bishop, *Enforcement of Arbitral Awards Against Sovereigns*, 1, 355-381 (Juris-Net, LLC, 2009).

[A] France

In accordance with Public International Law, French law recognizes that foreign states and their emanation are immune in case of attachments of their property resulting from decisions of justice or arbitral awards. As it stems from the *Eurodif* case, the immunity from enforcement enjoyed by the foreign state is a recognized principle under French law.[24] Until recently, most of the sovereign immunity from enforcement regime in France derived exclusively from a fluctuating case law. The Law on Transparency, Anti-Corruption and Modernization of Economic Life (*Loi Sapin II*) promulgated on December 9, 2016 eventually settled the conditions governing a state's waiver of its immunity from enforcement in France.

[1] The Burden of Seeking an Order from the Court

Under Article L111-1-1 of the Code of Civil Enforcement Proceedings (*Code de Procédure Civile*), as enshrined by the *Loi Sapin II*, a creditor seeking to seize foreign state's assets located in France must seek an ex parte order (*ordonnance sur requête*) authorizing the seizure from a *Juge d'exécution*. Under the previous regime, provided that the creditor had title pursuant to, *inter alia*, a final award, the foreign state's assets could be seized *a priori* through recourse to a *Huissier de Justice*.

Now, any creditors wishing to pursue their debts through interim or compulsory enforcement measures have to seek an order from the court that will be granted under very rigid and restrictive conditions.

[2] The Requirements of an Express, Property-Specific Waiver and Commercial Purpose of the Assets Targeted

In order for a waiver of state immunity from enforcement to be effective, it must be express (i.e., written and unambiguous), be special (i.e., precise the assets or categories of assets for which the waiver is given are expressly set out in the contract) and target purely commercial assets[25] that must relate to the entity against which the enforcement proceedings are sought. Hence, military assets, cultural assets, tax or social debts would for instance be excluded.

The criteria applied by French courts to determine whether an act is commercial have evolved over time. Since 2003, however, the *Cour de Cassation* has chosen an approach which is summarized as follows: "foreign states and their organizations that constitute their 'emanations' benefit from jurisdictional immunity only if the act in issue involves, by its nature or its goal, the exercise of sovereignty."[26] Nevertheless, the distinction between assets used for public service considerations and for commercial

24. *See supra* n. 16.
25. Code de Procédure Civil, Articles L111-1-1 – L111-1-3 (January 1, 2018).
26. *Dame Soliman v. Ecole Saoudienne de Paris et Royaume d'Arabie Saoudite*, Bulletin (Cass. chambre mixte, June 20, 2003), pourvoi no. 00-45629 00-45630.

purposes is not as clear-cut as it seems. Hence, evidencing that the assets one seeks to seize are of a purely commercial nature might prove to be difficult in practice.

[3] Similar Conditions Apply on Diplomatic Assets

The *Loi Sapin II* provides for special rules regarding the attachment of diplomatic assets. Article L111-1-3 of the *Code de Procédure Civile* now provides that preliminary measures or enforcement measures may not be applied to diplomatic property unless it is subject of an express and special waiver which is granted by the state concerned. A sound illustration stems from a case dated January 10, 2018, in which the *Cour de Cassation* canceled the attachments of bank accounts held at *Société Générale* in the name of the Congolese diplomatic mission and its delegation to UNESCO in Paris on the grounds of the absence of a property-specific waiver. Notwithstanding the Republic of Congo's written promise that it would finally and irrevocably waive any immunity from jurisdiction and enforcement in the context of the settlement of the dispute, the French judges overruled the decision held on May 13, 2015[27] whereby a sole express waiver of immunity was deemed sufficient for enforcing in France the ICC award against the Republic of the Congo.

Along with the abovementioned statute and with reference made to the Code of Civil Enforcement Proceedings and to the 1961 Vienna Convention on Diplomatic Relations, the *Cour de Cassation* in this case recalled the requirement of an express and property-specific waiver for any state wishing to withdraw its diplomatic assets from enforcement in France and describes it as an expression of customary international law.

[B] England

Section 13(2)(b) of the SIA provides that "the property of a state shall not be subject to any process for the enforcement of a judgment or arbitration award or in an action in rem for its arrest detention or sale."

Hence, in England, no relief may be granted against the foreign State by way of recovery of land or other property, and the property of a State is not subject to any enforcement of a judgment or award. However, some exceptions are to be found within the SIA. In particular, section 13(3)-(4) enables enforcement against a state's assets in two situations, namely:

(a) with the written consent of the State; or
(b) where the relevant property is in use or intended for use for commercial purposes.

27. *Société Commissions Import Export (Commisimpex) v. République du Congo*, Bulletin (Cass. 1re civ, May 13, 2015), pourvoi no. 13-17751.

[1] The State Consent to Enforcement Exception

In England only a clear consent to enforcement will suffice. A clause submitting to the jurisdiction of the English Courts may well not be enough to amount to consent to enforcement. Instead, clear consent to enforcement is required. This is most likely to involve an additional express reference to enforcement against assets or a waiver of immunity over property in the relevant contractual clause.

A sound example of an effective waiver of immunity in respect of enforcement can be found in *Donegal International v. Republic of Zambia*.[28] In that case, the Court accepted that the following waiver of immunity clause amounted to an effective consent to enforcement: "if proceedings are brought against it or its assets" in relation to the contract, "no immunity from those proceedings (including without limitation, suit, attachment prior to judgment, other attachment, the obtaining of judgment, execution or other enforcement) will be claimed by or on behalf of itself or with respect to its assets."

In addition, it is possible that consent to enforcement may be obtained at the enforcement stage, should the state be willing to comply with the judgment or award, though this is reasonably rare. The body within the state with the authority to provide valid consent to execution on an asset on behalf of the state is the head of the state's diplomatic mission in the United Kingdom, or the person performing said functions.

[2] The Commercial-Purpose Exception

State property used for commercial purposes will be available for enforcement even if that property is not connected to the dispute. But to enforce an award or judgment against State-owned assets, those assets must be used or intended to be used exclusively for commercial purposes. Thus, if a bank account held in England by the foreign state is "mixed" because it is used for both the state's commercial transactions and also by its diplomatic mission, that bank account would not be considered to be used for "commercial purposes" within the meaning of section 13(4) of the SIA, and will therefore be immune from enforcement.

Section 17 of the SIA defines commercial purpose by reference to section 3(3), as being for the purposes of commercial transactions in respect to which a state will not have immunity. However, it is important not to confuse the "commercial-purpose" test of section 13(4), relating to exceptions to immunity from enforcement, with the "commercial transaction" test of section 3 relating to exceptions to immunity from jurisdiction. As a matter of fact, the "commercial-purpose" test is very rarely met, as foreign states tend to place their assets held abroad in the hands of their central banks or diplomatic missions.

28. *Donegal International Ltd v. Republic of Zambia and another*, LexisNexis (EWHC 197 Comm, February 15, 2007).

[3] The Importance of the Present and Future Use of the Property Over Its Origin

The limits of this rule are well illustrated by the case of *SerVaas Incorporated v. Rafidain Bank and others*.[29] *SerVaas* obtained a judgment in Iraq which it sought to enforce in England. *Rafidain Bank* (which had a branch in London) held large sums on behalf of Iraq, which *SerVaas* claimed had been acquired through commercial transactions between the bank and its creditors and so were available for enforcement.

The question before the Court was whether the sums held by *Rafidain Bank* were in use or intended for use for commercial purposes, such that there would be no immunity from enforcement. The Supreme Court found that immunity prevailed, on the basis that it was not the origin of the property that was important, but the present and future use of the property. Although the funds were held by the bank, their future use was for the specially created and UN-backed Development Fund of Iraq which was sovereign in nature, not commercial.

A recent illustration of this rule also stems from the case of *L R Avionics*.[30] L R Avionics brought proceedings to enforce a judgment of the Nigerian Federal Court (together with an arbitration award) rendered against Nigeria. *L R Avionics* was granted authorization to register the Nigerian judgment in England, and it subsequently obtained a final charging order in respect of premises located in London owned by Nigeria. These premises were leased to a company for the purpose of providing Nigerian visa and passport services. Nigeria applied to set aside the charging order on the basis that the property was immune from enforcement. It was then accepted that the use by a state of its own premises to carry out consular activities such as providing the said services could not be said to be a use for commercial purposes pursuant to section 13(4) of the SIA.

However, the Court had to consider the position if, instead of handling the applications itself, the state had granted a lease of the premises to a privately owned company, to which the processing services were outsourced. The Court found that the London premises were not being used for commercial purposes within the meaning of section 13(4). This was because, instead of processing the applications itself, the task had simply been outsourced by the state. The property was therefore being used for a consular activity which, even if outsourced, could only be carried out on the state's behalf.

The commercial-purpose exception allowing enforcement over state property is even narrower where the foreign state is party to the EU Convention. Under the EU Convention, the exception will only be available upon fulfillment of two conditions: (1) the foreign judgment to enforce must be final (i.e., not subject to appeal) and (2) the foreign state must have made a declaration (under Article 24 of the EU Convention) generally agreeing to enforcement proceedings within the territories of other states party (Article 26 of the EU Convention).

29. *SerVaas Incorporated v. Rafidain Bank and others*, United Kingdom Supreme Court database (UKSC 40, August 17, 2012), Case No. UKSC 2011/0247.
30. *LR Avionics Technologies Ltd v. Nigeria*, Westlaw UK (EWHC 1761 Comm, July 15, 2016).

[C] Spain

Under Spanish law, immunity from enforcement is covered in Chapter II of Title I of the Immunities Act, which establishes the "default" immunity of a foreign state's assets, while also providing the conditions under which this immunity might not operate.

[1] Exception to Immunity from Enforcement by State Consent

Under the Immunities Act, a state may consent to enforcement "or other coercive measures"[31] against its assets. This consent may be explicit, or implicit, where explicit consent being required in almost equal terms as the UN Convention on the same matter.[32]

The Immunities Act's understanding of implicit consent derives from the allocation of specific assets to serve as relief for the claim. If the foreign State assigns assets of its property to certain proceedings, with the intention of using them as relief, it is understood then that it has renounced, implicitly, to the immunity from enforcement those assets would otherwise enjoy.

Additionally, consent to enforcement is irreversible. Once the proceedings before Spanish Courts have begun, the foreign state may not revoke its position.

[2] The Commercial-Purpose Exception

In similar fashion to other legal systems, the Immunities Act distinguishes between assets with official, noncommercial purposes, which are immune without exception, and their counterparts, which may be subject to enforcement.

The Immunities Act compiles in Article 20 a list of assets that are considered to be of official, noncommercial purposes, and thus, may not be subject to enforcement unless there is consent by the owning state. This list includes those that belong to the diplomatic mission of the state, those of the military or the central bank, cultural heritage objects, ships and aircraft.

When facing enforcement proceedings without a specific allocation of assets by the state, under Spanish law it is each judge's prerogative to determine whether a certain asset is of commercial nature or sovereign property in order to be protected – the traditional iuri imperii and iure gestionis distinction – considering not only the nature of the asset itself but also the purpose to which said asset is effectively put (provided that said asset is not among the ones listed in Article 20).[33] In this regard, the Spanish *Tribunal Constitucional* ruled in 1992 that in carrying out the process "to

31. Article 17.1. of the Immunities Act.
32. United Nations Convention on Jurisdictional Immunities of States and their Property, A/RES/59/38, 2004, *supra* n. 9. The Immunities Act does not mention consent given in the context of an arbitration agreement, which is included in its reference to "a written contract."
33. Javier Díez-Hochleitner, *La inmunidad de ejecución de los bienes del estado extranjero en la Convención de 2004 y en la Ley Orgánica 16/2015 sobre inmunidades*, Cuadernos de la Escuela Diplomática 79-115 (2016).

determine which [assets] are unequivocally allocated to the exercise of economic activities in which the state […] acts in the same way as a private individual,"[34] judges have a particularly demanding standard of diligence[35] and may request the sovereign state to provide input.

Although this decision is prior to the adoption of the Immunities Act, it is still upheld as the relevant precedent in state immunity,[36] particularly as regards to bank accounts as "mixed-use" assets, which the Court ruled were immune from enforcement "even if the quantities deposited […] could also be used for actions in which the sovereignty of the foreign state is not exercised."[37]

[3] Assets with Unclear Purpose and Fact-Finding Role of the Judge

The Immunities Act, like the UN Convention, does not address burden of proof when the purpose of certain assets is unclear. In practice, this task belongs to the judge hearing the case, who may rule on the assets' nature.

For this purpose Spanish Courts may request information to the state against whom enforcement is sought, as well as to other Spanish authorities (Ministries, Registries, etc) and private corporations (financial institutions), to establish the character of the assets and determine whether there is record of their noncommercial purpose.

If so requested by Spanish Courts, the foreign state may not invoke its immunity from jurisdiction or enforcement in order not to contribute to the fact-finding process of the judge.[38] Spanish Courts have, in the past, carried out enforcement proceedings on assets that had not been conclusively proven by the foreign state to be allocated to noncommercial purposes. In a dispute that was appealed all the way up to the *Tribunal Supremo*, it was ruled that the United States had failed to establish that their tax returns "were linked to activities that involved an exercise of sovereignty." Although it is generally accepted that the party seeking enforcement does not have an extensive burden of proof regarding the purpose of the assets, it does have the burden to provide "sufficient arguments and facts to found […] its claim."[39]

34. *Diana G.A v. República de Sudáfrica*, Aranzadi Insignis (TC, July 1, 1992) [RTC 1992\107].
35. Díez-Hochleitner, *supra* n. 34, at 79-115.
36. *Armando v. Embajada de Chile*, Aranzadi Insignis (TS, June 25, 2012) [RJ 2012\9582], concerning enforcement on a bank account that belonged to the Republic of Chile. After a decision by the Tribunal Superior de Justicia of Madrid, the Republic of Chile appealed before the Spanish Supreme Court upholding the Constitutional Court's 1992 ruling to argue that the decision against Chile did not respect the relevant precedent, unlike other proceedings concerning sovereign states (such as the Tribunal Superior de Justicia decision on the Republic of Korea's bank accounts). The Supreme Court ruled in favor of Chile and returned to the 1992 precedent.
37. *See supra* n. 35.
38. *Francisco S. O. v. Gobierno de EE.UU*, Aranzadi Insignis (TC, May 6, 2002) [RTC 2002\112].
39. Fernando Gascón Inchausti, *Inmunidades procesales y tutela judicial frente a estados extranjeros* 1, 368-369 (1st ed., Thomson-Aranzadi 2008).

§22.04 EXEMPTED ASSETS

[A] France

Under French law, the assets that are exempted from enforcement are those that are to be considered as "property specifically used" or "intended for use" by the state for public service purposes as defined under Article L111-1-2 of the Code of Civil Enforcement Proceedings. This property includes: (i) bank accounts, used or intended for use in the performance of the functions of the diplomatic mission of the State, its consular posts, special missions, missions to international organizations, its delegations to the organs of international organizations or international conferences; (ii) property belonging to the military, or used or intended for use by the military; (iii) property part of the cultural heritage of the state, or its archives; (iv) property part of an exhibition that is of scientific, cultural or historical interest not intended to be offered for sale; (iv) and tax or social debts of the state.

[B] England

[1] Diplomatic Goods

In England, immunity from enforcement of assets held by a diplomatic mission arises from the Diplomatic Privileges Act 1964 and is conferred upon a wide range of assets. Embassies, goods and monies held in banks on account for the diplomatic mission will attract immunity and as such will generally be unavailable for enforcement, and the exceptions to immunity provided by the SIA will not apply to assets of a diplomatic mission.

[2] A Strengthened Immunity for Central Banks' Assets

Sovereign assets located abroad are often held in the name of the central bank of that state, which is a bar to enforcement against these assets. A central bank is given absolute immunity under English law pursuant to section 14(4) of the SIA, subject only to the exception of written consent of the central bank.

This was put beyond doubt in the *AIC* case,[40] where the Court had to decide whether funds in a bank account in the name of a central bank falling within section 14(4) of the SIA could be enforced if those funds were used or intended for use for commercial purposes, falling within the exception to immunity under section 13(4) of the SIA. The Court held that even if the use of the funds would be commercial, the property of a central bank should not be subject to enforcement. In other words, the protection afforded to central banks jeopardizes the commercial-purpose exception.

40. *AIC Limited v. (1) The Federal Government of Nigeria, (2) The Attorney General of the Federation of Nigeria*, Lexis Nexis (EWHC 1357, QB, June 13, 2003).

The abovementioned rule was considered and applied recently in *Thai-Lao Lignite (Thailand) Co. ltd, and Hongsa Lignite (Lao PDR) Co. Ltd v. Government of the Lao People's Democratic Republic, The Bank of the Lao People's Democratic Republic,*[41] in which Thai-Lao had secured an arbitral award which it sought to enforce in England, and successfully obtained a freezing order against Laos over assets held by its central bank in England. Laos then tried to have the freezing order set aside on grounds of sovereign immunity over those assets. The Court found that freezing accounts in the name of the central bank should not have been granted. As the funds were owned by the central bank, they benefited from special protection pursuant to Article 14(4) of the SIA and no exception to state immunity applied in this instance.

[3] Debts of the Foreign State Held by a Third Party

Enforcing against a debt owed to a state by a third party located in England such as a bank has proven to be a common method to obtain debt collection. This was the case in *SerVaas* described above. This process of execution was used to be called a "garnishee order" and is known in England as a third party debt order (TPDO) and is provided for by Rule 72 of the Civil Procedural Rules. When applying for a TPDO, the judgment creditor is in effect seeking to obtain monies held by a private party – the bank – that belongs to the state. When granted by the Court, a TPDO will require the bank owing the debt to pay the judgment creditor instead of the state and will discharge the bank of its obligation to pay the state. The Court will only allow enforcement through TPDO where the monies are in England and where the exceptions under the SIA regarding jurisdiction and enforcement immunity are met.

[C] Spain

According to Article 17 of the Immunities Act, property of a foreign state is immune from enforcement measures unless: (i) the state has consented, either expressly or implicitly, to the enforcement measures (Article 17.1) or (ii) it has been established that the property is specifically in use or intended for use by the state for purposes other than public noncommercial (iure gestionis), provided that the property is within Spanish territory and has a connection with the foreign state against which the proceedings were brought, even if it is assigned to an activity other than that which gave rise to the dispute (Article 17.2).

Furthermore, Article 20.1 of the Immunities Act establishes a list of assets which are deemed specifically in use or intended for use by foreign states for public noncommercial purposes (iure imperii). These assets are:

41. *Thai-Lao Lignite (Thailand) Co. Ltd, and Hongsa Lignite (Lao PDR) Co. Ltd v. Government of the Lao People's Democratic Republic, The Bank of the Lao People's Democratic Republic*, Westlaw UK (EWHC 2466, August 8, 2013).

(a) Assets, including bank accounts, used or intended to be used to perform the duties of the diplomatic mission of the state or its consular office, special task forces, special missions, permanent representatives at international organizations or delegations in bodies of international organizations or international summits.
(b) Assets of the state of military nature, or used or intended to be used to perform military tasks.
(c) Assets of the central bank or monetary authority of the state used for the purposes of said institutions.
(d) Assets part of the cultural heritage or archive of the state or part of an exhibition of scientific, cultural, or historical objects, provided that they have not and are not intended to go on sale.
(e) State Vessels and Aircrafts.

According to Article 49 of the Immunities Act, Spanish Courts will assess ex officio the immunity and refrain from hearing any requests for enforcement measures with respect to any of the mentioned entities and assets. Hereunder, we will provide a brief overview of the possibilities of taking enforcement measures against the assets of central banks and vessels or aircraft of a state.

[1] Central Banks

As it has been mentioned above, according to Article 20.1 of the Immunities Act the assets of a foreign state's central bank intended for the own purposes of that state (iuri imperii) cannot be enforced. However, it could be argued that assets of central banks which are not used, neither intended to be used, for those purposes are not covered by immunity from enforcement and as a consequence could be subject to enforcement proceedings.

In this regard, Spanish case law dealing with requests for enforcement against assets of central banks has tended to reject immunity from enforcement in cases where the central banks were acting iure gestionis. In particular, the *Audiencia Provincial* of Madrid[42] in a case concerning a request by a German company for enforcement of a recognition of debt granted by the National Bank of Cuba rejected the immunity from enforcement claimed by the National Bank of Cuba on the basis that when the bank signed the recognition of debt it was acting in its private sphere (iure gestionis) absolutely devoid of any kind of privilege and so it could not claim immunity from enforcement.

Furthermore, on November 8, 2004 the *Audiencia Provincial* of Cádiz[43] declared void the seizure of a bank account owned by the US Navy Resale System Office, which

42. *Hachemie, Hamburger Chemikalien Gesellschaft mit Beschränker Haftung v. Banco Nacional de Cuba*, Aranzadi Insignis (AP Madrid, April 10, 2000) [AC\2000\2362].
43. *Montajes e Instalaciones Industriales, SA v. EE.UU*, Aranzadi Insignis (AP Cádiz, November 8, 2004) [JUR 2005\78178].

was previously ordered by the *Juzgado de Primera Instancia* of Rota on the understanding that the US Navy Resale System cannot be considered as a military activity impacting on the sovereignty of the United States and, thus, their bank account could be seized. Later, the *Audiencia Provincial* of Cádiz dismissed this previous judgment and held that the funds of this account are public funds, as the Navy's resale system is run by military staff and these accounts are controlled by the US Department of Defense. On this basis, the *Audiencia Provincial* of Cádiz understood that it was clear that these funds were allocated to military service and, therefore, they had to be considered assets for the performance of military functions not subject to enforcement measures.

It is important to highlight that the abovementioned judgments were rendered before the enactment of the Immunities Act. However, they reflect very clearly the position that Spanish Courts have been holding with regards to assets of state banks.

[2] State Vessels and Aircrafts

Another type of assets which have traditionally been subject of enforcement by creditors are vessels and aircrafts owned by the state, provided that these assets are generally of a high value.

In light of Article 20.1 of the Immunities Act, there is no doubt about the impossibility of taking enforcement measures against the warships or military aircraft of the state, due to the fact that these assets are used by states for public noncommercial purposes. However, certain doubts can arise regarding, for example, training ships which can fall out the concept of iure imperii if they are used by the state for acts iure gestionis.

In order to provide clarity when assessing if a certain vessel or aircraft is covered by state immunity, Article 2 of the Immunities Act provides a definition of what shall be understood by state ship,[44] warship[45] and aircraft.[46]

§22.05 CONCLUSION

As depicted, international arbitration intersects with domestic laws for the purposes of enforcement. In England, France and Spain, the arbitration agreement is considered as a waiver of immunity from jurisdiction. With regard to the concept of sovereign immunity, it generally protects most sovereign assets from enforcement and attachment with regard to acts made in a sovereign capacity. However, under the "commercial activity" exception to sovereign immunity, codified in the statutes of these three

44. A vessel owned or used by a foreign state provided that it provides, on an exclusive basis, public noncommercial services.
45. A vessel and, where appropriate, auxiliary vessels, assigned to the army of a foreign state, bearing distinctive emblems of this state's army, under the command of duly appointed official and subject to the discipline of the army.
46. An aircraft belonging to a foreign state, operated or operated by it and used exclusively for a noncommercial public service, such as military, customs or police services.

forums, the party seeking enforcement may be able to reach the sovereign's commercial assets in satisfaction of the award.

Nevertheless, it is important for any business engaged in international transactions to consider the application of sovereign immunity in the jurisdictions in which they operate. The right reflexes for award creditors are twofold. First, they must investigate carefully what assets of the state exist and whether they are likely to be available for enforcement. Second, they must be cautious in the local audit of the domestic laws of the states in which enforcement of their award is sought and make sure the abovementioned waiver requirements are fulfilled. Good drafting appears to be critical. Alleged consent or submission in advance by the state is often central to state immunity issues and is advisable. These practical steps are required as French, Spanish and to a lesser extent English laws have shifted from investor-friendly to much more protective of states' assets. Enforcement has become increasingly complex and these reflexes would honor the philosophy of the NY Convention – celebrating its 60th birthday this year – which is to facilitate the recognition and enforcement of arbitral awards to the greatest extent possible.